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JAMAICA



IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 91/95

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.
HE HON. MR. JUSTICE HARRISON, J.A.

| | | |
|---|---|---|
| BETWEEN | DORIS FULLER (ADMINISTRATRIX ESTATE AGANA BARRETT DECEASED) | PLAINTIFF/ APPELLANT |
| | V | |
| | THE ATTORNEY GENERAL | DEFENDANT/ RESPONDENT |

Earl Witter, Barrington E. Frankson and Jacqueline Cummings instructed by Messrs Gaynair and Fraser, for the appellant

Lennox Campbell Senior Assistant Attorney General, Michelle Walker and Susan Reid-Jones instructed by the Director of State Proceedings for the respondent

8, 9, 11, 12th December 1997, 26 - 30th January, 1998, 2- 6th February, 1998, 9-13th February, 1998, March 30, and October 16, 1998

DOWNER, J.A.

Why did the events in Cell 3 at the lock- up in the Constant Spring Police Station generate such enormous concern and publicity since 1992? Agana Barrett was found dead after two days of incarceration between October 22 and 24 and that event has given rise to prolonged hearings in the Supreme Court and thereafter in this Court. The issue of law was whether in addition to liability for battery and assault as well as false imprisonment which were admitted there was also liability for breaches of constitutional rights which warranted compensation by the state to the estate of the

deceased. The submissions were necessarily wide ranging since they involved an examination of areas of the Constitution that were hitherto unexplored.

**Narrative of Events**

In the Supreme Court the assessment by Karl Harrison, J. for damages in respect of liability for tort, pursuant to the Crown Proceedings Act was as follows

> **"Conclusion**
>
> On the principle that where the beneficiaries are the same under both the Fatal Accident and Law Reform Acts, the damages recoverable under the Law Reform (Miscellaneous Provisions) Act should be taken into account in assessing the damages under the Fatal Accidents Act. No award is made therefore under the Fatal Accidents Act (See **Gammel v Wilson** [1981] 1 All E.R. 578)
>
> Damages are therefore assessed for the Plaintiff as follows:
>
> 1. Law Reform (Miscellaneous Provisions) Act
>
> | | |
> |---|---|
> | Plaintiff (deceased's mother and sole dependant) | $511,560.00 |
> | Loss of Expectation of life | $ 3,000.00 |
> | Funeral expenses | 15,000.00 |
> | | Total $529,560.00 |
>
> Interest is awarded at 3% on Ninety-three thousand dollars ($93,000.00) being the pre-trial portion from the 24th October, 1992 to July 5, 1995.
>
> Interest is also awarded at 3% on the funeral expenses of Fifteen thousand dollars ($15,000.00) from the date of service of the writ up to today.

2. GENERAL DAMAGES

| | |
|---|---|
| Assault and Battery | $150,000.00 |
| False Imprisonment | 50,000.00 |
| Aggravated Damages | 100,000.00 |
| Total | $300,000.00 |

Costs to the Plaintiff to be taxed if not agreed."

As for the rule referred to by the learned judge stating the relationship between the damages to the dependency and the estate the true rule was stated thus in **Gammell v Wilson** at page 578. It reads thus:

> "In each case because the award to the estate under the 1934 Act exceeded that under the Fatal Accidents Acts, no award was made in respect of the fatal accident claim, in accordance with the rule that in assessing loss of dependency under the Fatal Accidents Acts the court was required to take into account any benefit accruing to a dependant from the deceased's estate."

Before adverting to the grounds of appeal it is necessary to recount the events which compelled the Crown to admit liability in tort. Here is how Karl Harrison J. recounted the evidence:

> "Summary of evidence
>
> Shawn Coleman, one of the survivors, testified that several men including the deceased and himself were taken from Grant's Pen Road to Constant Spring Police Station by the police on Thursday the 22nd day of October 1992. After being finger-printed and processed they were placed in different cells at Constant Spring Station. Coleman stated that the deceased, himself and sixteen others were placed in cell number 3. By Friday, one more man was added to their numbers.
>
> Coleman gave a graphic description of conditions which existed in this cell. The cell which

> was about 8 ft. x 7 ft. in size was extremely hot due to the congestion. There was very little air available and this was only accessible through small holes in a metal door for the cell. The cell had no windows and they were surrounded by concrete walls. Water dampened the floor and in order to quench thirst, perspiration and water dripping from walls had to be used as no drinking water was made available for them. He also testified that one man had to drink his own urine in order to quench his thirst. After being released from the cell for lunch at 1:00 p.m. on Friday, they were never fed again and were locked up thereafter without further release until Saturday morning."

Despite this excellent summary it is necessary to refer directly to some aspects of the evidence of Shawn Coleman to demonstrate the agony of Agana from the inception of his arrest. It should also be noted that his imprisonment began from he was arrested and transported with others to Constant Spring.

> " After 7:00 we were taken over to station and placed in a little cage where our belts, shoeslace taken from us. Separate building from C.I.B. office. This includes Agana Barrett.
>
> Cage is a little thing like this (witness shows witness stand) but it has mesh at top. It bigger than in here. All 48 of us in there when belts were taken. I could not move freely. Too many people in there. If you lift up foot you cannot put it back down. I could not move hands freely. No space to move. If you put out hand you bounce somebody.
>
> Agana in cage also. Never remain in cage all night. Kept there for about 1/2 hour. They write down what they take from you. Police was writing."

Shawn gave a detailed description of the interior of the cell which was as follows:

> "Cell was walled all around. Bunk take up 1/3 of space. There is metal door with bars weld on to metal. Holes in metal about size of 5 cents. Metal

> is thick sheet weld on to grill itself. No air can get in unless is through the five cents holes. Holes not in line with each other. Metal at front and metal at back. Sheets of metal that holes are in. Front metal has holes and inside metal has holes. Both holes not in line for air to flow freely. Sheet of metal about 3 feet wide and 6 feet high. Wall on top, back and sides. Wall made of concrete."

It was a veritable death trap.

So the false imprisonment continued and finger prints were taken contrary to the Finger Print Act.

He continued thus:

> " After we were put in cell the police close metal door from outside. They close it and lock it. No light was in cell. Dark like mid night in there. It was hot and dark. Thursday night from you enter in there you are hot. I never felt heat like this before.
>
> Door was next opened the Friday morning. Opened about 7:00 to 8:00. Every man was crying about the heat that night. Crying about condition of cell also.
>
> Agana Barrett was also complaining. I saw no one sleeping in cell that night. I remain in same position all night sitting on ground. I could not see Agana but I could hear him. I could not see because of darkness. Some sitting on bunk and some by door. Some were standing, place limited.
>
> We were very close. Everybody bouncing on one another. They talk loud saying officer man a faint, we can't take the heat. We want water, we hot, we thirsty, crying out going on Thursday night about 2:00-3:00 in the morning. Beating on door taking place same time. We were all beating the metal on the door. It caused loud sounds. There was no response to these sounds."

The appalling conditions were aptly described by Shawn Coleman as he continued his evidence as follows:

> " After door was closed inside cell was very dark that Friday afternoon. It was not cooler, it got worse now. We were not offered any food from 1:45 p.m. the Friday to 8:00 a.m. the Saturday."

Referring specifically to Agana, Shawn Coleman continued thus:

> " Agana Barrett was then in right hand corner of cell. I was on left hand side of cell. I could hear his voice so I knew he was in corner. I hear him say he would give police officer U.S. $10.00 for spoonful of water. He made this statement the Friday night 11:00 going up to 12:00. This is estimate time. This is last thing I heard him say."

The response of the gaolers has to be emphasised. Here is how Coleman put it:

> " All inmates in cell 3 were beating on door with our hands. We beat door with palm of our hands. This caused loud banging on the metal. This go on for almost entire night.
>
> Apart from banging I could hear sounds coming from front of station. I heard domino playing and radio. After banging get louder sound on radio come up high so we could hardly hear tapping of domino anymore. Tapping of domino never stop. I hear it right through the night.
>
> There was no response by anyone to banging on the door. We all cried out officer, inspector, some say they want water and some crying out say 'officers man faint'."

Here is how death was described:

> " After cell open on Saturday morning I was first to come out. I walk out feeling weak and sweat up. Sixteen of them walk out too. Agana Barrett, Ian Forbes and Vassell Brown never come out. They died. I saw them lying on ground motionless.
>
> Agana was lying on ground without any shirt and motionless. He was lying in water motionless. He was in the right corner. Same corner I saw him when I was on bunk.

> When I saw Agana the Thursday morning he looked healthy and sound. On the Friday he was still looking healthy and sound but we were all talking of heat and condition of cell.
>
> Richard Green told police about men lying on the ground. He call police and say 'officers it look like three man dead, see three men lying on the ground'. I don't know name of officer. He could have heard when Green spoke. Officer went to cell door and start to shake all three men. He told us to stay in the passage and he would soon come back. He came back with about 4-5 more officers. At this time they open cell 1 and 2. All inmates were taken to the front leaving all three dead men. We were taken to front of police station."

It is important to pause at this point to notice how the case was pleaded to show the distinction between the claim for false imprisonment and the claim for breach of fundamental rights for inhuman and degrading treatment as foreshadowed in the endorsement on the writ. It is equally important to note that there could have been a valid imprisonment which gave rise to a constitutional claim for inhuman and degrading treatment. The following paragraphs pertain to the torts of assault, battery and false imprisonment which the learned judge recognised. Here are paragraphs 1-5 of the Statement of Claim:

> "1. The Plaintiff is the Administratix of the Estate of Agana Barrett, deceased and sues under and by virtue of the Provisions of the Law Reform Miscellaneous Provisions Act and/or Fatal Accidents Act.
>
> 2. The Plaintiff's claim is against the Defendant for assault and battery and false imprisonment of the Deceased committed by members of The Jamaica Constabulary or Special Constabulary Force in the performance or purported performance of their duties and/or functions and as such the Defendant is sued under and by virtue of the Provisions of the Crown Proceedings Act.

3. On or about the 22nd day of October 1992, at 11 a.m. the Deceased was at Grants Pen Road in the Parish of Saint Andrew when he was taken into custody by a party of Policemen and placed in a truck parked by the gully.

4. The deceased was kept waiting in the said truck for an hour or more along with some sixty (60) or more other persons after which the truck was driven away with the Deceased therein.

5. The Deceased was taken by Members of the Jamaica Constabulary or Special Constabulary Force to the Constant Spring Police Station where without the Deceased's consent:

(a) His fingerprint was taken.

(b) He was referred to sign a book.

(c) He was searched.

(d) He was placed in a cage in the Guardroom at the said Police Station."

It must be admitted that the Statement of Claim was not drafted with clarity in some respects, but it was sufficient to advance the plaintiff's claim. After dealing with those common law claims the plaintiff turned to the constitutional claims thus:

"6. The Deceased was kept in a cell of the said Police Lock-up with other persons for a total of approximately thirty eight (38) hours, during which his constitutional rights to freedom of the person, to freedom of movement and to protection from inhuman and degrading treatment were infringed.

PARTICULARS

(a) Was prevented from leaving the said lock up despite several requests.

(b) Was kept in a cell with other person grossly overcrowded, unsanitary, hot, wet or damp, unhealthy and dangerous conditions.

(c) Was denied adequate food, water and/or fresh air."

Then paragraphs 7 and 8 refer to paragraph 6. They read:

> "7. The Members of the Jamaica Constabulary Force concerned acted and/or purported to act in the execution of their duties and as such were servants and/or agents of the Crown.
>
> 8. The said acts against the Deceased were in breach of his constitutional rights as aforesaid."

Further paragraphs 9 and 10 refer to paragraphs 1-5 supra. They read as follows:

> "9. The said acts were carried out maliciously and/or without reasonable and/or probable cause.
>
> 10. The Defendant is sued under and by virtue of the Provisions of the Crown Proceedings Act."

As for the complaint by the respondent that the Statement of Claim was imprecise Lord Diplock's words in **Maharaj v Attorney-General of Trinidad and Tobago (No 2)** [1978] 2 All ER 670 at 675 are instructive:

> "It is true that in the notice of motion and the affidavit which, it may be remembered, were prepared with the utmost haste, there are other claims and allegations some of which would be appropriate to a civil action against the Crown for tort and others to an appeal on the merits against the committal order of Maharaj J., on the ground that the appellant had not been guilty of any contempt. To this extent the application was misconceived."

Be it noted that the claims under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act in the instant case were claims in tort pursuant to the Crown Proceedings Act.

Then Lord Diplock continued thus:

> "Nevertheless, on the face of it the claim for redress for an alleged contravention of his constitutional rights under s 1 (a) of the Constitution

> fell within the original jurisdiction of the High Court under s 6(2)."

Equally the claim for constitutional redress adumbrated in paragraph 6 above was made plain in the pleadings. Despite this the learned judge failed in his reasons for judgment to distinguish the claim for false imprisonment which assumes that the place of imprisonment would have conformed to the conditions laid down by law and the constitutional claim pursuant to Section 17(1) of the Constitution.

Another distinction emphasised in **Maharaj No. 2** and applicable to this case was put thus by Lord Diplock at page 677:

> "Read in the light of the recognition that each of the highly diversified rights and freedoms of the individual described in s 1 already existed, it is in their Lordships' view clear that the protection afforded was against contravention of those rights or freedoms by the state or by some other public authority endowed by law with coercive powers. The chapter is concerned with public law, not private law. One man's freedom is another man's restriction; and as regards infringement by one private individual of rights of another private individual, s 1 implicitly acknowledges that the existing law of torts provided a sufficient accommodation between their conflicting rights and freedoms to satisfy the requirements of the new Constitution as respects those rights and freedoms that are specifically referred to."

There is also the contrast between damages for tort and compensation for the right to life and inhuman and degrading treatment which will be addressed in due course

The learned judge however considered that an award for aggravated damages pursuant to the tort for false imprisonment was adequate in the circumstances of this case. This may be ascertained from the following passage in his reasons. It runs thus:

> "The general principle is that the estate may recover damages for all the losses which the victim

> had sustained before his death and for which he would have recovered compensation if he had survived to pursue his action. I would therefore agree with Mr. Witter that the Law Reform (Miscellaneous Provisions) Act does not exclude the award of aggravated damages.
>
> It is my considered view therefore that I must have regard to any aggravating feature in so far as it relates to the detention of the deceased and the circumstances relating to his detention."

One comment which is pertinent to the above passage is that it is correct as regards claims under the Law Reform Act and in the instant case the constitutional claim for inhuman and degrading treatment. However a claim for deprivation of life contrary to Section 14 of the Constitution must be a claim after death has ensued and is therefore vested in the estate.

Turning to the submission on aggravated damages the learned judge continues thus:

> "Mr. Witter submitted that the plaintiff is entitled to aggravated damages for the following reasons:
>
> (i. the conduct of the jailers who are servants or agents of the State.
>
> (ii. the wilfulness exhibited by the jailers in the manner and degree of the incarceration to which the deceased was subjected to.
>
> (iii. the malice (ill-will) exhibited by the jailers.
>
> (iv. the good character and reputation of the deceased.
>
> (v. the supposed apology.

Mr. Witter was in this instance confining his submissions to aggravated damages for false imprisonment. That this was so is evidenced in an earlier passage where the learned judge said:

"General Damages

Mr. Witter submitted that the Plaintiff was entitled to General Damages in respect of:

1. Assault and Battery committed upon the deceased.

2. False imprisonment of the deceased.

3. Constitutional redress by virtue of section 25 of the Constitution of Jamaica due to infringement of the deceased's fundamental rights and freedom under the Constitution."

Responding to Mr. Witter the learned judge continued thus:

"What is the evidence which has been presented to support this award? The conditions under which the men were subjected to whilst in the cell have been alluded to already. On the Friday morning when the men were taken from the cell, they were told by the police that the papers relating to their finger-print records would be forthcoming anytime between 10:00 a.m. and 11:00 a.m. When the men told the police of the conditions which existed in the cell they were told that they should remain in the passage while checks were made for the papers. The police it is said, returned and told them to co-operate and return to the cells as their papers had been received. The men pleaded with the police for them to remain in the passage leading to the cell but they were nevertheless taken back to the cell. During the night, the men kept banging on the cell door. This loud banging went on for almost the entire night. The men shouted, crying out for help, but the only response they got was the sound of dominoes and a radio playing somewhere in the station. The louder they shouted, the higher was the volume on the radio.

I also take into account that there was an apology extended to the Plaintiff by officials of the Ministry of National Security and Justice.

I am of the view therefore, that in light of the conduct of the police officers towards the deceased and others, the conditions under which they allowed the men to remain in the cell, and adding to

> their numbers when they knew what the conditions were, are factors which warrant the grant of aggravated damages in this case. I therefore award the sum of One hundred Thousand dollars ($100,000.00). under this head."

This passage is further proof that the learned judge considered the remedy of aggravated damages was sufficient to preclude him from considering the constitutional issues and the attendant compensation payable, if the appellant was successful on this aspect of the matter.

It is now important to refer to the post mortem report by Dr. R. E. Clifford. The information he has given was as follows:

> " Deceased was found dead in the Constant Spring Lock-up."

As to his opinion on the cause of death it was recorded as follows:

> " The cause of death is attributed to Cardiorespiratory Failure consistent with cerebral hypoxia and hypercapnia. Blunt Force injuries noted were not fatal, but could be contributory."

The following passage from the learned judge's reasons is useful to explain the post-mortem report:

> " He [Mr. Witter] referred to Simpson. He argued that the deceased was exposed to unbearable heat and lack of oxygen in a cell which was 8 ft x 7 ft in size, housing nineteen men, for an unconscionable long period of time.
>
> According to the post mortem examination report death was attributed to cardiorespiratory failure consistent with cerebal hypoxia and hypercapnia. Hypoxia has been described as the deprivation of oxygen and hypercapnia as excess supply of carbon dioxide. The post-mortem examination also revealed inter alia, that the brain showed congestion and oedema with cerebellar tonsillar herniation. The heart was grossly unremarkable except for petechial haemorrhages. There was also pulmonary congestion.

> Mr. Witter referred to 'Simpson's Forensic Medicine' 10th Edition, by Bernard Knight, Professor of Forensic Pathology, where it states at page 139 that functionally, a person with obstructed air entry will show various phases of distress and physical signs listed hereunder:
>
> 1) Increased efforts to breathe, with facial congestion and commencing cyanosis (blueness of the skin).
>
> 2) Deep laboured respirations, with a heaving chest if free to move, deepened cyanosis and congestion, with appearance of petechiae if venous return is impaired.
>
> 3) Loss of consciousness, convulsions, evacuation of bladder, vomiting. If continued, respirations becomes shallow and cease, pupils dilate and death ensues."

It was on the basis of the above evidence that Karl Harrison, J. awarded damages with respect to Assault and Battery, and False Imprisonment with aggravated damages together with damages under The Law Reform (Miscellaneous Provisions) Act as referred to above. The learned judge rejected the claim for constitutional redress on the ground that the appellant was caught by the proviso. The following passages state in summary form the basis of the learned judge's decision:

> "Claim for Constitutional Redress
>
> Mr. Witter submitted that the Court ought to assess damages for constitutional redress notwithstanding the proviso to section 25. It was his view that the evidence of Coleman and the pleadings which have not been traversed, amount to the most horrendous illustration of the inhumanity of the jailer to the jailed in modern times, if not in all recorded history. He argued that the experience of the men in cell No. 3 far surpassed those in the other cells and what took place in the "Dark Hole of Calcutta."

After adverting to the authorities which he found relevant Karl Harrison, J. concluded thus:

> " I am satisfied that in respect of the matter before me, adequate means of redress are available. The plaintiff is therefore caught by the proviso to section 25 of the Constitution and accordingly the claim for an award for breach of the deceased's constitutional rights cannot be granted."

In determining whether the learned judge was correct, care must be taken to analyse in particular the tort of false imprisonment so as to avoid duplication of wrongs and of remedies. Another factor to be borne in mind is that these proceedings are in the nature of a test case as two others suffered death in like manner to Agana Barrett. Their cases are awaiting the outcome of this case. To appreciate how the claim was formulated initially the endorsement on the writ must be examined. It reads:

> "The Plaintiff claims as the Administratrix of Estate Agana Barrett Deceased and claims against the Defendant to recover damages under the Fatal Accidents Act and/or the Law Reform Miscellaneous Provisions Act and/or for Assault, False Imprisonment and Breach of his Constitutional rights to freedom of the person, freedom of movement, right to life and protection from inhuman and degrading treatment committed the 22nd to the 24th days of October, 1992 along Grants Pen Road and at the Constant Spring Road Police Station. The Defendant is sued under and by virtue of the Provisions of the Crown Proceedings Act for that the acts complained of were done maliciously and/or without reasonable or probable cause by the servants and/or agents of the Crown purporting to act in the execution of their duty as members of the Jamaica Constabulary Force."

**The grounds of Appeal**

It is now convenient to refer to the three grounds of appeal to grasp the issues which were debated in this court over many days. They read as follows:

> "1. The Award of One Hundred and Fifty Thousand Dollars ($150,000.00) for Assault and Battery was wholly inadequate and unreasonable having regard to the evidence of the inhumane and intolerable conditions which existed and which caused the death of the Deceased.
>
> 2. The Award of One Hundred Thousand Dollars ($100,000.00) for Aggravated Damages is wholly inadequate and unreasonable having regard to the evidence.
>
> 3. The Learned Trial Judge was wrong in Law when he failed and/or refused to make an Award in respect of the Plaintiff's/Appellant's claim for Constitutional redress as the Plaintiff was entitled to compensation for breach of the Deceased Constitutional rights." (as amended)

As to ground 1

Here is how the learned judge put the claim for Assault and Battery:

> **"Claim for Assault and Battery**
>
> The evidence revealed that the deceased was fingerprinted and thereafter detained in a cell. Mr. Witter submitted that the assault and battery comprised the finger printing of the deceased without lawful authority and the application of force indirectly on the deceased."

Be it noted before Agana was put in the cell he was searched in the cage and that constituted battery.

As it will be of importance to the claim for false imprisonment and the constitutional claims it is pertinent to mention that the Lock-up (No 1) Order 1075 published in the **Jamaica Gazette Supplement Proclamations, Rules and Regulations** Thursday, February 20, 1975 reads:

> "In exercise of the power conferred on the Minister by section 4 of the Prisons Act, the following Order is hereby made:

1. This Order may be cited as the Lock-up (No.1) Order 1975.

2. The places described in the Schedule hereto together with all buildings thereon are each hereby declared to be a Lock-up for the confinement of persons awaiting trial, remanded in custody, or sentenced to a short term sentence."

| Place | St. Andrew District | Parish |
|---|---|---|
| Constant Spring | St. Andrew | St. Andrew" |

It is important to note that the assault and battery took place in the lock-up despite the fact that Parliament required the executive to provide tolerable conditions for inmates. Also safeguards are provided so as to ensure that inmates have the protection of law. For example here are some of the records which the officer in charge of the lock-up is obliged to keep. See the Prisons (Lock-ups) Regulations 1980 **The Jamaica Gazette Supplement Proclamations, Rules and Regulations** Wednesday, September 10, 1980:

"3. There shall be recorded in the appropriate Register, the following particulars in respect of every person being in a lock-up -

(a) the name, age, sex, address and occupation, of the person in custody;

(b) the date, time and place of arrest;

(c) the offence or suspected offence for which the person is arrested;

(d) a summary of the circumstances of the arrest;

(e) the physical condition of the person at the time when he is brought to the lock-up including any marks, bruises, or other signs of injury observed or complained of by him."

Safeguards are stipulated in paragraph 4 to ensure that there are records for complaints. The provision reads as follows:

> "4. There shall be recorded in the appropriate Register at every lock-up, the following particulars in relation to every complaint made by or concerning a person being detained in that lock-up-
>
> (a) the name, age, address, occupation and signature of the person making the complaint;
>
> (b) the nature of the complaint;
>
> (c) the name and address of the person arrested;
>
> (d) the name, rank, number or other identification of the officer or person against whom the complaint is made;
>
> (e) the name, rank, number and signature of the officer receiving the complaint."

These responsibilities imposed by the regulations for the benefit of inmates demonstrate that the gaolers had a duty to the inmates which they breached. It will be of importance when the breach of Section 14 of the Constitution is being considered.

Then the police officers administering the lock-up have detailed responsibilities. They are to record as follows:

> "(f) the condition of the clothing of the person when he is brought to the lock-up;
> (g) any property taken from the person being detained;
>
> (h) the name, rank and number of the officer who made the arrest;
>
> (i) the name and rank of the police officer informed of the arrest and the date and time when he was so informed."

It is clear that quite apart from taking finger prints of Agana without lawful authority which was battery there was the tort of assault from the arrest on Grants Pen Road. **Clerk and Lindsell on Torts** Twelfth Edition paragraph 544 put it thus:

> "If a tap be given on the shoulder for the purpose of effecting an arrest, and the arrest be unlawful, the tap constitutes a battery."

Here is the evidence from Shawn Coleman from which the torts were inferred:

> "Live at 1a Morgan Lane, Kingston 8, off Grants Pen Road.
>
> Woodworker self employed, make furniture.
>
> Recall 22/10/92. Born 16/8/68. Sitting on verandah about 10:00-11:00 a.m. Working around back before. Just finished eating. Saw two policemen - one in uniform and other in plain clothes. Plain clothes man come to me and identified self. Man in uniform was red seam. He said I should join truck, police truck. Walk to truck by order. To join others. Police walking behind me.
>
> About 30-40 men in truck. I know a lot of them. I know Agana Barrett. I knew him for about 5-6 years. I knew majority. I knew where Agana lived. He lived up Grants Pen.
>
> Truck take us to Constant Spring by C.I.B. office including Agana Barrett."

**Claim for false imprisonment**

Clerk and Lindsell defines false imprisonment as follows:

> "A false imprisonment is complete deprivation of liberty for any time, however short, without lawful cause. 'Imprisonment is no other thing but the restraint of a man's liberty, whether it be in the open field, or in the stocks, or in the cage in the streets or in a man's owne house, as well as in the common gaole; and in all the places the party so restrained is said to be a prisoner so long as he hath not his liberty freely to go at all times to all places whither he will without bail or mainprise or otherwise.' The prisoner may be confined within a definite space by being put under lock and key or his movements may simply be constrained by the will of another. The constraint may be actual physical force, amounting to an assault, or merely

> the apprehension of such force or it may be submission to a legal process."

So on the day Agana was imprisoned falsely from the time he was taken up in the truck on 22nd October to when he died on 24th October his estate was entitled to damages.

It is important to return to the regulations pertaining to lock-ups to understand what Agana could reasonably expect having regard to those regulations. He was to be allowed visitors. Paragraph 5 makes those provisions. They read:

> "5. There shall be recorded in the appropriate Register at every lock-up the following particulars concerning visits to a person being detained in a lock-up -
>
> (a) the name and address of the person detained;
>
> (b) the name, address and occupation of the visitor;
>
> (c) the date of the visit and time of arrival and departure of the visitor;
>
> (d) where any person is not permitted to visit, the fact of the refusal and the reasons therefor;
>
> (e) any article given to the person being detained;
>
> (f) any article taken by a visitor to be given to the person being detained which is rejected by an officer;
>
> (g) the signature of the officer in whose custody the person is being detained;
>
> (h) the date and time of each entry."

In view of these provisions a more exact pleader might have added a plea for misfeasance in a public office against the relevant police officers and joined the

Attorney-General under the Crown Proceedings Act. **Bourgoin SA Ministry of Agriculture Fisheries and Food** [1985] 3 All ER 585 is the relevant authority.

As for visitors it is appropriate to turn to the evidence of Agana's mother and Administratrix. She said:

> "I last saw him the Thursday evening when he was over C.I.B. office and marching over to cell. Plenty of them going over to cells. He was living with me at 8 1/2 Grants Pen Road. Just two of us lived. I see him the Thursday morning, spoke to him then. He was a healthy boy. He was always a healthy boy.
>
> When I see him the Thursday he was crying, waving and saying mama go home and sleep, I will see you tomorrow. That was last time I saw him."

Under cross-examination from Mr. Campbell the following evidence emerged:

> "I heard of his death the Saturday while cooking beef soup for Agana. I go to station Thursday he was taken by police. I bought something for him to eat. I don't know if he got it. He took box drink and bun from policeman.
>
> Following morning I took breakfast but I don't know if he got it. I cook his dinner and leave about 2:00 p.m. to station. Policeman took away bag and say no food for them boy them. Later on police take food from me write his name on box and take it around the cell. I never see the police come back. They take other food to go around there. The Saturday morning I decided to cook soup for him."

It does not appear that his mother was told of her rights as a visitor and there is evidence from Shawn Coleman from which it could be inferred that the cooked meals brought for Agana were never delivered.

Provisions for an audit are important to ensure compliance with the regulations. The following paragraphs provide for inspection and emphasise the duty of the gaolers

to the inmates. It must be reiterated that the breach of these duties will be of importance when the contravention of Section 14 of the Constitution is considered.

> "6.(1) Every lock-up shall be visited at least once in every twenty-four hours by a police officer not below the rank of Assistant Superintendent or any other officer delegated for that purpose (hereinafter referred to as "visiting officer.").
>
> (2) The visiting officer shall observe the physical condition of each person being detained in such lock-up and enter a record of the physical condition of each such person in the appropriate register.
>
> (3) The visiting officer shall record the fact that complaints have been brought to his attention
>
> 7. The officer in charge of a lock-up shall take such steps as are necessary to cause medical attention to be given without delay to any person being detained in such lock-up who appears to be ill or in need of medical attention or who complains of any illness."

These rules have been cited to demonstrate that when there is false imprisonment in a lock-up the assumption is that conditions to be observed and required by the regulations accord with that which is expected of a civilised regime. If there are some falling off of standards then aggravated damages is a remedy under the Law Reform (Miscellaneous Provisions) Act. Had Agana survived and the conditions of imprisonment merely 'insanitary and humiliating' then exemplary damages would have been an appropriate remedy. See **Attorney-General of St. Christopher Nevis and Anguilla v Reynolds** [1979] 3 All ER 129.

The learned judge must have considered such an approach for he awarded aggravated damages thus:

> "2. <u>General damages</u>
>
> Assault and Battery - $150,000.00

False Imprisonment - $ 50,000.00

Aggravated damages - $100,000.00"

On the face of it the damages for assault and battery seem to be on the high side while that for false imprisonment seems to be on the low side. In both instances I would not disturb the figures especially since the global amount seems correct. The justification for the high award for assault and battery is to be found at paragraph 1260 in **McGregor on Damages** 13th edition page 1262. It reads:

> "In so far as an assault and battery results in physical injury to the plaintiff, the damages will be calculated as in any other action for personal injury. Beyond this, the tort of assault affords protection not only from physical injury but also from the insult which may arise from interference with the person. Thus a further head of damage is the injury to feelings, i.e. the indignity, mental suffering, disgrace and humiliation, that may be caused. Substantial damages may thus be recovered by a plaintiff for an assault, with or without a technical battery, which has done him no physical injury at all. **Westwood v. Hardy [1964] C.L.Y.998 provides an illustration of damages awarded for aggravation of the injury. Cf. Asinobi v Chuke [1971] C.L.Y. 6561 awarding damages for stress and humiliation to a wrongfully evicted tenant."**

What seems important is that the figure for false imprisonment only makes sense if it is considered to be imprisonment from arrest to confinement in the cage. Maybe that is why there was no appeal on this aspect. It could never be for the degrading and inhuman conditions in the cell as the constitutional claim was dismissed.

From the foregoing it will be seen that the award of one hundred and fifty thousand dollars ($150,000.00) damages for Assault and Battery cannot be considered inadequate so the first ground of appeal fails.

As to Ground II

Was the award of aggravated damages of one hundred thousand dollars ($100,000.00) for the three torts inadequate as the appellant averred? To answer that question the issue of aggravated damages to the estate under the Law Reform Act must be considered. **McGregor on Damages** put the relevant consideration for false imprisonment thus at paragraph 1263 page 846:

> "The details of how the damages are worked out in false imprisonment are few: generally it is not a pecuniary loss but a loss of dignity and the like, and is left much to the jury's or judge's discretion. The principal heads of damage would appear to be the injury to liberty, i.e. the loss of time considered primarily from a non-pecuniary viewpoint, and the injury to feelings, i.e. the indignity, mental suffering, disgrace, and humiliation with any attendant loss of social status. This will all be included in the general damages which are usually awarded in these cases: no breakdown appears in the cases."

As for the factors which make for aggravated damages **McGregor on Damages** put it thus at paragraph 1267 page 848:

> "The manner in which the false imprisonment is effected may lead to aggravation or mitigation of the damage, and hence of the damages. The authorities illustrate in particular the general principle stated by Lawrence L.J. in **Walter v Alltools (1944) 61 T.L.R. 39,40 (C.A.)** that 'any evidence which tends to aggravate or mitigate the damage to a man's reputation which flows naturally from his imprisonment must be admissible up to the moment when damages are assessed. A false imprisonment does not merely affect a man's liberty; it also affects his reputation. The damage continues until it is caused to cease by an avowal that the imprisonment was false'."

The tort of false imprisonment ceased when the confinement in the cage ended. Then the breach of the Constitution commenced. This breach had an element

of false imprisonment but the gist of this or constitutional breach was the inhuman and degrading treatment or in the alternative the cruel and unusual punishment in contravention of the Bill of Rights. No charges were even preferred. Agana was put in a truck with around 40 others. This must have been humiliating. So I have no hesitation in affirming the award for aggravated damages. At the same time I do not regard the award under this head of one hundred thousand dollars ($100,000.00) inadequate. Therefore ground two of this appeal fails. It only remains to add that the basis of these claims is in the Law Reform (Miscellaneous Provisions) Act of which Section 2(1) in so far as material reads:

> "2.-(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate."

Additionally Section 2(2) of this Act in part reads:

> "(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person-
>
> (a) shall not include any exemplary damages:"

Since aggravated damages are within the ambit of compensation then the element of aggravated damages found was permissible.

<u>As to Ground III</u>

Although the ground as amended was formulated on the basis that compensation ought to have been awarded, it must first be established that there were breaches of the appellant's constitutional rights. So the first issue to be determined was whether it was permissible for the estate of Agana Barrett to institute the proceedings pursuant to the Constitution.

Section 13 of the Constitution reads:

> "13. Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-
>
> (a) life, liberty, security of the person, the enjoyment of property and the protection of the law; and
>
> (b) freedom of conscience, of expression and of peaceful assembly and association; and
>
> (c) respect for his private and family life,
>
> the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

The classic statement by Lord Wilberforce in **Minister of Home Affairs v Fisher** [1979] 3 All ER 21 at page 25 on constitutional rights reads:

> "Here, however, we are concerned with a Constitution, brought into force certainly by Act of the United Kingdom Parliament, the Bermuda Constitution Act 1967, but established by a self-contained document set out in Sch 2 to the Bermuda Constitution Order 1968. It can be seen that this instrument has certain special characteristics. (1) It is, particularly in Chapter 1, drafted in a broad and ample style which lays down principles of width and generality. (2) Chapter I is headed 'Protection of Fundamental Rights and Freedoms of the Individual'. It is known that this chapter, as similar portions of other constitutional instruments drafted in the post-colonial period,

> starting with the Constitution of Nigeria **SI 1960 No 1652, Sch 2,** and including the constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms **Rome, 4th November 1950, TS 71 (1953),Cmd 8969.** That convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations Universal Declaration of Human Rights 1948 **Paris, 10th December 1948, UN 2 (1949), Cmd 7662.** These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to. (3) Section 11 of the Constitution forms part of Chapter I. It is thus to 'have effect for the purpose of affording protection to the aforesaid rights and freedoms' subject only to such limitations contained in it 'being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice ... the public interest'."

It is pertinent to note that the right to life is the first fundamental right mentioned in the preamble and this right is the first right that can be enforced by Section 25.

Against this background it is instructive to turn to Section 14(1) which reads:

> "14.-(1) No person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted."

If a person in Jamaica is intentionally deprived of his life then the logical entity to prosecute the claim of the deceased is his estate. If it were not so then Section 25 which is the enforcement section to Chapter III would be unworkable as there would be no one to enforce Section 14 against the State in a constitutional action. The reasoning in **Attorney General v Antigua Times** [1975] 3 All ER 81 supports the contention that a legal entity as a company or other unincorporated body can institute

a constitutional action. By parity of reasoning so can an estate. It is in these circumstances that it is appropriate to address the claims for a breach of Sections 14 and 17 of the Constitution. Section 17 reads:

> "17.(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

Before addressing these claims it is essential to ascertain if these were pleaded. One of the specific complaints of the respondent was that the right to life was not pleaded. It must be acknowledged that this claim was not pleaded with the same clarity as the claim for inhuman and degrading treatment. Logically the claim for right to life should be the initial claim, since it is a breach of Section 14. Yet the pleader presented Section 17 as the prior claim. So it is appropriate to reiterate how that claim was pleaded. It was pleaded thus:

> "6. The Deceased was kept in a cell of the said Police Lock-up with other persons for a total of approximately thirty eight (38) hours, during which his constitutional rights to freedom of the person, to freedom of movement and to protection from inhuman and degrading treatment were infringed.
>
> PARTICULARS
>
> (a) Was prevented from leaving the said lock up despite several requests.
>
> (b) Was kept in a cell with other persons grossly overcrowded, unsanitary, hot, wet or damp, unhealthy and dangerous conditions.
> (c) Was denied adequate food, water and/or fresh air."

These particulars make it plain that these averments went beyond 'insanitary and humiliating' conditions experienced by Reynolds in **Attorney-General of Saint Christopher, Nevis and Anguilla v Reynolds** [1979] 3 All ER. 129. If the conditions of

Reynolds ' imprisonment were comparable to Agana's he would have invoked Section 7 of the Constitution of St. Christopher and Nevis which is comparable to Section 17 of our Constitution. So that breach of statutory duty, the relevant statute being the Bill of Rights or breach of Section 17 of the Constitution were now the relevant issues rather than the mere tort false imprisonment.

Then as for the claim made pursuant to Section 14 of the Constitution it was pleaded in a somewhat roundabout way. Paragraph 12 of the Statement of Claim reads:

> "12. In addition to the facts stated in paragraphs 2-11 hereof, the Plaintiff will rely on the following facts and matters to support his claim for aggravated and/or exemplary damages.
>
> ...
>
> (c) The Deceased was placed in a cell approximately 8 feet long by 7 feet wide along with eighteen (18) other persons in conditions which the officers responsible knew or ought to have known, were physically oppressive and a danger to his health, his well-being and his life.
>
> (d) The Police Officers on duty on the evening of the 23rd day of October 1992, wilfully and deliberately deprived the Deceased of a meal, or water and refused to open the door to the Deceased's cell to allow him to obtain fresh air and/or relieve.
>
> (e) After being kept in custody the Deceased succumbed to the inhuman and degrading conditions under which he was being kept and he died."

Then paragraph 13 sums up both the claims in tort and constitutional redress thus:

> "13, By reason of the matters aforesaid, the deceased suffered pain and injury, loss and damages humiliation and shame and as a result of

> the inhuman and degrading treatment the Deceased died and he lost the expectation of a long and happy life and his estate has suffered loss and damage."

Then this paragraph continued thus:

> 'AND THE PLAINTIFF CLAIMS against the Defendant:-
>
> (a) Under the Fatal Accidents Act damages for the aforesaid Dependants
>
> (b) Under the Law Reform (Miscellaneous Provisions) Act damages for the Estate of the Deceased.
>
> (c) Damages for assault and/or battery.
>
> (d) Aggravated and/or exemplary damages.
>
> (e) Damages and /or compensation by way of constitutional redress
>
> (f) Damages for false imprisonment" (as amended)

It would have been helpful if at (e) the specific claims for compensation by way of constitutional redress had been spelt out.

As it has been said of the plea for false imprisonment "the claim is merely a statement of the wrong" See Odgers **Principles of Pleadings Practice** nineteenth edition page 173. As all these issues were argued both in the Supreme Court and in this Court, Lord Wright's statement in **North Western Utilities Ltd. v London Guarantee and Accident Co., Ltd.**[1935] All ER 196 at 199 is relevant:

> "The main defence of the appellants was that the breaking of the joint in the pipe was solely due to the action of the city in letting down the soil under the pipe by the negligent and improper way in which they excavated the weir chamber and tunnel under the appellants' main, without providing adequate support. The respondents' case originally was that the city's work had been properly designed and carried out, so that there could be no

> reason at any time, either while it was being carried on or at any subsequent period, to anticipate that it could cause any mischief, but in the course of the trial there was alleged, as a new alternative ground of negligence or breach of absolute duty against the appellants, that the appellants either knew or ought to have known what work the city was doing, and failed to take, as they could and should have done, all proper precautions to prevent the escape of the dangerous gas which they were carrying in their mains. No amendment has ever been made of the pleadings, nor have any precise particulars been given of this head of claim. Their Lordships must observe that it is pessimi exempli to admit a new head of claim without a proper amendment of the pleadings. But this ground of claim has been considered by the trial judge and by the Appellate Division and must now be regarded as a relevant issue in the case. The trial judge decided against the contentions of the respondents, but the Appellate Division allowed the appeal solely on the new ground of claim."

It is in the light of the above averments and authority of **North Western** (supra) and **Lazard Brothers & Company v Midland Bank, Limited** [1933] A.C. 289 at 299, that the constitutional claims must be assessed.

**Breach of Section 17 of the Constitution**

For emphasis it is useful to set out once more Section 17 of the Constitution. It reads thus:

> "17.-(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

The appellant sought an amendment to paragraph 6 of his statement of claim to include torture in his claim in addition to inhuman and degrading treatment. By a majority this Court (Downer JA dissenting Patterson and Harrison JJA) refused the application. I will set out the reasons for my dissent because it has important implications for procedural and constitutional law. I should say however that so far as

the outcome of this case is concerned the omission of torture in the averment will have little effect on my ultimate decision.

The unqualified language of Section 17 demonstrates that the Constitution imposed an absolute prohibition on the State as regards torture, or inhuman, or degrading treatment. The nearest counterpart to this in our statute law is the Bill of Rights which prohibits illegal and cruel punishment inflicted. That goes beyond mere false imprisonment in bad conditions. Equally Section 17 of the Constitution which also goes beyond the tort of false imprisonment is a recognition that the horrors which governments in this century have inflicted on those within their jurisdiction, require constitutional remedies. This provision in combination with Section 25 is designed to provide constitutional redress for such breaches of fundamental rights.

Colourful language is a feature of Mr.Witter's advocacy but the constitutional points were made in the court below and reiterated in this Court. The initial attempt in the court below deserves repetition. It ran thus:

> "Court not debarred from entering upon constitutional jurisdiction to award redress for infringement of rights by the proviso to Sec. 25.
>
> Submitted that in particular circumstances of case as regards award of general damages court is at large.
>
> Also submitted that the approach is that of reasonable man and that that approach is one to be adopted by a single judge doing an assessment. Evidence of Coleman and pleadings which have not been traversed amounts to the most horrendous illustration of the inhumanity of the jailer to the jailed in modern times, if not in all recorded history.
>
> Submitted that little guidance if any can be had from previous awards but there is no experience in terms of its horror with the experience of deceased and hence the gravity of the battery. Refers to

> "Encyclopaedia Britanica" page 62 - "Black Hole of Calcutta." Compare dimensions and number of persons. Coleman testify that cell was 8ft x 7ft. Pleaded and not traversed by defendant. Submitted that each man would be allowed 1/9 sq.ft. of space. By this Friday when there were 19 detainees in cell each would have had available to him under 3 sq. ft. Concrete bunk would reduce sq.ft. available. Ground space available to each would be 2 1/3 sq.ft. This would have been reduced to 2 4/19 sq. ft. by the Friday when 19 men were in cell.
>
> Submitted that experience of men in dark hole does pale to experience of men in cell No. 3 i.e. - The deceased and other detainees. Experience of detainees in cell No. 3 surpassed those in cells 1 and 2."

As for the pleading point, the differences between torture or inhuman or degrading treatment is one of degree and the question posed in this case is which category was appropriate in the circumstances. The averments ought to be in the alternative and the appropriate approach ought to have followed the pattern of pleas for Breach of Statutory Duty. Consequently Section 17 of the Constitution ought to have been expressly mentioned thus 'Breach of Section 17 of the Constitution - torture or inhuman or degrading treatment. Then after a general statement in the manner of paragraph 6 of the Statement of Claim supra, but confining the averments to torture, or inhuman or degrading treatment, the particulars of each breach ought to have been spelt out. The untidy and imprecise plea presented had the effect of lengthening the submissions of counsel. A similar criticism is applicable to the plea of breach of Section 14 of the Constitution, the right to life where the averments were even more untidy and more imprecise.

Turning to the substantive issue, counsel for the appellant's estate has satisfied me that the overcrowded cell, the failure to respond to the complaints of the inmates

including Agana, the lack of proper ventilation, the loud playing of the radio and the constant domino playing in the face of cries for help was inhuman. The test is on a balance of probabilities which the estate has met, but even if the test had been on a preponderance of evidence the appellant would still have been successful. Two previous cases on this section of the Constitution sought declarations, but in this case monetary compensation is the redress sought. The first case is **Riley and Others v Attorney-General and Another** (1982) 35 WIR 279. At page 288 the opinion of Lord Scarman and Lord Brightman has the following statement as to what constituted 'inhuman treatment' in the circumstances of that case. The classic statement runs thus:

> "The problem which arises is this: given the premise that no person may lawfully be subjected to "inhuman treatment", and given the premise that that the execution of sentences of death after the prolonged delays which have here taken place would have subjected and would now subject the appellants to "inhuman treatment", is such "treatment" cleared of inhumanity for the purposes of the section and thus legalised because "the law", namely section 3 of the Offences against the Person Act, authorises the death sentence and the death sentence was a lawful punishment in Jamaica immediately before the appointed day? With profound respect to those who take the opposite view, we consider that the question posed should be answered in the negative. The "treatment" which has to be considered is not the death penalty in isolation. The "treatment" which is prima facie "inhuman" under section 17(1) of the Constitution is the execution of the sentence of death as the culmination of a prolonged period of respite. That species of "treatment" falls outside the legalising effect of section 17(2). Section 17(2) is concerned only to legalise certain descriptions of punishment, not to legalise a "treatment", otherwise inhuman, of which the lawful punishment forms only one ingredient. Section 17(1) deals with "punishment" and "other treatment". In the instant case the punishment is the execution of the death sentence. Section 17(2) is directed both to "punishment" and to "other treatment". The "other

> treatment", if inhuman, is not validated by section 17(2), in our opinion, merely because lawful punishment is an ingredient of the inhuman treatment."

As to how the balance of probabilities is stated the following passage at pages 294-295 states it thus:

> "The cruel and dehumanising experience suffered by these appellants meets the test. But we doubt whether the actual effects should be the test. It would be quite unacceptable to differentiate in the application of section 17 between victims of strong character and those of weaker character. The test must be, in our view, that of the likely effect of the experience to which they have been subjected. Evidence, of course, of actual effect will be very relevant and, indeed, necessary in order to reach a conclusion as to the likely effect."

This minority opinion was approved of in **Pratt and Another v Attorney-General and Another**(1993) 43 WIR 340. There are two passages there which are relevant to the instant case. The first at page 354 reads:

> "This construction of 17(2) (that is the construction of the majority opinion) focuses on the act of punishment, and proceeds upon the assumption that the legality of a long-delayed execution could never have been questioned before Independence. Their lordships, having had the benefit of much fuller argument, cannot accept that there could have been no challenge to a long-delayed execution before Independence and, for the reasons already given, are satisfied that such an execution could have been stayed as an abuse of process. The due process of law does not end with pronouncement of sentence: see **Abbot v Attorney-General**(1979) 32 WIR 347."

Then their Lordships continued thus:

> "The minority who would have allowed the appeal, adopted a narrower construction of section 17(2) which limited the scope of the subsection to authorising the passing of a judicial sentence of a description of punishment lawful in Jamaica before

> Independence and they held it was not concerned with the act of the executive in carrying out the punishment.
>
> Their lordships are satisfied that the construction of section 17(2) adopted by the minority is to be preferred. The purpose of section 17(2) is to preserve all descriptions of punishment lawful immediately before Independence and to prevent them from being attacked under section 17(1) as inhuman or degrading forms of punishment or treatment. Thus, as hanging was the description of punishment for murder provided by Jamaican law immediately before Independence, the death sentence for murder cannot be held to be an inhuman description of punishment for murder.
>
> Section 17(2) does not address the question of delay and does not deal with the problem that arises from delay in carrying out the sentence. The primary purpose of the Constitution was to entrench and enhance pre-existing rights and freedoms, not to curtail them. Before Independence the law would have protected a Jamaican citizen from being executed after an unconscionable delay, and their Lordships are unwilling to adopt a construction of the Constitution that results in depriving Jamaican citizens of that protection."

Regarding the issue that the proviso to Section 25(2) of the Constitution would deny the estate a remedy under the Constitution, I will deal with that issue after addressing the matter of breach of Section 14 of the Constitution. It is therefore appropriate to turn to the issue of compensation appropriate to the circumstances of a breach of Section 17. Just as those who survived the ordeal were entitled to institute proceedings for inhuman or degrading treatment, that right was vested in Agana and his estate is entitled to pursue the claim.

Lord Diplock in **Maharaj** No 2 (supra) at 680 said:

> "Finally, their Lordships would say something about the measure of monetary compensation recoverable under s 6 where the contravention of the claimant's constitutional rights consists of

> deprivation of liberty otherwise than by due process of law. The claim is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration. Counsel for the appellant has stated that he does not intend to claim what in a case of tort would be called exemplary or punitive damages. This makes it unnecessary to express any view whether money compensation by way of redress under s 6(1) can ever include an exemplary or punitive award."

By parity of reasoning the claim for compensation must include the loss of liberty and the pain and suffering experienced by Agana during the 38 hours he was confined in the cell in inhuman and degrading conditions. To my mind exemplary or punitive award is appropriate in this instance. The common law was clarified in **Rookes v. Barnard**[1964] 1 All ER 367 at 410, that exemplary damages are permissible for "excessive arbitrary or unconstitutional action by the servants of the government". Also that such damages "serves a useful purpose in vindicating the strength of the law." The remedies entrusted to the Supreme Court under Section 25(2) are stated in wide and general terms so as to include an order for an exemplary award:

> "(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person is entitled."

So an exemplary award is appropriate on the two bases referred to above. It is important to vindicate the strength of the Constitution in this case. Thus One and a half Million dollars ($11/2M) seems a reasonable award. Because the present Ja $ is valued at around 37:1 or 38:1 as against the U.S. $ or 58:1 as against the pound sterling, care must be taken not to fall for the money illusion. A million in a heavy currency is a large amount, but it is otherwise in a devalued currency. So in areas where there are no precedents it is prudent to think of what the award can purchase. In terms of housing this is the price of a unit in a low cost housing scheme. It is on this basis that I quantified the compensation.

**Breach of Section 14 of the Constitution. The right to life.**

To reiterate Section 14 reads:

> "14.-(1) No person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted."

To appreciate the radical change the Constitution has effected in this area of public law, there must be some reference to the evolution of tort law on this issue. The starting point on this branch of law is the decision of **Baker v. Bolton** 1 Camp 493 which was analysed by Lord Parker and Lord Sumner in **Admiralty Commissioners v S.S. Amerika** [1917] A.C. 38. This is how Lord Parker stated the rule in **Baker v Bolton** at page 42:

> "The second is that no sufficient case has been made for overruling Lord Ellenborough's decision in **Baker v. Bolton 1 Camp. 493** to the effect that in a civil court the death of a human being cannot be complained of as an injury."

Another important aspect of this case is the light it throws on intentional deprivation of life in the law of torts. Lord Parker put it thus at page 45:

> "My Lords, during the period we are considering it is probable that all homicide by act of violence amounted to felony. Certainly intentional homicide or homicide through negligence was felonious. It follows that the death of a human being occasioned by an act of violence on the part of the defendant could not be the ground of complaint in an action of trespass. It could not be alleged without alleging felony, and for felony trespass would not lie. If the writ alleged only an injury per quod servitium or consortium amisit, the writ would be unobjectionable, but if death ensued, damage could be obtained up to the date of the death only. If the injured person had been killed on the spot the action would fail altogether. The plaintiff's remedy, if he had any, would be the appeal."

Lord Sumner is also very helpful on this issue. He stated at page 57:

> "Doubtless lawyers as familiar with fatal accidents due to mere negligence as we are would have analysed the injury and have distinguished fully between killing with intent to kill, killing by an intended act without intent to kill but in breach of a duty towards the victim, and killing without either intent or breach of duty by mere mis-adventure; but in days when negligence causing death was probably rare as compared with our day, and the guilty party more often than not had nothing with which to pay damages, men acquiesced without discussion in a procedure by which the Royal justice dealt with homicide of all kinds, and actions of trespass did not deal with homicide at all. No doubt it is the tradition of this change that was preserved in the language of Tanfield J. in **Higgins v. Butcher yelv. 89,** "the servant dying of the extremity of the battery, it is now become an offence to the Crown, being converted into felony," to which the report in Noy, p. 18, adds, "for the King only is to punish felony except the party brings an appeal." Though no longer in accordance with the formal law as stated by Cockburn C.J. in **Wells v. Abrahams L.R. 7 Q. B. 554** and by Bagally L.J. in **Ex parte Ball 10 Ch. D. 674,** this was historically not far from the truth." [Emphasis supplied]

Before continuing with Lord Sumner's historical analysis it is inctructive to refer to **Hyam v Director of Public Prosecutions** [1974] 2 All ER 41. At page 51 Lord Hailsham said:

> "I know of no better judicial interpretation of 'intention' or 'intent' than than that given in a civil case by Asquith LJ (**Cunliffe v Goodman) [1950] 1 All ER 720 at 724, [1950] 2 KB 237 at 253** when he said:
>
> > 'An "intention," to my mind, connotes a state of affairs which the party "intending" - I will call him X. - does more than merely contemplate. It connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition'."

Then Lord Hailsham concludes his speech thus at page 56:

> "Before an act can be a murder it must be 'aimed at someone' as explained in **Director of Public Prosecutions v Smith [1960] 3 All ER at 167, [1961] AC at 327,** and must in addition be an act committed with one of the following intentions, the test of which is always subjective to the actual defendant: (I) The intention to cause death; (ii) The intention to cause grievous bodily harm in the sense of that term explained in**Director of Public Prosecutions v Smith [1960] 3 All ER at 172, [1961] AC at 335,** ie really serious injury; (iii) Where the defendant knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the defendant desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed."

Viscount Dilhorne is also helpful to illustrate how the law on intentional killings has developed. At page 60 he said:

> "In **R v Bubb, R v Hook (1850) 14 JP 562** the jury was directed that there must be an intention to cause death or some serious bodily injury. In **R v Porter (1873) 12 Cox CC 444** Brett J told the jury that 'if the prisoner kicked the man, intending to inflict grievous harm, and death ensued from it, he was guilty of murder'. In **R v Doherty (1887) 16 Cox CC 306** Stephens J said:
>
> > 'What, then, is the intention necessary to constitute murder? Several intentions would have this effect; but I need mention only two in this case, namely, an intention to kill and an intention to do grievous bodily harm'."

Then Lord Cross (at page 70) said:

> " My Lords, Ackner J directed the jury in the following terms:
>
> > 'The prosecution must prove, beyond all reasonable doubt, that the accused intended to (kill or) do serious bodily harm to Mrs. Booth, the mother of the deceased girls. If you are satisfied that when the accused set fire to the house she knew that it was highly probable that this would cause (death or) serious bodily harm then the prosecution will have established the necessary intent. It matters not if her motive was, as she says, to frighten Mrs. Booth.'
>
> As the jury returned a verdict of guilty they must have been satisfied that the appellant when she set fire to the house realised at the least that it was highly probable that one or more of the inmates would suffer serious bodily harm."

The principle expressed in in these passages is applicable to the circumstances of this case. The police officers knew that to imprison so many men in a tiny cell would have caused death or serious bodily harm. Further it must be realised that in constitutional proceedings the evidential test is on a balance of probabilities.

Then Lord Sumner in **Admiralty Commissioners** (supra) explains appeal thus at pages 58-59:

> "Parallel with the respective proceedings in trespass and on the case and on indictment there remained the right of appeal. For many years an appeal was more common that an indictment in cases of homicide, and the judges were careful to preserve the relatives' private right to the appeal and to secure that they should not be prejudiced by the course taken by or in the name of the Crown. The liability of the manslayer to punishment might be discharged by the King's pardon, or by the appellant's release, but in case of the former the appellant's right was saved, so that the King's pardon could not be pleaded to defeat the appeal. Out of this there arose the practice of using the appeal as an engine of compulsion, by which the slayer was driven to make compensation in order to obtain the appellant's release. In the appeal there were risks on both sides, for if the appeal failed the appellee had his action on the case for a false and malicious appeal. Down to the end of the fifteenth century appeals were nevertheless common, but the statute 3 Hen. 7, c. 1, after reciting that in appeals "the party is oftentimes slow, and also agreed with . . . . also he that will sue any appeal, must sue in proper person, which suit is long and costly, that it maketh the party appellant weary to sue," enacts that indictments should no longer be held back "so that the suit of the party may be saved," but are to be proceeded with at once. Eventually appeals fell much into disuse; but they are mentioned from time to time, and a reported instance occurs, which is instructive, in 1 Croke's Eliz. (1599), pp. 632 and 682, **Phillida Shacckborough v. Biggins** or **Biggen**."

Equally important Lord Sumner showed the scope and limit of the action and why it was abolished. At page 59 he said:

> "Here in a widow's appeal for murder, in which the act was held to have only been manslaughter, the Queen's pardon was relied on. It was decided, with some difference of opinion, that the pardon did not get rid of the appellee's liability to be burnt in the hand, it being the suit of the party and not an information in the Star Chamber, which was the suit

> of the Queen. On this the appellee promptly paid the appellant forty marks, and the suit was discontinued. There is little subsequent record of similar cases. In 1770 in **Bigby v. Kennedy (1770) 5 Burr. 2643** it is stated that there had been no such case for nearly half a century, and as eventually the appellant did not appear and a nonsuit was entered, no doubt the appellee had satisfied her demands. In **Ashford v. Thornton (1818) 1 B. & Al. 405, 457** in 1818, the case which led to the abolition of appeals by 59 Geo. 3, c. 46, s. 1, Bayley J.observes: 'This mode of proceeding, by appeal, is unusual in our law, being brought, not for the benefit of the public, but for that of the party, and being a private suit, wholly under his control. It ought, therefore, to be watched very narrowly by the Court; for it may take place after trial and acquittal on an indictment at the suit of the King; and the execution under it is entirely at the option of the party suing, whose sole object it may be to obtain a pecuniary satisfaction.' In this sense down to 1819 the death of a human being could be complained of in a civil court, for the appeal, though 'a vindictive action,' was on the civil side of the Court, but it could not be complained of 'as an injury,' and the rule as stated by Lord Ellenborough stands untouched'."

It is now useful to refer to Lord Diplock's statement in **Hinds v The Queen** (1975), 13 J.L.R. 262 at 267-268. It states:

> "Nevertheless all these constitutions have two things in common which have an important bearing on their interpretation. They differ fundamentally in their nature from ordinary legislation passed by the parliament of a sovereign state. They embody what is in substance an agreement reached between representatives of the various shades of political opinion in the state as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in future. All of them were negotiated as well as drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it has been developed in the unwritten

> constitution of the United Kingdom. As to their subject-matter, the peoples for whom new constitutions were being provided were already living under a system of public law in which the local institutions through which government was carried on, the legislature, the executive and the courts, reflected the same basic concept. The new constitutions, particularly in the case of unitary states, were evolutionary not revolutionary. They provided for continuity of government through successor institutions, legislative, executive and judicial, of which the members were to be selected in a different way, but each institution was to exercise powers which, although enlarged, remained of a similar character to those that had been exercised by the corresponding institution that it had replaced."

Then referring to the enlarged powers of Courts Lord Diplock said at 269:

> "The more recent constitutions on the Westminster Model, unlike their earlier prototypes, include a Chapter dealing with Fundamental Rights and Freedoms. The provisions of this Chapter form part of the substantive law of the state and until amended by whatever special procedure is laid down in the constitution for this purpose, impose a fetter upon the exercise by the Legislature, the Executive and the Judiciary of the plenitude of their respective powers."

It is against the background of fact, law, and constitutional principles that Section 14 must be construed. As was said in **Maharaj No. 2** supra:

> "...it is in their Lordships' view clear that the protection afforded was against contravention of those rights or freedoms by the state or by some other public authority endowed by law with coercive powers."

The test therefore is whether the members of the Constabulary Force were responsible for <u>"killing by an intended act without intent to kill but in breach of a duty towards the victim".</u> By inserting the "intent to cause grievous bodily harm", in Lord Sumner's analysis the basis for finding breach of Section 14(1) of the Constitution is

established. The placing of 18 men in a small cell for 38 hours, the refusal to heed their cries for help, the refusal to supply them with water, the deliberate turning up of the radio in response to the bangs on the cell door for help were all intended acts. Further the Lock-up regulations examined at length earlier, demonstrate the duty the gaolers had to the prisoners. To my mind it is clear that the appellant has proved that on a balance of probabilities that she had made out her claim on this aspect of the case. It was no excuse in a constitutional action as Mr. Campbell for the respondent asserted that gaolers did not intend to kill or that the Director of Public Prosecutions had indicted the police officers for manslaughter and a jury had found them not guilty. What had to be disproved and was not was that the acts of the gaolers were unintentional on the evidence in these proceedings. The previous case on this aspect **Abbott v Attorney-General** (1979) 32 WIR 347 from Trinidad sought a declaration. In this case compensation is sought. As there is no precedent from this jurisdiction, this court will be obliged to state the principle on which an award can be made and decide the appropriate award. Once again **Maharaj No 2** at page 679 is helpful in pointing the way forward. Lord Diplock said:

> "The claim for redress under s 6(1) for what has been done by a judge is a claim against the state for what has been done in the exercise of the judicial power of the state. This is not vicarious liability: it is a liability of the state itself. It is not a liability in tort at all: it is a liability in the public law of the state, not of the judge himself, which has been newly created by s 6(1) and (2) of the Constitution."

In like manner, an action pursuant to Section 25 of the Constitution enforcing fundamental rights is an 'action against the state or by some other public authority endowed by law with coercive powers'. Chapter III is concerned with 'public law not

private law'. The Crown Proceedings Act by virtue of Section 3 enables a litigant to sue the state in tort in defined circumstances. Section 3 in part reads:

> "3.-(1) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject -
>
> (a) in respect of torts committed by its servants or agents;
>
> (b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and
>
> (c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property.
>
> Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) in respect of any act or omission of a servant or agent of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action in tort against that servant or agent or his estate."

But a breach of Chapter III provisions arises directly under the Constitution. Constitutional law imposes duties on the State for the benefit of those within its borders. No private person can set up a prison system save with permission of the State. So we are in an area beyond the province of the law of torts. This is recognised in the United States the country with the oldest written common law Constitution.

In paragraph 36 of **Ntandazeli Fose v The Minister of Safety and Security** reported at 1996 BCLR 232 (W) there is a useful extract pertinent to the instant case. Counsel kindly provided a copy presumably from Lexis Nexis but they were unable to

trace the case from the United States. Paragraph 39 in the leading judgment of Ackerman J reads as follows:

> "[36] In **Carlson v Green 446 US 14, 28, 28 n 1 (1980)** the plaintiff sued on behalf of her deceased son's estate alleging that her son had died as a result of personal injuries because defendant's prison officials violated, inter alia, his Eight Amendment rights by failing to give him proper medical attention. She claimed compensatory and punitive damages. The Court held that the plaintiff could avail herself of a **Bivens**-type action for damages."

Chapter III of the Constitution fixes the State with responsibility of guaranteeing fundamental rights and freedoms. When the State infringes those rights then monetary compensation is an available remedy. The 'right to life' is the most fundamental of rights. Compensation by States where there is intentional killing of citizens of other States is well known in international law so the United States decision in domestic law is not surprising. In this case it must be stressed that there was no evidence led by the Attorney-General that the killing of Agana was not intentional. The inference from the evidence points one way. The Constitution establishes the liability of the State: it is the judiciary pursuant to our Section 25(2) who must determine the amount of the award. In so doing the award must be substantial so that the State on the one hand be made aware of the measure of its responsibility. On the other hand it must be sufficient recompense to the estate of the deceased so that the beneficiaries will be aware in a tangible way that the State cares and acknowledges its responsibilities with regard to its obligations pursuant to Chapter III of the Constitution. On this basis the appropriate award to my mind is $3M. with an addition for an exemplary award. The global sum on my reckoning for the torts and constitutional breaches ought to be in the region of $5-

$6M. and I take into account the award of $25,000 made by the Ministry of National Security and Justice to cover funeral expenses.

**Did the proviso to Section 25 of the Constitution preclude the award of compensation as Karl Harrison J. found?**

To appreciate the scope and limit of the proviso it is appropriate to put it in context.

Section 25 provides inter alia:

> '(1)Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24(inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.
>
> (2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person is entitled:
>
> Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law. [Emphasis supplied]

Our modern constitutional development since 1944 has been evolutionary and the Constitution recognised the mature legal system in place of which it became the apex. Many of the rights enshrined in Chapter III existed before the appointed day. This is the basis of the oft quoted statement by Lord Devlin in **Nasralla v Director of**

**Public Prosecutions** [1967] 2 All ER 161 which was cited with approval in **Maharaj No. 2** at page 676 thus:

> "This chapter ... proceeds on the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed."

But the presumption may be rebutted where the pre-existing law did not conform to Chapter III of the Constitution. In some instances Parliament has stepped in and repealed those laws. Thus the Unlawful Possession Act, and the Vagrancy Act which offended Chapter III provisions were repealed. Also Section 210 of the Customs Act which was out of harmony with separation of powers as illustrated in **Hinds v The Queen** (supra) was repealed and adapted in compliance with Section 4(1) of the First Schedule to the Constitution after this court pointed out the obligation to do so. Presumptions of law are also important in construing Section 41 of the Interpretation Act.

So stated, it is understandable that there would be common law and statutory justiciable rights which conformed to the constitutional principles enunciated in Chapter III. Section 25(1) is emphatic in stating that although those rights and remedies exist it does not preclude a litigant resorting to the Constitution.

It is acknowledged that resort to the Constitution will be the exception rather than the rule. The legislature, the judiciary or the executive are responsible for the development of the legal system on the principles laid down in Chapter III. So the

litigant will have recourse to Acts of Parliament and judicial decisions to vindicate his rights against the State in most instances. The Crown Proceedings Act will cover most of the disputes between the citizen and the State. So it is only when the remedy in the legal system is inadequate that recourse to the Constitution is necessary. This salutory principle of constitutional interpretation was developed in the United States and is followed by countries which follow the course of the common law. It is judicial restraint which makes recourse to the Constitution a last resort. Therefore Section 25(2) of the Constitution which entrusts the Supreme Court with a wide range of powers to enforce constitutional principles in Chapter III will be a remedy of last resort.

There are in addition to the entrenched remedies provided in Section 25(2) for challenges to unconstitutional legislation or unconstitutional executive or judicial acts a wide range of remedies provided by the ordinary law as manifested in legislative enactment and judicial decisions. It is against this background that the proviso must be assessed to ascertain if the learned judge below was correct in his interpretation of it, to the circumstances of this case.

The two claims which Karl Harrison, J found were adequately provided for in the ordinary law was the 'right to life' and 'protection from inhuman and degrading treatment'. The general answer to the learned judge's stance is to be found in the celebrated statement by Lord Scarman and Lord Brightman in **Riley** (supra) at page 287:

> "The contribution which the Constitution makes to the jurisprudence of Jamaica is that it offers to every person in Jamaica the protection of a written Constitution in respect of the rights and freedoms recognised and acknowledged by the law; and "law" means both the pre-existing law so far as it remains in force (see section 4(1) of the Jamaica (Constitution) Order in Council 1962) and the new law arising from the Constitution itself and from

> future enactment. However, the Constitution's introduction of a new judicial remedy negatives any presumption that the remedies available under the pre-existing law were necessarily sufficient: indeed, the enactment of new protection suggests that they needed strengthening. In summary. the Constitution declares the fundamental rights and freedoms of every person in Jamaica and provides for their judicial protection if no adequate means of redress are available to the person concerned under any other law. Thus the Constitution ensures that in Jamaica 'ubi jus, ibi remedium'. The 'jus' is the substantive law of fundamental rights and freedoms recognised by the law and practice of the State and now embodied by statute in sections 13 to 24 of the Constitution: the remedy is their judicial protection under section 25, if no means of redress is available to the victim under any other law."

On the matter of detail, the criminal law made murder or manslaughter criminal offences and it could not be contested that the right to life was not recognised by the legal system. However, as was pointed out because of the rule in **Baker v Bolton** there was no remedy in tort law until the statutory reforms by way of the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act. There was still a gap however in the civil law which the Crown Proceedings Act did not cover, namely a remedy by way of compensation directly against the State for the intentional deprivation of life. Section 14 of the Constitution provides the solution.

As for torture, inhuman and degrading treatment, the Imperial Act the Bill of Rights provided a partial remedy. However it must firstly be ascertained if the Bill of Rights is part of the Jamaican Legal System. The answer is to be found in the true construction of the Interpretation Act. Section 41 of that Act reads:

> "All such laws and Statutes of England as were, prior to the commencement of I George II Cap. I, esteemed, introduced, used, accepted, or received, as laws in the Island shall continue to be laws in the Island save in so far as any such laws or statutes

> have been, or may be, repealed or amended by any Act of the Island."

This was the initial Act which settled the reception of English law in Jamaica, before 1727. Section 4(1) of the First Schedule of the Constitution has recognised, entrenched and extended this provision.

The most recent interpretation of Section 41 is to be found at pages 476-479 of **The Commissioner of Income Tax v Blue Cross of Jamaica** (1989) 26 JLR 458. The basic principle to grasp is that although in International Law, Jamaica is regarded as a conquered colony pursuant to the Treaty of Madrid, 1670, in Constitutional Law it is regarded as a settled colony and the reception of English Law was to be determined by the predecessor to Section 41 of the Interpretation Act. It is not proposed to repeat the analysis of section 41 here. However, it is necessary to introduce two further authorities which confirm the approach in **Blue Cross** that presumptive evidence is all that is required to establish that a statute was esteemed in Jamaica prior to 1727 and this position has been reaffirmed by these authorities. If it was esteemed it is now part of our legal system. It ought also to be reiterated that this was the approach of Lord Devlin in **Nasralla** as regards pre-existing law in the Constitution relating to Chapter III provisions.

In dealing with the issue of the reception of Roman-Dutch law in Ceylon, Lord Diplock said in **Chelliah Kodeeswaran v Attorney General of Ceylon** [1970] AC 1111 at 1119:

> "It is not, however, essential that it should be demonstrable that such a remedy was in fact exercised before the British occupation, for although the Roman-Dutch law as applied in Ceylon under the Government of the United Provinces is the starting point of the "common law" of Ceylon, it is not the finishing point. Like the common law of England, the common law of

> Ceylon has not remained static since 1799. In course of time it has been the subject of progressive development by a cursus curiae **(Samuel v. Segutamby** 1924) 25 N.L.R. 481) as the courts of Ceylon have applied its basic principles to the solution of legal problems posed by the changing conditions of society in Ceylon. In their Lordships' view, if long-established judicial authority for a proposition of law not inconsistent with the British constitutional concept of the exercise of sovereign authority by the Crown can be found in the decisions of the Ceylon courts themselves there is no need to go back to see whether any precedent can be found for it in the jurisprudence of the courts of the United Provinces or the doctrine of the Roman-Dutch jurists of the eighteenth century. Still less is it necessary to find a precedent for it in English common law."

Emphasising that a direct precedent is not essential to establish the reception of a specific principle of Roman-Dutch Law, Lord Diplock continues thus:

> "The absence of any supporting precedent for the proposition in Roman-Dutch law, as applied in the United Provinces, may be due to a number of reasons. It may have been "taken for granted" law in the United Provinces, or it may deal with circumstances which did not exist there or did not attract the attention of writers on Roman-Dutch law in the eighteenth century; or it may be a development of the common law of Ceylon itself either before or after 1799, of which the nascence and growth may be impossible to trace in the absence of any reports of decisions before 1833 and very incomplete reports thereafter until towards the end of the nineteenth century."

Lord Diplock further demonstrates that presumptive evidence would prevail and would not be displaced by conflicting precedent in eighteenth century jurisprudence thus:

> "Even a clear conflicting precedent in the eighteenth century jurisprudence or doctrine of the United Provinces would not necessarily be a conclusive indication that a later decision of a Ceylon court is erroneous. As Wood Renton J.

> pointed out in **Colombo Electric Tramway Co. v Attorney-General** (1914) 16 N.L.R. 161, 173, little is known as to the precise extent to which the doctrines of Roman-Dutch law which were applied in the United Provinces themselves were actually introduced into Ceylon while it was under Dutch rule, and if authority were found in the eighteenth century law of the United Provinces which was inconsistent with an old-established line of decisions by the courts of Ceylon, the inference may well be that the authority relates to a part of the law of the United Provinces which was regarded as unsuitable to conditions in Ceylon and was never introduced there."

This approach to the reception of English statutes was anticipated in the Jamaican case of **Woodgate v Malabre** Vol 1 Stephens Reports 472. The Supreme Court, (Rowe C.J. Allwood, Barrett, Bernard JJ) said as follows:

> "Anyone at all acquainted with the history of this Island is aware that one of the principal struggles of its inhabitants was to obtain the benefits of the laws of England; and that the differences on this subject were put an end to by I Geo. 2 (commonly called the Revenue Act), which declares "that all such statutes and laws of England as have been at any time esteemed, introduced, used, accepted, or received as laws in this Island, shall, and are hereby declared to be and continue laws of this His Majesty's Island of Jamaica for ever." If therefore it can be shown that the statutes of England relating to costs were acted upon in this Island before the Geo. 2, and are not controlled by any subsequent Acts, there can be no doubt we can give costs according to our own discretion. In most of the cases which have come before this Court on this Act, we have been obliged to infer that the laws of England were acted on in this Island previously to its passing from the fact, as far as any evidence could be procured, of their having been acted upon since that period. But in this case we are left in no doubt, nor driven to any presumption; for by the records in the office of the clerk of the Court, which I have most carefully examined, we find that from the earliest period, even before 10 Anne, costs were always given, and when taxed, formed part of the judgment. In the absence of this positive

> evidence, we might fairly have inferred that as the 8 Eliz. c. 2, giving costs in cases of discontinuance, and the 8 & 9 Wm. 3, c. 4, giving them in demurrers, are clearly acted on here - that the other statutes of England relating to costs must also be considered in force; but even this inference we are not called upon to draw." [Emphasis supplied]

There is one more citation necessary from the **Blue Cross** case at 477:

> "In a judgment of 1867 Kemble, J., in **Jacquet v. Edwards I** Stephens Reports 421 demonstrated that from the earliest times the colonists in Jamaica claimed to be governed by English law. At page 21 this passage appears in his judgment -
>
> > 'His Majesty, King Charles, assuming his acquisition of this island by conquest, legally possessed the power, which he thought fit to exercise of conferring on all children of English subjects who settled in Jamaica, the rights and privileges of free-born Englishmen, and that they consequently considered themselves entitled to those rights and actually enjoyed them at a very early period appears from the answer of Sir Thomas Modyford, in 1664 (he was then Governor of Jamaica), in reply to the following questions put to him by his majesty's Commissioners: 'What statutes, law and ordinances, are now made in force?' and to which he answers: 'Right reason, which is the common law of England, is **esteemed** in force amongst us, together with Magna Carta and the ancient statutes of England, as far as they are applicable.' (See Journals of Ass.. Vol. 1, App.22)' (Emphasis supplied).
>
> This passage suggests that there was no doubt that the common law was esteemed in force amongst the settlers. So far as Statute Law was concerned, it was also esteemed but it was limited to those statutes which were then applicable."

If in 1664 Magna Carta was esteemed and received as applicable to the colony that was presumptive evidence that the Bill of Rights of 1689 would have been

esteemed and received as applicable to the conditions in the colony and in conformity to Section 41 of the Interpretation Act. After Magna Carta, the Bill of Rights was the foremost fundamental statute of the unwritten constitution of England. There are yet other aspects of Section 41 of the Interpretation Act in the context of the reception of the Bill of Rights which it is necessary to examine. The colonists received the Toleration Act 1689. See **R v. Greensped v Livingston** referred to in **R v Commissioner of Police ex parte Cephas** (1976) 24 WIR 402 at 408-409 and **Exparte Cephas No 2** (1976) 24 W.I.R. 500 at 507. As this was a companion constitutional statute to the Bill of Rights it is presumptive evidence that the Bill of Rights was esteemed. There is also additional direct evidence that the Bill of Rights was received as part of the laws of Jamaica. The Revenue Act which contains the predecessor to Section 41 of the Interpretation Act was the result of a bargain between the Crown and the settlers, that in return for revenue the status of settlers would be defined in the Revenue Act. This constitutional practice was in accordance with the clause in the Bill of Rights which reads:

> "That levying Money for or to the use of the Crowne by pretence of Prerogative without Grant of Parlyament for longer time or in other manner than the same is or shall be granted is Illegal."

The settlers had their own parliament called the House of Assembly and the Revenue Act was an enactment of that body. The grievance concerning their status as a settled colony was redressed by the Revenue Act. In enacting this financial legislation they were acting in conformity with the clause in the Bill of Rights which reads:

> "And that for Redresse of all grievances and for the amending strengthening and preserving the Lawes Parlyaments ought to be held frequently."

Further there is a direct reference to the Toleration Act in the Bill of Rights which reads thus:

> "That the subjects which are Protestants may have Arms for their Defence suitable for their conditions as allowed by Lawe."

Against that background it is arguable that by relying on the common law cause of action, Breach of Statutory Duty, the appellant could before the appointed day have sought this remedy on the ground that the gaolers at Constant Spring lock-up were in breach of prohibition against cruel and unusual punishment in the Bill of Rights. The prohibition reads:

> "That excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted."

That this is so finds support in the following passages in **R v Secretary of State for the Home Department,ex parte Herbage (No 2)** [1987] 1 All ER 324. At 337, Purchas L.J said:

> "Counsel for the applicant submitted that the appeal was misconceived because it was in fact an attempt to reopen the question of the granting of leave under Ord 53, r 3. For the reasons already appearing in this judgment I am impressed by this submission. The judge was clearly well aware of the authority of **Ex p King,** [1984] 3 All ER 897 but nevertheless granted leave. Counsel for the applicant emphasised that the case against the governor, however, was not based merely on breaches of the 1964 rules but on an alleged breach of the provision of the Bill of Rights, namely that the applicant was entitled not to be inflicted with 'cruell and unusual punishments'. This is a fundamental right which, in my judgment, goes far beyond the ambit of the 1964 rules."

Then the learned judge continued thus at page 338:

> "This is far from saying that every prisoner who complains about the management of the prison can

> apply to the court under Ord 53 alleging a breach of the Bill of Rights. Unjustified complaints of this nature will be readily detected by the judge hearing the application.
>
> Once the central issue is divested of the encumbrance of considerations of breaches of 1964 rules or duties under the 1952 Act and is viewed as a case involving a breach of the Bill of Rights alone, then the matter, in my judgment, becomes easier to comprehend. Two questions arise. The first is: what are the conditions in fact in which the applicant is presently detained at Pentonville? The second is: do these conditions amount to 'cruell and unusual punishment'? By way of example, and not wishing to indicate any view of the actual conditions existing, it is generally held to be unacceptable that persons supposedly of normal mentality should be detained in psychiatric institutions as is said to occur in certain parts of the world. Coming close to the alleged facts of this case, if it were to be established that the applicant as a sane person was, for purely administrative purposes, being subjected in the psychiatric wing to the stress of being exposed to the disturbance caused by the behaviour of mentally ill and disturbed prisoners, this might well be considered as a 'cruell and unusuall punishment' and one which was not deserved. This raises issues quite different from compliance or non-compliance with the 1964 rules; although they may well involve breaches on the part of the Secretary of State of the 1952 Act."

If the Constitution has strenghtened this provision in the Bill of Rights by giving a direct remedy, it is difficult to understand how the remedy can be denied today. The only criticism that could have been made against the appellant was that she could have pleaded Breach of Statutory Duty, in the alternative to Breach of Section 17 of the Constitution. Then this court would have examined both claims and awarded either damages or compensation. The particulars under the claim for Breach of Statutory Duty would have to be subsumed under the heading cruel and unusual punishment.

Since exemplary damages would be awarded for breach of the Bill of Rights, then by parity of reasoning there can be an exemplary award for breach of Section 17 of the Constitution. This is especially so since Section 13, the preamble in Chapter III, specifically declares that every person in Jamaica was entitled to "the protection of the law". For exemplary damages, see **Rookes v Barnard** (supra).

It ought to be recognised that the proviso is merely the expression of a well known constitutional principle that if the legal system as reflected in the ordinary laws provides adequate remedies then there is no need to resort to the Constitution to seek those remedies. It is the legislature by enactments and the judiciary by developing the common law and interpreting the Constitution and statutes which provides remedies 'under other laws' adequate for aggrieved litigants. It is only when the remedies so provided are not adequate that recourse to the Constitution is necessary. Recourse to the Constitution was necessary in this case so on this ground the appellant succeeds.

**Are there authorities binding on this court which support the above approach?**

Mr. Witter contended that the proviso to Section 25 of the Constitution was like a shackle and that it should be ignored so as to achieve justice. Since the evolving common law, and the interpretation of statutes and the Constitution which are in the province of the judiciary keeps the legal system in harmony with Chapter III, Mr. Witter's submission is not well-founded. Also, the enactment of legislation to reflect the principles enunciated in Chapter III of the Constitution, the innovations by the Director of Public Prosecutions prompted by **Vincent v The Queen** [1993] 1 W.L.R. 862; (1993) 42 W.I.R. 262 in disclosing relevant police statements in summary proceedings, demonstrate that the legal system is being updated to be in harmony with Chapter III

and enables the Crown to rely on the proviso in many instances and so ensures that recourse to Section 25 of the Constitution is a last resort. An instance of the foregoing is the following passage from **Franklyn and Vincent v R** per Lord Woolf at pages 271-273 42 W.I.R. (supra):

> "This being the position, the Director of Public Prosecutions may like to consider whether or not he should give further guidance on this subject. Clearly, it would be preferable if the need to consider each case in relation to its particular circumstances could be avoided by a general practice being promulgated which required the disclosure of statements of witnesses or, alternatively, giving the defence a statement of the nature of the evidence which will be relied upon by the prosecution before trial (in the absence of special circumstances) to assist the defendant in the preparation of his defence. In making this suggestion, their Lordships have in mind the judgment delivered by Lord Lowry in **Berry Linton v. R** [1992] 41 WIR 244 at page 253 where he said:-
>
> > '. . . in a civilised community the most suitable ways of achieving such fairness ( which should not be immutable and require to be reconsidered from time to time) are best left to, and devised by, the legislature, the executive and the judiciary which serve that community and are familiar with its problems'."

In two notable statements Lord Diplock enunciated this principle of constitutional interpretation in the case of Trinidad and Tobago where there is no proviso to their Chapter on fundamental rights and freedoms. Both instances were referred to in **Attorney-General of Trinidad and Tobago v McLeod** [1985] L.R.C. 81 at 89. Lord Diplock said:

> "The Judicial Committee has previously had occasion to draw attention to the necessity of vigilance on the part of the Supreme Court to prevent misuse by litigants of the important safeguard of the rights and freedoms enshrined in

sections 4 and 5, that is provided by the right to apply to the High Court for redress under section 14. Two specific forms that such misuse may take have previously been dealt with in judgments of the Judicial Committee. In **Harrikissoon v Attorney General of Trinidad and Tobago** [1980] AC at p.268, it was said of the identical section, although differently numbered, section 6 in the 1962 Constitution:-

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

Then his Lordship continues thus:

> "In **Chokolingo v Attorney General** [1981] 1 WLR 106 the Judicial Committee applying what they had previously said obiter in **Maharaj v Attorney General of Trinidad and Tobago** (No. 2) [1979] AC 385, held that the procedure for redress under section 6(1) of the 1962 Constitution was not to be

> used as a means of collateral attack upon a judgment of a court of justice of Trinidad and Tobago acting within its jurisdiction, whether original or appellate."

**Bell v Director of Public Prosecutions** [1986] LRC (Const) 392 demonstrates that the courts will not permit the Crown to whittle away the Constitution by referring to the existing common law. The above statement appears in the head note at page 393. Implicit in the statement is that automatic reliance on the proviso would not preclude the courts from expounding the principles embodied in Chapter III and granting the appropriate relief under the Constitution when it is necessary to do so. At page 398 Lord Templeman said:

> "In the present case, in determining whether the appellant was afforded a fair hearing within a reasonable time by an independent and impartial court established by law, the practice and procedure of the courts established by law prior to the Constitution must be respected. But by section 20(1) the appellant is entitled to a fair hearing "within a reasonable time", albeit that, in considering whether a reasonable time has elapsed, consideration must be given to the past and current problems which affect the administration of justice in Jamaica."

Then Lord Templeman continued:

> "Their Lordships consider that, in a proper case without positive proof of prejudice, the courts of Jamaica would and could have insisted on setting a date for trial and then, if necessary, dismissing the charges for want of prosecution. Again, in a proper case, the court could treat the renewal of charges after the lapse of a reasonable time as an abuse of the process of the court. In **Connelly v Director of Public Prosecutions** [1964] AC 1254 Lord Devlin at page 1347 rejected the argument that an English court had no power to stay a second indictment if it considered that a second trial would be oppressive. In his opinion:-

> '... the judges of the High Court have in their inherent jurisdiction, both in civil and in criminal matters, power (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the court's process is used fairly and conveniently by both sides ... First, a general power, taking various specific forms, to prevent unfairness to the accused has always been a part of the English criminal law ... Nearly the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what was fair and just was done between prosecutors and accused.'

Lord Devlin was there speaking of the power of the court to stay a second indictment if satisfied that its subject matter ought to have been included in the first. But similar reasoning applies to the power of the court to prevent an oppressive trial after delay."

Despite this their Lordships concluded thus:

> "Provided that the courts of Jamaica recognised that a retrial required urgency, the Board would not normally interfere with a finding of those courts that a particular period of delay after an order for a retrial did not contravene the constitutional right of an accused to trial within a reasonable time. But in the present case their Lordships conclude that the decisions of the courts of Jamaica were flawed by failure to recognise the significance of the order for a retrial and the significance of the discharge by the Magistrate. In these circumstances their Lordships will humbly advise Her Majesty that the appeal should be allowed and that the appellant is entitled to a declaration that section 20(1) of the Jamaica Constitution Order in Council 1962, which afforded the appellant the right to a fair hearing within a reasonable time by an independent and impartial court established by law, has been infringed."

Those authorities demonstrated further that the finding by Karl Harrison J that:

> "I am satisfied that in respect of the matter before me, adequate means of redress are available. The plaintiff is therefore caught by the proviso to section 25 of the Constitution and accordingly the claim for

> an award for breach of the deceased's constitutional rights cannot be granted."

cannot be upheld.

**The significance of torture in the Constitution**

Mr. Witter on behalf of the appellant sought to amend his pleadings on the authority of **Carrington v Karamath** (1985) 36 W.I.R. 306 to include an averment of torture. The issue was fully debated and the outcome was that by a majority this court decided to refuse the amendment. I dissented and promised to state my reasons. I considered that the intentional action by the police of placing eighteen (18) men in a small cell for thirty-six (36) hours without providing adequate food and water was direct evidence of torture. Any reasonable police officer responsible for the custody and safe keeping of prisoners must have foreseen that the lack of oxygen, and the excess of carbondioxide was likely to cause acute pain and suffering and lingering death. The prohibition against torture or inhuman or degrading treatment in the Constitution is expressed in unqualified language. Consequently I do not accept Mr. Campbell's submission that torture should be limited to instances where it is proposed to obtain a confession or otherwise. It is true that he referred this court to **Human Rights in International Law Council of Europe Press** page 101 which reads:

> "Article I
>
> For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official

> or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
>
> 2. This Article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."

However having regard to my analysis that torture or inhuman or degrading treatment are gradations of cruel and unusual treatment it would not matter in the instant case which label was applicable since death occurred. It would matter seriously in an instance where the claimant survived and compensation had to be determined in the face of detailed medical evidence. For my part it would make no difference in this case that I had found inhuman treatment instead of torture since I had to proceed to assess compensation for the right of life in contravention of Section 14 of the Constitution.

**Conclusion**

Mr. Campbell in his closing speech paid tribute to the dignity of Dorris Fuller the mother of Agana in all her dealings with the Attorney-General. She displayed the same impressive dignity in her attendance every day in this court during the long and difficult hearings. I wish also to pay tribute to Mr. Campbell's advocacy in a case that was not an easy one for any counsel for the Crown. In the face of probing questions by me there was always the courteous response and the citation of a relevant authority, or a sound submission. As for Mr. Witter there was his courageous advocacy and diligent research which were commendable.

Turning to the order which I am mindful to make I would affirm the judge's order and additionally I would allow the appeal for constitutional redress awarding one and half million dollars ($1 1/2M) for inhuman treatment and top it up with ($1/2M) half a

million dollars as an exemplary award and three million dollars ($3M) for right to life and top this up with half million dollars ($1/2M) as an exemplary award with interest on both sums at the rate of 3% from October 1993 to the date of judgment of this court. The appellant should have the taxed or agreed costs of this appeal.

**PATTERSON, J.A.:**

This appeal from the judgment of Harrison, J. (Ag.) (as he then was) occupied four full weeks of hearing. Numerous authorities were cited or referred to in argument, and written submissions in reply were made by counsel for the appellant. However, the issues, to my mind, are well defined and could have been argued in a much shorter time.

Doris Fuller is the mother of one Agana Barrett, a 20 year old second class carpenter, who died on the 24th October, 1992, while in police custody at the Constant Spring Police Lock-up. He had been detained and locked up two days before. There can be no doubt that the deplorable and inhumane conditions in which he was confined contributed to his death. Doris Fuller, as administratrix of the deceased's estate, brought an action against the Attorney General claiming on behalf of herself and Reuben Barrett, the father of the deceased, the following reliefs:

> "(a) Under the Fatal Accidents Act, damages for the aforesaid Dependants.
>
> (a) Under the Law Reform (Miscellaneous Provisions) Act, damages for the Estate of the Deceased.
>
> (b) Damages for assault and/or battery.
>
> (c) Aggravated and/or exemplary damages.
>
> (d) Damages and/or compensation by way of Constitutional redress.
>
> (e) Damages for false imprisonment."

The reliefs stated at "(e)" and "(f)" above were added by way of an amendment to the statement of claim granted by the court below before the hearing of the evidence commenced.

The question of liability was not an issue since no defence was filed; the matter proceeded to assessment of damages which occupied four hearing days. Harrison, J. (Ag.) delivered a comprehensive judgment awarding the plaintiff damages as follows:

> "1. Law Reform (Miscellaneous Provisions) Act
>
> Plaintiff (deceased's mother and sole dependant) - $511,560.00
>
> Loss of Expectation of life - $ 3,000.00
>
> Funeral expenses - $ 15,000.00
>
> Total - $529,560.00
>
> Interest is awarded at 3% on Ninety-three thousand dollars ($93,000.00) being the pre-trial portion from the 24th October, 1992 to July 5, 1995.
>
> Interest is also awarded at 3% on the funeral expenses of Fifteen thousand dollars ($15,000.00) from the date of service of the Writ to the 5th July, 1995.
>
> 2. General damages
>
> Assault and Battery - $150,000.00
>
> False Imprisonment - $ 50,000.00
>
> Aggravated damages - $100,000.00
>
> There shall be interest of 3% per annum on the general damages from the date of service of the writ up to today.

Costs to the Plaintiff to be taxed if not agreed."

No award was made under the Fatal Accidents Act, since the plaintiff is the sole beneficiary under both the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act.

The order sought on appeal reads:

> "For an Order that:
>
> The Judgment in favour of the Plaintiff/Appellant be varied by increasing the award made to the Plaintiff/Appellant for General Damages and that the Defendant/Respondent do pay the cost of this Appeal." (Emphasis added)

The grounds of appeal identified the issues with crystalline clarity. These are they:

1. "The Award of One Hundred and Fifty Thousand Dollars ($150,000.00) for Assault and Battery was wholly inadequate and unreasonable having regard to the evidence of the inhumane and intolerable conditions which existed and which cause the death of the Deceased.

2. The Award of One Hundred Thousand Dollars ($100,000.00) for Aggravated Damages is wholly inadequate and unreasonable having regard to the evidence.

3. The Learned Trial Judge was wrong in law when he failed and/or refused to make an Award of Damages in respect of the Plaintiff's/Appellant's claim for Constitutional redress as the Plaintiff was entitled to an Award of Damages for breach of the Deceased Constitutional rights."

(Ground 3 was amended (by leave of the court) by substituting the word "Compensation" for "Damages", wherever it occurred therein). I shall consider the grounds of appeal in turn.

**The Award for Assault and Battery**

The evidence established that at about 11:00 a.m. on the 22nd October, 1992, a party of policemen took the deceased into custody at Grants Pen Road in St. Andrew. He was placed in the body of a truck along with a number of other men. The police were apparently acting under the provisions of the infamous Suppression of Crime (Special Provisions) Act. After about an hour had elapsed, the deceased and the other men were driven in the said truck to the Constant Spring police station. There the deceased's fingerprints were taken without his consent. All the men were fingerprinted to ascertain if they were "wanted" for a crime. The deceased was "referred" to sign a book, he was searched and then placed in a "cage" in the guardroom of the said police station. His belt and shoe laces were taken from him and he remained in the "cage" for approximately half an hour along with about 48 other men. Thereafter, he and 18 other men were taken to a cell and locked away to await the result of their fingerprints. On the following day, another man was added to their number. The conditions under which the deceased was imprisoned are relevant when considering the award for assault and battery even though a separate award of damages for false imprisonment was made by the learned judge, and is not the subject of appeal. However, it has been rightly said that every

restraint of a man's liberty without lawful authority is false imprisonment, for which the law gives an action; and this is commonly joined to an action for assault and battery, for every imprisonment includes a battery and every battery an assault.

The learned judge accepted the evidence of one Shawn Coleman who had been imprisoned in the same cell as the deceased, as to the conditions that existed in that cell. The cell was about eight feet long, seven feet wide, with a two feet wide concrete bunk projecting from one of the walls, and reducing the available concrete floor space. The reinforced concrete walls had no windows, and the only door was made of two metal sheets welded on to steel bars between them. The only sources of ventilation were small irregular perforations in the metal sheets located in such a way that the free flow of air was interrupted and a view of the outside was restricted. There was no light in the cell; it was hot and "dark like midnight in there."

That was the cell in which the deceased was imprisoned and remained along with 18 other men from about 7:30 p.m. on the 22nd October, 1992, until "7-8 a.m." the next day. The men were huddled together in a manner that inhibited sleep. They cried out for the excessive heat generated by their bodies and the witness said, "They talk loud saying, 'Officer, man a faint, we can't take the heat. We want water. We hot, we thirsty'," while beating on the cell door. Their cries fell on deaf ears. When the cell was eventually opened in the morning there was water on the floor

that came dripping from the walls and ceiling of the cell as a result of condensation generated by the body heat of the men. They were fed "hot sugar and water and crackers" while confined in a passage outside the cell. The deceased partook of the lowly fare.

At about 9:30 a.m. the deceased and the other men were returned to their cell and locked away until about 1:00 p.m. when they were again let out in the passage and fed lunch by the police. The men complained to the police about the unbearable heat in the overcrowded cell and drew their attention to the water on the floor. After about 30-40 minutes, the men were returned to their cell. They were not fed again and their shouts for water throughout the night went unheeded. Some fainted from the heat. They remained locked in the cell until about 8:00 a.m. the following day. By then, the deceased and two others had succumbed to the horrible conditions that continued throughout the night. The starvation of oxygen and excess of carbon dioxide was too much for the deceased. The forensic pathologist who performed a post mortem examination attributed the deceased's death to cardio-respiratory failure consistent with cerebral hypoxia and hypercapnia. He also noticed blunt force injuries that, although not fatal, could have been a contributory factor. However, there was no evidence to establish when or how the deceased came by those injuries. The witness Coleman, who it appears was in the company of the deceased at all material times, testified that he did not see the police or anyone hit the

deceased and he did not notice any injury to the deceased when the cell was opened.

The judge's assessment of damages for assault and battery, false imprisonment and for aggravated damages were based on the facts given in evidence, as I have summarised it. Counsel for the appellant argued that "the learned trial judge fell in error in that he failed to take into account the pain and suffering caused or likely to be caused to the deceased by his awareness that his expectation of life has been reduced by virtue of the injuries he received." It is for that reason, so it was submitted, that the sum of $150,000 for assault and battery was not a "fair compensation." The sum of $5,000,000 was suggested as fair compensation. Counsel for the respondent contended that based on the evidence presented by the appellant to support the claim for assault and battery, the assessment of damages under that head "was reasonable". He submitted that claims for damages in respect of assault rest on the subjective pain and suffering to which the deceased would have been exposed, and in those areas, there was a dearth of evidence. The learned trial judge alluded to the fact that he did not have the viva voce evidence of an expert to assist the court in assessing the likely degree of the pain and suffering which the deceased experienced, and more importantly, the likely duration. The witness Coleman could not assist the court in fixing a time when the deceased may have lost consciousness. The cell was pitch dark and Coleman was by the door while the deceased was in the "right corner" of the cell.

An appeal to this court from the award of damages by a judge hearing a case without a jury takes the form of a re-hearing by the court on the question of what damages ought to be awarded. This court will not reverse the finding of a trial judge as to the amount of damages awarded unless convinced either that the judge acted on some wrong principle of law or that the amount awarded was so extremely high or so very low as to make it, in the judgment of the court, an entirely erroneous estimate of the damages to which the plaintiff is entitled. That is a good general working rule laid down by Greer, L.J. in ***Flint v. Lovell*** (1935) 1 K.B. 354 at 360, and I will be guided accordingly.

It is clear that in civil proceedings, as a general proposition of law, "any person who suffers damage by reason of the death of another, occasioned by the wrongful act of a third party in respect of which the law would otherwise give him a cause of action, cannot, either for the purpose of proving a cause of action, or for the purpose of recovering damages for a cause of action which he proves independently of the death, rely on the death either as giving him a right to, or increasing the amount of, damages which he is entitled to recover" (per Greer, L.J. in ***Flint v. Lovell*** (supra)). In the instant case, it is the personal injuries which the plaintiff proved that the deceased suffered before his death as a result of the assault and battery that will determine the amount of damages which is recoverable. The humiliation and disgrace in taking him from his home, his mental suffering and the indignity attached to the taking of his fingerprints and removal of his

belt and shoe laces were factors to be considered. The trial judge outlined the evidence which he took into account in making his award and he exercised his discretion on that evidence. It has not been shown to me that he acted on a wrong principle and I am satisfied that there is no ground for me to say that he made a wholly erroneous estimate of the damages suffered. Accordingly, I would not disturb his assessment of damages under the heading of assault and battery.

**The Award for Aggravated Damages**

Aggravated damages may be awarded to compensate a plaintiff whose injury has been aggravated by the conduct of the defendant. It is compensation which takes into account the motives and conduct of the defendant over and above the ordinary damages flowing from the injury done to the plaintiff. Thus the general damages awarded a plaintiff for assault and battery or for false imprisonment may take into account the conduct of the defendant where it has caused injury to the feelings of the plaintiff or has subjected him to sub-standard conditions of imprisonment resulting in actual bodily harm. Aggravated damages usually arise in assault cases, and as I have said before, an unlawful imprisonment includes an assault. It seems, therefore, that in the instant case, in considering the appropriate amount of compensation, the learned judge, sitting without a jury, was obliged to take into consideration the hurt feelings of the deceased, the mental distress consequent on the humiliating conditions which were characteristic of his imprisonment and the nonchalant conduct

of the police officers. Lord Devlin made this quite clear when he said in ***Rookes v. Barnard*** (1964) 1 All E.R. 367 (at 407):

> "Moreover, it is very well established that in cases where the damages are at large the jury (or a judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation."

The seriousness of the injuries sustained by the deceased is reflected in the fact that it resulted in his death. I am satisfied that the conduct of the gaolers was neither deliberate nor designed to create the serious consequences that developed. We were told that the cells had been newly constructed and were being occupied for the first time. This may have contributed to the lack of foresight or the inadvertence of the gaolers. But their insensitiveness to the horrific conditions in the cell in which the deceased was imprisoned cannot be overlooked. The deceased must have been aware of his imminent death and that would have caused him great mental anguish, distress and suffering. The learned judge made a global award under the heading of aggravated damages, which seems to be intended to increase the compensation payable to the estate of the deceased for the assault and battery and false imprisonment.

Before us, counsel for the respondent conceded that the sum awarded for aggravated damages does not reflect the conditions of the

assault and false imprisonment. He suggested that an appropriate sum would be "$500,000 at the bottom". But counsel for the respondent, in making that concession, urged us to consider the inhuman and degrading treatment meted out to the deceased, as an aggravating factor to the false imprisonment. This seems to accord with the learned judge's views in that regard.

In my opinion, the inhuman and degrading treatment meted out to the deceased clearly established a flagrant disregard for his constitutional rights and is separate and apart from the false imprisonment to which he was subjected.

The learned judge bemoaned the fact that the doctor who performed the post-mortem examination did not give viva voce evidence, and that the post mortem report admitted in evidence did not assist him in the way that the viva voce evidence may have done. But it seems to me that the plaintiff proved enough facts from which inescapable inferences can be drawn to reflect the seriousness of the conditions and the way it must have affected the deceased. Taking into account all factors resulting from the assault and battery, and the false imprisonment, including the manner in which the police officers failed to react when not only the deceased but all the others in cell number 3 were in obvious distress, I would not interfere with the global award of $300,000 general damages, which I consider to be a quite appropriate compensation in the circumstances of this case. I have not commented on the pattern of the learned trial judge in specifying the

amount awarded under the various heads of damages mentioned herein. However, I think I should make it clear that a trial judge sitting alone is under no obligation to quantify such amounts separately, and that both the trial judge and this court are justified in awarding a global figure as compensation under all heads of general damages.

**The Claim for Constitutional Redress**

I turn now to the appellant's claim for "damages and/or compensation by way of constitutional redress." The pleadings that counsel for the appellant submitted are relevant, are contained in the following paragraphs of the statement of claim:

> "**6.** The Deceased was kept in a cell of the said Police Lock-up with other persons for a total of approximately thirty eight (38) hours, during which his constitutional rights to freedom of the person, to freedom of movement and to protection from inhuman and degrading treatment were infringed.
>
> PARTICULARS
>
> (a) Was prevented from leaving the said lock up despite several requests.
>
> (b) Was kept in a cell with other person grossly overcrowded, unsanitary, hot, wet and damp, unhealthy and dangerous conditions.
>
> (c) Was denied adequate food, water and/or fresh air.
>
> **7.** The Members of the Jamaica Constabulary Force concerned acted and/or purported to act in the execution of their duties and as such were servants and/or agents of the Crown.

> **8.** The said acts against the Deceased were in breach of his constitutional rights as aforesaid."

As already stated, the relief claimed as "Damages and/or compensation by way of constitutional redress" was added by consent as an amendment to the statement of claim when the matter came on for assessment of damages. In making his application, Mr. Witter submitted that the relief was "foreshadowed" in the endorsement to the writ itself and also in paragraphs 6 and 8 of the statement of claim. Before us, counsel stated that as regards the relief sought for constitutional redress, he pursued only a claim for inhuman and degrading treatment under the provisions of section 17(1) of the Constitution of Jamaica ("the Constitution") set out in the second schedule to the Jamaica (Constitution) Order in Council, 1962. The appellant, as the personal representative of the deceased, Agana Barrett, claimed she was entitled to seek redress for the breach in the form of an award of compensation by virtue of the Law Reform (Miscellaneous Provisions) Act, for the benefit of the estate of the deceased.

The pleadings did not aver that the claim for constitutional redress was by virtue of the provisions of section 25 of the Constitution. Section 25 of the Constitution is in these terms:

> "**25.--(1)** Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

> **(2)** The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:
>
> Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.
>
> **(3)** Any person aggrieved by any determination of the Supreme Court under this section may appeal therefrom to the Court of Appeal.
>
> **(4)** Parliament may make provision, or may authorise the making of provision, with respect to the practice and procedure of any court for the purposes of this section and may confer upon that court such powers, or may authorise the conferment thereupon of such powers, in addition to those conferred by this section as may appear to be necessary or desirable for the purpose of enabling that court more effectively to exercise the jurisdiction conferred upon it by this section."

In short, the plaintiff did not apply to the Supreme Court pursuant to the provisions of section 25 for redress. The provisions with respect to the practice and procedure of the Supreme Court for the purposes of section 25 of the Constitution are to be found in the Judicature (Constitutional Redress) Rules, 1963, made pursuant to section 25(4) of the Constitution, and published in the Jamaica Gazette Supplement - Proclamations, Rules and

Regulations - on Monday, July 1, 1963. The relevant provisions are rules 3(i), (ii), (iii) and (v) which are stated in the following terms:

> "3 (i) An application to the Court pursuant to section 25 of the Constitution for redress by any person who alleges that any of the provisions of sections 14 to 24 inclusive, of the Constitution has been or is being contravened in relation to him, may be made by motion to the Court supported by affidavit.
>
> (ii) An application to the Court pursuant to section 25 of the Constitution for redress by any person who alleges that any of the provisions of sections 14 to 24 inclusive, of the Constitution has been, is being or is likely to be contravened in relation to him, may be made by filing a writ of summons claiming a declaration of rights and/or praying for an injunction or other appropriate order.
>
> (iii) Where in the course of any action or proceedings (civil or criminal) before the Court any question arises under the provisions of sections 14 to 24 inclusive, of the Constitution, the Court may determine such question and give effect to such determination so far as applicable, in its judgment or decision in such action or proceeding.
>
> ...
>
> (v) The Chief Justice may at any time direct any application to the Court pursuant to section 25 of the Constitution whether commenced by motion or writ of summons, shall be heard and determined by a bench of Judges not exceeding three in number."

It seems to me that there is a clear distinction between an application for constitutional redress pursuant to section 25 of the Constitution and the raising of any question under the provisions of sections 14 to 24 (inclusive) of the Constitution in the course of any action or proceedings. In the instant case, the appellant raised, by the pleadings, the question relating to inhuman and degrading treatment meted out to the deceased by servants of the Crown, particularly during the time of his incarceration. In my view, the pleadings in paragraphs 6 to 8 of the statement of claim are not in nature a substantive application for constitutional redress. But they raised a constitutional question in the action for tortious liability in order to emphasize the horrific treatment to which the deceased was subjected. In accordance with rule 3(iii) of the Judicature (Constitutional Redress) Rules, 1963 (supra), the learned judge was empowered to "determine such question and give effect to such determination so far as applicable", in the action before him. The learned judge did not make an award in respect of the claim for constitutional redress. I will now consider that issue.

A convenient starting point is a general examination of the provisions of Chapter III of the Constitution which enshrines the fundamental rights and freedoms of the individual. Lord Wilberforce, in delivering the opinion of the Judicial Committee in ***Minister of Home Affairs v. Fisher*** (1979) 3 All E.R. 21, expressed the proper approach to the interpretation of Constitutions such as that of Jamaica which embody a Bill of Rights or Charter of Fundamental

Rights and Freedoms drafted on the model of the European Convention on Human Rights. This is what he said (at page 25):

> "Here, however, we are concerned with a Constitution, brought into force certainly by an Act of the United Kingdom Parliament, ...but established by a self-contained document set out in Schedule... It can be seen that this instrument has certain special characteristics. It is ...drafted in a broad and ample style which lays down principles of width and generality."

Then referring specifically to the chapter dealing with Fundamental Rights and Freedoms, he continued:

> "It is known that this chapter, ...was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms. ...It was in turn influenced by the United Nations Universal Declaration of Human Rights, 1948."

He said that those antecedents and the form of this chapter itself, "call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to." He continued by saying what he meant by "a generous interpretation" (at page 26). It is:

> "...to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law."

The chapter begins at section 13 of the Constitution and its provisions are in the following terms:

> "13.-- Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely--
>
> (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
>
> (b) freedom of conscience, of expression and of peaceful assembly and association; and
>
> (c) respect for his private and family life,
>
> the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

The subsequent provisions of this chapter are declaratory of the law presumed to be existing in Jamaica immediately before the Constitution came into effect. This was made quite clear by Lord Devlin in delivering the opinion of their Lordships' Board in ***D.P.P. v. Nasralla*** (1967) 2 All E.R. 161. This is what was said ( at p. 165):

> "This chapter, ... proceeds on the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers

> derogate from the rights which at the coming into force of the Constitution the individual enjoyed."

Lord Griffiths expressed similar views when he said in ***Pratt & another v. Attorney General and another*** (1993) 43 W.I.R. 340 (at 355):

> "The primary purpose of the Constitution was to entrench and enhance pre-existing rights and freedoms, not to curtail them."

Sections 14 to 24 set out the provisions of the protected rights and freedoms, and the provision relevant to the instant case is as follows:

> "17(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

As I have already stated, the pleadings alleged "inhuman and degrading treatment" as the contravention that formed the basis of the claim for constitutional redress. Counsel for the appellant commenced his arguments on that basis only. However, during the course of his arguments, he applied to amend his pleadings to include an allegation of "torture". Counsel for the respondent objected and after hearing arguments, the court decided by a majority to refuse the application for amendment.

There can be no doubt that the evidence established that the deceased was subjected to inhuman and degrading treatment. That was not contested. So I turn again to the provisions of section 25 of the Constitution. It is the section that provides for the enforcement of the protective rights and freedoms included in sections 14 to 24. Section 25(2) bestows original jurisdiction upon the Supreme Court to hear and determine

any application made by any person who alleges that any of the protective provisions "has been, is being or is likely to be contravened in relation to him." But it goes further by stating in a purposeful proviso "that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law." This provides an important safeguard against an abuse of the powers conferred on the court to grant constitutional redress. Lord Diplock, in delivering the opinion of their Lordships' Board in ***Kemrajh Harrikissoon v. Attorney General*** (1979) 31 W.I.R. 348 (at 349), said:

> "The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action."

The opinion expressed was in relation to a case from Trinidad and Tobago, and section 6 of the 1962 Constitution of that territory is in terms of section 25 of the Jamaica Constitution, with the important exception that it does not contain the purposeful proviso mentioned above. Nevertheless, even without that expressed safeguard in the form of the proviso, it is quite clear to me that applications under section 25 for constitutional redress ought only to be resorted to when no adequate means of redress are otherwise available.

The constitutional court will not grant redress for the contravention of the fundamental rights and freedoms of the individual enshrined in sections 14 to 24 of the Constitution, if there is an adequate remedy available at law. Carberry, J.A. made this quite clear when he said in ***Grant v. Director of Public Prosecutions*** (1980) 30 W.I.R. 246 (at page 271):

> "The court may grant new and additional remedies, despite the existence of common law remedies covering the same ground; the only question that may arise is whether the adequacy of the existing remedies is such that no further additional remedy is necessary."

But where no such adequate remedy is available, the jurisdiction of the constitutional court may be invoked. A classical example is to be found in the case of ***Maharaj v. Attorney General of Trinidad and Tobago (No. 2)*** (1978) 2 All E.R. 670. A judge wrongly committed Maharaj, a barrister, to seven days imprisonment for contempt of court. Maharaj served the term of imprisonment. He was falsely imprisoned. At first blush, it would appear that, his remedy would be the common law tort of false imprisonment or he could have appealed against conviction. But ***Maharaj*** claimed by originating motion that his constitutional right to liberty had been contravened, and he sought redress that would adequately satisfy the contravention. As their Lordships pointed out in upholding the motion, what the claim involved was "an inquiry into whether the procedure adopted by the judge before committing the appellant to prison for contempt contravened a right to which the appellant was entitled under section 1(a),

not to be deprived of his liberty except by due process of law." Their Lordships' Board in considering whether such a right existed under the law of Trinidad and Tobago before that Constitution came in force, expressed the following opinion (at page 677):

> "Some of the rights and freedoms described in s 1 are of such a nature that, for contraventions of them committed by anyone acting on behalf of the state or some public authority, there was already at the time of the Constitution an existing remedy, whether by statute, by prerogative writ or by an action for tort at common law. But for others, of which '(c) the right of the individual to respect for his private and family life' and '(e) the right to join political parties and express political views' may be taken as examples, all that can be said of them is that at the time of the Constitution there was no enacted law restricting the exercise by the individual of the described right or freedom. The right or freedom existed de facto. Had it been abrogated or abridged de facto by an executive act of the state there might not necessarily have been a legal remedy available to the individual at a time before the Constitution came into effect, as, for instance, if a government servant's right to join political parties had been curtailed by a departmental instruction. Nevertheless de facto rights and freedoms not protected against abrogation or infringement by any legal remedy before the Constitution came into effect are, since that date, given protection which is enforceable de jure under s 6(1)."

There are a number of cases decided by this court in which contravention of the protective provisions were alleged and proved, but in which applications pursuant to section 25 were refused on the ground that adequate means of redress were available to the applicant under other law (e.g. see ***Director of Public Prosecutions for Jamaica v. Feurtado*** (1979) 30

W.I.R. 206; S.C.C.A. 6/88 ***Leonard Graham v. The Attorney General*** (unreported) delivered March 17, 1989). The clear principle that is established by these cases is, in my judgment, that in every case that an application pursuant to section 25 of the Constitution, is made to the Supreme Court alleging a contravention of the protective provisions of sections 14 to 24 of the Constitution, the court may only exercise its powers of enforcement of the provision if it is satisfied that no other law provides adequate means of redress for such contravention. The same principle is applicable to cases where a constitutional question arises to be determined by the Supreme Court in the course of any action or proceeding.

I will now consider whether the proviso was applicable to the facts of this case and accordingly, whether the learned trial judge was right in concluding that "...in respect of the matter before me, adequate means of redress are available" and that "the plaintiff is therefore caught by the proviso to section 25 of the Constitution and accordingly the claim for an award for breach of the deceased's constitutional rights cannot be granted."

The meaning to be attached to the words "adequate means of redress" is quite clear from the opinion of their Lordships' Board in the ***Maharaj (No. 2)*** case. There must be a remedy available at law which will be sufficient for the purpose of enforcing or securing the enforcement of the alleged contravention. "Adequate means" is referable to the remedy at law that can be invoked to bring about like protection to those stated in

section 25(2) of the Constitution; it has nothing to do with the quantum of damages recoverable at law or the amount of compensation that may be payable as redress.

The inhuman and degrading treatment to which the deceased was subjected resulted from his being placed and confined for a protracted period in a cell that was grossly overcrowded, pitch dark, poorly ventilated, wet and extremely hot, and his being deprived of adequate food and water. Such treatment falls well outside the norm that is expected when persons are taken into the custody of the State and the State has admitted it. The only question that remained was whether adequate means of redress for such contravention were available or had been available to the deceased under any other law. Counsel for the respondent argued that any such treatment before the Constitution came into effect would have been adequately compensated for in the common law actions of assault and battery and/or false imprisonment by an award of aggravated damages. I reject his contention. Aggravated damages is not arrived at by determining the damages attributable to the tort and then adding to that an amount by way of aggravated damages. The claim in the instant case for constitutional redress involves a consideration separate and apart from the tortious liability of the respondent. It involves a liability in the public law of the State. It is not a liability in tort, as the appellant rightly submitted. It was further submitted that no remedy at law existed prior to the Constitution which could adequately compensate the deceased for the horrific

treatment meted out to him. I think there is merit in this submission. The State failed in its duty to guard against such treatment. The State contravened the constitutional rights of the deceased and I can think of no other law which, in the circumstances of this case, would provide adequate remedy to redress such a contravention. The common law is quite deficient in these circumstances. The only remedy is provided by the Constitution, and the learned trial judge should have so determined and given effect thereto in his judgment. His failure so to do makes it incumbent on the court to consider the appropriate form of redress applicable in this case.

The redress obtainable under the Constitution is stated in section 25(2). The Supreme Court has "original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled." The width of the court's jurisdiction in this regard seems to be somewhat undecided. In ***Jaundoo v. Attorney General*** (1971) A.C. 972, their Lordships' Board held that the jurisdiction of the Guyana Court did not include the issue of injunctive relief against the Crown. Declaratory orders are usually made in appropriate cases. Section 15(4) of the Constitution provides that "any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that person." Section 18(1) also

provides for the payment of compensation where property has been compulsorily acquired. None of the other sections make specific provision for the payment of monetary compensation for its breach. However, the "generous interpretation" which Lord Wilberforce advocated in ***Minister of Home Affairs v. Fisher*** (supra) had already been recognised in the ***Maharaj (No. 2)*** case. In that case, ***Maharaj*** applied by notice of motion to the High Court of Trinidad and Tobago, as Lord Diplock puts it, "in purported pursuance of s 6 of the Constitution claiming redress for contravention of his constitutional rights under section 1 of the Constitution... The nature of the redress that he claimed was (a) a declaration that the order committing him to prison for contempt was unconstitutional, illegal, void and of no effect, (b) ... (c) an order that damages be awarded him against the Attorney-General 'for wrongful detention and false imprisonment'..." His Lordship expressed the view that "the redress claimed by the appellant under s 6 was redress from the Crown (now the state) for a contravention of the appellant's constitutional rights by the judicial arm of the state." Then at page 679, His Lordship addressed the nature of the redress to which the appellant was entitled. This is what he said:

> "Not being a term of legal art it must be understood as bearing its ordinary meaning, which in the Shorter Oxford Dictionary is given as: 'Reparation of, satisfaction or compensation for, a wrong sustained or the loss resulting from this.' At the time of the original notice of motion the appellant was still in prison. His right not to be deprived of his liberty except by due process of law was still being contravened; but by the time the case reached the Court of Appeal he had

> long ago served his seven days and had been released. The contravention was in the past; the only practicable form of redress was monetary compensation."

Then a little further on:

> "In their Lordships' view an order of payment of compensation when a right protected under s 1 'has been' contravened is clearly a form of 'redress' which a person is entitled to claim under s 6(1) and may well be the only practicable form of redress, as by now it is in the instant case. The jurisdiction to make such an order is conferred on the High Court by para (a) of s 6(2), viz jurisdiction 'to hear and determine any application made by any person in pursuance of subsection (1) of this section'. The very wide powers to make orders, issue writs and give directions are ancillary to this."

The measure of monetary compensation recoverable is considered at page 680. This is what is said:

> "Finally, their Lordships would say something about the measure of monetary compensation recoverable under s 6 where the contravention of the claimant's constitutional rights consists of deprivation of liberty otherwise than by due process of law. The claim is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration. Counsel for the appellant has stated that he does not intend to claim what in a case of tort would be called exemplary or punitive damages. This makes it unnecessary to express any view whether money compensation by way of redress under s 6(1) can ever include an exemplary or punitive award."

It seems quite plain that in the instant case, the appropriate form of redress can only be an award of monetary compensation. But as Lord Hailsham pointed out in his dissenting judgment in the ***Maharaj (No. 2)*** case, it is not an easy task to assess the amount. Their Lordships' Board expressed the opinion that the "compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration." It is a primary liability of the State, based in public law, and in my view, the principles applicable to an assessment of damages in a common law action ought not to be applied. It is incumbent on the courts to develop appropriate principles and guidelines as to the quantum of awards of compensation where applicable. As I pointed out before, the usual order sought is the grant of a declaration that the applicant's constitutional rights had been infringed. Where such a declaration has been made, it is adhered to by the appropriate organ of the State and the implementation poses no difficulty. Where an award of monetary compensation is appropriate, the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective, an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the State itself. But that does not mean that the infringement should be blown out of all proportion to reality, nor does it

mean that it should be trivialized. In like manner, the award should not be so large as to be a windfall, nor should it be so small as to be nugatory. I would reserve considerations of aggravated damages and punitive or exemplary damages as being confined and appropriate to tortious liability; I do not think such considerations should be imported into public law liability. I will take into account "the inconvenience and distress which the deceased must have sufferod during his incarceration." I will also take into account the fact that the inhuman and degrading treatment lasted for approximately thirty-six hours. There is no evidence of any loss of earnings for that period.

I am not unmindful of the award of general damages which I considered earlier on in this judgment, but I do not think that I should take it into account when considering the quantum of the compensation for constitutional redress. The liability of the Crown for the torts of its servants is vicarious, but in the case of constitutional redress, the State is primarily liable. The award should be made {in accordance to section 25(1)} without prejudice to any other award in any other action with respect to the same matter. I consider $1,000,000 as the appropriate quantum of compensation to be awarded in this case.

There is another issue that attracts my views. It is the question of whether an application for constitutional redress survives a deceased person so as to enure to the benefit of his dependants or his estate. In other words, can the personal representative of a deceased individual whose

constitutional rights had been infringed apply for the enforcement of protective provisions? Mr. Witter's submissions on this issue are as follows:

> "The evidence of the circumstances of the seizure and incarceration; the death and the cause of death of the deceased; the conditions under which the deceased was incarcerated and which led inexorably to his death, undoubtedly amounted to a breach of section 17(1) of the Constitution - inhuman and degrading treatment. The evidence in support is not refuted nor was it sought by the respondents to refute it.
>
> Secondly, section 25(1) of the Constitution confers a right upon the deceased to redress through exercise of its jurisdiction under subsection (2) for that treatment.
>
> Thirdly, by virtue of the provisions of the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act that right or cause of action survived the death of the deceased and the appellant, as administrator of the estate of the deceased, has the requisite locus standi to claim."

Section 25 of the Constitution must again be examined to ascertain its scope and objectives. It creates a new public law remedy imposed directly on the State. An application for constitutional redress is directed against the State.

The remedy is intended to enure to the benefit of the aggrieved person. It is stated to be for "the protection of which the person concerned is entitled." It is necessary, therefore, to decide whether the appellant enjoys the necessary locus standi to enforce the protective provisions. The

appellant relies on the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act, and I must now examine them.

## The Fatal Accidents Act

The Fatal Accidents Act, enacted in 1845, provides a new tortious action whereby dependant relatives of a deceased person may recover damages suffered by them as a result of his death. The action under the Act is maintainable against "the person causing death through a wrongful act, neglect or default." Section 3 provides:

> "3. Whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages in respect thereof, then and in every such case the person who would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony."

Where the person who caused the death is a servant of the Crown, the Crown in such a case may be vicariously liable. The damages awarded under the Act is restricted to financial loss sustained by the dependants of the deceased. Section 4(1) is relevant; it provides as follows:

> 4.--(1) Any action brought in pursuance of the provisions of this Act shall be brought--
>
> (a) by and in the name of the personal representative of the deceased person; or
>
> (b) where the office of the personal representative of the deceased is vacant, or where no action has been instituted by

> the personal representative within six months of the date of death of the deceased person, by or in the name of all or any of the near relations of the deceased person,
>
> and in either case any such action shall be for the benefit of the near relations of the deceased person."

It is quite clear that, having regard to the limited provisions of the Fatal Accidents Act, the liability of the Attorney General in the instant case arises strictly by virtue of the Crown Proceedings Act. The Attorney General is sued as being vicariously liable for the tort committed by the police, the servants of the Crown, in the execution of their duty. In my judgment, the Fatal Accidents Act created a new tort, and it does not give the appellant any right whatsoever to bring a public law application against the State for constitutional redress.

**The Law Reform (Miscellaneous Provisions) Act**

Prior to the passing of this Act, the rule at common law was that the death of either the tortfeasor or his victim would normally extinguish the possibility of an action in tort. This was expressed in the maxim *actio personalis moritur cum persona.* But the Law Reform (Miscellaneous Provisions) Act, which came into operation on the 6th June, 1955, changed the common law by providing that on the death of any person, all causes of action (with few exceptions) subsisting or vested in him shall survive for the benefit of his estate. The relevant section, as originally enacted, provided as follows:

> "2.--(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:
>
> Provided that this subsection shall not apply to causes of action for defamation (or seduction or for inducing one spouse to leave or remain apart from the other or to claims under section 33 of the Divorce Act for damages on the ground of adultery)."

The words in brackets no longer apply; only an action for defamation is now excepted. But it should be noted that not <u>all</u> causes of action survive the deceased. The maxim *actio personalis moritur cum persona* was not entirely abolished by this Act. How then is an application for constitutional redress related to this Act? The Act preserves "causes of action", and those words are widely interpreted. In ***Read v. Brown*** 22 Q.B.D. 128, Lord Esher, M.R., interpreted the words in this way: "A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment." It is my view that the words of this Act are wide enough to embrace the facts that give rise to an application for constitutional redress. There can be no doubt that had the deceased survived his ordeal, he could have enforced his right for redress. His estate must, therefore, benefit and the applicant is endowed by law with the necessary locus standi to enforce the right. Although the Act contemplated the enforcement of tortious liability, I think

that a wide and purposeful interpretation should be adopted to include public law liability.

## Conclusion

In conclusion, I would allow the appeal in respect of the claim for compensation by way of constitutional redress and award the appellant the sum of $1,000,000. In all other respects, I would dismiss the appeal and affirm the judgment of the court below. It appears to me that in the circumstances of this case the costs to the appellant should be diminished, having regard to my decision that for the most part the appellant's appeal has failed, and my views on the unnecessary length of time that the proceedings occupied. Accordingly, I would award the appellant ten days costs.

**HARRISON, J.A.**

This is an appeal from a judgment of Harrison (Karl), J. delivered on the 5th day of July, 1995, awarding damages totaling $829,560.00 plus interest, for assault, false imprisonment, aggravated damages, and also under the Law Reform (Miscellaneous Provisions) Act.

The plaintiff is administratrix of the estate of the deceased, Agana Barrett. A claim for an award for a breach of the deceased's constitutional rights under Section 17(I) of the Constitution of Jamaica was refused by the learned trial judge.

The facts relevant to this appeal are as hereunder. The deceased and forty-seven (47) other men were taken into custody from various places in the Grants Pen Road area of St. Andrew at about 11:a.m. on Thursday the 22nd day of October, 1992, and transported to the Constant Spring Police Station; they were fingerprinted there and at 7:00 p.m. all forty-eight (48) men were placed in a cell with mesh on the top for half hour. Thereafter at 7:30 p.m. the deceased and seventeen (17) other men were placed in a cell at the said station lock-up, cell No. 3 measuring in size 8ft by 7ft. inside of which was a single concrete ledge approximately 2 ft. wide on one wall and which served as a bed.

This cell was constructed of concrete walls and roof, with no windows. It had one door made from metal sheets welded to bars. In the said metal sheets holes were bored at intervals on either side, in order to facilitate the passage of air. Each hole was not in line with the hole on the opposite side. One could not therefore see from outside into the cell, nor from within the cell to outside, no light entered the cell and the free flow of air was obstructed.

Within this cell from Thursday night at 7:30 p.m. were the eighteen (18) men.

The learned trial judge found that:

> "...(it)... was extremely hot due to the congestion. There was very little air available and this was only accessible through small holes in a metal door for the cell. The cell had no windows and they were surrounded by concrete walls. Water dampened the floor and in order to quench thirst, perspiration and water dripping from the walls had to be used as no drinking water was made available for them .. one man had to drink his own urine in order to quench his thirst...
>
> ...There was constant banging on the cell door and shouting by the detainees but they received no attention from the police."

They were released into the corridor from the cell at about 7:00 a.m. the following morning, Friday. They complained about the conditions within the cell, the walls and ceiling of which were dripping with water which also collected on the floor, due to condensation of the steamy sweating of the men. The men swept out the said water. After being fed a drink of hot water and sugar and crackers, the men were again locked in the cell; the condition remained intolerable. They were again let out of the cell at about 1:00 p.m. on that day, Friday for about forty (40) minutes. They had lunch and were again locked into the cell, with an additional man then totaling nineteen (19) men at 1:45 p.m.

The men shouted and banged on the door from then and during the night complaining about the unbearable conditions, the heat, the lack of air, the congestion and the water. The only response from the police officers was the loud volume from a radio and the sounds from the playing of dominoes. The cell was not re-opened until Saturday morning. Three of the nineteen (19) young men including the deceased, were found dead. The cause of death was:

> " cardiorespiratory failure consistent with cerebral hypoxia and hypercapnia. Blunt force injuries noted were not fatal, but could be contributory."

Hypoxia is a deprivation of oxygen, whereas hypercapnia is an excess supply of carbon dioxide.

The deceased was twenty-one (21) years old, on the very day he was found dead, the 24th day of October, 1992. He was a carpenter, lived with his mother Dorris Fuller, the plaintiff (administratrix of the estate of the deceased Agana Barrett) and contributed fortnightly to the upkeep of the household.

The grounds of appeal argued were:

> (1) "The award of One Hundred and Fifty Dollars ($150,000.00) for assault and battery was inadequate.
>
> (2) The Award of One Hundred Thousand Dollars ($100,000.00) for aggravated damages was inadequate.
>
> (3) The learned trial judge was wrong in law when he failed to make an award of compensation in respect of the appellant's claim for constitutional redress for a breach of the deceased's constitutional rights."

Mr. Witter for the appellant in respect of ground 3, argued that the evidence of the seizure and the conditions of the incarceration of the deceased constituted inhuman and degrading treatment in contravention of section 17(1) of the Constitution of Jamaica, an absolute prohibition which cannot be justified, conferring on the deceased the right to redress under section 25. Under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act, the right and cause of action survived and were enforceable by the appellant, as administratrix of the estate of the deceased. No pre-existing law protected against inhuman and degrading treatment which right

existed de facto, but was not enforceable as no law expressly prohibited such behaviour, though unlawful, until section 25 gave it the de jure recognition The Jamaican Constitution, a document sui juris, modelled on the Universal Declaration of Human Rights must be interpreted, in relation to its recognition of the fundamental rights and freedoms of the individual, "generously, purposively benevolently, widely and in a non-rigid manner" and not according to the accustomed statutory rules. The court's ability to grant protection against inhuman and degrading treatment of the individual is distinct from "assault and false imprisonment", and was enhanced by section 25 of Chapter III making it a new right and a new remedy, creating an original jurisdiction in the Supreme Court for its contravention. The common law and statutes are inadequate to deal with the behaviour complained of and therefore constitutional redress under section 25 was available without prejudice to other available remedies. Exemplary damages should be granted as a component of constitutional redress, and the respondent had the burden to show that the contravention was authorised. Mr. Witter applied to amend ground 3 and to include "torture - in contravention of section 17(1)," arguing further that the issue was fairly raised before the learned trial judge, based on the evidence of the conditions in which the deceased "presumptively innocent" was held in the lock-up, a-kin to a dungeon, displaying all the elements of torture. In addition he stated that this court should consider that a contravention of section 14 of the Constitution, the right to life, was committed, and grant redress accordingly. He relied, inter alia, on **Minster of Home Affairs v Fisher** [1979] 3 All ER 21, **Attorney General of Gambia vs Jobe** (1985) L.R. Comm. 556, **Bell vs. Director of Public Prosecutions** (1986) L.R. Comm 392, **Abbott vs. Attorney-General of Trinidad and Tobago** [1979] 1 W.L.R. 1343, **Pratt and Morgan vs. Attorney-General**

[1993] 43 WIR 340, **Thornhill vs Attorney-General** (1976) 3 WIR 498, **Maharaj vs. Attorney-General of Trinidad and Tobago** [1978] 2 All ER 670, **Attorney-General of St. Christopher vs. Reynolds** [1979] 3 All E.R.131, **Ncube vs The State** [1988] LRC (Const.) 442 and **State v. Henry Williams** CCT 20/94 dated 9/6/95 (S.Africa).

Miss Cummings submitted in support of ground I, that in respect of the claim of assault and battery which entailed the deceased being held by the police and his fingerprints taken, the learned trial judge failed to consider the extent of the injuries suffered by the deceased, and therefore the award was inadequate. In support of ground 2, she contended that because of the draconian measures employed against the deceased and despite the apology to the mother of the deceased the award of One Hundred Thousand Dollars ($100,000.00) for aggravated damages was inadequate. She concluded that because the Law Reform (Miscellaneous Provisions) Act excludes an award of exemplary damages, one may recover for the aggravation compensatory damages and in the circumstances an amount of Two Million Dollars ($2M) was adequate.

Mr. Campbell for the respondent, in response to the arguments in support of ground 3, argued that the provisions of Chapter III of the Constitution presumes that the fundamental rights and freedoms existed in Jamaica prior to 1962, and therefore the rights under section 17(1) are protected in the said pre-existing laws. No claim for constitutional redress arises, and the learned trial judge was correct in declining such jurisdiction, because adequate means of redress are already available. The complaint under section 17(1) is no more than an aggravated imprisonment without any evidence of prolonged pain or suffering, and that the loss of dignity, humilation, mental anguish and agony suffered by the deceased can all be adequately compensated at common

law and by statute without recourse to constitutional redress, in that damages are at large. No scope exists, in the realm of public law for the award of exemplary damages, which adds a punitive and vindictive element creating a burden to the taxpayer and windfall to the estate. No amendment should be granted to include torture, because the respondent had no opportunity to call rebutting evidence. Torture involves pre-meditation and intention on the part of the State to inflict treatment to secure information or admissions and the court should be guided by the international conventions and case law to determine the definition of torture in section 17, seeing that the Jamaican Constitution is modelled on the European Convention and the United Nations Convention on Human Rights. There is no evidence of an intentional or deliberate act to inflict injuries, mental anguish or suffering to constitute torture or inhuman or degrading treatment. The right to life under section 14 does not arise on the statement of claim as the state did not "intentionally" contravene such rights. The State concedes that there was some inhuman treatment thereby causing a contravention of the deceased's rights, and the state apologised, paid the funeral expenses, offered no defence to the claim and cast no aspertions on the character of the deceased, but there is no inadequacy of available means to cause recourse to constitutional redress. It is inappropriate to award exemplary damages in public law where the state is alleged to have committed the wrong or the defendant before the court is not the tortfeasor, or where there are multiple plaintiffs, thereby incurring the punitive element of multiple "sentences", and that there is no evidence before the court to justify increased awards, in that there was no wrong principle of law applied by the learned trial judge nor were the sums awarded inordinately low or high. He relied, inter alia on **Maharaj vs Attorney-General** (supra), **Attorney-General of Saint**

**Christopher vs Reynolds** (supra), **Jamakana v Attorney-General** [1985] LRC (Cont.) 569, **Director of Public Prosecutions v Nasralla** [1967] 2 All ER 161, **Grant vs. Director of Public Prosecutions** 24 JLR 504, **Director of Public Prosecutions v Feurtado** (1979) 30 WIR, **Leonard Graham v Attorney-General** SCCA No 6/88 (unreported) delivered 17.3.89, **Republic of Ireland vs United Kingdom** (1979-80) 2 EHRR 25, **Tyrer v United Kingdom** (1979-80) 2 EHRR 1, **Fisher's case** (supra), European Convention for the Protection of Human Rights, U.N. Universal Declaration of Human Rights, **Riley v Attorney-General** (1982) 35 WIR 279, **Rookes v Bernard** [1964] 1 All ER 367, **Cassell v Broome** [1972] 1 All ER 801, **Fose v Minister of Safety** (unreported) Const. Ct South Africa - CCT 14/96 dated 5.6.97, **Johnson v Sterling** (1981) 30 WIR 155, **West v Shepherd** [1964] A.C 326 and **Singh v Joon Gong Omnibus Co.**[1964] 3 All E.R. 925.

The Constitution of Jamaica, enacted in 1962, guaranteed to its citizen certain fundamental rights and freedoms. These are enacted provisions, specifically so, as Lord Diplock stated in **Hinds vs The Queen** [1976] 1 All ER 353 at page 360:

> "...to ensure that those provisions which were regarded as important safeguards by the political parties in Jamaica, minority and majority alike, who took part in the negotiations which led up to the constitution, should not be altered without mature consideration by the parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws."

These provisions proceed on the presumption that the fundamental rights are already secured to the people of Jamaica by existing laws (**Director of Public Prosecutions v Nasralla,** supra). Chapter III is entitled "Fundamental Rights and Freedoms", and section 13 therein states:

> "13. Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest..."

Accordingly protection from harmful treatment to the person is afforded to each individual. Section 17 provides:

> "17.-(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

This protection enables any person where rights are infringed to enforce his right and obtain redress for any such contravention.

Section 25 provides inter alia:

> "25.-(1)...if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."

A restriction is placed on this right to be granted redress, and is particularly relevant to the instant case; the proviso to the said section 25, reads:

> "Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

It therefore means that because the presumption arises that these fundamental rights and freedoms are already enjoyed by the Jamaican people, prior to 1962, presumably under some existing law, the proviso to section 25 obliges the court to decline to entertain an application for enforcement of a section 17 infringement "if it is

satisfied that adequate means of redress" are already available under any other law, whether statute or common law.

Counsel for the respondent Mr. Campbell, maintains that adequate means of redress already exist in the law of tort by the actions of assault and false imprisonment and therefore the learned trial judge was correct to decline jurisdiction to grant constitutional redress. One therefore needs to examine the existing laws in the context of this constitutional prohibition but with some restraint. This examination must be mindful of the fact that the Constitution is a document sui generis to be interpreted within the context of its own language and not according to the accustomed statutory rules and that it must be given a generous expansive interpretation and not a rigid restrictive one.

In dealing with the interpretation of a provision in the Bermuda Constitution Order 1968, Lord Wilberforce in **Fisher's** case (supra) at page 25, said:

> "It is, ...drafted in a broad and ample style which lays down principles of width and generality. (2) Chapter I is headed 'Protection of Fundamental Rights and Freedoms of the Individual'. It is known that this chapter, as similar portions of other constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria **SI 1960 No 1652, Sch 2**, and including the constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms **Rome, 4th November 1950, TS 71 (1953), Cmd 8969**. That convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations Universal Declaration of Human Rights 1948, **Paris, 10th December 1948, UN 2 (1949), Cmd 7662.** These antecedents, and the form of Chapter I itself, cali for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."

As to "generous interpretation", he stated what he meant, at page 26:

> "...to treat a constitutional instrument such as this sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law."

The Board in **Fisher's** case as a consequence, interpreted "child" in a wide sense to include a child born out of wedlock.

Lords Scarman and Brightman, delivering the minority opinion in **Riley vs. Attorney-General** (supra), in support of the generous interpretation to be applied to a constitution, at page 287, said:

> "... we believe that the majority opinion is in error because it has adopted in its construction of the Constitution an approach more appropriate to a specific enactment concerned with private law than to a constitutional instrument declaring and protecting fundamental rights. An austere legalism has been preferred to the generous interpretation which in **Fisher's** case was held to be appropriate."

This interpretation and minority opinion, that the death sentence was lawful per se, but the inordinate delay was a feature creating an addition to the sentence of death which made the circumstances of the subsequent enforcement of such sentence inhuman and degrading and in contravention of section 17(1) of the Jamaican Constitution, was preferred and endorsed in **Pratt vs Attorney-General** (1993) 43 WIR 340.

The restraint to be observed, in weighing the existence of adequate means of redress "under any other law" was voiced by Lord Devlin, referring to Chapter III of the Constitution of Jamaica "Fundamental Rights and Freedoms" and in particular section 17, in **Director of Public Prosecutions v Nasralla** (supra). He said, at page 303:

> "This chapter...proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed." (Emphasis added).

The deceased came to his death as a result of the incarceration by police officers, the agents of the state, in extreme conditions. The suit by the administratrix of the estate of the deceased was brought on behalf of his dependants and his estate, under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act, respectively. The cause of action for assault was based on the act of the fingerprinting of the deceased and that of false imprisonment involved the fact of his subsequent incarceration, in the Constant Spring Police Station lock-up.

False imprisonment is simply the intentional and wrongful restraint of one's liberty, a civil wrong, well known to the common law of tort. The main locus of this tort is the unlawful and unjustified interference with the liberty of the subject and the indignity and hurt to his feelings. Lawful arrest based on the common law or the statutory rules usually provides the justification for the detention and imprisonment of alleged offenders.

There are established statutory rules which regulate the manner in which persons may be detained and kept by the police, relating particularly to lock-ups. The first requirement is that the place of detention must be approved and declared to be a lock-up by the Minister.

The Corrections Act, 1985 which came into force on the 2nd day of December, 1985 amalgamated the provisions of several acts, including the Prisons Act, "... to provide for the inspection of correctional institutions, and to make better provisions for the rehabilitation of offenders, and for connected purposes." Section 6 (1) of the Act gave the Minister power to,

> " (c) declare any house, building, ... or place...
>
> (i) to be, if under the control of the police, a lock- up;
>
> ...
> for the confinement of persons awaiting trial, remanded in custody, or sentenced to a short-term sentence;
> ...

The Corrections Act repealed the Prisons Act, but section 87, itself now repealed, declared, by its saving provisions:

> "(2)... all appointments made, licences granted, orders, rules and regulations made under the repealed Acts shall continue to have effect as if made under this Act" (emphasis added).

The Prisons (Lock-up) Regulations 1980 made on the 8th day of September, 1980 and published in the Jamaica Gazette Supplement, Proclamations, Rules and Regulations dated the 10th day of September, 1980 consequently provided for the proper supervision of persons detained in lock-ups. A register is required to be kept in which should be recorded, inter alia, the names and addresses of the detained, the offence or suspected offence, the physical condition and any injury complained of by the said detained- paragraph 3; every complaint, and its nature, the officer to whom and against whom such complaint is made, the senior officer to whom the complaint is made and any observations made - paragraph 4. It further provides:

> "6 (1) Every lock-up shall be visited at least once in every twenty-four hours by a police officer not below the rank of Assistant Superintendent or any other officer delegated for that purpose (thereinafter referred to as 'visiting officer').
>
> (2) The visiting officer shall observe the physical condition of each prisoner being detained in such lock-up and enter a record of the physical condition of each person in the appropriate register.
>
> (3) The visiting officer shall record the fact that complaints have been brought to his attention.
>
> 7. The officer in charge of a lock-up shall take such steps as are necessary to cause medical attention to be given without delay to any person being detained in such lock-up who appears to be ill or in need of medical attention or who complains of any illness."

The maximum number of persons to be accommodated in one cell of a lock-up is not stated in these regulations, unlike the regulations relating to prisons. The Prison Rules 1947 made under the provisions of section 63 of the Prisons Act provides, in rule 219:

> '219-(1) Subject to the provisions of paragraph (2) every prisoner shall occupy a cell.
>
> (2) Where by reason of lack of accommodation in the prison or for medical or other reasons it is necessary that prisoners be associated, dormitories shall be provided:
>
> Provided that where sleeping in association is unavoidable, not more than three prisoners shall be permitted to occupy one dormitory." (Emphasis added).

Despite the fact that in relation to lock-ups, as opposed to prisons, the statute did not specifically deal with the maximum numerical accommodation to each cell, basic common humanity and the duty of the police authorities towards a person merely

detained or accused and not yet convicted, demand that the practice follows as near as possible the accommodation principle that applies to the convicted in a prison namely, 3 persons to one cell. This remains so despite the enormous increase in the general prison population.

The Constant Spring Police Station was declared a lock-up on the 13th day of February, 1975 and published in the Jamaica Gazette Supplement dated the 20th day of February, 1975:

> "... for the confinement of persons awaiting trial, remanded in custody, or sentenced to a short term of imprisonment."

The State itself, therefore, has provided the machinery for the minimum level of decency in the treatment of detained persons. It breached its own rules.

The cell into which the deceased and 18 other men were placed on the 22nd day of October, 1992 measured 8ft long by 7ft wide, and included a "bunk" 2ft wide along one wall for one man to lie on, thereby reducing further the standing space. On a mathematical calculation, there was standing room of approximately 40-42 square feet, providing for each man in that cell a maximum of 336 square inches - an area of approximately 18 inches by 18 inches, equivalent to an 18" square floor tile. On that space he may be required to stand from Thursday the 22nd until Saturday the 24th of October, a period of approximately 35 hours less two brief periods, one such period being 40 minutes in duration. They could not all at the same time comfortably sit or lie if they wished. There was no space to accommodate 19 men lying down at the same time in that cell, some were forced to stand. The volume of space occupied by the 18 bodies left less volume of space for air to occupy much less to circulate. The heat was intolerable, the air to breathe inadequate, the space limited and within the cell

perspiration poured down. One of the detained Shawn Coleman, a witness at the trial said:

> "After we were put in the cell the police close metal door from inside. They close it and lock it. No light in cell. Dark like midnight in there. It was hot and dark. Thursday night from you enter in there you are hot. I never felt heat like that before ...
>
> ...We were very close. Everybody bouncing on one another. They talk loud saying officer a man faint, we can't take the heat. We want water, we hot, we thirsty, crying out going on ... Beating on the door taking place some time. We were all beating the metal on the door. It caused loud sounds. There was no response to these sounds."

No "visiting officer", as required by the regulations, came to the cell during these hours. There was no evidence before the trial judge of any written record of any complaints by the detained or any assistance given to them or any observations of their condition. There was a clear callous indifference by the police officers, servants of the state at the Constant Spring Police Station lock-up, to the sufferings of the men in the cell, in breach of their statutory duties.

The Bill of Rights, the Imperial Statute of the 17th century, prohibiting "Cruel and unusual treatment" adverted to by Mr. Witter, and the lock-up regulations, both exist as statutory bases to ground statutory duties on the police officers. There is no clear certainty that the plaintiff could base an adequate claim on those statutes in these circumstances.

The tort of false imprisonment attracting damages at large, does not contemplate treatment as that suffered by the deceased and others in the instant case; they endured suffering far in excess of that said tort. In **Middleweek vs Chief Constable of Merseyside Police** [1990] 3 All ER 662 it was observed that a lawful

imprisonment could become unlawful where arrested persons were placed in a cell which became and remained badly flooded thereby seriously prejudicing the health of the prisoner. The conduct of the police officers in the instant case, was of such a sustained harsh subjection of men to incarceration, and extreme indifference to their suffering that in my view it exceeded the conventional tort of false imprisonment. Even with added damages for aggravation that could not adequately address the wrong. This deficiency in the pre-existing law was recognized as arising in some circumstances. In **Riley v Attorney-General** (supra), Lords Scarman and Brightman, said at page 287:

> "However, the Constitution's introduction of a new judicial remedy negatives any presumption that the remedies available under pre-existing law were necessarily sufficient; indeed, the enactment of new protection suggests that they needed strengthening."

The generous interpretation that is required to be given to the Constitution reveals that there was a contravention of the deceased's rights not to be subjected to inhuman and degrading treatment. The plaintiff is entitled to constitutional redress as claimed.

My conclusion that the plaintiff is entitled to constitutional redress, is further based on the interpretation that one may place on the exclusion of exemplary damages in a claim under the Law Reform (Miscellaneous Provisions) Act. Section 2 of the said Act reads:

> "2.-- (1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:
>
> ...

> (2) Where a cause of action survives as aforesaid for the benefit of the estate of deceased person, the damages recovered for the benefit of the estate of that person-
>
> (a) shall not include any exemplary damages; ..." (Emphasis added)

The rule in **Baker vs Bolton** (1808) 1 Camp 493, is, "In a civil court the death of a human being cannot be complained of as an injury." The rule remains unless modified by statute. Great difficulties therefore arose with the advent of the motor car in the early 20th century causing numerous deaths on the roads. Consequently, the latter Act was passed in England in 1934 to remedy this situation; by its nature it is called a "survival statute." A similar Act was enacted in Jamaica in 1955.

Exemplary damages are awarded for the purpose of deterring defendants from wrongful conduct; it involves the use of the punitive element, more akin to the criminal law.

Although exemplary damages had been awarded as early as the 18th century, in addition to compensatory awards, to punish the defendant for outrageous conduct, when in England the Law Reform (Miscellaneous Provisions) Act was passed in 1934, there was no categorisation of a class of defendants such as "servants of the Crown who displayed arbitrary oppressive or unconstitutional behaviour" which attracted such an award. This categorisation first appeared in 1964, in **Rookes v Barnard** [1964] A.C. 1129 and later approved in **Cassell v Broome** [1972] 2 WLR 645.

The exclusion of exemplary damages from the Act, was therefore in the context of its irrelevance to a defendant being so penalized punitively, for operating a motor vehicle without due care in breach of his duty and therefore negligent, thereby benefitting the estate. In any event exemplary damages was not granted in a claim in

negligence, generally. The exclusion of exemplary damages in 1934 did not contemplate the said class of defendants so categorised by Lord Devlin in 1964, in **Rookes v Bernard** (supra).

The author Fleming in the Law of Torts, 4th edition (1971) in commenting on the exclusion, at page 646, said:

> "Exemplary damages are excluded altogether, although one might have thought this more appropriate where it was the tortfeasor not the victim, who had died."

In the instant case, the conduct of the police officers at the said lock-up, unquestionably, can be categorised as, "arbitrary, oppressive and unconstitutional conduct of servants of the Crown", as public officials. No legal system nor a trial court could justifiably fail to take note of such conduct of public officials, functionaries of the defendants. A failure to do so would be a condonation of callous, indifferent and reckless behaviour on the part of public officials, in a trial court's duty to progress to the achievement of fairness and justice.

If Agana Barrett had survived, he would have been entitled to an award of exemplary damages, because of the behaviour of the police officers. There is therefore no rationale on the face of it to justify the exclusion of the said award in an action which because of his death, survives for the benefit of his estate.

Of course, in strict law, exemplary damages as demonstrated has been expressly excluded in an action under the Law Reform (Miscellaneous Provisions) Act. It is incorrect to argue, as counsel for the respondent sought to, that an award of aggravated damages can satisfy the claim. Aggravated damages are awarded as compensation for the extreme hurt to the feelings of the plaintiff, and is unconnected to the outrageous conduct of the defendant, which is the province of exemplary damages.

That being so the Law Reform (Miscellaneous Provisions) Act, does not provide an "adequate means of redress for the contravention alleged", in the instant case.

The restraint imposed by the proviso to section 25 of the Constitution cannot therefore be brought into operation, in these circumstances.

For this reason also, I am of the view that the plaintiff is entitled to constitutional redress for the inhuman and degrading treatment suffered by the deceased, in contravention of his rights under section 17(1) of the Constitution. This is " ... without prejudice to any other action with respect to the same matter" (section 25(1)).

Torture, counsel for the appellant argued, fairly arose on the evidence before the learned trial judge, because the evidence shows that the deceased had been incarcerated in intolerable conditions akin to sufferings in a dungeon and the appellant is for that reason entitled to constitutional redress for torture under section 17(1).

Torture is not defined in the Constitution. However, because of the history of the origin of the Constitution and the fact that it was influenced by the said conventions which were adopted primarily to deal with the atrocities of the Second World War, the decisions of international tribunals and bodies can provide assistance in interpretation, despite the sui generis nature of the Constitution.

The European Court of Human Rights in the case of **Republic of Ireland vs United Kingdom** (supra) by a majority, made a distinction between "torture" on the one hand and "inhuman and degrading treatment" on the other. Torture, that Court found involved "... deliberate inhuman treatment causing very serious and cruel suffering..." of a particularly high level of intensity.

The Court was considering certain techniques used by the United Kingdom Government on detained persons in Northern Ireland. Called the "five techniques," it involved:

> (a) "wall-standing" forcing the detainees to stand 'spread-eagled' against a wall with arms outstreatched overhead and fingers against the wall, standing on their toes for hours;
>
> (b) hooding: putting a hood over detainees' heads during interrogation;
>
> (c) subjecting the detainees to a continuous loud hissing noise before interogation;
>
> (d) depriving the detainees of sleep and;
>
> (e) depriving the detainees of food and drink and giving them a reduced diet. The Court found that the techniques amounted to inhuman and degrading treatment."

The General Assembly of the United Nations by resolution No. 3452 on the 9th day of December, 1975, in Article I, declared:

> "Torture constitutes an aggravated and deliberate form of cruel and inhuman and degrading treatment or punishment."

The European Court, in the Ireland case, having referred to the said resolution, held, at paragraph 167:

> "Although the five techniques, as applied in combination, undoubetedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and for information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as understood."

I humbly adopt the above reasoning.

In the instant case, the deceased Agana Barrett was undoubtedly subjected to extreme suffering and discomfort, and debasing indignity. There is no evidence of a "deliberate" act for the purpose of the achievement of any object, nor was there any systematic imposition of that high intensity of suffering. The regulations relating to lock-ups (supra) disclose that the State itself had fixed minimum standards of decency of detention.

The police officers displayed on the contrary, a callous indifference, a lack of care and an absence of concern for the detainees' suffering, and consequently subjected them to inhuman and degrading treatment. Inadvertence is not the "deliberate" act of torture as contemplated by the Constitution.

For the above reasons the application for an amendment to the statement of claim to include "torture", was refused, by a majority.

The "right to life," briefly canvassed by Counsel for the appellant , is a fundamental right preserved by section 14 of the Constitution:

> "14-(1) No person shall intentionally be deprived of his life save in execution of sentence of a court in respect of a criminal offence of which he has been convicted."

The right is a new right given by the Constitution. It is a right that arises because of death; it did not exist before because of the rule in **Baker vs Bolton** (supra). However for this right to be contravened, the unlawful deprivation by the state, must be done "intentionally." This means a deliberate act. In this regard also, I maintain my earlier observations, that the conduct of the police officers, in the instant case, is best described as inadvertence and indifference and lacking in a duty of care, as opposed to a calculated and deliberate act.

There was no evidence, either direct or inferentially of the state of mind of the said police officers to indicate an intention to kill or to cause grievous bodily harm. Nor could one argue that it was an intentional act because it was reasonably foreseeable that death was likely to occur in these circumstances, and the police officers, with that knowledge proceeded to take the risk of incarceration (see **Hyman v. Director of Public Prosecutions** [1974] 2 All ER 41). Despite the insanitary, unhealthy, overcrowded, oxygen-starved imprisonment, an intentional act of deprivation of life, as contemplated cannot arise in these circumstances, whether on a subjective or objective test. In my view, therefore there is no basis to consider a breach of one's section 14 rights.

Miss Cummings, counsel for the appellant, argued, as to ground one, that the award of One Hundred Thousand Dollars Dollars ($100,000.00) damages for assault and battery, and as to ground two that the award of One Hundred and Fifty Thousand Dollars ($150,000.00) for aggravated damages, were both too low and accordingly should be increased to Five Hundred Thousand Dollars ($500,000.00) and Two Million Dollars ($2M) respectively.

The Court of Appeal, although functioning by way of re-hearing may disturb an award only if the trial judge applied a wrong principle of law in his findings or made an award which was inordinately high or too low.(**Johnson vs Sterling Products Ltd.** (1981) 30 WIR 155). In the latter case reference was made to the dictum of Haynes, C. in **Heeralall v Hack Bros. (Constructing) Co** (1977) 25 WIR 117, who said, at page 122:

> "Because a finding on damages is generally so much a matter of speculation, of estimate and of individual judicial discretion the court will not increase or decrease an award only because every member or majority of it would have awarded

> something more or something less. If the judge in making his assessment applied a wrong principle of law, we can interfere, for example if he took into account some irrelevant factor or left out of account some relevant one or gave too much or too little weight to it."

In the instant case, the trial judge relied on the medical evidence contained in the post-mortem report and discounted the submissions referring to an author on forensic pathology, which work was not properly compared with the sufferings of the deceased, in making the award for assault and battery. He considered the evidence of any "aggravating feature relating to the detention" and said further:

> "I am of the view therefore, that in the light of the conduct of the police officers towards the deceased and others, the conditions under which they allowed the men to remain in the cell, and adding to their numbers when they knew what the conditions were, are factors which warrant the grant of aggravated damages in this case. I therefore award the sum of One Hundred Thousand Dollars ($100,000.00) under this head."

In so far as any portion of the latter damages was attributable to the conduct of the police officers, clearly deserving of punitive condemnations, as distinct from the suffering of the deceased, I do not agree that such conduct is capable of being dealt with under the head of aggravated damages.

However, in all the circumstances, I am satisfied that he interpreted the law correctly in making the said awards for assault and aggravated damages and I see no reason to disturb them.

The claim for constitutional redress for the contravention under section 17(1) lies in public law as being a breach by the State. Because of this, to speak of and to claim therein an award of exemplary damages in such redress would serve in principle to cloud the distinction between a claim for compensation under the Constitution and a

claim for damages in private law. I am not however entirely convinced that such an award of exemplary damages cannot arguably be made, in principle.

In **Maharaj vs. Attorney-General of Trinidad and Tobago** (supra) the Privy Council in allowing the appeal and returning the appellant's claim for assessment of compensation for breach of his constitutional rights for a breach of natural justice, in that he was not told by the judge of the nature of the contempt before he was committed to prison, referred to the punitive feature as it related to such an award. Lord Diplock, for the majority said, at page 680:

> "Finally, their Lordships would say something about the measure of monetary compensation recoverable under s 6 (alike section 25 of the Jamaican Constitution) where the contravention of the claimant's constitutional rights consists of deprivation of liberty otherwise than by due process of law. The claim is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration. Counsel for the appellant has stated that he does not intend to claim what in a case of tort would be called exemplary or punitive damages. This makes it unnecessary to express any view whether money compensation by way of redress under s 6(1) can ever include an exemplary or punitive award."

An award of exemplary damages was upheld by the said Board in **Attorney-General vs Reynolds** (supra), in a claim for compensation under section 3(6) of the Constitution of St. Christopher, Nevis and Anguilla for unlawful arrest and detention. The appellant a former inspector of police in the State of St. Christopher, Nevis, Anguilla was unlawfully detained without justification and remanded in prison in

unsanitary and humiliating conditions. The appellant claimed "Damages for ... false imprisonment" and "compensation pursuant to the provisions of section 3(6) of the Constitution" (section 25 in Jamaica). His claim therefore included the common law tort of false imprisonment, permissible under the Constitution and damages were assessed in the global sum of Eighteen Thousand Dollars ($18,000.00) by the Court of Appeal. The Board concluded, at page 142:

> "The Attorney-General did not dispute that, if the Governor had acted unconstitutionally, the present case would fall into the first category of the cases which the House of Lords laid down as justifying an award of exemplary damages, namely, 'oppressive, arbitrary or unconstitutional action by the servants of the government': see **Rookes v Barnard [1964] 1 All ER 367 at 410, [1964] AC 1129 at 1226.** The Attorney-General did however argue that the Court of Appeal had erred in not quantifying that part of the $18,000 which represented exemplary damages. The observations on this topic in **Rookes v Barnard [1964] 1 All ER 367 at 411, [1964] AC 1129 at 1228** were confined to trials by jury. Even so they do not suggest that if the jury gives exemplary damages it must necessarily specify the amount of those damages separately from the amount of compensatory damages which it awards. Their Lordships are satisfied that obviously that judgment does not cast any such obligation on a trial judge sitting alone or on the Court of Appeal. Accordingly, their Lordships can find no grounds which could justify them in reducing the award of $18,000 damages or remitting it for re-assessment." (Emphasis added).

Exemplary damages was probably awarded in respect of the claim for false imprisonment, and therefore it is inconclusive to argue that, the claim for compensation for redress specifically, attracted exemplary damages, in that case.

There is no doubt that in the instant case, the deceased was subjected to inhuman and degrading treatment, due to the "oppressive, arbitrary and unconstitutional action" of the said police officers.

The Constitutional Court of South Africa in a case of the **State v Henry Williams,** (supra), unreported, in categorising juvenile whipping as inhuman and degrading acknowledged:

> "According to UNHRC (United Nations Human Rights Commission), the assessment of what constitutes inhuman or degrading treatment depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim."

The said Court noted that:

> "The European Commission of Human Rights (European Commission) described inhuman treatment as that which 'causes severe suffering, mental and physical which in the particular situation is unjustifiable'... The European Court of Human Rights (European Court)... categorised degrading conduct as that which aroused in its victims feelings of fear, anguish and inferiority leading to humiliation and debasement and possible breaking of their physical or moral resistance."

The Concise Oxford Dictionary 9th edition, defines inhuman treatment as "... manner of behaving towards or dealing with a person... (in a way which is)... brutal unfeeling (or ) barbarous" and degrading treatment, as "humiliating causing a loss of self respect." I adopt these descriptions of inhuman and degrading treatment.

In the instant case the detention and incarceration of the 18 men including the deceased Agana Barrett, in the ceil 8ft x 7ft, under the conditions described and for the extended hours causing such extreme suffering and death, was a cruel, unfeeling indifferent treatment to human beings creating humiliation a loss of self respect and an

affront to human dignity. It qualified as inhuman and degrading treatment as contemplated by section 17(1) of the Constitution. I find it difficult to visualise what level of humanity resided in police officers who allowed to remain in such conditions and to be so disadvantaged, the very members of the society whom they were being paid by the State to serve. This callous, oppressive indifference of public officials must bear condemnation, and because it caused such a contravention of the fundamental rights of the deceased under section 17(1) in the extreme in my view it attracts a punitive element in the award of compensation as constitutional redress.

I am not unmindful of the fact that there are multiple claimants arising out of this incident. This claim for redress is "a new remedy" (**Riley vs Attorney-General** (supra)) and therefore there is no helpful guiding assistance by way of comparable cases in the jurisdiction. In all the circumstances, I would award the sum of One Million Dollars ($1,000,000.00) for constitutional redress.

I would accordingly dismiss the appeal as it concerns grounds 1 and 2 but allow the appeal in relation to the claim for constitutional redress for the reasons and on the terms stated above and with costs to the appellant.

**DOWNER, J.A.**

Judgment of the Court below affirmed in part. Appeal allowed in respect of claim for constitutional redress.

By a majority, the appellant awarded the sum of $1,000,000.00 compensation for constitutional redress.

By majority costs of appeal to the appellant to be taxed if not agreed.