

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2018/0006

BETWEEN:

WAKEEM GUISHARD

Appellant

and

THE ATTORNEY GENERAL OF THE VIRGIN ISLANDS

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mr. Gerard St.C Farara, QC

Justice of Appeal [Ag.]

Appearances:

Mr. Jamal Smith and Ms. Keah Glasgow for the Appellant

Ms. Maya M. Barry, Principal Crown Counsel, for the Respondent

2020: July 22;
October 2.

Civil Appeal – Quantum of damages –Appellate court’s approach in reviewing exercise of discretion by a lower court in arriving at an award of general damages – Wrongful arrest – False imprisonment – Whether master applied the correct principles in determining award of damages for the initial period of appellant’s detention and for remainder of appellant’s detention – Malicious prosecution – Whether master properly took into account damage to appellant’s reputation in arriving at award for malicious prosecution – Pre-judgment interest – Whether master erred by failing to award appellant pre-judgment interest – Costs – Calculation of prescribed costs – Whether master erred in his calculation of prescribed costs

On the 28th May 2014, the appellant was arrested at his home on the island of Tortola and taken into custody by police officers of the Royal Virgin Islands Police Force on suspicion

of the murder of one Darren Allen “Tiger” Hodge (“the deceased”). He was detained in a cell at the West End Police Station and later at the Road Town Police Station on Tortola. The following day, after being questioned by the police in the presence of his lawyer, the appellant was formally charged with the murder of the deceased. On 30th May 2014, he was taken before a magistrate and subsequently remanded into custody at the H.M Prison at Balsam Ghut on the island of Tortola. The appellant contends that he suffered several indignities at the hands of police during the first two days of his detention, which included having to sleep on a piece of wood on the floor of the cell at both police stations. He was kept hungry during the first 24 hours of his detention and not allowed to take a bath for three to four days. Upon being remanded to the prison by the magistrate, he was deliberately taken by police out the front entrance of the Magistrates’ Court in full view of members of the public and the media.

The appellant’s detention lasted a total of 708 days, almost 2 years. For the greater part of this period, some 648 days, he was effectively kept in solitary confinement at the “A wing” of the prison locked up for 23 hours each day in a cell with a sponge for a bed. During the appellant’s detention at the prison at the “A wing” he witnessed several fights and bloody attacks, including the stabbing of a prison guard by an inmate, and another incident where an inmate was stabbed in the neck and fell right in front of the appellant’s cell. The appellant was only permitted visits from his family twice a week, with each visited limited to 15 minutes.

On 8th January 2015, the appellant was formally indicted by the Director of Public Prosecutions for the murder of the deceased. During the period 13th March 2015 to 12th April 2016, the appellant was subjected to three trials on indictment on the charge of murder. His first trial, after 11 days, was declared a mistrial. The appellant’s second trial, which commenced on 8th March 2016, was aborted after 4 days of hearing, as the presiding judge discharged the jury; and the third trial, which lasted 16 days, resulted in his acquittal on 4th May 2016 by the unanimous verdict of the jury. The appellant was immediately ordered to be released from custody.

On 2nd December 2016, the appellant instituted proceedings against the respondent, claiming damages, including special and exemplary damages, for wrongful arrest, false imprisonment, and malicious prosecution. The respondent did not file a defence to the claim within the time prescribed by rules of court, and judgment in default of defence was entered against the Crown on 17th March 2017 for an amount to be determined by the court. The respondent’s application to set aside the judgment in default was unsuccessful. On 31st May 2018, the appellant applied for assessment of damages. The application was heard by a master (“learned Master”) who delivered a written judgment on 4th October 2018. The learned Master awarded the appellant damages in the sums of US\$231,500.00 for wrongful arrest and false imprisonment; US\$25,000.00 for malicious prosecution; interest on the sums awarded as damages at the rate of 5% per annum from the date of the judgment; prescribed costs in the sum of US\$15,480.00; and costs in the sum of US\$1,500 on the appellant’s application for assessment of damages.

Being dissatisfied with the decision of the learned Master, the appellant appealed to this Court relying on four grounds of appeal. The main issues which arise for determination

are (i) whether the learned Master applied the correct principles in determining the appellant's award of damages for the initial or "shock" period of the appellant's detention, and in arriving at a daily compensatory rate of US\$300.00 for the remainder of the appellant's detention at the prison; (ii) whether the learned Master properly took into account the likely damage to the appellant's reputation in arriving at the award for malicious prosecution; (iii) whether the learned master erred by failing to award the appellant pre-judgment interest; (iv) whether learned master erred by applying the wrong percentage in his calculation of prescribed costs; and (v) whether the learned master erred in awarding the appellant cost of his application for assessment of damages.

Held: allowing the appeal, in part, and setting aside certain orders of the learned Master; ordering that each party bear their own costs of the appeal each having been successful in part; and making the orders set out in paragraph 89 of this judgment, that:

1. An appellate court must approach its review of an award of general damages ever mindful of the well-established principles under which an appellate court may review the exercise of discretion by a lower court in arriving at such an award. Accordingly, this Court can only interfere with an award of general damages where the trial judge or master acted on some wrong principle or failed to take into account a correct principle or failed to take cognisance of comparable awards or where, on the particular facts of the case, the award is so low or so high as to be manifestly wrong and outside the generous ambit of reasonable disagreement.

Flint v Lovell [1935] 1 KB 354 applied; **Michael Francois v Ryan Richards** GDAHCVP2013/0033 (delivered 1st June 2018, unreported) applied.

2. When quantifying the damages to be awarded to a claimant for wrongful arrest and false imprisonment, the court must approach such an award by considering the amount of compensation applicable to two periods of the claimant's detention in arriving at an appropriate total sum. The first is the initial or 'shock period', that is, the period of the claimant's arrest and initial imprisonment; and the second, the remainder of the period of the claimant's imprisonment by the State. As it relates to the initial or 'shock period', the court is required to arrive at a lump sum figure and ought not to apply a daily compensatory rate in determining what that sum ought to be. As to the second period, the amount of damages must be assessed by determining a daily rate to be applied to each day of the remainder of the period of the claimant's imprisonment. The total amount of the award under this head of damages is the aggregate of the lump sum applicable to the initial or 'shock period' and the resulting sum having applied the appropriate daily rate to the remainder of the period of the claimant's detention and false imprisonment.
3. In determining the amount of damages for the initial or 'shock period', the court must take into account all relevant factors. These include the manner in which the claimant was arrested, his initial imprisonment, the conditions under which he was detained by the police, any harsh or inhumane treatment meted

out to him at the hands of police officers, any undue publicity attendant with his arrest and detention, and any affront to his dignity. The amount of compensation for the initial or 'shock period' will depend upon the circumstances of each case and the quantum of any comparable awards for initial shock. In the instant matter, the learned master correctly applied these principles in arriving at the sum of US\$20,000.00 for the initial or 'shock period'. He approached his assessment on the basis of fixing a reasonable lump sum and took into account comparable awards in the Eastern Caribbean.

4. In determining the amount of damages for the second or remainder of the period of imprisonment, while the court should consider the daily rate arrived at in similar cases when determining the applicable daily rate, there is some latitude in arriving at a higher or lower daily rate from what might be considered the current trend or prevailing rate after taking into account all the relevant factors and conditions of the claimant's detention. These factors include the length of the detention, the conditions under which the claimant was kept and the degree and severity of the inhumane treatment and indignities to which the claimant was subjected and made to endure. The learned master correctly applied these principles in reaching a daily rate of US\$300.00. While this Court may have reached a somewhat high daily rate of US\$400.00, this does not provide a proper basis for setting aside the daily rate of US\$300.00 determined by the learned master, which rate was not manifestly or inordinately low, but was within the generous ambit of reasonable disagreement. Accordingly, there is no basis upon which the award of US\$231,500.00 damages for wrongful arrest and false imprisonment can or ought to be disturbed.

Atain Takitota v The Attorney General & Ors (Bahamas) [2009] UKPC 11 applied; **Millette v McNicolls** (2000) 60 WIR 362; **Everette Davis v The Attorney General of St. Christopher and Nevis** SKBHCV2013/0220 (delivered 30th June 2014, unreported); **McGreggor on Damages** 8th Edn considered.

5. In delivering the decision in a matter, a judge is not required to slavishly recite or regurgitate each and every fact or factor from the evidence which has been alluded to or relied upon by the parties in their submissions, nor is a judge required to state every principle of law upon which the parties have relied in their argument. It is also not the task of a judge to conduct a detailed analysis of all the evidence he has heard, or which was put before him at the trial. What is of the utmost importance is for the judge to render a decision which is clear and well-reasoned, and upon which the parties can be certain as to why they won or lost, and which will enable an appellate court to decide whether or not the decision is sustainable.

Re F (Children) [2016] EWCA Civ 546 applied.

6. When determining an appropriate award of damages for malicious prosecution, the court must take into consideration all relevant factors, including the loss of reputation suffered or likely to have been suffered by the claimant. Failure to do so will result in the judge committing an error of principle or law rendering the award liable to being set aside by the appellate court. In the circumstances of this case, the learned master failed to consider or to take into account in his assessment, the element of damage to the appellant's reputation when arriving at the award of damages for malicious prosecution. Furthermore, the award of US\$25,000.00 was inordinately low in all the circumstances of this case, including the fact that the appellant had been subjected to three trials for the charge of murder of the deceased. Accordingly, the award ought to be set aside and an award of US\$50,000.00 damages for malicious prosecution substituted.

Danny Ambo v Michael Laudat et al DOMHCV2010/0030 (delivered 17th October 2011, unreported) considered.

7. While it is appropriate for a judge, as part of the process of arriving at an award of general damages, to consider comparative awards and to convert such awards where necessary, from one currency into another, whether from the Eastern Caribbean currency to US currency or vice versa, so as to ascertain what the equivalent sum would be, that equivalent sum arrived at ought not to be simply used as a base sum from which to arrive at the final award in the claim under consideration.

Danny Ambo v Michael Laudat et al DOMHCV2010/0030 (delivered 17th October 2011, unreported) considered.

8. The provisions of rule 8.6(4) of the **Civil Procedure Rules 2000** ("CPR") regarding making a claim for interest, are in mandatory terms. A claimant who intends to make a claim for interest must include such a claim in the claim form, and must provide certain particulars of his claim for payment of interest, including the legal basis of the entitlement to interest, the rate being sought, and the period to which such interest and rate is to be applicable. While the appellant did not specifically state that he was claiming pre-judgment interest, he did in his claim form include a claim for interest for "such period as the court considers just", and at the applicable rate under the Judgments Act or some other rate which the court deems appropriate. This claim for interest, while somewhat scantily made, satisfies the basic requirements of CPR 8.6(4) and would include a claim for pre-judgment interest. Accordingly, it was open to the learned master to consider and to award, if appropriate, pre-judgment interest.

Rule 8.6(4) of the **Civil Procedure Rules 2000** applied.

9. Pre-judgment interest is to be awarded on loss or damage already incurred at the time of filing the claim. This includes both general and special damages.

In the instant matter, the damages awarded to the appellant for wrongful detention, false imprisonment and malicious prosecution relate to the period from his wrongful arrest and detention by police up until when he was released from prison, and not to any future period of loss or damage. It was therefore within the jurisdiction and power of the learned master to make an award of pre-judgment interest having assessed the quantum of damages to be awarded to the appellant for wrongful detention, false imprisonment and malicious prosecution. Accordingly, the learned master erred in not making an award of pre-judgment interest. In the circumstances, pre-judgment interest will be awarded to the appellant at the rate of 3 percent per annum on the total award of damages, from 4th May 2016 when the appellant was acquitted and released from prison, until 4th October 2018 when judgment was delivered on the assessment of damages.

Atain Takitota v The Attorney General & Ors (Bahamas) [2009] UKPC 11 applied; **Martin Alphonso et al v Deodat Ramnath** [1996] 56 WIR 183 considered; **Creque v Penn** [2007] UKPC 44 considered; **Jefford v Gee** [1970] EWCA Civ 8 considered; **Steadroy Matthews v Garna O’Neal** BVIHCVAP2015/0019 (delivered 16th January 2018, unreported) considered.

10. The correct rate of prescribed costs on a default judgment up to an assessment of damages is 60 percent as set out in the CPR. Accordingly, the learned master erred when he awarded to the appellant, prescribed costs to be calculated at the lower rate of 45 percent.

Appendix C of the **Civil Procedure Rules 2000** applied.

11. Rule 16.2(2) of the CPR makes provision for a separate award of costs on an application for assessment. Therefore, the learned master did not err when he awarded to the appellant costs in the sum of US\$1,500.00 on his application for assessment of damages.

Rule 16.2(2) of the **Civil Procedure Rules 2000** applied.

JUDGMENT

- [1] **FARARA JA [AG.]:** This is an appeal by the claimant in the court below, against the quantum of damages awarded to him by Master Moise (“the learned Master”) in a written judgment delivered on 4th October 2018 (“the Judgment”) following an assessment of damages hearing on 18th July 2018. The learned Master awarded to the appellant damages in the sums of US\$231,500.00 for wrongful arrest and false imprisonment and US\$25,000.00 for malicious prosecution; plus interest at

the rate of 5% per annum from the date of the Judgment, prescribed costs in the sum of US\$15,480.00, and costs in the sum of US\$1,500.00 on the appellant's application for assessment of damages. There has been no appeal against the latter award of US\$1,500.00 costs.

- [2] As confirmed by counsel for both parties, all sums awarded to the appellant, inclusive of judgment interest and costs, have been paid in full to the appellant by the Crown on 18th December 2018. This was substantiated by a letter of even date from the Attorney General's Chambers to the appellant's legal practitioners, a copy of which was provided to the Court, and receipt of such payment acknowledged by learned counsel for the appellant. I will return to this at the conclusion of this judgment.

The Facts in Brief

- [3] The appellant is a father of five (5) children. In his witness statement in support of his application for assessment of damages, he gave a detailed account of the circumstances surrounding his initial arrest and detention, his incarceration at Her Majesty's Prison at Balsam Ghut on the island of Tortola ("the prison"), the conditions under which he was kept there and which he had to endure during the period of his detention, the treatment to which he was subjected, and the effect this all had on him and his family life. The appellant also gave an account of the three trials which he endured, charged on indictment with the offence of murder. These accounts remain largely, if not totally, unchallenged. I do not consider it necessary to recount these matters in any great detail in this judgment. Most of the salient facts relied on by the appellant during the assessment hearing, have been recounted in the decision of the learned Master and are set out in the appellant's witness statement and oral evidence at the trial. Instead, I intend to briefly summarise and highlight certain matters of particular importance and significance relative to the appellant's arrest, detention, incarceration and trial, the conditions under which he was detained, and the treatment to which he was subjected to until he was released almost 2 years later.

[4] In the early afternoon of 28th May 2014, the appellant was arrested at gun point by “a battalion” of seven (7) police officers of the Royal Virgin Islands Police Force at his home at Carrot Bay on the island of Tortola, on suspicion of the murder of one Darren Allen “Tiger” Hodge (“the deceased”). His home was searched in execution of a search warrant obtained by the police on 7th May 2014. He was handcuffed and taken into custody by the police, and then taken to the West End Police Station where he was placed in a cell with a sheet of plywood for a bed. Later that day he was taken to the Road Town Police Station and placed in a cell, also with a wooden bed. The next day, after being questioned by police officers in the presence of his lawyer, he was formally charged with the murder of the deceased on 10th September 2010. He was taken before a magistrate on 30th May 2014 and remanded into custody at the prison. On being escorted out of the court room, the appellant was taken by the police through the front entrance of the court building and in full view of members of the public and the media present.¹ The appellant also complains that he was kept hungry during the first day of his detention and not allowed to take a shower for three or four days. This he contends is demonstrable of the poor treatment, contempt, and indignity with which he was treated at the hands of the police during the initial period of his arrest and detention.

[5] The appellant’s detention lasted a total of 708 days, almost 2 years. For the greater portion of this period he was kept in what is called the “A wing” of the prison, in a cell which he described in his evidence as consisting of an iron frame with a sponge for a bed, a metal sink with a small counter and with a metal toilet attached to the side. He remained in the “A wing” for the greater portion of his imprisonment, a period of some 648 days (1.7 years), during which period he was locked in a cell 23 hours each day. Conditions at the “A wing” were particularly harsh and impactful on him. There he witnessed several fights and bloody attacks. In particular, one incident where a prison guard was stabbed by an inmate, and another where an inmate was stabbed in the neck and fell right in front of the

¹ Witness Statement of Wakeem Guishard filed on 31st May 2018 at para 38.

appellant's cell.² His family was only permitted to visit him twice a week, each visit limited to 15 minutes. He had to endure the embarrassment and distress of having his five children visit him at the prison. Essentially, his life was put on hold for almost 2 years.

- [6] As to the criminal proceedings brought against him, the appellant was formally charged and indicted for the most serious offence of murder. He was subjected to and had to endure a preliminary inquiry before a magistrate, and three trials on indictment before a judge and jury. The result of the preliminary inquiry was his committal, on paper, on 14th July 2014 to stand trial in the High Court for the offence of murder, along with three other co-accused. He was formally indicted by the Director of Public Prosecutions for murder on 8th January 2015. His first trial for the offence of murder commenced on 13th March 2015. After 11 days, the presiding judge declared a mistrial, as the jury was unable to arrive at a majority verdict. Between May and December 2015, the appellant made two applications for bail. The first was refused by the lower court, and he withdrew the second on 19th January 2016, after it had to be adjourned on 16th December 2015, at the instance of the Crown, and his second trial was scheduled to commence in the March 2016 criminal sittings of the High Court. His second trial, which commenced on 8th March 2016, was aborted on 21st March 2016 after 4 hearing days, as the presiding judge discharged the jury. The appellant's third trial, which commenced on 12th April 2016, lasted 16 days and resulted in him being acquitted by the unanimous verdict of the jury on 4th May 2016. He was immediately ordered to be released from custody. During his trial and retrials, the prosecution relied on the witness statement and evidence of a convicted murderer, Terrance Abdullah Charles, in proof of its case against the appellant.

The High Court Proceedings

- [7] By claim form and statement of claim filed on 2nd December 2016, the appellant claimed damages against the Crown, including special and exemplary damages,

² Ibid at paras. 45-48.

for wrongful arrest, false imprisonment and malicious prosecution. Having been served with the claim form and statement of claim, no defence was filed by or on behalf of the Crown within the time prescribed by rules of court. Accordingly, on 17th March 2017, Master Actie entered judgment in default of defence against the respondent (the defendant in the court below) for an amount to be determined by the court.³ The respondent's application dated 20th March 2017 to set-aside the default judgment (as amended 4th April 2017), was unsuccessful before Master Glasgow, whose written decision was handed-down on 24th October 2018, but apparently not received by the parties until 30th May 2018.⁴ This decision was not appealed by the Crown, and on 31st May 2018 the appellant applied for assessment of the damages.⁵ The application for assessment of damages is supported by the witness statement of the appellant also filed 31st May 2018.⁶ As mentioned above, the damages were assessed by Master Moise and his written judgment thereon rendered on 4th October 2018.⁷

- [8] Before moving on, I am constrained to comment on the degree of laxity on the part of the Crown in not complying, in a timely manner, with the applicable rules of court for filing a defence, particularly in a matter such as this, and thereby allowing judgment in default to be entered against the Crown. This resulted in a claim of this nature and gravity not being decided by the court below on its merits. This is particularly concerning to the administration of justice where, as here, the causes of action upon which the claim for damages is predicated, are wrongful arrest, false imprisonment, and malicious prosecution. These are matters which involve a citizen's fundamental rights, the liberty of the subject, and the nature and gravamen of the treatment meted out to the appellant by the prosecutorial arm of the Crown in its constitutionally mandated role. It is therefore quite unsettling, the degree of laxity with which this matter was approached and handled once the claim had been served on the Crown. I can only hope that those responsible for

³ Tabs 25 and 26 of the Record of Appeal.

⁴ Tab 27 of the Record of Appeal.

⁵ Tab 23 of the Record of Appeal.

⁶ Tab 24 of the Record of Appeal.

⁷ Tab 28 of the Record of Appeal.

overseeing and administering these vital roles, which are so important to the administration of justice, have taken the appropriate remedial steps necessary to ensure that this sort of laxity is not repeated.

[9] The appellant's claim for special damages was two-fold. The first was for loss of earnings for the approximately 2 years he was incarcerated and, the second, for child support for his five (5) children at the rate of \$1,660. 00 per month or alternatively at the statutory minimum award of \$200.00 per month per child.⁸ The learned Master did not accede to either of these claims which were, accordingly, dismissed. In relation to the claim for child support reimbursement, this was dismissed by the learned Master on the basis that the maintenance by the appellant of his five children would, in the normal course of things, have been met out of his income and, accordingly, it would not be appropriate in this type of case, to make an award with respect to child support.⁹

[10] It was also the appellant's pleaded case, that prior to his arrest he was employed with Smith's Trucking in Sea Cow's Bay on Tortola earning \$120.00 per day, working Monday through Saturday and sometimes on Sunday. He claimed to have suffered loss of income at the said rate during the 2 year period of his incarceration.¹⁰ However, during the assessment hearing, he provided no documentary evidence of his employment with the said trucking business and no evidence of his actual wages. The learned Master, having considered the court's power to nevertheless award nominal damages to the appellant for loss of income during the period of his wrongful detention, declined to do so in light of the total absence of any documentary evidence from the appellant to substantiate an award of nominal damages.¹¹

⁸ Statement of claim filed 2nd December 2016 at para. 30 and para. 9 of the Judgment.

⁹ Paragraph 11 of the Judgment.

¹⁰ Statement of Claim filed 2nd December 2016 at para. 31.

¹¹ Paragraph 17 of the Judgment.

[11] There has been no appeal from the learned Master's decision on special damages.

Issues on Appeal

[12] In his notice of appeal filed on 29th October 2018,¹² the appellant relies on four grounds of appeal. These are:-

- (i) The total award by the learned Master of the sum of US\$231,500.00 damages for wrongful arrest and false imprisonment is too low, in that the learned Master erred in awarding the sum of US\$20,000.00 damages for the initial period of the appellant's detention, and in setting a sum of US\$300.00 as the appropriate daily rate of compensation for the remainder of the period the appellant was wrongfully detained. Accordingly, he ought to have set a much higher appropriate daily rate resulting in a much higher award of compensatory damages to the appellant under this head.
- (ii) The award by the learned Master of the sum of US\$25,000.00 as damages for malicious prosecution was too low, as the learned Master did not properly consider the damage to the appellant's reputation in a small community like the British Virgin Islands ("BVI") and the impact on his family life, especially his relationship with his children.
- (iii) The learned Master erred when he failed to award the appellant pre-judgment interest. It is contended that this decision was perverse and unreasonable in all the circumstances.
- (iv) The award of prescribed costs should be revised upwards in light of the error made by the learned Master in the applicable percentage under Part 65 of the **Civil Procedure Rules 2000** and the errors in making the awards of damages for wrongful arrest and false imprisonment, and for malicious prosecution.

¹² Tab 1 of the Record of Appeal.

Ground 1 - The award of damages for wrongful arrest and false imprisonment

[13] As mentioned above, the learned Master awarded the appellant the sum of \$231,500.00 damages for wrongful arrest and false imprisonment. Under this head of damages, the learned Master had to consider and arrive at the appropriate sum as compensation for the “initial shock” covering the period when the appellant was first arrested and detained by the police; and a daily rate of compensation for the remaining period of his incarceration taking into account all relevant factors, including the length of the incarceration.

[14] In the decision of the Court of Appeal of the Republic of Trinidad & Tobago in **Millette v McNicolls**,¹³ referred to by the learned Master, de la Bastide CJ (as he then was) helpfully summarised the law applicable to quantifying the damages for wrongful arrest and false imprisonment, in these terms:

“There is an element of initial shock when a person is first arrested and imprisoned which must first be taken into account and compensated in the assessment of damages for wrongful arrest and false imprisonment, regardless of whether the term of imprisonment is long or short. The extent of the compensation for the initial shock will depend on the facts of the case (and not the length of the imprisonment) and factors which may be relevant include: the way in which the arrest and initial imprisonment was effected, any publicity attendant thereon, and any affront to dignity of the person. While any normal person will adjust to some extent to the circumstances of imprisonment, the longer the imprisonment lasts the more burdensome it becomes: and the length of the imprisonment is to be taken into account in this context. Damages in such cases should however be assessed by dividing the award strictly into separate compartments (initial shock, length [of] imprisonment, etc.) but by taking all such factors into account and then approaching the appropriate figure in the round.¹⁴

...

It is important, however, that judges approach the assessment of damages in cases like this in the round. I do not think that one can divide the award strictly into different compartments, one for initial shock,

¹³ (2000) 60 WIR 362.

¹⁴ Ibid at page 362.

another for length of imprisonment and so on. All the factors are to be taken into account and an appropriate figure arrived at.”¹⁵

- [15] The learned Master also derived some guidance under this head of damages from the dicta of Ramdhani J, at paragraph 46, in **Everette Davis v The Attorney General of St. Christopher and Nevis**.¹⁶ In that case, the learned judge reformulated the applicable principles in this way:

“ [46] In fixing the compensation the court should consider a number of factors including, the loss of liberty, the loss of reputation, humiliation and disgrace, pain and suffering, loss of enjoyment of life, loss of potential normal experiences, such as starting a family, other foregone development experiences, loss of freedom and other civil rights, loss of social intercourse with friends, neighbours and family, whether the claimant suffered assault in prison, the fact that he had to be subjected to prison discipline, and accepting and adjusting to prison life, and what effects the unlawful detention might have had on his life. In any given case some of these may not be relevant whilst some may have greater effect on the eventual sum.”

- [16] Also at paragraph 60 in **Everette Davis**, Ramdhani J had this to say in relation to the approach a court should adopt when considering the appropriate sum for the initial shock period and compensation for the remainder of the claimant's detention:

“ [60]... In matters such as this where the detention is not a short one as in a few hours or days, I am of the view that an initial sum should be given for the initial period of detention, and then a fixed sum should be given for each day that the claimant was detained. I have chosen to take this approach in recognition of the shock and humiliation, which would have been felt by the claimant initially on being arrested by the police. The aggravation is more at this stage. A fixed sum is appropriate for this initial act of detention. Thereafter, I consider that it is only proper that a sum be fixed for every day of detention having regard to those relevant factors that are set out above.”

- [17] The learned Master was clearly guided by the above statements of principle in **McNicolls** and in **Everette Davis**, which he set out as the guiding principles at paragraphs 18 and 19 of the Judgment. Specifically on quantum of damages, the

¹⁵ Ibid at page 367, para J.

¹⁶ SKBHCV 2013/0220 (delivered 30th June 2014, unreported).

learned Master considered and placed much weight on the sums awarded in similar cases in the Eastern Caribbean, specifically in **Everette Davis** where Ramdhani J awarded EC\$20,000.00 for the initial period of detention and a daily rate of EC\$500.00 from the remainder; and in **Michael Stephens v The Attorney General of Saint Lucia**¹⁷ where Wilkinson J likewise arrived at a daily rate of EC\$500.00 for the calculation of compensatory damages. The learned Master also gave some consideration to the award by the British Virgin Islands High Court in **Elihu Rhymer v The Commissioner of Police**¹⁸ which was relied on by learned counsel for the appellant in arguing for a daily rate of US\$12,000.00 in present day value. In **Elihu Rhymer** the claimant was compensated for 3 hours of detention with an award of US\$1,000.00 nominal damages and US\$20,000.00 exemplary damages for wrongful arrest.

[18] Specifically on the question of what ought to be the appropriate daily sum for the calculation of compensatory damages in the instant matter, the learned Master placed some reliance on the decision of the Privy Council in **Atain Takitota v The Attorney General & Ors (Bahamas)**¹⁹ where the Court of Appeal of the Bahamas used a daily rate of BS\$250.00 (US\$250.00 equivalent). I will return to a more in-depth consideration of this important decision later in this judgment.

[19] Having considered the applicable principles and comparable awards, the learned Master awarded the appellant US\$20,000 compensation for the initial period of his detention by police and a daily rate of US\$300.00 for the remainder of his period of incarceration, totaling US\$231,500.00. The reasoning and conclusions reached by the learned Master under this head are set out at paragraphs 28 and 29 of the Judgment: -

“[28] “I am in a similar position to Ramdhani J where he states in **Everette Davis** that “**there is hardly any definitive guidance even in cases as to how the courts arrive at the final figures, and I have not been able to locate any literature to guide me in this process.**” It would seem that

¹⁷ SLUHCv2013/0425 (delivered 30th June 2017, unreported).

¹⁸ BVI Civil Appeal No. 13 of 1997 (delivered 25th January 1999, unreported).

¹⁹ [2009] UKPC 11.

the sum of \$500.00EC has emerged as an acceptable figure in the other territories of the Eastern Caribbean. This is approximately \$185.00US which is lower than the rate initially fixed in the Bahamian case of **Takitota** which was decided over a decade ago. In the circumstances I am of the view that the sum of \$300.00US per day is reasonable compensation for the period of the claimant's incarceration. I am not inclined to place different rates for the period in which the claimant was removed (sic) from the "A wing" of the prison. It would suffice to say that I have taken all of these factors into consideration in arriving at this figure."

[29] Having fixed the compensation for the initial period of incarceration, I would therefore compensate the claimant for the remaining 705 days of his imprisonment at the rate of \$300.00US per day. I would therefore award the claimant the sum of \$211,500.00US plus the sum of \$20,000.00US as damages for wrongful arrest and false imprisonment. This makes a total of \$231,500.00US."

Appellant's Submissions

[20] The appellant submits that the award by the learned Master under this head is manifestly wrong and ought to be increased significantly by this Court. Learned counsel Mr. Smith, submits that the approach adopted by the learned Master in making a direct conversion of the daily rate of EC\$500.00 in **Everette Davis** and **Michael Stephens** to a US dollar equivalent, was wrong. Further, since the equivalent sum of US\$185.00 was lower than the sum of BS\$250.00 in **Takitota** (US\$250.00), the learned Master then simply or arbitrarily increased it to arrive at a sum of US\$300.00 as his benchmark. In Mr. Smith's submission, the learned Master at the very least, ought to have held that US\$500.00 was an appropriate daily rate of compensation for the appellant under this head. Learned counsel also submits that the learned Master ought to have taken due account of inflation using the guidance from the United States Department of Labor's Bureau of Labor Statistics' CPI Inflation Calculator for US inflation rates, and to have applied an uplift of 10% after doing a direct conversion.²⁰

[21] At paragraphs 7 to 14 of his written submissions on appeal, the appellant sought to distinguish this matter from the prevailing facts and circumstances in **Takitota**, so as to demonstrate that the circumstances in the instant matter are more

²⁰ Appellant's Written Submissions at para 15.

grave and ought to have resulted in a substantially higher daily rate than the US\$250.00 used in **Takitota**. At paragraph 16, the appellant submits that the learned Master had 'overlooked' these distinguishing factors, which ought properly to have resulted in a daily rate of US\$6,000.00.

[22] The appellant also submits, that the learned Master erred when he employed an arbitrary approach in arriving at the sum of US\$20,000.00 compensation for the initial shock period or initial period of detention of the appellant.²¹ It is submitted that the learned Master failed to undertake a proper assessment of the individual circumstances of the appellant during the first 2 days of his arrest and detention and gave no proper reasons for arriving at the sum of US\$20,000.00. After analysing certain decided cases in the Eastern Caribbean,²² the appellant, in his written submissions, submits that the appropriate rate applicable to this initial period of the detention, ought to be US\$12,000.00 per hour. This sum was reached taking account of the award of US\$20,000.00 in **Elihu Rhymer** for 3 hours of detention resulting, learned counsel submitted, in a rate of US\$6,666.67 per hour (about US\$10,224.24 after inflation) plus a 10 percent uplift would amount to US\$11,247.24.²³

[23] The appellant therefore submitted that the award by the learned Master under this head ought to be set aside and an award of US\$12,000.00 per hour for the first 24 hours of the appellant's detention and US\$6,000.00 per day for the remaining period of his incarceration be substituted by this Court.²⁴ These sums would lead to an award of US\$288,000.00 for the initial shock period of one day, and US\$4,242,000.00 for the remaining 708 days of his incarceration, for a total award under the head of US\$4,530,000.00.

²¹ Ibid at para. 17.

²² Ibid at paras. 18 to 22.

²³ Ibid at para. 22.

²⁴ Ibid at paras. 16 and 22.

[24] However, during oral submissions before this Court, learned counsel for the appellant did not continue to contend for an award under this head based on the rates and sums set out at paragraph 22 of the appellant's written submissions referred to above. Instead, he contended for a bifurcation in the sums to be awarded as compensatory damages for the remainder of the period of detention after the initial shock period. He urged this Court to award a the higher daily rate of US\$750.00 for the period of 648 days that the appellant was incarcerated at the "A wing" of the prison, and US\$500.00 for the remaining 60 days of his detention during which he was kept in the general population section of the prison. This was on the basis of the share length of the period that the appellant was kept at the "A wing", and the conditions of imprisonment which he endured during that period. At these rates, the award under this head would amount to US\$486,000.00 for the period in the "A wing" and US\$30,000.00 for the period in the general population section, for a total award of US\$516,000.00 under this head.

Respondent's Submissions

[25] The respondent's case on appeal is that the learned Master applied the correct principles and treated with similar awards in this jurisdiction and elsewhere in arriving as the sums awarded, including under this head; and, accordingly, there is no basis upon which this Court can or ought to set aside the awards. It is the respondent's submission, that the sums awarded are not so inordinately low or high that this Court ought to set them aside. Learned counsel for the respondent, Ms. Barry submits further, that the learned Master "was required to assess the quantum of damages to be awarded to the appellant by determining what would be an appropriate and reasonable sum. In doing so, he was required to exercise his discretion guided by similar awards from within our region."²⁵ Accordingly, this appeal challenges the exercise of discretion by the learned Master in the award of general damages. It is settled that this Court is not justified in substituting a higher figure or figures for those arrived at by the learned Master, simply because it

²⁵ Respondent's Written Submissions at para 7.

would have arrived at a different sum on the same facts, unless the sum or sums awarded are so inordinately low or were arrived at on a wrong principle.

- [26] As to the power of an appellate court to review the award of damages by a lower court, the respondent relied on this statement of principle in **Flint v Lovell**²⁶ at page 360 per Greer LJ:

“In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.”

- [27] In submitting that the learned Master approached the assessment of damages on the correct basis and applicable principles, the respondent relies on this passage from the judgment of Patterson JA in decision of the Jamaican Court of Appeal in **Fuller (Doris) v Attorney General**:²⁷

“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 trivialised. 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.”

- [28] Furthermore, it is submitted on behalf of the respondent, that the appellant has not produced any authority to demonstrate that the awards were clearly wrong or inordinately low so as to warrant this Court setting them aside and substituting its own awards. The attempt by the appellant to distinguish some of the decided cases from the instant matter, is without proper foundation and ought not to be adopted by this Court. In particular, learned counsel for the respondent relied on

²⁶ [1935] 1 KB 354.

²⁷ (1998) 56 WIR 337 at 402.

the decision of the Board in **Takitota** as providing the best guidance when a court is considering a long period of detention and false imprisonment.

[29] Turning to other decided cases in this jurisdiction, Ms. Barry, cited **Michael Stevens v Attorney General of Saint Lucia**,²⁸ to which the learned Master had regard in arriving at the award, in submitting that the award which he made was reasonable and appropriate in the circumstances of the instant matter. In **Michael Stevens** the claimant was imprisoned for approximately 12 years (4,544 days). The judge awarded the sum of EC\$2,272,000.00 as compensation for unlawful detention using a daily rate of EC\$500.00. Ms. Barry submitted further, that the appellant has not put before this Court any decided case which would support an award of US\$4,248,000.00 contended for by the appellant in his written submissions (referred to above); and that **Michael Stevens** demonstrates the unsustainability of an award of that level and supports the reasonableness of the award under this head by the learned Master.²⁹

[30] Accordingly, Ms. Barry submits that the learned Master was correct in arriving at the sum of US\$20,000.00 for the first day of the appellant's detention (shock value) and US\$300.00 as the benchmark daily sum for calculating the compensation to be paid to the appellant for the remaining 708 days of his incarceration. Learned counsel also submits that the daily rate of US\$750.00 now contended for by the appellant in oral submissions as what ought to apply to the period he was detained in the "A wing" of the prison, which sum was, she concedes, within the scope of the learned Master's discretion to award, is not supported by the awards in any of the similar cases, including **Everette Davis**, **Michael Stephens** and **Takitota**. On these cases, counsel submits, it cannot be demonstrated that the award based on a daily rate of US\$300.00 was inordinately low. Furthermore, there is no basis upon which this Court can or ought to disturb the said award, as the sums awarded under this head are within the general ambit

²⁸ SLUHCv2013/0425 (delivered 30th June 2017, unreported).

²⁹ Respondent's written submissions at para 15.

of the discretion of the lower court, and are no so inordinately low as to warrant being set aside.

- [31] In support of this submission, learned counsel referred to the decision of the Privy Council in **Calix v Attorney General of Trinidad and Tobago**³⁰ where, at paragraph 30 of the decision of the Board delivered by Lord Kerr, he considered that the award in that case was “inordinately low” when contrasted with the award of compensation in a number of decided cases in Trinidad and Tobago. These other cases and awards referred to by the learned law Lord included **Mark Blake v The Attorney General of Trinidad and Tobago**,³¹ where the court awarded TT\$450,000.00 as compensation for the 3.5 years that the claimant was in detention, although there was some tapering of the award in line with the observations of the Privy Council in **Takitota**. Learned counsel observed that, in the instant matter, the appellant’s continued detention was the subject of a judicial order a mere 2 days after he had been arrested by the police, as distinct from **Takitota** where the claimant had never been charged or taken before a judge or a court during the entire period of his very long unlawful detention.

Analysis and Conclusions on Ground 1

Principles of review of award of general damages

- [32] This Court must approach its review of the quantum of general damages awarded by the learned Master ever mindful of the principles under which an appellate court may review and disturb the exercise of discretion by a lower court in arriving at such an award. These principles, and the guidance to be derived therefrom, are well-known and were clearly stated in the decision of the English Court of Appeal in **Flint v Lovell** referred to above. Suffice to be said, that I adopt them wholesale. The applicable principles were also authoritatively restated in the decision of this Court in **Michael Francois v Ryan Richards**.³² The burden, which rest squarely with an appellant who invites an appellate court to interfere with an award of

³⁰ [2013] 4 All ER 401.

³¹ [2013] Civ 2010 – 03388 (unreported).

³² GDAHCVAP2013/0033 (delivered 1st June 2018, unreported).

general damages, is a heavy one. Accordingly, unless the learned Master has committed an error of principle or failed to take into account a correct principle or failed to take cognisance of comparable awards, or where, on the particular facts of this case, the quantum which he awarded under this or any head is so low or high as to make it erroneous or manifestly wrong, this Court cannot interfere with the award. Put simply, the award of general damages must be so outside the generous ambit of reasonable disagreement as to warrant it being interfered with.

At paragraph 36 of **Michael Francois** Michel JA stated:

“ [B]efore an appellate court can be justified in interfering with a discretionary order of a trial judge, the court must first determine that the trial judge failed to apply the relevant principles and take cognizance of comparable awards and that the trial judge made an award which was outside the range of awards which could reasonably have been made on the facts of the case and was therefore manifestly wrong.”

- [33] As to the duty of a court in assessing damages to be awarded to a party to legal proceedings, I also adopt, without more, the guidance provided by Patterson JA in **Fuller (Doris) v Attorney General** referred to above. While that was a case concerning damages for breach of fundamental rights (as was **Takitota**), I regard the principles encapsulated in **Fuller** as equally applicable to the instant case where the damages to be awarded to the appellant for wrongful detention, false imprisonment and malicious prosecution, fell to be assessed by the learned Master. In this vein, it is necessary to undertake a detailed examination of the decision of the Privy Council in **Takitota** since, in my considered view, this decision has been the subject of much mischaracterisation in the submissions before this Court, particularly as to whether the daily rate of US\$250.00 was adopted by the Board in rendering its decision.

The Decision of the Board in Takitota

- [34] In **Takitota** the Privy Council, in 2009, had to consider the correctness of an award of compensatory and exemplary damages made by the Court of Appeal of the Commonwealth of the Bahamas in favour of the claimant. The claimant was a Japanese national, who brought a claim in the High Court for damages for

wrongful detention and breach of his fundamental rights under the Bahamian Constitution. This case concerned an immigration matter for which the claimant had been arrested, but had never been charged with an offence, nor was he ever brought before a court. During the long period of his detention, he had been detained in various facilities, including a maximum-security facility, and subjected to horrendous, degrading and inhumane conditions. These conditions had driven him to attempt suicide on three separate occasions.

[35] The Court of Appeal, contrary to the findings of the trial judge, found that the claimant had been unlawfully detained and incarcerated for a total of 8 years and 2 months, for which period (2,981 days) he was entitled to be compensated in damages for unlawful detention and breach of his fundamental rights, and to a separate award for exemplary damages. Accordingly, in allowing his appeal against the quantum of damages awarded by the High Court, the Court of Appeal substituted a total award of BS\$500,000.00 (US\$500,000.00). The award of compensatory damages was arrived at using a daily rate of BS\$250.00 which resulted in the total sum of BS\$730,500.00. This was then significantly discounted upon the patently wrong and inappropriate application of the principle relating to lump sum awards in matters of compensation for personal injuries. The Bahamas Court of Appeal arrived at the base figure of BS\$250.00 by dividing the sum of BS\$1,000.00, awarded by the trial judge for “the initial detention and false imprisonment”, by the number of days for that period, which the Court of Appeal, as the Privy Council found, wrongly calculated as 4 days. They then reduced the total sum of BS\$730,500.00 by BS\$330,500.00 arriving at a final award of BS\$400,000.00, since the claimant would have been receiving a lump sum award. However, the Privy Council found that, on the available evidence, the initial period of detention was actually 6 and not 4 days. This erroneous calculation is what resulted in the so-called daily rate of US\$250.00.

[36] The assumption that the decision in **Takitota** is legal precedent for a daily rate of BS\$250.00 (or US\$250.00) as a benchmark for calculating compensatory

damages for wrongful detention is incorrect and totally unfounded, as a simple reading of the opinion of Lord Carswell illustrates. In fact, Lord Carswell pointed out that, on the Bahamian Court of Appeals' approach to arriving at a daily rate (which was itself erroneous), applying the correct number of days of 6 as the divider, this would have resulted in a daily rate of BS\$166.66 and not BS\$250.00. It follows therefore that it is totally erroneous to rely on the daily rate of US\$250.00 as having been approved or endorsed by the Board in **Takitota**. Likewise, it would be equally unfounded to say that the Privy Council endorsed or adopted a daily rate of BS\$166.66 (US\$166.66) as an appropriate daily compensatory rate when assessing damages for false imprisonment. This is clear from the reasoning of the Board and its disposition of the appeal. The decision of the Board was to uphold only the award of BS\$100,000.00 for exemplary damages. As to the award of compensatory damages in the sum of BS\$400,000.00, the Board declined to conduct its own assessment and arrive at its own award, and remitted this aspect to the Court of Appeal for reassessment. At paragraph 16 Lord Carswell states:

“There Lordships accordingly consider that that part of the award made by the Court of Appeal [exemplary damages] can be upheld and should not be disturbed. **They are unable, however, to regard the figure of either \$730,500 or \$400,000 by way of compensatory damages as being sufficiently securely based on the facts and the law.** The Board was invited by the appellant's counsel itself to revise the amount of the award. In line with its established practice, however, it is reluctant to follow this course, for it has repeatedly expressed the view that local courts are very much better placed than the Board to say what is appropriate by way of damages, having regard to the conditions in the country concerned. Their Lordships therefore consider that that part of the award should be remitted to the Court of Appeal for reassessment.” (emphasis mine)

[37] Moreover, the Board went on to give the necessary guidance to the Bahamian Court of Appeal when conducting a reassessment of the award of compensatory damages, which includes arriving at a daily rate. At paragraph 17 of the decision, Lord Carswell helpfully encapsulates the legal principles in these terms:

“The Court should determine what they consider to be an appropriate figure to reflect compensation for the long period of wrongful detention of the appellant, taking into account any element of aggravation they think proper, reflecting the conditions of his detention and, in their own words, misery which he endured. In assessing the proper figure for compensation

for such long-term detention, they should take into account that any figure they might regard as appropriate for the initial short period, if extrapolated, should ordinarily be tapered, as their Lordships have pointed out in para. 9 above. The final figure for compensatory damages should therefore amount to an overall sum representing appropriate compensation for the period of over eight years' detention, taking account of the inhumane conditions and the misery and distress suffered by the appellant."

- [38] The above passage in **Takitota**, authoritatively sets out the principles which are to guide any court in this jurisdiction, including this Court, when assessing or reassessing, as the case may be, the quantum of compensatory damages to be paid or awarded to a claimant who has made out his or her claim of wrongful arrest and false imprisonment. These principles apply to the second step in the assessment process, as the first step relates to assessing the appropriate figure to compensate for the 'the initial shock' or initial detention. At this juncture, it would be appropriate for me to unreservedly endorse and adopt the two-step process so eloquently formulated de la Bastide CJ (as he then was) in **McNicolls**, and by Ramdhani J in **Everette Davis**, as set out above, both of which were relied on by the learned Master in reaching his decision on the quantum of damages under this head.

Compensation for the Initial Shock – step 1

- [39] At paragraph 25 of the Judgment, the learned Master awarded to the appellant the sum of US\$20,000.00 for the initial period of his detention. In doing so, the learned Master correctly referred to the principles in **McNicolls** and **Everette Davis** setting out the correct approach by the court and the salient factors to be taken into account in arriving at an appropriate and reasonable sum. This first element of 'initial shock', is to take account of the manner in which the appellant was arrested, his initial imprisonment, the conditions under which he was detained, any harsh or inhumane treatment meted out to him at the hand of police officers, any undue publicity attendant with his arrest and detention, and any affront to his dignity. The amount of compensation for this element would naturally depend upon the particular facts and circumstances of each case and the quantum of any comparable awards for initial shock. An award for this element of damages is on a

lump sum basis and not on a daily compensatory basis, which is quintessentially what applies under step 2.

[40] In my considered view, the learned Master was quite correct to rejected the appellant's reliance on the decision and the quantum of damages awarded in **Elihu Rhymer** as a proper or appropriate basis for arriving at a daily rate under step 1 , and as an hourly rate under step 2. At paragraph 25, the learned Master recognised, correctly, that the proper approach by a court when considering what ought to be the appropriate compensation to be awarded to a claimant for the 'initial shock' or 'initial detention' period, is not to set an hourly rate applicable to that period as the basis for the calculation of damages, but to take into account all the relevant factors applicable to the initial arrest and detention of the claimant, in arriving at an appropriate reasonable sum. In adopting this latter approach, the learned Master cautioned, "the approach is not one in which the court is to set an exorbitant hourly rate for the first period of detention. The courts have adopted a more general approach in fixing a reasonable sum for this period and then to go on to set a daily rate." I would only add the cautionary statement of principle by de la Bastide CJ (as he then was) in **McNicolls** that "Damages in such cases should not however be assessed by dividing the award strictly into separate compartments (initial shock, length of imprisonment, etc) but by taking all such factors into account and then approaching the appropriate figure in the round".

[41] The learned Master correctly held that this submission by the appellant based upon the quantum of damages awarded in **Elihu Rhymer** is entirely unsustainable and the resulting sum would be way above a reasonable sum which the court ought to award for the initial period of detention.³³ Likewise, I reject the identical submission made by the appellant at paragraph 22 of his written submissions on appeal. There is no basis whatsoever for applying an hourly rate to the calculations with respect to the initial shock or initial detention period, and I decline to do so.

³³ Paragraph 23 of the Judgment.

[42] In my considered view, the learned Master applied the correct principles and took into account all of the salient or relevant factors applicable to the appellant during this initial shock period. Learned counsel for the appellant categorised the initial period as commencing with the arrest and detention of the appellant by police at his home at Carrot Bay on Tortola on 28th May 2014 until he was brought before a magistrate the following day, having been formally charged with the serious offence of murder, and remanded into custody at the prison, a period of approximately 24 hours. Furthermore, the learned Master, as he was obliged to do, considered awards for initial shock in comparable cases in the Eastern Caribbean, including **Everette Davis**, where the judge made an award for the initial shock period of EC\$20,000.00. Taking all these factors into account, the learned Master made an award of US\$20,000.00 for the initial shock suffered by the appellant.

[43] In summary, I do not discern any error of principle which the learned Master committed in arriving at this sum. He was correct, in my view, in discounting any reliance upon the decision and award in **Elihu Rhymer** for the reasons which he gave at paragraph 22 of the Judgment, which I completely endorse. Accordingly, there is no basis upon which this court can or ought to set aside or increase the award of US\$20,000.000 for initial shock, and we decline to do so.

Compensatory Damages for the remainder of the detention – step 2

[44] The learned Master arrived at an award of US\$211,500.00 compensatory damages for the remaining 708 days of the appellant's incarceration. In arriving at this figure, the learned Master determined that the appropriate daily rate was US\$300.00. The way in which the learned Master arrived at this daily compensatory rate is set out at paragraph 28 of the Judgment. Essentially, the learned Master, having considered that the "acceptable figure" in other parts of the Eastern Caribbean where the EC currency is legal tender, is EC\$500.00 (see **Everette Davis** and **Michael Stephens**), converted that figure into US dollars,

arriving at the sum of US\$185.00, which he commented was lower than the US\$250.00 “initially fixed in**Takitota** which was decided over a decade ago.”

He then applied an uplift to the latter sum and concluded:

“In the circumstances I am of the view that the sum of \$300.00US per day is reasonable compensation for the period of the claimant’s incarceration. In am not inclined to place different rates for the period in which the claimant was removed from the “A wing” of the prison. It would suffice to say that I have taken all of the (sic) factors into consideration in arriving at this figure.”

- [45] This approach by the learned Master in arriving at a daily rate for the calculation of compensatory damages to be paid to the appellant, has been stoutly criticised on appeal by the appellant. It was submitted that the learned Master failed to take into account a number of relevant factors concerning the particular circumstances of and surrounding the detention of the appellant including, most importantly, the attendant embarrassment and damage to his reputation, having never before been indicted and tried before a judge and jury. In my view, while the learned Master may not have specifically referred to all these factors, he made it clear that he had considered and taken into account all the relevant factors, which can only have been derived from the evidence of the appellant, in arriving at the figure of US\$300.00 as the appropriate daily rate. Most, if not all, of these factors had been painstakingly set out by the learned Master at paragraphs 2 to 8 of the Judgment. Furthermore, the learned Master was guided in arriving at that figure, by the daily rates applied in other decided cases in the Eastern Caribbean, after applying the applicable principles of assessment to the particular facts in each such case. It was accepted that there is a sparsity of authority available within the Eastern Caribbean on this aspect, and none from the BVI, except **Elihu Rhymer**, upon which to guide the courts when assessing the quantum of compensatory damages to be paid to a claimant who has proven his or her case of wrongful arrest and false imprisonment. Against this prevailing position, a court must do the best it can, applying the correct principles of assessment as set out in the authorities to the particular facts and circumstances of each case, as found by the court.

[46] In this regard, the guidance given by de la Bastide CJ (as he then was) in **McNicolls** and Lord Caswell at paragraph 17 of the decision of the Board in **Takitota**, is most helpful. What is clear is that while a court must consider similar cases and the daily rate or rates arrived at by the judge in the respective cases, as a guidance as to what is the appropriate daily figure, there is some latitude or scope, within the confines of the particular facts and the age of the respective awards, for arriving at a different rate to what may be considered to have been or is the prevailing rate or trend in the Eastern Caribbean. This is particularly so, as in the instant matter, where essentially there exists no US dollar precedent as the appropriate rate in such cases. Here the learned Master had to consider what would be appropriate on the particular facts and circumstances of this case, and the conditions and circumstances of this claimant's (the appellant's) incarceration. These factors include the range of factors mentioned by de la Bastide CJ in **McNicolls**, by Ramdhani J in **Everette Davis**, and by Lord Caswell in **Takitota**.

[47] In reviewing the learned Master's assessment and decision on this limb of damages, I am cognisant that a judge is not required in his decision to slavishly recite or regurgitate each and every fact or factor from the evidence which has been alluded to or relied upon by the parties in their submissions, nor is a judge required to state every principle of law upon which the parties have relied in their argument. It is also not the task of a judge to conduct a detailed analysis of all the evidence he has heard or which has presented at the trial or relied on in the submissions made by the parties. What is of the utmost importance is for the judge to render a decision which is clear and well-reasoned, and upon which the parties can be certain as to why they won or lost, and which will enable an appellate court to decide whether or not the decision is sustainable. In **Re F (Children)**,³⁴ Sir James Munby P formulated this important principle in this way:

"Like any judgment, the judgment of the Deputy Judge has to be read as a whole, and having regard to its context and structure, The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all evidence and submissions he had heard.

³⁴ [2016] EWCA Civ 546 at para 22.

Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. They judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Mostyn J in *SP v EB* [2014] EWHC 3964 (Fam), 1 FLR 228, para 29, there is no need for the judge to “incant mechanically” passages from the authorities, the evidence or the submissions, as if he were “a pilot going through the pre-flight checklist.”

[48] As mentioned above, learned counsel for the appellant submitted strenuously that this Court ought to disturb the award made by the learned Master as compensatory damages for wrongful detention and false imprisonment. In doing so, learned counsel contends for a daily rate of US\$750.00 for the 648 days that the appellant was in detention in the “A wing” of the prison, and US\$500.00 for the remainder of the period of his detention. In this regard, it must be noted that learned counsel for the respondent conceded, somewhat surprisingly, that a daily rate of US\$500.00 or even US\$750.00 was within the purview of the learned Master to award, but not in accord with the trend in similar cases within the Eastern Caribbean or the decision in **Takitota**. The learned Master having arrived at a daily rate of US\$300.00 applied it to the full period of the detention, other than the initial shock or initial detention period. In support of his submission, learned counsel for the appellant sought to distinguish the facts in the instant matter from those in some of the other cases cited, including **Takitota**. He argued that the facts in this case were more serious and impactful in terms of what the appellant had endured during his detention.

[49] In my view, the significant distinguishing features between the instant matter and the facts in **Takitota** is that the appellant was arrested at gun point, was charged with the serious offence of murder, and had to face and to endure being tried for that most serious offence, not once, but three times. Whereas in **Takitota** the claimant was never charged with any offence and therefore did not have his liberty put in jeopardy in that way, albeit he was never given due process during the very long period of his detention as he was never taken before a court of law.

[50] In every other basis of significance, the claimant in **Takitota** was subjected to greater inhumane and degrading treatment at the hands of the State. These conditions and treatment included him having to sleep on the dirty and filthy floor of a 18 foot by 8 foot cell, which he shared with between 20 to 35 persons at any given time, with no running water and with four buckets to be used by those detainees for the important bodily functions of urinating and defecating. He endured these conditions for some 8 years in a maximum-security facility with hardened criminals. He was “attacked and assaulted and taken advantage of by prisoners”, to the point where he was afraid to use the buckets provided for the detainees to relieve himself, and he would sometimes urinate and defecate himself.³⁵ On at least three occasions he attempted to commit suicide. By contrast, there is no evidence that the appellant was physically assaulted or abused, either by fellow inmates or by prison officers, or that he was subjected to that level of degrading and inhumane conditions and treatment, and not for anything approaching 8 years.

[51] At first blush, it would seem that the more potent ground advanced by the appellant under this head of damages is the learned Master declining to use a different or higher daily rate for the period of 648 days in which the appellant was incarcerated in the ‘A-wing’ of the prison. This was by far the greater of the total period of his incarceration and where he must have suffered most, having regard to the prevailing conditions in the “A wing”. Although there is no direct evidence of this, the “A wing” would seem, on the appellant’s evidence, to be the equivalent of a ‘maximum security’ section of the prison (at least in some respect), where the more dangerous prisoners are kept locked down for 23 hours a day. There the appellant was kept in a cell with others, under quite basic and degrading conditions, and for a long period of time, albeit not as long as was the claimant in **Takitota**. There he witnessed several acts of violence being committed by others, including the assault of a prison guard, and a separate incident involving the

³⁵ [2009] UKPC 11 at para 4.

stabbing of another inmate who fell right in front of the appellant's cell. These incidents must have traumatised the appellant, who must have feared for his own safety. These factors were catalogued and referred to by the learned Master at paragraph 4 of the Judgment and must have been considered by him when arriving at the appropriate daily rate.

[52] In this context, it must be remembered that the appellant was not a convicted prisoner, but a person on remand awaiting, initially, a preliminary inquiry, and later, a trial, and later, two retrials. These factors cannot be underestimated in terms of the anxiety and distress which the appellant must have had to endure, as he faced the possibility of being convicted of such a heinous crime and sentenced to a long term of imprisonment; and the attendant embarrassment and damage to his reputation which he must have suffered. This is especially so, and becomes even more magnified, in a small society such as the BVI, as learned counsel for the appellant has emphasised to this Court in his submissions.

[53] Specifically with regard to the element of injury to reputation, this Court was referred to an extract from **McGreggor on Damages** 8th ed at paragraph 37-013 where, under the section on 'False Imprisonment', the learned authors state:

"Damages may also be given for any injury to reputation, for, as Lawrence LJ said in *Walter v Alltools*, "a false imprisonment does not merely affect a man's liberty; it also affects his reputation". These damages may be, or include vindictory damages for, while defamation is the principal tort in which damages by way of vindication are included in the heads of damage under which awards are made, an element of vindication will sometimes make its appearance in damages for false imprisonment."

[54] These principles are also echoed at paragraph 5-011 of **McGreggor on Damages** (supra) where, dealing with the element of 'social discredit', the learned authors proffered: "However, recovery may also be made for injury to reputation in malicious prosecution, and it can also add to the damages given in false imprisonment."

- [55] The basic principle is not just that the injury to the claimant's reputation can, and in some circumstances, ought to be taken into account when coming to an award of damages for both false imprisonment and malicious prosecution, but that it is one of the elements of damages, which, if present, must be factored into the assessment in arriving at an appropriate award. In the instant matter, the learned Master did not award a sum for exemplary damages, although this was one of the categories of damages claimed by the appellant in his Claim in the court below. While an award of exemplary damages is permissible in a claim for wrongful detention and false imprisonment as the authorities confirm, the omission to consider an award on that basis has not been made a ground of appeal by the appellant.
- [56] At paragraph 28 of the Judgment, the learned Master declined to apply different rates for the period the appellant was incarcerated in the "A wing" of the prison. He stated thusly "I am not inclined to place different rates for the period in which the claimant was (sic) removed from the "A Wing" of the prison. It would suffice to say that I have taken all of the factors into consideration in arriving at this figure."
- [57] In my view, this approach is not an error of principle. There is no legal principle applicable to the assessment of damages for wrongful arrest and false imprisonment, which requires the court to arrive at different daily rates for certain periods of a claimant's detention at different facilities, or under significantly different prevailing physical conditions. Indeed, this had not been the approach adopted in other decided cases. In **Takitota** the claimant was for over the 2,981 days of his wrongful detention, held at three different types of facilities. For the bulk of that time he was held in a sealed room at a maximum security prison in Fox Hill, with hardened criminals, under appalling, deplorable and grossly inhumane conditions, before being moved to a minimum security unit and, ultimately, after some 6 years, to a detention centre. The Court of Appeal of the Bahamas, in their judgment, categorised the treatment of the claimant as not only

“less than inhumane” but as a “flagrant misuse/abuse of power.”³⁶ In that case, the Court of Appeal made one award of compensatory damages for the period of his incarceration in these different facilities, after arriving at a sum for the initial period of his detention.

[58] I might add that the evidence of the conditions under which **Takitota** was kept at the maximum security facility, which was accepted by the learned trial judge and not challenged on appeal, were considerably more harsh and inhumane than those to which the appellant in the instant matter was subjected during his detention in the “A wing”. I say this, not to in anyway diminish or lessen the conditions under which the appellant was kept in the “A wing” or his evidence as to the effect which this period of his detention had on him, as set out in the evidence in support of his application for assessment of damages.

[59] The guidance provided by the Privy Council in **Takitota** to the Bahamian Court of Appeal on remittance of this element of compensatory damages, is most apt when reviewing the correctness of the decision reached by the learned Master in the instant matter, who made one award using one daily rate covering the remaining 708 days of the appellant’s period of incarceration. After setting out the several factors which must be taken into account in arriving at the appropriate figure, Lord Carswell concluded:

“The final figure for compensatory damages should therefore amount to an **overall sum** representing appropriate compensation for the period of over eight years’ detention, taking account of the inhumane conditions and the misery and distress suffered by the appellant.” (emphasis added)

[60] In my view, the learned Master did not commit any error of principle in arriving at the daily rate of US\$300.00. While the learned Master did not refer specifically to each and every factor in arriving at the sum of US\$300.00 as the applicable daily rate, he was not bound to do so. This is especially so since the learned Master at paragraph 28 stated: “It would suffice to say that I have taken all of the factors into

³⁶ Supra note 32.

consideration in arriving at this figure.” Furthermore, the learned Master had expressly referred to and catalogued most, if not all, of the salient factors of the appellant’s arrest and detention in paragraphs 2 to 7 of the Judgment. These included the initial arrest and detention of the appellant, the conditions under which he was held in police custody during the first 24 hours or so of his detention. Also, being charged with the serious offence of murder and being taken before and remanded to the prison by a Magistrate; being taken out the front door of the court room in full view of the public and media there; the conditions under which he was held at the prison both in the “A wing” and later in the general population section of the prison; his attendant loss of liberty; the length of the period of his wrongful detention; the conditions at the prison under which he was kept in detention; the distress and embarrassment which he must have endured; his unsuccessful application for bail; and his trial and two retrials, and ultimate acquittal. Furthermore, it must be assumed from the Judgment that the learned Master had not only read, but took into account in arriving at the sum of US\$300.00 as the appropriate daily rate, the evidence of the appellant in his witness statement and orally in support of his application for assessment of damages.

- [61] Taking all the relevant factors into account, and mindful of the submissions by learned counsel for the parties on this aspect, I am of the view that the learned Master committed no error of principle in approaching the award under this head as a lump sum award, using one applicable daily rate reflective of the particular circumstances of the appellant’s entire period of detention, including, importantly, the period of his detention in the “A wing” of the prison, what degrading and inhumane conditions he was forced to endure, and the effect and likely effect of that entire experience on him. Accordingly, I respectfully do not accept the submission of learned counsel for the appellant that the learned Master erred in not assessing damages for this period of detention by first arriving at two different daily compensatory rates, one applicable to the period the appellant was incarcerated in the “A wing”, and a lower rate for the period he was held in the

general population section of the prison. Furthermore, in my view, a daily rate of US\$750.00 argued for by the appellant is not supported by the evidence in this case or by the rates used in other decided cases in the Eastern Caribbean. Likewise, it is not supported, on any view, by the rate applied by the Bahamian Court of Appeal in **Takitota**. I also consider, that a daily rate of US\$500.00 is not justified based upon the awards in comparable cases, and that such rate, while open to the learned Master as conceded by learned counsel for the respondent, is too high in all the circumstances of this case.

- [62] In my view, the learned Master was cognisant of all the relevant factors and took them into account in arriving at the daily rate of US\$300.00 to be used as the benchmark in calculating the compensatory damages to be awarded to the appellant under this head. In my considered judgment, the said daily rate is not so manifestly or inordinately low as to warrant this Court to set it aside. To the contrary, it is within the general ambit of reasonable disagreement. I say this even though, speaking for myself, I would probably have arrived at or applied the somewhat higher daily rate of US\$400.00. However, this opinion cannot provide a proper legal basis for this Court disturbing the daily rate of US\$300.00 arrived at by the learned Master, and the total award of US\$231,500.00 under this head. Accordingly, I will uphold and approve the daily rate of US\$300.00 applied by the learned Master and the resulting award of US\$231,500.00 as compensatory damages for unlawful detention and false imprisonment.

Ground 2 – Damages for Malicious Prosecution

- [63] In the Judgment, the learned Master, referred to the four criteria necessary for a claimant to establish a claim of malicious prosecution. These are: (i) the claimant was prosecuted by the defendant for a criminal offence; (ii) the outcome of the prosecution was in the claimant's favour; (iii) the prosecution was without reasonable and probable cause; and (iv) it was malicious (per Byron CJ in

Sylvanus Leslie v Ryan Oilivierre).³⁷ The learned Master observed that, on the facts, the appellant had clearly established the first two of these criteria. As to the third and fourth criteria, the learned Master noted that the appellant had the benefit of a judgment in default of defence. A judgment in default, while not strictly a judgment on the merits, is nevertheless a final judgment (unless it is set aside) on the causes of action upon which the claim is based. In his statement of claim, the appellant pleaded that his arrest and detention on a charge of murder was without probable cause and his subsequent prosecution was malicious.³⁸ Furthermore, in his witness statement in support of his application for assessment of damages, he repeats these contentions. No evidence in this matter was filed by or on behalf of the Crown and, accordingly, there was no alternative or different set of facts for the court to consider.

[64] The learned Master also considered and was guided by the statements at paragraphs 22 and 23 in the decision of Master Lanns in **Danny Ambo v Michael Laudat et al**³⁹ in reaching his decision on an award of damages for malicious prosecution. The learned Master's conclusion and award is at paragraph 34 of the Judgment:

“I note the in **Danny Ambo**, the claimant was awarded \$50,000.00EC in damages for malicious prosecution. This amounts to approximately \$18,500.00US. This was a case decided in 2011. In the circumstances, I am of the view that the sum of \$25,000.00 is reasonable as compensation for the claimant in his claim for malicious prosecution.”

I observe that the learned Master did not consider or rely in the Judgment on any other decided case concerning the appropriate quantum of damages to be awarded for malicious prosecution.

[65] The appellant has appealed against this award as being too low in all the circumstances. It is submitted that the learned Master failed to consider at all (or did not give sufficient weight or consideration to) the damage to the appellant's

³⁷ Civil Appeal No. 27 of 2001 (delivered 28th January 2003, unreported).

³⁸ Statement of Claim filed 2nd December 2016 at para. 28.

³⁹ DOMHCV2010/0030 (delivered 17th October 2011, unreported).

reputation in a small community like the BVI (population of about 30,000 persons), and the impact of him being charged and prosecuted for murder on his family life, especially his relationship with his children.⁴⁰ Mr. Smith, learned counsel for the appellant has, in both his written and oral submissions before this Court, criticised the singular reliance by the learned Master upon the award in **Danny Ambo** as the basis for arriving at the appropriate award under this head in the instant matter.

[66] In brief, learned counsel submits that the learned Master erred in doing so, and he failed to appreciate or to treat with the particular facts and circumstances in the instant matter, which were more serious and impactful on the appellant and on his life, when compared to those of the claimant in **Danny Ambo**. In the latter, the claimant was prosecuted for the offence of murder. However, the charge was withdrawn by prosecution after he had been incarcerated at the prison for 93 days and 5 hours. A further charge of conspiracy to commit murder was dismissed by the court some 5 days later after the prosecution offered no evidence. Following a claim for damages for false imprisonment and malicious prosecution, a default judgment was entered against the defendants and the damages were assessed by Master Lanns and judgment rendered on 17th October 2011. The learned master awarded this claimant the sums of \$EC\$100,000.00 for false imprisonment, EC\$50,000.00 for malicious prosecution, and EC\$10,000.00 exemplary damages. The total award of compensatory damages was EC\$160,000.00 and EC\$7,010.50 special damages.

[67] Learned counsel for the appellant asserts that the instant matter is distinguishable from the facts in **Danny Ambo** and require a much higher award of damages for malicious prosecution than the sum of US\$25,000.00 awarded by the learned Master in the instant matter. In this current matter, the appellant was prosecuted for the offence of murder, not once but three times, before being acquitted by the jury. The fact of the appellant facing three trials for murder was noted by the learned Master at paragraph 33 of the Judgment, but, to learned counsel's point,

⁴⁰ Ground No. 2 of Notice of Appeal filed on 28th October 2018.

this important distinguishing feature and material consideration in the assessment of damages for malicious prosecution, was not alluded to by the learned Master when arriving at the award of US\$25,000.00 under this head. In my considered opinion, there is some force in this submission.

[68] Learned counsel for the appellant concedes that the learned Master did, at paragraph 32 of the Judgment, refers to certain of the factors relevant to the appellant's case, including the humiliation, indignity and disgrace which he must have suffered. However, counsel focused his submissions on the factors not taken into account, which includes the impact on his relationship with his five (5) children and the indignity of having his children visit him in the prison. Learned counsel summarises his point on this aspect by submitting that, unlike **Danny Ambo**, it was not only the public impact, but the considerable personal impact on the appellant and his children which ought to have been considered and factored into the assessment of damages by the learned Master.

[69] Specifically with regard to injury to reputation and public indignity, the appellant relies on the matters set out at paragraph 32 of his witness statement where he attests that his reputation has been "permanently ruined" as persons will always "assume that I have guns or access to guns." Reference was also made during oral submissions to paragraph 66 of the appellant's witness statement. There the appellant attests to certain serious and inflammatory accusations made against him by the then Director of Public Prosecutions during his opening address to the jury at the first trial, including that the appellant was a member of a 'gang'. The appellant, further attests that these accusations were not made out by the prosecution during the trial, and have seriously damaged the appellant's reputation.

[70] It is the case for the appellant that the award under this head of damages for malicious prosecution is inordinately low and manifestly wrong, having regard to all the factors, including those not considered by the learned Master. Accordingly, this

Court ought to set aside the award and substitute an award of damages in the amount of at least US\$75,000.00.

[71] On the other hand, learned counsel for the respondent contends that this ground of appeal has no merit. She submits that the learned Master clearly considered and was guided by the relevant law and principles, including the decision and award in **Danny Ambo**. He considered all the relevant circumstances concerning the charging, indictment and prosecution of the appellant, including him being prosecuted thrice on the same charge of murder, in reaching his award of US\$25,000.00.

[72] As to whether the learned Master failed to take into account the likely damage to the appellant's reputation when arriving at his award of damages for malicious prosecution, learned counsel for the respondent conceded that the learned Master did not specifically do so, albeit he did refer to the relevant principles of law at paragraph 3], which includes the element of compensation for damage or injury to reputation; and at paragraph 32 where mention was made by the learned Master of the appellant suffering indignity and disgrace. This notwithstanding, it is the submission of learned counsel that the award of US\$25,000.00 damages under this head was not so inordinately low as to warrant being disturbed by this Court.

Conclusion on Ground 2

[73] It is clear from the Judgment that the learned Master did not properly take into account the element of damage to the appellant's reputation, which it is accepted he must have suffered as a result of being charged with the most heinous offence of murder, and having been prosecuted on indictment for this offence three times, only to be acquitted. In my view, the learned Master clearly erred in not attaching any or enough importance to the loss of reputation suffered by the Appellant. In doing so, he committed an error of law. Furthermore, the learned Master did give the full weight and significance when arriving at the quantum of damages to be paid under this head, to the fact that the appellant was actually tried for the

offence of murder, and not once but three times, as compared with **Danny Ambo** where the claimant did not have to endure the stress and spectacle of a trial, either for the offence of murder or conspiracy to commit murder, and where his period of incarceration was approximately 3 months.

[74] However, in carrying out its review powers, this Court must nevertheless ask itself whether the award of US\$25,000.00 is so significantly low, taking into account and giving the appropriate weight to all the relevant factors, including loss or damage to the appellant's reputation. Put differently, is the sum awarded so inordinately low that it ought to be set aside and a much higher award imposed. The learned Master arrived at the sum of US\$25,000.00 based, in part, on the award of EC\$50,000.00 in **Danny Ambo**. He converted that sum into US dollars arriving at a figure of \$18,500. Recognising that the award in **Danny Ambo** was in 2011, some 7 years earlier, the learned Master decided to give an uplift and to award the sum of US\$25,000.00.

[75] In my opinion, this approach was, in part, flawed. While it was proper for the learned Master, as part of the assessment exercise, to look at comparative awards and even, as part of his comparative exercise, to convert the award in **Danny Ambo** into in US currency, so as to ascertain what the equivalent sum is in US dollars, that equivalent sum ought not to be used as a base sum in US dollars from which to arrive at the final award. It was necessary for the learned Master to fully and properly consider and weigh all the relevant factors in this case, some of which he had alluded to at paragraph 32 and 33 of the Judgment. However, he failed to specifically refer to and include in his assessment the element of damage to the appellant's reputation. The age of the award in **Danny Ambo** was also a material and proper consideration for the learned Master, as it would be for awards in comparable cases when assessing the quantum of damages. I would add that implicit in that approach would be the element of inflation which was stressed by learned counsel for the appellant in his submissions. The learned Master was therefore quite correct to consider and to give some uplift for the age of the award

in **Danny Ambo**, in order to arrive at what was the appropriate award in US dollars in the instant matter, having taken all relevant factors and circumstances into account, including the fact that the appellant had be prosecuted three times on indictment for the charge of murder and faced, at each such trial, the possibility of losing his freedom and liberty for a very long time.

[76] In my view, the award of US\$25,000 damages for malicious prosecution is woefully low and ought to be set aside. Taking all the relevant factors into account as mentioned above, and mindful of the award (albeit in EC currency) in **Danny Ambo**, and not having the benefit of awards in similar cases in US currency either in the BVI or elsewhere in the Eastern Caribbean, in my judgment the appropriate award ought to be the sum of US\$50,000.00. Accordingly, I would set aside the award of US\$25,000 made by the learned Master as damages for malicious prosecution and substitute an award of US\$50,000.00. In doing so, I attach much importance to the fact that the appellant was indicted and prosecuted thrice for the most serious offence of murder, the humiliation, indignity, disgrace and anxiety which he must have endured as he faced the possibility of being convicted for such a heinous offence and losing his freedom and liberty for a very long period of years, and the resulting damage to his reputation in what was clearly three high profile trials, being subjected during his first trial to inflammatory accusations about himself and his reputation by the then Director of Public Prosecutions, accusations which were apparently not made out on the evidence adduced at the trials, to the extent that they were of any relevance to the charge he was facing.⁴¹

Ground 3 – Pre-Judgment Interest

[77] The learned Master awarded interest on the sums awarded as damages at the statutory rate of 5% from the date of judgment, that is, from 4th October 2018. During the assessment of damages, the appellant, in submissions, argued for an award of pre-judgment interest. In those proceedings, counsel for the respondent's countered that the appellant's claim did not include a claim for pre-judgment

⁴¹ Witness Statement of Wakeem Guishard filed on 31st May 2018 at para. 66.

interest, and in any event there was no basis upon which pre-judgment interest could be awarded in this case.⁴² In deciding not to award pre-judgment interest, the learned Master at paragraph 36 reasoned:

“The court would normally allow for pre-judgment interest on special damages, as these are expenses which the claimant may have had to undertake from the date of the incident. Although pre-judgment interest was granted in the cases referred to by the claimant, no explanation was given by either master as to the basis for adopting that approach. However, I note that in **Shawn Chinnery DBA Car Rentals** the award of interest covered general as well as special damages. In the present case I have made no award for special damages. I will therefore award interest at the statutory rate of 5% from the date of judgment.”

[78] The decided cases relied on by learned counsel for the appellant before the learned Master in support of his submission that the court has the jurisdiction to order pre-judgment interest are: **Steadroy Matthews v Garna O’Neal**;⁴³ **Clifton Belfon v The Attorney General**;⁴⁴ and **Shawn Chinnery DBA Car Rentals and Charters v Department of Customs et al.**⁴⁵

[79] Before this Court, learned counsel for the appellant conceded that pre-judgment interest was not specifically pleaded or claimed by the appellant in his claim below, but was sought in written submissions to the learned Master. Nevertheless, learned counsel pointed to the claim for interest in the claim form and statement of claim, and in the appellant’s application for assessment of damages in submitting that the claim for interest, including pre-judgment interest, was properly before the learned Master who had the power to award pre-judgment interest, having made an award of damages in favour of the appellant.

[80] On this ground of appeal, learned counsel for the respondent, Ms. Barry conceded that the court has the jurisdiction to make an order for the payment of pre-judgment interest. She submitted, however, that this was not pleaded by the

⁴² Paragraph [35] of the Judgment.

⁴³ (BVIHCVAP2015/0019) (delivered 16th January 2018, unreported).

⁴⁴ (GDAHCV2007/0439) (delivered 4th February 2014, unreported).

⁴⁵ (BVIHCV2013/0195 (delivered 16th November 2015, unreported).

appellant either in the claim form or in the statement of claim, as required by rule 8.6(4) of the **Civil Procedure Rules 2000** ("CPR") which provides:

"A claimant who is seeking interest must-

- (a) Say so expressly in the claim form; and
- (b) Include, in the claim form or statement of claim, details of the
 - (i) basis of entitlement;
 - (ii) rate; and
 - (iii) period for which it is claimed."

[81] The provisions of CPR 8.6(4) are in mandatory terms. A claimant who intends to ask the court for an award of interest on their claim must expressly so state in the claim form, and must provide certain particulars of his claim for payment of interest, including the legal basis of the entitlement to interest, the rate being sought, and the period to which such interest and rate is to be applicable. In the claim form and statement of claim, the appellant claimed "[s]tatutory interest at the rate of 5% per annum, pursuant to section 7 of the Judgments Act and/or at such rate and for such period as the Court considers just". The appellant's application for assessment of damages⁴⁶ contains a claim for interest in identical terms. While the appellant did not specifically state that he was claiming pre-judgment interest, he did claim interest for "such period as the court considers just." In my view, this claim for interest, albeit scant, satisfies the basic requirements of CPR 8.6(4). By his interest claim, the appellant sought an award of interest for any period which the court thinks just, at a rate of 5% pursuant to section 7 of the Judgments Act, which is normally applicable to post judgment interest, or at such other rate as the court considers just. In my judgment this pleading would, on a somewhat generous reading, include or encapsulate a claim for pre-judgment interest. Accordingly, it was open to the learned Master to consider and to award, if appropriate, pre-judgment interest.

[82] In the Judgment, the learned Master did not refuse to order pre-judgment interest on the basis that it had not been properly pleaded. The learned Master's ruling on this issue is at paragraph 36 of the Judgment, which is set out in full above. The

⁴⁶ Tab 23 of the Record of Appeal.

genesis of this ruling is that pre-judgment interest is normally granted on special damages, that is, the kind of out of pocket expenses already incurred by a claimant as a result of the civil wrong committed by the defendant. Further, the learned Master, having accepted that pre-judgment interest had been awarded in the cases cited by learned counsel for the appellant, including **Shawn Chinnery** where pre-judgment interest was awarded on both general and special damages, declined to make such an award in the instant matter, having made no award for special damages.

- [83] Firstly, it is well established that a court in BVI has jurisdiction to order pre-judgment interest on general damages - **Steadroy Matthews v Garna O'Neal**. This jurisdiction confers a discretion on the court as to whether to award pre-judgment interest and, if so, at what rate. In **Steadroy Matthews**, Michel JA extensively reviewed the applicable law and the various authorities emanating from the BVI and the courts of the United Kingdom. These include **Martin Alphonso et al v Deodat Ramnath**⁴⁷ and **Creque v Penn**⁴⁸ from the BVI; and **Jefford v Gee**⁴⁹ a decision of the English Court of Appeal. In **Steadroy Matthews v Garna O'Neal** Justice of Appeal Michel concluded in these terms:

“[70] In the circumstances, I am of the view that the master did not err in awarding pre-judgment interest on the general damages for pain, suffering and loss of amenities and that her jurisdiction to do so was founded on the doctrine of stare decisis which mandated her to follow the precedent set by this Court in *Alphonso v Ramnath*. I am also of the view that *Alphonso v Ramnath* is now settled law in the Territory of the Virgin Islands on the issue of pre-judgment interest on damages, and that its authority is buttressed by the judgment of this Court in *Adamovsky v Malitskiy* and the judgment of the privy Council in *Creque v Penn*.”

- [84] In my opinion, pre-judgment interest is to be awarded on loss or damages already incurred at the time of filing the claim. This includes both general and special damages. In the instant matter, the damages awarded for wrongful detention, false imprisonment and malicious prosecution relate to the period of the wrongful

⁴⁷ Civil Appeal 1 of 1996 (delivered 21st July 1997).

⁴⁸ [2007] UKPC 44.

⁴⁹ [1970] EWCA Civ 8.

detention of the appellant, that is, before filing his claim, and not to any future loss or damage to be incurred and in respect of which he is to receive an advanced award. This characterisation of such damages, is well supported by dicta of Lord Carswell in **Takitota** where at paragraph 9 the learned Law Lord states:

“Secondly, where a figure is to be awarded to represent a period of future financial loss or loss of amenities, it is correct to reflect in the calculation that the Claimant will receive an immediate capital sum, being the present value of the future annual losses, which is materially less than their total. The same does not apply, however, when the award represents past loss or damage. In that case full restitution for the loss sustained by the Claimant should ordinarily be awarded and there is no basis for reducing it on the ground that the Claimant will receive a capital sum.”

[85] While Lord Carswell was there dealing with the arbitrary reduction imposed by the Bahamian Court of Appeal when they reduced the amount of compensatory damages from BS\$730,500.00 to BS\$400,000.00 (a reduction of BS\$330,500.00) “in light of the fact that the Appellant will be receiving a lump sum”, the simple point is that an award of compensatory damages for wrongful detention is in respect of past loss or damage and not future loss. In **Shawn Chinnery**, a matter which concerned, *inter alia*, a claim for damages for false imprisonment, the learned master awarded pre-judgment interest at the rate of 3 % per annum on the entire award (which included the sum of US\$10,000.00 damages for false imprisonment) adopting the approach in **Clifton Belfon v CPL #48 Alex Fletcher et al** which concerned a claim for damages for assault.

[86] In my judgment it was within the discretion of the learned Master to make an award of pre-judgment interest having assessed the damages to be awarded for his past loss and damage for wrongful detention, false imprisonment and malicious prosecution. The appellant was incarcerated for almost 2 years from 28th May 2014. He was released from prison upon his acquittal for the offence of murder on 4th May 2016. He commenced these proceedings on 2nd December 2016. The assessment of damages took place approximately 1.5 years later, on 18th July 2018, and Judgment on the assessment of the compensation to be paid to him by the Crown was delivered on 4th October 2018. The learned Master erred in not

considering an award of pre-judgment interest. Accordingly, I would award pre-judgment interest of 3 % per annum on the total award of damages (as confirmed by this Court) from 4th May 2016 until 4th October 2018. In doing so, full account must be taken of the payment of the sum of US\$295,838.64 by the Crown to the appellant on 18th December 2018.

Ground 4 – Prescribed Costs and Cost award on application for assessment of damages

- [87] This ground can be disposed of quite simply. It is agreed by counsel for both parties, that the learned Master made an error when he awarded prescribed costs at the rate of 45%, when the correct applicable rate up to entry of a default judgment and assessment of damages as set out in Appendix C to CPR, is 60% of the total amount of prescribed costs on the sum awarded. Accordingly, I would also set aside that part of the learned Master's order setting a rate of 45% , and substitute an order for prescribed costs in favour of the appellant at the rate of 60% of prescribed costs on the total award of damages, as confirmed and awarded by this Court in this judgment.
- [88] Counsel for the respondent also argued that the separate sum of US\$1,500.00 ordered by the learned Master as costs made in favour of the appellant on his application for assessment of damage, ought to be subsumed into the award of prescribed costs at the 60% rate, and not be the subject of a separate award of costs. Counsel for the appellant disagreed, and submitted that CPR 16.2(2) makes provision for a separate cost order upon an application for assessment. I agree with this submission by learned counsel for the appellant. Accordingly, I would not disturb the order made by the learned Master for payment of US\$1,500.00 costs of the application for assessment. Moreover, the respondent did not file a counter notice of appeal in this matter and, accordingly there is no basis upon which this Court could disturb the order of US\$1,500.00 costs to the appellant on his assessment of damages application

Disposition

[89] For the reasons set out in detail above, I would accordingly allow the appeal, in part, and set aside certain orders of the learned Master as set out below, and order that both parties bear their costs of the appeal each having been successful in part, and order as follows:

- (1) the appeal against the award of US\$231,500.00 damages for wrongful arrest and false imprisonment is dismissed and the order of the learned Master for payment of the said sum by the Crown to the appellant is affirmed;
- (2) the appeal against the award of US\$25,000.00 damages for malicious prosecution is allowed, the said award is set-aside, and the sum of US\$50,000.00 awarded to the appellant as damages for malicious prosecution;
- (3) the appeal against the learned Master's refusal to order the payment of pre-judgment interest on the award is allowed and interest is awarded to the appellant on the award of damages (as confirmed and awarded by this Court) at the rate of 3 percent per annum from 4th May 2016 to 4th October 2018;
- (4) the appeal against the rate of 45 percent for the calculation of the prescribed costs ordered by the learned Master to be paid to the appellant is allowed and the rate of 60 percent of the total amount of prescribed costs substituted; and
- (5) the appeal against the learned Master's order of US\$1,500.00 costs to the appellant on his application for assessment of damages is dismissed and the order of the learned Master affirmed.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar