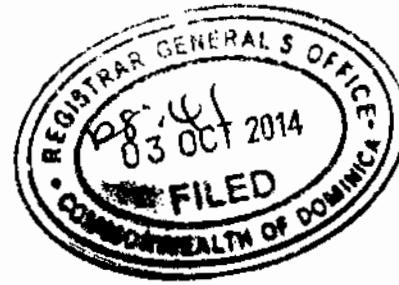


EASTERN CARIBBEAN SUPREME COURT

COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE



CLAIM NO. DOMHCV2014/0057

BETWEEN:

- [1] ALEXIS CARRIERE
- [2] KENDELL SYLVESTER
- [3] FERDINAND PHILLIP DANIEL

Claimants

And

- [1] ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA

Defendant

Appearances:

Mr. Wayne Norde and Bernadette Lambert of Norde and Lambert Chambers for the Claimants

Mrs. Tameka Hyacinth of the Attorney General Chambers for the Defendant

.....
2014: June 13th, 25th

October 3rd
.....

JUDGMENT

- [1] **THOMAS, J.(Ag):** On February 4th 2014, the claimants filed an originating motion claiming against the Defendant, the Attorney General of the Commonwealth of Dominica

- (a) A declaration that their constitutional rights guaranteed to them under section 3 of the Constitution of Dominica not to be deprived of their liberty was contravened by the Police when they were detained beyond 72 hours.
 - (b) A declaration that the charges preferred against the claimants while in unlawful custody of the police are null and void and of no effect and should be struck out.
 - (c) Damages, including aggravated and exemplary damages, compensation in Public Law for the unlawful detention beyond 72 hrs of detention.
 - (d) Such further or other relief as may be just.
 - (e) Prescribed costs.
- [2] Based on the affidavit evidence in support¹ and affidavit in reply,² the claimants being detained for more than 72 hours before being taken before a court of law were a violation of the claimants' constitutional rights.
- [3] The affiant, John Carbon of the Commonwealth of Dominica Police Force, deposed at paragraph 15 of his affidavit in reply deposes that: "The detention of the Applicants for a period beyond 72 hours was in no way malicious or capricious. The investigation in this case proceeded with all due regard to the public interest in the proper investigation of crime and as much as possible with due regard to the rights of the accused."
- [4] Accordingly, this judgment is concerned with whether the claimants are entitled to the reliefs sought with respect to the violation of their constitutional rights. In the premises submissions were ordered to be filed.

Submissions

- [5] In submissions on behalf of the claimants, learned counsel cited relevant *dicta* from a number of cases³ and compared the awards of damages. The introduction to the operative submissions are in these terms:

¹ Filed 4th February 2014

² Filed 7th March 2014

³ Cases cited are: Romauld James v The AG of Trinidad and Tobago [2010] UKPC 25; The Attorney General v Ramanoop [2005] UKPC 15; Clive Oliveria v The Attorney General et al ANUHCv2008/0449; Merson v Cartwright [2005] UKPC 38; Takitola v The Attorney General et al [2009] UKPC 11; Mark Smith et al v The Attorney General of Antigua & Barbuda ANUHCv521/2010

"18. (d) In **Mark Smith et al v The Attorney General of Antigua & Barbuda** ANUHCv0521/2010 the claimants were awarded \$10,000.00 each being compensatory damages and \$5,000.00 being vindictory damages, damages for breach of their fundamental right to personal liberty guaranteed under section 5 of the Antigua and Barbuda constitution. They were unlawfully incarcerated for 143 days.

Madam Justice Jennifer Remy in arriving at the amount awarded looked closely at the **Ramanoop** line of cases but more particularly at the **Takitola v The Attorney General of the Bahamas** [2009] UKPC 11 and quoted Lord Carswell who sent the appeal back to the Court of Appeal of Antigua for failure to adopt a global approach (see paragraph 23 of the Judgment). The Court of Appeal had multiplied the daily amount by as many days by 8 years.

19. Lord Carswell stated inter alia that the court should determine an appropriate figure to reflect compensation for the long period of wrongful detention taking into account any element of aggravation and misery endured. They should take into account a figure which is appropriate for an initial short period, if extrapolated should be tapered and the final figure should amount to an overall sum representing appropriate compensation for a period of over 8 years taking account of inhuman conditions, misery and distress suffered. The Privy Council awarded \$250.00 per day. This guided Justice Remy in awarding \$15,000.00 overall for the 143 days."

[6] And the operative submissions are as follows:

"20. In the case at bar the Applicants have spent over 48 hours in unlawful detention. As in **Oliveira's** case they suffered no losses save and except the inconvenience pleaded. (See paragraph 12 of their affidavit). They should be awarded the sum of \$3,000.00 each for the said 48 hours being \$1500.00 per day. Simple declaratory relief will not suffice as the state would conclude that the sanction to be imposed by keeping the Applicants beyond the constitutional period would be a statement to that effect.

21. An additional award of \$250.00 per day would also act as a deterrent to the conduct of the police who simply stated upon complaint made by the Applicants that 'weekends do not count'."

[7] The submissions on behalf of the defendant are based on the principle that the award of compensation with respect to the violation of constitutional right is a matter is vested in the court and it depends on the circumstances. In this regard reliance is placed on the following dictum of Lord Kerr in **James v Attorney General of Trinidad and Tobago**⁴, including the following:

"4. The very least that these statements make obvious is that there will be cases where the vindication of the constitutional right will be achieved by the making of a declaration. Where there has been no major impact on the claimant, a declaration is more likely than not to suffice."

⁴ [2010] UKPC 2 at para 37

[8] The submissions continue in this way:

"The Respondents submits that on the totality of evidence, there is no major impact to the Applicants. Consequently, this is a case where a declaration that there was a violation of the Applicant's constitutional rights would be sufficient to vindicate the right and uphold the sanctity of the right to liberty. The Respondent asks the Court to look at not only the period of detention but also the circumstances surrounding the detention

5. The Applicants were lawfully arrested. That is not in dispute. They are charged with very serious crimes. They are charged with the importation of a substantial quantity of not only alleged cannabis but also cocaine. There is a very good arguable case against them. That is deposed to by the affidavit filed on behalf of the Respondent by Inspector John Carbon. It is true that they are innocent until proven guilty but there is public interest having criminal case tried and allowing them to answer the charges and evidence against them

6. There are no allegations of inhuman treatment, torture, assault, battery or anything of the sort. They were ensured their rights to attorneys: they were given the opportunity to enjoy their right to silence. Further, they were taken to the Magistrate's Court as soon as was reasonably practicable. The 72 hours expired on Saturday and the Applicants were taken to court first thing Monday morning."

[9] Based on the foregoing submissions, learned counsel for defendant is asking the court to exercise its discretion, having regard to the circumstances and facts, to grant a declaration that the applicants rights to personal liberty was breached and to decline to grant the other remedies sought. In support of this prayer a number of cases⁵ are cited in which there were aggravating features meriting the award of damages.

[10] In the alternative, learned counsel is asking the court to award nominal damages if it considers that damages are necessary to vindicate the right that has been infringed.

[11] As noted above, a number of reliefs are sought by the claimant and this must be considered *seriatim*.

Reasoning

[12] This case presented to the court is unique in that both sides agree that the detention beyond 72 hours violated the claimants right under section 3 (3) of the **Constitution of the**

⁵ Attorney General of Trinidad and Tobago v Siewchand Ramanoop [2005] UKPC 15, Merson v Cartwright [2005] UKPC 38; Maharaj v Attorney General of Trinidad and Tobago [1979] 2ALL 670; Mark Smith and Andy Sharpe v Attorney General of Antigua and Barbuda ANUHCv0521/2010; Clive Oliviera v Attorney General and Chief Immigration Officer ANUHCv2008/0449

Commonwealth of Dominica had been violated by the State. The departure comes as to whether the court should award compensation, and, if so the nature of the compensation.

- [13] In making the determination the court is guided by the following dicta from the case of **Attorney General of Trinidad and Tobago v Siewchand Ramanoop**:

“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..

An award of compensation will go some distance towards vindicating the infringed constitutional right. How 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, emphasise the importance of the constitutional right and the gravity of the breach and deter further breaches.”

- [14] Learned counsel for the claimants in their submissions relies on the case of **Clive Oliveira**’ where no losses, save and except, the inconvenience was pleaded. On that premise, the contention is that the claimants should be awarded \$3,000.00 each for the 48 hours being \$1,500.00per day. The further contention that a simple declaration will not suffice.

- [15] Having regard to the submissions on behalf of the defendants and other factors, the court does not consider that **Clive Oliveira**’s case is entirely on par. For while it is true that **Oliviera** did not have a pending criminal charge, a perusal of the findings of fact the learned trial judge, Justice Blenman (as she then was) make the point clear. The following are extracted from paragraphs [64] and [65] of the judgment and thought prolix the points are clear:

“[64] I have given careful consideration to the evidence adduced and to the very helpful submissions of both learned Counsel. For the most part, the facts are not in dispute. In any event the following represents my findings of facts in relation to the issues that have been joined: Mr. Oliveira is Guyanese national who has been living in Antigua and Barbuda for several years. At one time, he was self employed and for various periods, the relevant government department granted him work permits. He apparently ran afoul of the law in relation to serious sexual offences. He was charged, tried, convicted and eventually freed by the Court of Appeal. He was retried and the same sequence of events obtained. Finally, the learned Director of Public Prosecutions discontinued all criminal proceedings against him. It is apparent that the State was not satisfied with those developments and after Mr. Oliveira was released from prison, the State deported him. By the time of his criminal trial, he had acquired property in Antigua and Barbuda and had married to a naturalised Antiguan, who was Guyanese born. His marriage is in excess of 10 years and together they have children.

[65] Having been deported, he was somehow able to acquire a new passport and returned to Antigua where he gained entry and was given a month to remain. The circumstances under which he was able to obtain a new passport in Guyana are unclear, but it is evident that the new passport did not indicate that he had previously been deported. What is equally unclear is whether the Immigration Authorities had followed the letter of the law in deporting him in the first instance. Be that as it may, it is obvious that subsequently, the Immigration Authorities realised that Mr. Oliveira had returned to Antigua and they set about to have him repatriated to the country of his birth. Mr. Oliveira was determined to remain in Antigua and Barbuda and the Immigration Authorities were determined to send him home. The Immigration Authorities visited his home and took him into custody. He was detained for five days.”

- [16] In a word, the claimants’ case pales in comparison with **Clive Oliveira’s** case. The court also takes into account the fact, as submitted, that the material time of the detention was over a weekend which must be placed in the context of our jurisdiction and the operation of our courts at all levels. This was a major factor considered by the Privy Council in **Pratt and Morgan** ⁶ and although the context is different the critical factor was the weight of criminal trials against the available resources. Another factor is the nature of the operation carried out and what is alleged to have been found. The extrapolation in this context can be infinite.
- [17] The foregoing gives credence to the submissions on behalf of the defendant that the court should either make a declaration or make an award of nominal compensation.
- [18] In private law, one circumstance in which nominal damages may be awarded is where the claimant has suffered wrong but no damage⁷ the court will apply that principle to this case as the common ground on the facts fits into the legal matrix of nominal compensation coupled with the declaration. In this context the court has not lost sight of the fact that the claimants face serious criminal charges but at the same time the presumption of innocence prevails. Nor can the detention beyond 72 hours be considered ‘aggravation and misery endured’ ⁸ as there is no such evidence.
- [19] Accordingly, the court hereby declares that the detention violated the claimants’ constitutional rights under section 3 of the **Constitution of the Commonwealth of Dominica**, the claimants are awarded nominal damages of \$500.00 each. In the circumstances the court agrees

⁶ [1993] UKPC 1

⁷ *Learie Constatine v Imperial Hotel*; See also *McGregor on Damages* 16th ed. para 423

⁸ Per Lord Carswell in *Tokitola v Attorney General of Bahamas* [2009] UKPC 11

with the submissions on behalf of the defendant that no award of compensation is merited in law.

[20] The court notes that the prayer seeking a declaration that the charges against the claimants while they were in custody are null, void and of no legal effect be struck out has been withdrawn since the procedural law⁹ they are in the right church but in the wrong pew- *cadit questio*.

[21] The other relief prayed is for damages including aggravated damages, compensation in public law for the unlawful detention beyond 72 hours. In this regard the court can discern no submissions on behalf of the claimants, but learned counsel on behalf of the defendant submits that:

"It is settled law that aggravated and exemplary damages are not available in constitutional motions (see *Attorney General of St. Christopher, Nevis and Anguilla v Reynolds* [1980] AC 637; *Attorney General of Trinidad and Tobago v Siewchand Ramanoop* [2005] UKPC 15."

[22] The court agrees entirely with the submissions and as such the prayer for aggravated and exemplary does not fall for consideration.

Costs

[23] The claimants are entitled to prescribed costs, unless otherwise agreed.

ORDER

IT IS HEREBY ORDERED as follows:

1. The claimants are awarded nominal damages of \$500.00 each.
2. The prayer for aggravated and exemplary damages does not fall for consideration.
3. The claimants are entitled to prescribed costs, unless otherwise agreed.

⁹ Being Rule 56.3(1) of CPR 2000

Appreciation

The court wishes to express gratitude to learned counsel on both sides for very illuminating submissions which auger well for our jurisdiction.



Justice Errol L. Thomas

High Court Judge (AG)