

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO.: SLUHCV2016/0408

BETWEEN:

NINA DUNCAN

Claimant

and

ATTORNEY GENERAL

Defendant

APPEARANCES:

Mr. Leon Gokool for the Claimant

Ms. Kozel Creese for the Defendant

2018: January 22;
January 31.

JUDGMENT

- [1] **SMITH J.** Nina Duncan says that her constitutional right to be afforded reasonable facilities for private communication with her attorney was breached by police officers who allowed her only a “supervised visit” with her attorney at the Central Police Station after she had been arrested on 7th January 2016. She seeks redress, under the **Constitution of Saint Lucia**, by way of declarations and damages. The police say that the manner of their supervision of Ms. Duncan’s consultation with her attorney did not breach her right to private communication and that, in any event, section 589 of the **Criminal Code** of Saint Lucia permitted surveillance of attorney – client communications, where necessary.

- [2] The issues that arise are therefore: (a) whether the circumstances under which Ms. Duncan was allowed to communicate with her attorney infringed her right under section 3(2) of the **Constitution of Saint Lucia** (“the Constitution”) to reasonable facilities for private communication with her attorney; (b) whether section 589 of the **Criminal Code** (“the Code”) is inconsistent with section 3(2) of the Constitution; and (c) whether Ms. Duncan is entitled to any damages.

The right to private communication

- [3] For ease of analysis, it might be useful to keep the scope of the right to private communication with counsel in mind as the facts of the case are examined. Section 3 of the Constitution provides:

3. Protection of right to personal liberty

- (1) A person shall not be deprived of his or her personal liberty save as may be authorized by law in any of the following cases, that is to say—
 - (a) in consequence of his or her unfitness to plead to a criminal charge or in execution of the sentence or order of a court, whether established for Saint Lucia or some other country, in respect of a criminal offence of which he or she has been convicted;
 - (b) in execution of the order of the High Court or the Court of Appeal punishing him or her for contempt of the High Court or the Court of Appeal or of another court or tribunal;
 - (c) execution of the order of a court made to secure the fulfilment of any obligation imposed on him or her by law;
 - (d) for the purpose of bringing him or her before a court in execution of the order of a court;
 - (e) upon a reasonable suspicion of his or her having committed, or being about to commit, a criminal offence under any law;
 - (f) under the order of a court or with the consent of his or her parent or guardian, for his or her education or welfare during any period ending not later than the date when he or she attains the age of 18 years;
 - (g) for the purpose of preventing the spread of an infectious or contagious disease;
 - (h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his or her care

or treatment or the protection of the community;

- i) for the purpose of preventing his or her unlawful entry into Saint Lucia, or for the purpose of effecting his or her expulsion, extradition or other lawful removal from Saint Lucia or for the purpose of restraining him or her while he or she is being conveyed through Saint Lucia in the course of his or her extradition or removal as a convicted prisoner from one country to another; or
- ii) to such extent as may be necessary in the execution of a lawful order requiring him or her to remain within a specified area within Saint Lucia, or prohibiting him or her from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against him or her with a view to the making of any such order or relating to such an order after it has been made, or to such extent as may be reasonably justifiable for restraining him or her during any visit that he or she is permitted to make to any part of Saint Lucia in which, in consequence of any such order, his or her presence would otherwise be unlawful.

- (2) Any person who is arrested or detained shall with reasonable promptitude and in any case no later than 24 hours after such arrest or detention be informed in a language that he or she understands of the reasons for his or her arrest or detention **and be afforded reasonable facilities for private communication and consultation with a legal practitioner of his or her own choice** and, in the case of a minor, with his or her parents or guardian.
(Emphasis provided)

The Conflicting Narratives

- [4] The following facts are not in dispute between the parties. On 7th January 2016, upon her arrival from the United States at the Hewanorra Airport in Saint Lucia, Ms. Duncan was met at the airport by PC Alexander and informed that he had a warrant for her arrest for the offence of stealing by reason of employment. She was first taken to the Major Crimes Unit, arrested, cautioned and informed of her rights in custody. She was not allowed to call her husband because the police said that he was a suspect in the matter of aiding and abetting her. Neither was

she allowed to call anyone else. She was then taken to Central Police Station. When her attorney, Ramon Raveneau, appeared at the police station he was informed by a police constable that Ms. Duncan was not being allowed any visitors, not even her attorney. When Mr. Raveneau insisted, the constable called his superior, Corporal Marcel, who similarly stated that Ms. Duncan was not allowed to see anyone. Assistant Superintendent Collymore was telephoned and he too held the line. Apparently, it was only after Mr. Raveneau began demanding names and regimental force numbers, with all the authority he could summon and command, from the officers present that a final call was made and he was allowed what the police termed as a “supervised visit” with Ms. Duncan.

[5] What is vigorously disputed is how the supervised visit occurred. Ms. Duncan’s complaint is that two police officers stood inside the interview room and one stood in the archway of the open door to the interview room, and all three were observing her consultation with her attorney. The police say that only one police officer stood in the hallway outside the open door to the interview room and no police officer heard any of the conversation between Ms. Duncan and her attorney. Given the conflicting narratives, it is necessary for the Court to first decide which version it believes before going on to determine whether a constitutional right has been breached.

[6] The claimant’s case comprised the affidavit evidence of Ms. Duncan and Mr. Raveneau who were both cross-examined. In an affidavit deposed to with unsparing detail, Mr. Raveneau recounted his struggle to even get to the point of a supervised visit and, during the supervised visit, this is what he said happened: (1) he sat with his back to the wall of the interview room while Ms. Duncan sat across the table facing him with her back to the open door; (2) standing by the door in the interview room were police officers Marcel, Pierre-Louis and Augustin; (3) the officers were joking among themselves but were within earshot of himself and his client since they were only about four to six feet away; (4) Sergeant Augustin stood in the archway of the door looking into the interview room while Corporal

Marcel leaned sideways up against the inner wall intermittently looking in their direction; (5) PC Pierre-Louis stood with her back to them but would also occasionally look in their direction; (6) under these conditions he said he was unable to take instructions from his client.

[7] The defendant's case comprised the affidavit evidence of six witnesses, namely, police officers Alexander, Jules, Collymore, Marcel, Pierre-Louis and Cherubin, each of whose affidavit was tendered into evidence and each of whom was cross-examined. PC Alexander's testimony centered on what transpired at the airport when he detained Ms. Duncan and later when he formally charged her and sealed exhibits. While he was cross-examined at some length as to whether he had in fact shown the arrest warrant to Ms. Duncan at the airport, his testimony does not assist with the fundamental question this court has to resolve. Similarly, PC Jules' testimony centered on what happened at the Major Crimes Unit and not at the Central Police Station where the alleged breach of constitutional rights occurred. Assistant Superintendent Collymore stated in his affidavit that he did not recall speaking to Mr. Raveneau about Ms. Duncan but, at the hearing, clarified this to say that he in fact did speak to him.

[8] The material aspects of Corporal Marcel's evidence was that: (1) she informed Mr. Raveneau of the conditions under which he would be allowed to see his client and he did not object; (2) Mr. Raveneau informed his client who Corporal Marcel was and that she would be witnessing the proceedings; (3) the door of the interview room was left open and she stood near the door within sight but not within hearing of what was taking place; (4) her presence there was to ensure security was provided to both Mr. Raveneau and Ms. Duncan; (5) at no time did she or any other officer enter the interview room.

[9] PC Trecy Pierre Louis's evidence was that she was at her desk for the duration of the supervised visit, which was about fourteen feet away from the interview room, and she noticed that Corporal Marcel stood outside of the interview room.

- [10] The material part of PC Cherubin's affidavit evidence mirrored that of PC Pierre-Louis' evidence. He also stated that he had made an entry in the station diary of Mr. Raveneau's visit to Ms. Duncan and Corporal Marcel's "witnessing the proceedings".

Conflicting Narratives Resolved

- [11] I have no hesitation in preferring the evidence of Mr. Raveneau over that of Corporal Marcel and PC Pierre-Louis for the following reasons. First, I find it difficult to believe that Mr. Raveneau, an attorney of 14 years standing, who from the outset aggressively insisted on his client's right to counsel (notwithstanding refusal from three different police officers of varying rank) and who began asking for names and regimental numbers of the officers until they finally capitulated and allowed him access to his client, would then meekly agree not only to his consultation with his client being supervised but also introduce Corporal Marcel to his client and explain that the officer would be supervising the interview. Mr. Raveneau was wholly credible in his insistence that did not agree to any supervised visit, protested it, was livid as he sat through it and requested of PC Pierre-Louis that she make a note of his being upset about the supervised visit in the station diary. No such notation appeared in the station diary.
- [12] Secondly, the particularity with which Mr. Raveneau described his own actions, that of the police officers, how they stood and acted and what he observed whilst they were in the interview room – which was in no way weakened under cross-examination – lends credibility to his version of events. Thirdly, from the time of Ms. Duncan's arrest the police took the position that she was not to be allowed any visitors at all. After Mr. Raveneau's insistence upon seeing her, they relented and allowed a supervised visit. It would seem to follow from this position that they in fact attempted to supervise the attorney-client consultation by being present. P.C. Cherubin noted in the station diary that Corporal Marcel had witnessed the proceedings.

[13] Fourth, the vacillating positions taken by the police tend to erode the overall coherence and credibility of their narrative. On the one hand, they described what transpired as a supervised visit and contended that it was permissible under the Code. They then offered an alternate position, namely, that they were not in fact in the interview room and could not hear anything being said. Then they pivot from this position to say that the door of the interview room was kept open in order to provide security for both counsel and his client because, if anything happened to them, it would be the responsibility of the police. Plainly, any security needed to have been provided to the attorney or his client within the police precinct could have been provided without the police being within earshot of them. Overall, as a witness, Mr. Raveneau appeared to be honest, direct and fulsome in his answers compared to Corporal Marcel and PC Pierre-Louis who appeared halting and guarded in their responses to questions.

[14] Considering the totality of the evidence in the round, I am satisfied, on a balance of probabilities that officers Marcel, Pierre-Louis and Augustin were standing inside of the interview room within four to six feet of Mr. Raveneau and Ms. Duncan during their consultation. Ms. Creese contends, however, that even if one of the police officers was inside the room, the officers' position is that they did not hear any of the conversation between the attorney and his client and the onus would be on Ms. Duncan to satisfy the Court that in fact the officers heard what was being discussed in order to establish a breach of her right. Clearly, absent an admission from the officers, it would be impossible for the claimant to adduce evidence as to what the officers in fact heard. Were the Court to adopt such a pusillanimous approach to human rights adjudication, it would reduce judges to mice squeaking under the judicial bench rather than lions guarding the constitution.

The approach to human rights adjudication

[15] I think this is precisely the kind of austere, “tabulated legalism” that Lord Wilberforce in **Minister of Home Affairs v Fisher**¹ said should be avoided when interpreting human rights provisions in a constitution. In **Ong Ah Chuan v Public Prosecutor**², the Privy Council said, at pp. 669-670:

their Lordships would repeat what this Board has said on many occasions and most recently through Lord Wilberforce in *Minister of Home Affairs v Fisher* [1980] AC 319, 329: that the way to interpret a Constitution on the Westminster model is to treat it not as if it were an Act of Parliament, but “as sui generis, calling for principles of interpretation of its own, suitable to its character... without necessary acceptance of all the presumptions that are relevant to private law.

[16] In **Huntley v Attorney-General for Jamaica**³, the Privy Council said, at p. 5:

Section 20 of the Constitution [of Jamaica] is in Chapter III which deals with fundamental rights and freedoms. As was explained by Lord Wilberforce in *Minister of Home Affairs v Fisher* [1980] AC 319, 328 it calls “for a generous interpretation avoiding what has been called ‘the austerity of tabulated legalism’, suitable to give to individuals the full measure of the fundamental rights referred to’. A person in the position of the appellant is therefore entitled to require the courts to adopt a non-rigid and generous approach to his rights which section 20 is designed to protect.

[17] The Court concludes that the presence of an officer/s in the interview room or deliberately keeping the door of the interview room open and standing at the doorway in execution of what they characterized as a “supervised visit” did not afford Ms. Duncan reasonable facilities for private communication with her attorney. That, however, does not dispose of the matter. The defendant contends that, in any event, section 589 of the Code allows for surveillance of private communications between attorney and client where necessary.

Section 589 of the Criminal Code

[18] Section 589 of the **Criminal Code** provides as follows:

Interview with Legal Practitioner

589. Intimation to and interview with legal practitioner

¹ (1979) 3 All ER 21.

² [1981] AC 648

³ [1995] 2 AC 1

A person who is arrested, shall, immediately upon arrest be entitled, if he or she desires, to have intimation sent to any legal practitioner, and to have a private interview, subject to any necessary surveillance, with the legal practitioner prior to being brought before the Court.

[19] Mr. Gokool argued that the Constitution is the supreme law of the land and if a statutory provision, not saved under the general savings clause of the constitution, is inconsistent with the constitution then that provision must be struck down to the extent of the inconsistency. Ms. Creese readily conceded that section 3(2) of the Constitution did not contain any of the usual limitations – found in many of the detailed fundamental rights and freedoms provisions – designed to ensure that an individual's enjoyment of his right does not prejudice the rights of others or the public interest.

[20] Undeterred, she contended that section 589 was required to balance the right of the individual to private communication against that of the general public's right to proper administration of justice which allows the police officers to conduct their investigation without hindrance. This limitation, she submitted, was authorized under section 1 of the Constitution and the hindrance to the police's investigation could occur if Ms. Duncan passed sensitive information (such as where the money she was arrested for stealing was hidden) to any visitor she was allowed. The Court must therefore determine whether, absent any limitation on the right to private communication in section 3 (2) of the Constitution, section 1 of the Constitution is sufficient to authorize the enactment of a law that limits that right. We will return to the question of whether section 589 of the Code in fact conflicts with section 3(2) of the Constitution.

The effect of section 1 of the Constitution

[21] Section 1 of the constitution provides that:

1. Fundamental rights and freedoms

Whereas every person in Saint Lucia is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his or her race, place of origin, political opinions,

colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—

- (a) life, liberty, security of the person, equality before the law and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association; and
- (c) protection for his or her family life, his or her personal privacy, the privacy of his or her home and other property and from deprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.

[22] Section 1 is in the nature of a preamble. It introduces, in general terms, the compendium of rights and freedoms to be enjoyed by an individual as well as establishes the principle that such rights are not absolute but may be limited by the rights and freedoms of others or the public interest. Section 1 does not appear to confer any specific enforceable right in and of itself. Neither does it allow for any limitation on any specific right. On the contrary, it specifically mandates that limitations on rights are those that are contained in those provisions, meaning the specific detailed provisions that follow on from section 1. And indeed when the succeeding provisions are examined it is readily apparent that they confer rights and then carefully stipulate how and in what manner those rights may be derogated from.

[23] Ms. Creese referred the Court to the Canadian case of **Regina v Hummel**⁴ in which the Ontario High Court found that section 241 (c) of their Criminal Code (setting up a mandatory presumption legally requiring the accused to raise a reasonable doubt as to the presumed fact of his blood-alcohol level at the time of the offence, failing which the trier of fact must infer that fact) constituted a

⁴ 60 O.R. (2d) 545; [1987] O.J. 763.

reasonable limitation within the meaning of section 1 of the **Canadian Charter of Rights and Freedoms**. Section 1 of the **Canadian Charter** provided that;

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[24] On comparing the wording of section 1 of the Constitution with section 1 of the **Canadian Charter**, it will be observed that there is an important distinction that makes all the difference. The curtailment imposed on rights and freedoms under section 1 of the **Canadian Charter** are those “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. Under that construct, a limitation would have to be (a) reasonable, (b) prescribed by law and (c) demonstrably justified in a free and democratic society to the satisfaction of the Canadian Courts. Under Saint Lucia’s constitutional scheme, the rights conferred are subject to such limitations “as are contained in those provisions”. One has to then examine the derogation clauses in each of the specific rights and freedoms granted in sections 2 through to section 15 in Chapter 1 of the Constitution to see how and in what manner and to what extent they may be limited. Put another way, section 1 of the **Canadian Charter** is self-contained in that it authorizes and defines how limitations are to be enacted. Section 1 of the Constitution directs that the limitations on rights are only those that are authorized and defined under each specific fundamental right and freedom provision from sections 2 through 15 of the constitution.

[25] The Caribbean Court of Justice in **Attorney General v Boyce and Joseph**⁵, expressed its view on the enforceability of section 11 of the **Barbados Constitution** (the equivalent of Saint Lucia’s section 1). The extract below, which is highly persuasive in this jurisdiction, is from the joint opinion of President De la Bastide and Justice Saunders:

⁵ [2006] CCJ 1.

"11. Whereas every person in Barbados is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –

- (a) life, liberty and security of the person;
- (b) protection for the privacy of his home and other property and from deprivation of property without compensation;
- (c) the protection of the law; and
- (d) (d)freedom of conscience, of expression and of assembly and association,

the following provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest" (our emphasis).

[59] Sections 12 to 23 of the Constitution (which we will refer to as 'the detailed sections') contain specific provisions for the enforcement of rights which either correspond exactly with those enumerated in section 11 or may be regarded as corollaries or components of them. By way of illustration, section 12 is expressly concerned with the right to life and section 16, with the right not to be deprived of property without compensation, both of which are referred to in section 11. On the other hand, the protection afforded by section 14 against slavery or forced labour, and by section 15 against torture or inhuman and degrading punishment or treatment, is not linked as a matter of language to any of the rights enumerated in section 11. But those rights are in substance connected with the liberty and security of the person, which are included in the rights listed in section 11 (a). In the case of the right to the protection of the law, the only express link between that right and any of the detailed sections is provided by the marginal note to section 18 which reads: 'Provisions to secure protection of law'. It is important to note that the pattern followed in these detailed sections is that each section normally begins with a prohibition against conduct which would violate the right or freedom that is being protected, followed by a fairly detailed exposition of the exceptions which the law may create to that prohibition. In other words, there is a broad statement of the right or freedom followed by a number of limitations on the protection afforded that right or freedom. Those exceptions or limitations serve to put into more specific and concrete terms the qualifications contained in section 11 to the effect that persons in Barbados are entitled to the fundamental rights and freedoms enumerated "subject to respect for the rights and freedoms

of others and for the public interest". It is not unexpected, therefore, that the redress which section 24 of the Constitution provides for violation of these fundamental rights and freedoms, should be structured so as to take account of the exceptions and limitations contained in the detailed sections. Thus, the jurisdiction conferred by section 24 on the High Court to adjudicate allegations that any particular right has been, is being or is likely to be contravened and to fashion appropriate remedies for any contravention or likely contravention that it finds, is limited to cases which involve a contravention of one or other of the detailed sections.

- [26] This Court will venture to say that it would seem to follow that if only the detailed provisions of the fundamental rights and freedoms provisions in Westminster model Caribbean constitutions are enforceable, then the only permissible derogations are those authorized and set out as limitations in the specific detailed provisions of those rights and freedoms. Having concluded that section 1 could not authorize any limitation on the section 3(2) right to private communication with an attorney, we must now return to the question of whether section 589 of the Code is in conflict with section 3(2) of the Constitution.

Does the Code conflict with the Constitution?

- [27] Both counsel marshaled their arguments on the assumption that there was indeed a conflict between section 3 (2) of the Constitution and section 589 of the Code. But are they really in conflict? Section 589 states that a person arrested shall immediately upon being arrested be entitled to a private interview with his attorney, subject to any necessary surveillance. It is stated in mandatory terms that an arrested person shall be entitled to a private interview with his attorney, subject to any necessary surveillance. What then does "subject to any necessary surveillance" mean? And is it possible to interpret "any necessary surveillance" in a manner that does not offend the right to private communication? It is perhaps useful to determine what "private communication" means in order to then explore whether an attorney-client interview at a police station can be surveilled without interference with the right to private communication.

[28] Ms. Creese helpfully provided the Court with the case of **R v Boutilier and Melnick**⁶ from the Nova Scotia Supreme Court in which the Criminal Code of Canada defined “private communication” as meaning “any oral communication or any telecommunication made under circumstances in which it is reasonable for the originator thereof to expect that it will not be intercepted by any person other than the person intended by the originator thereof to receive it.” I think that that is as good and reasonable a definition of private communication as the framers of the Constitution must have intended to be accorded to an accused person if he is to be given a genuine opportunity to adequately prepare a defence in a fair trial. It is the privacy of the oral and/or telecommunication of the accused person with his attorney that is to be inviolable and sacrosanct. So that if circumstances arise where the police consider it necessary to visibly observe (as opposed to audibly) an interview room where a consultation between counsel and client is occurring, this would not violate the right based on the definition of what private communication entails.

[29] I therefore conclude that section 589 of the Code is not in conflict with section 3(2) of the Constitution. If, in their interpretation and application of section 589 of the Code, police officers go beyond a visual surveillance and, for example, listen in on a private interview with an attorney and his client using any of an array of electronic listening devices that would not be “necessary surveillance” as contemplated by the Code. It would be in breach of Code and in breach of the Constitution since the Code must be interpreted in a way that does not do violence to the constitutional right. I am satisfied that it is possible to read and apply section 589 of the Code in such a way as to not infringe the sanctity of conversations passing between counsel and client.

[30] Ms. Creese stated that in some jurisdictions police officers are able to observe but not hear consultations between attorney and client from behind soundproof glass. Her argument seemed to be that the Court should consider that lack of resources

⁶ 77 D.L.R. (3d).

in jurisdictions like Saint Lucia (as opposed to more developed countries) prevented the availability of such facilities like soundproofed interview rooms where the police could observe what was happening from behind a glass-plated window. In the absence of this, she contended, the police did the next best thing: they kept the wooden door of the interview room open and observed the interview from the hallway outside the interview room without hearing any of the conversation between Mr. Raveneau and Ms. Duncan. I have already ruled that I believe that the police officers stood inside the interview room well within earshot of the attorney-client conversation. But even if one or other of them stood at the doorway observing, on a liberal and generous interpretation of the section 3(2) right, it cannot be concluded that those circumstances afforded Ms. Duncan the plenitude of her right to expect reasonable facilities for private communication. What occurred was not necessary surveillance within the meaning of the Code.

- [31] Ms. Creese also submitted that if the police attempted to use any information obtained from a private communication between Ms. Duncan and her attorney, that an application could be made at the criminal trial to exclude such evidence. This was a remedy that was available to the claimant and the one she ought to use. I do not think that that is an adequate means of redress for the contravention. That would deal only with the use of evidence obtained from private communication and not the breach of the right itself. It would exclude the evidence but not vindicate the right. The Claimant's rights to approach the Court for a clear breach of her constitutional right cannot be constrained in this way.

Vindictory Damages

- [32] The provisions governing enforcement of fundamental rights and freedoms are found at section 16 of the Constitution

16. Enforcement of protective provisions

- (1) If any person alleges that any of the provisions of sections 2 to 15 inclusive has been, is being or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained

person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction—

- (a) to hear and determine any application made by any person in pursuance of subsection (1); and
- (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3), and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 2 to 15 (inclusive):

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

[33] The award of vindictory damages for breach of a constitutional right has been considered in a number of authorities of the Judicial Committee of the Privy Council in cases emanating from the Commonwealth Caribbean. It appears to be well settled that vindictory damages are to be distinguished both from compensation pure and simple, and from exemplary or punitive damages at common law; and it is by no means required in every case of constitutional violation. Lord Nicholls of Birkenhead in **Attorney General of Trinidad and Tobago v Ramanooop**⁷ said;

“18. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and,

⁷ [2005] UKPC 15

moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

19. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. 'Redress' in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions 'punitive damages' or 'exemplary damages' are better avoided as descriptions of this type of additional award."

[34] Similarly, in the judgment of the Board delivered by Lord Scott of Foscote in **Merson v Cartwright and the Attorney General of The Bahamas**⁸ in which, after citing a passage from Ramanoop including the paragraphs set out above, this was said:

- "18. These principles apply, in their Lordships' opinion, to claims for constitutional redress under the comparable provisions of the Bahamian constitution. If the case is one for an award of damages by way of constitutional redress – and their Lordships would repeat that 'constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course' (para 25 in Ramanoop) – the nature of the damages awarded may be compensatory but should always be vindicatory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount. The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will

⁸ [2005] UKPC 38

be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary.”

[35] In **Dennis Graham v Police Service Commission and the Attorney General of Trinidad and Tobago**⁹, Sir John Laws after citing **Ramanoop** and **Merson** with approval stated:

Plainly the statement that “the nature of the damages... should always be vindicatory” does not imply a rule that a distinct vindicatory award should be made in every case of constitutional violation; as the balance of the passage shows, it merely serves to indicate the overall purpose of any award of damages in constitutional cases.

[36] Ms. Creese relied on the case of **The Queen v Kitaitchik**¹⁰ from the Court of Appeal of Ontario in which that court, at paragraph 41 of the judgment, dealt with the approach to the assessment of damages where there was an allegation of breach of Charter rights:

41. The nature of police conduct, by the officer or officers involved in the breach and on an institutional level, is an important consideration when calibrating the seriousness of the Charter breach. Indeed, where that breach does not implicate trial fairness, the nature of the police conduct will often determine whether the evidence should be excluded. Police conduct can run the gamut from blameless conduct, through negligent conduct, to conduct demonstrating a blatant disregard for Charter rights...

What is important is the proper placement of the police conduct along that fault line, not the legal label attached to the conduct.

42. The trial judge understood that the characterization of the police conduct was a necessary element in assessing the seriousness of the Charter breach. In characterizing that conduct, the trial judge referred to four factors:

- the officer obtained a search warrant from a Justice of the Peace authorizing the seizure of the appellant’s clothing in the circumstances where he believed that the law permitted him to make application for a search warrant;

⁹ [2011] UKPC 46

¹⁰ retrieved from 1987 CanII 4075 (ON SC)

- the officer honestly believed that he had the power to seize the appellant's clothing in furtherance of the homicide investigation;
- while there had been an earlier breach of the appellant's Charter rights, the police could not be faulted in any way for that breach; and
- there was no pattern of deliberate Charter breaches.

[37] In applying those principles to the facts of the instant case, Ms. Creese submitted that at all material times Corporal Marcel (1) sought to facilitate Mr. Raveneau's visit; (2) did not have all of the information but had sufficient information to determine that a supervised visit was necessary; (3) ensured that she was in sight but out of hearing of what was said between the Claimant and her attorney. Thereafter, a search was conducted at the Claimant's home, the evidence was found to support the police case and at all material times the Claimant was allowed to consult with her attorney, that is, at the time she was about to be charged and at the time of the sealing of the evidence obtained from the her home. Under those circumstances, the Defendant says, there is no indication that the officers operated in bad faith and in any way to prevent the claimant from consulting with her legal counsel.

[38] I do not think that the facts as I have found them to be bear out that Corporal Marcel sought to facilitate Mr. Raveneau's visit or that she was in sight but not of hearing of what was said; on the contrary, she seemed to have been bent on obstructing him, based on her instructions. I am however prepared to accept that, on the evidence, after the supervised visit, the police did facilitate Ms. Duncan's right to access her attorney at the time of her charging, during the search carried out at her home and at the sealing of the evidence. In terms of a pattern of breach of rights, the violation of her rights seemed to have been limited to the supervised visit at the custody suites of the Central Police Station. I am also prepared to accept that the police might not have been acting in bad faith but under the mistaken belief that section 589 of the Code permitted them to do what they did. I

think this latter point is one that weighs heavily in favor of the Defendant in considering the quantum of damages to be awarded.

[39] Were it not for the socio-cultural reality in Commonwealth Caribbean jurisdictions that bare declarations tend not to be a sufficient deterrent to abuse of power by the state, I would have concluded that the appropriate declarations were a sufficient vindication of the Claimant's rights. But considering the frequency of cases of police abuse that come before these courts and the importance of the constitutional right to private communication, I consider it necessary to make an award of vindictory damages in order to deter further breaches of this kind. In doing so, I keep in mind that the police officers might not have been acting in bad faith but on the assumed lawfulness of their actions based on their interpretation of section 589 of the Code.

Disposition

[40] I therefore make the following orders:

- 1) A declaration is granted that the presence of police officers in the interview room while the Claimant was consulting with her attorney was in breach of the Claimant's right, under section 3(2) of the **Constitution of Saint Lucia**, to be afforded reasonable facilities for private communication with her attorney.
- 2) A declaration is granted that the presence of police officers in the interview room while the Claimant was consulting with her attorney was in breach of section 589 of the **Criminal Code**.
- 3) The Claimant is awarded the sum of \$15,000.00 as vindictory damages for the infringement of her right under section 3(2) of the **Constitution of Saint Lucia**.
- 4) Prescribed costs are awarded in accordance with Part 65(5) of the Civil Procedure Rules.

**JUSTICE GODFREY SMITH, SC
HIGH COURT JUDGE**

BY THE COURT

REGISTRAR