

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA**

CLAIM NO. : ANUHCv0521/2010

BETWEEN

**MARK SMITH
ANDY SHARPE**

Claimants

AND

THE ATTORNEY GENERAL OF ANTIGUA & BARBUDA

Defendant

Appearances:

Mr. Ralph Francis for the Claimants
Ms. Luann De Costa for the Defendant

2012: June 6
July 26

JUDGMENT

[1] **REMY J.:** By way of Amended Claim Form dated 22nd October 2010, the Claimants Mark Smith and Andy Sharpe filed a constitutional motion seeking against the Attorney General of Antigua and Barbuda:-

- i. A declaration that the right of the Claimants to personal liberty guaranteed under section 5 of the Antigua and Barbuda Constitution Order 1981 were breached;
- ii. Damages for their unlawful detention at Her Majesty's Prison from 22nd December, 2009 until 14th May, 2010 (the date of the Claimants' release);

iii. Costs.

- [2] When the matter came up before the Court for hearing, Counsel for the Defendant advised the Court that liability was admitted by the Defendant for the unlawful detention of the Claimants, but that the parties were unable to come to an agreement on the quantum of damages to be awarded to the Claimants. The Court indicated that a day would be set for the Assessment of Damages. The hearing of the assessment took place on the 6th day of June 2012, with the Claimants as well as Mr. Percy Adams, Acting Superintendent of Her Majesty's Prison, a witness for the Defendant, being cross examined. At the conclusion of the hearing, the Court ordered that written submissions be filed within seven (7) days. The said submissions were filed by Counsel, albeit after the stipulated seven days.

THE FACTS

- [3] The facts of the instant case are as follows:- In July 2008, the Claimants Mark Smith and Andy Sharpe who formerly lived at Leicester, England, United Kingdom, travelled to Antigua for the purpose of establishing a company. On the 8th October 2009, the Claimants were arrested and charged with the offences of obtaining with intention to defraud and larceny. Specifically, they were charged with stealing \$37,500.00 from John Bonnett and obtaining \$65,000.00 with intent to defraud Bonnett in May and June 2009 respectively.
- [4] The Claimants were taken before the Chief Magistrate at the St. John's Magistrate Court on the same day. They were denied bail and remanded to her Majesty's Prison for a period of seven days from October 8th 2009 to October 15th 2009. Thereafter, they both appeared before the Chief Magistrate on a weekly basis and were remanded for successive seven (7) day periods. The last day on which they were brought before the Magistrate was December 15th 2009 and they were remanded until December 22nd 2009. The Claimants were not brought before the Magistrate for the period December 22, 2009 to May 14, 2010 to be further remanded. On the 14th May 2010, the Prosecution formally discontinued the case against the Claimants, as the Virtual Complainant, John

Eustace Bonnett had since died on the 16th March 2010. The Claimants were accordingly released from custody on the 14th May, 2010.

- [5] During the period 22nd December 2009 and the 12th May 2010, in light of a pending civil suit against the Claimants in the High Court of Antigua and Barbuda - unrelated to the criminal charges - the Claimants were taken before a Judge of the High Court on several occasions.
- [6] Learned Counsel Ms. Luann De Costa submits that the facts of the instant case dictate that the Claimants' detention ab initio was legal i.e. to await trial on the serious criminal charges of obtaining money by false pretence and larceny. She further submits that at no point in time at Her Majesty's prison were the Claimants kept under the conditions in the manner as expressed by the Claimants in their evidence given to the Court; that while at Her Majesty's prison, the Claimants did not complain of the matters contained in their affidavits and witness statements which forms their evidence in these proceedings.
- [7] Ms. De Costa submits that, in the present case, the detention of the Claimants was ab initio lawful. Their detention became unlawful when they were not brought before the Court to be further remanded for the requisite periods. She submits that Section 5 (7) of the Antigua and Barbuda Constitution Order authorizes compensation where there is unlawful detention. She submits that, while it is accepted that unlawful detention is a strict liability wrong and compensation will be awarded, the compensation to be awarded should be appropriate after considering all the circumstances of the case. Counsel further submits that in considering the quantum of compensation the position of the Claimants should also be looked at. The crimes that the Claimants were charged with are serious criminal offences. Bail was denied them by the Magistrate; further, the circumstances surrounding the Claimants and their criminal charges indicate that even if bail was granted, the Claimants more likely than not were in no position financially to meet bail.

[8] Learned Counsel further submits that the wrong committed by the State was the failure to continue to bring the Claimants before the Court, as was being lawfully done before, for remand. Counsel contends – as I understand it - that, in spite of the error, if the power to detain had been exercised by the application of lawful policies in the authority vested in the Magistrate to remand, the Claimants would have continued to be lawfully detained. It is Learned Counsel's submission that, but for the error in not bringing the Claimants to Court to be remanded, there would have been no actual loss injury or damage suffered by the Claimants as they would have continued to be on remand at Her Majesty's prison. She submits that, in light of that, and in the circumstances, that an award of damages for the Claimants' unlawful detention should be no more than nominal.

[9] Learned Counsel relies on the case of **Lumba (WL) v Secretary of State for the Home Department ('SSHD')**¹. She states as follows: - In that case, Mr. Lumba and Mr. Mighty were foreign national prisoners (FNPs) who had been convicted of serious crimes were unlawfully detained due to a secret policy of the state. As regards damages awarded in this case, the outcome was not favourable to the appellants. The Claimants were awarded nominal damages. The Court held: Whilst they had been falsely imprisoned, the government could have imprisoned them lawfully such that, strictly speaking, they had not suffered loss. Lord Dyson's reasoning on this was that it was inevitable that they (the Appellants) would have been detained, "they have suffered no loss or damage as a result of the unlawful exercise of power and therefore should receive no more than nominal damages."

[10] In reliance of the Lumba case, Counsel submits that the Claimants suffered no injury, loss or damage "because it is inevitable that they would have remained in detention had the power to remand been exercised by the relevant authority." She contends that an award of nominal damages would be the appropriate award of damages in the circumstances.

¹ [2011] UKSC 12 (23 March 2011)

THE LEGISLATIVE FRAMEWORK

[11] Section 3 of the Constitution of Antigua and Barbuda, in so far as is relevant, provides:-

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

- (a) Life, liberty, security of the person, the enjoyment of property and the protection of the law.....
- (b)"

[12] Section 5 of the Constitution provides:-

Section 5. (1) - "No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say –

- (a)
- (b) In execution of the sentence or order of a court, whether established for Antigua and Barbuda or some other country, in respect of a criminal offence of which he has been convicted;
- (c)
- (d)
- (e) For the purpose of bringing him before a court in execution of the order of a court;"

Section 5 (7) - "Any person who is unlawfully arrested or detained by any other person shall, subject to such defences as may be provided by law, be entitled to compensation for such unlawful arrest or detention from the person who made the arrest or effected the detention, from any person or authority on whose behalf the person making the arrest or effecting the detention was acting or from them both:

Provided that a judge, a magistrate or a justice of the peace or an officer of a court or a police officer acting in pursuance of the order of a judge, a magistrate or a justice of the peace shall not be under any personal liability to pay compensation under this subsection in consequence of any act performed by him in good faith in the discharge of the functions of his office any liability to pay any such compensation in consequence of any such act shall be a liability of the Crown."

- [13] Section 18 of the Constitution deals with the enforcement of the protective provisions of the Constitution. Section 18 (1) provides:-

"18 (1) If any person alleges that any of the provisions of sections 3 to 17 (inclusive) of the Constitution has been , is being or is likely to be contravened in relation to him (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 that is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2)"

- [14] It is not in dispute that there was an illegal deprivation of the Claimants' liberty over the period 22nd December 2009 to 4th May 2010, that is , for a period of 143 days. As stated in paragraph 12 above, Section 5 (7) of the Constitution provides for compensation where there has been an unlawful arrest or detention. It is therefore not in dispute that the Claimants are entitled to redress. The Court will afford the wronged individual effective relief in respect of the state's violation of a constitutional right.

- [15] In the Privy Council decision of **The Attorney General of Trinidad and Tobago v Siewchand Ramanooop**², Lord Nicholls of Birkenhead, delivering the decision of the Board, had this to say:-

"Paragraph 17. - Their Lordships view the matter as follows. Section 14 recognises and affirms the court's power to award remedies for contravention of chapter 1 rights and freedoms. This jurisdiction is an integral part of the protection chapter 1 of the Constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of state power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the state's violation of a constitutional right. This jurisdiction is separate from and additional to ("without prejudice to") all other remedial jurisdiction of the court.

"Paragraph 18. - When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A

² (2005 UKPC 15 (23 March 2005)

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. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

Paragraph 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, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All those 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..... 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."

[16] In assessing compensation, the Court must take into account all relevant facts and circumstances of the particular case as well as the particular victims. A claim for compensation for deprivation of liberty is a claim in public law and includes any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered during the incarceration. In the instant case, the Claimants have provided no evidence as to any pecuniary loss, loss of earnings, or otherwise. Accordingly, no award will be made under this head of pecuniary loss or loss of earnings.

[17] The sum assessed as compensation can also take account of whatever aggravating features there may be in the case. Lord Carswell in delivering the judgment of the Privy Council in **Atain Takitota v The Attorney General et al**³, had this to say :-

".....In awarding compensatory damages the court may take account of an element of aggravation. For example, in a case of unlawful detention it may increase the award to a higher figure than it would have given simply for the deprivation of liberty, to reflect such matters as indignity and humiliation arising from the circumstances of arrest or the

³ [2009] UKPC 11

conditions in which the claimant was held. The rationale for the inclusion of such an element is that the claimant would not receive sufficient compensation for the wrong sustained if the damages were restricted to a basic award. The latter factor, the conditions of imprisonment, is directly material in the present case, and it would be not merely appropriate but desirable that the award of compensatory damages should reflect it."

[18] It is the submission of Learned Counsel for the Claimants that Section 3 of the Prison Act Cap 341 states that there should be "adequate accommodation for its prisoners in a prison." He submits that "by any stretch of the imagination the conditions under which the Claimants have testified that they were made to live is far below that which is to be expected." Counsel further submits that the admission that the prison facility is designed to hold 150 prisoners and now holds over 320 prisoners is sufficient to condemn the prison as being inadequate."

[19] According to the evidence of the Claimants, the conditions under which they were detained at her Majesty's Prison were "horrid". The Claimants both state in their Witness Statements that "for the period of 22nd December 2009 to the 14th May 2010, (they were) held unlawfully in conditions which are below that which allows for the maintenance of human dignity." Mark Smith, in his Witness Statement filed on the 4th March 2011, states:-

"Paragraph 12 - I was housed in cells which contained ten persons per cell. There were three double bunks upon which six persons slept and the remaining persons slept on the concrete floor. No mattresses were provided to those who slept on the concrete floor. A blanket was provided to each person but there were no provision for pillows.

Paragraph 13 - The physical condition of life in the cell was atrocious. There was no provision for any sanitary receptacle save for a bucket provided for use by all persons per cell. The bucket was emptied three times daily i.e. in the morning before breakfast, before lunch, and before supper at 4:00 p.m.

Paragraph 14 - The cells are infested with mosquitoes, cockroaches and rats. Once per month, some kind of spraying takes place. However, at nights the rats come out in full force.

Paragraph 15 - Once per day, I was released from the cell for a period of fifteen to twenty minutes. This time was used to visit one of the pit latrines in the prison and

thereafter to take a shower. There are three pit latrines for the entire male prison population.

Paragraph 16 - With respect to food, the prison has adopted a practice because of a shortage of food to ensure that the convicted persons are fed first. This leaves very little for those on remand. At breakfast, there is provided small bread roll and bush tea. For dinner, the inmates are given a small bread roll and a mixed drink. At approximately lunch time a small portion of rice and chicken is provided."

[20] The Witness Statement of Andy Sharpe, filed on the 4th day of March 2011, contains statements identical to those of Mark Smith referred to in paragraph 19 above. Further, according to the Claimants, at the end of the detention, the Claimant Mark Smith had lost seventy pounds, while the Claimant Andy Sharpe had lost sixty three pounds.

[21] Further, according to the evidence contained in his Witness Statement, Mark Smith was hypertensive and collapsed while in prison; he had to be rushed to the Mount St. John Hospital where he was kept for a period of a week as his blood pressure level had been elevated to unacceptable levels. In his Witness Statement, the Claimant Andy Sharpe also stated that he was hypertensive and that "there was no adequate medical attention" at the prison.

[22] In dealing with the issue of the quantum of monetary compensation for the Claimants, Mr. Ralph Francis, Counsel for the Claimants submits as follows:-

- i). The issue for consideration of the Court is the determination of a quantum which includes an award for the detention of each of the Claimants for a period of 143 days together with an additional award for the conditions under which they were housed at Her Majesty's Prison.
- ii). In addressing the issue of an award for unlawful detention, the starting point must be a determination of the value of a person's daily freedom.
- iii). In the case of Clive Olivera and the Attorney General, Chief Immigration Officer, claim No. ANUHCV 2008/0449, several authorities including Attorney General of

Trinidad & Tobago v Ramanroop were cited. The Claimant Mr. Olivera was awarded \$15,000 for unlawful detention over a three day period.

- iv). In the Privy Council Appeal No. 71 of 2007, *Takitota v The Attorney General*, an award of \$250.00 per day was made.

[23] In the Privy Council decision of ***Takitoka v The Attorney General***⁴, referred to by Counsel for the Claimants, the claimant had been incarcerated for over eight years in appalling prison conditions and the Court of Appeal of the Bahamas had not adopted the global approach but had multiplied the daily amount by as many days as are in eight years. The Privy Council said that this would not do and sent the case back for a re-assessment. In paragraph 17 of the Judgment, Lord Carswell had this to say:-

“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, the 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 an 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.”

[24] I am guided by the words of Lord Carswell as stated above. In assessing the quantum of compensation in the instant case, I have taken into account that there is no evidence of abusive, degrading or malevolent conduct by the authorities towards the Claimants. It is undisputed that the conditions at the prison were, in the words of the Claimants, “horrid”. Indeed, the evidence of Acting Superintendent of Her Majesty’s Prison, Mr. Percy Adams, was that conditions in the prison were “rough” and that he was not pleased with the conditions under which, as Superintendent, he was forced to keep persons in the prison. According to Acting Superintendent Adams, notwithstanding these rough conditions, the Claimants were given the best treatment that he could have

⁴ [2009] UKPC 11

given them. He testified that he never ill-treated the Claimants and that, as far as he was aware, none of his officers ill-treated the Claimants.

[25] Nowhere in the Witness Statements or the Affidavits of the Claimants, or in their evidence before the Court is there any mention of ill-treatment by the prison officials. The Claimants both testified that while in custody, they were allowed free time out of the prison cell; they both denied that prison officials on occasion inquired of them whether they were experiencing difficulties or that they told them that they were not. However, under re-examination, the Claimant Andy Sharpe admitted that he never expressed to prison officials that he was experiencing any discomfort. There is no evidence that the Claimants were subjected to humiliation and indignity such as would constitute aggravating factors.

[26] Acting Superintendent Adams gave evidence that on the day that the Claimants were released from prison, they exchanged handshakes with himself, the former Superintendent of Prisons and other officers present at their departure. Further, that on leaving, the Claimants thanked them for the "good treatment they received while at the prison." Under cross-examination, the Claimants both denied that they thanked the Superintendent of Prison and the other prison officials for their kindness and care. However, according to the Claimant Mark Smith, what was exchanged was "a respectful and courteous handshake." In my view, this admission is evidence that the Claimants were not subjected to any degrading or humiliating treatment at the hands of the prison authorities. Further, the Claimants were not assaulted by police officers or prisons officials while in prison, as was the claimant in the Ramanoop case.

[27] Taking into account all of the circumstances of the case, I am of the view that a sum of \$10,000.00 as compensation for each of the Claimants for the inconvenience and distress caused to them during the period of their unlawful detention, is reasonable and fair in the circumstances.

ARE THE CLAIMANTS ENTITLED TO AN ADDITIONAL AWARD?

[28] It is clear from the authorities, that in certain circumstances, more will be required than a mere declaration articulating the fact of the constitutional violation. In those cases, redress in the form of public judicial recognition of the constitutional right of the Claimants and its violation is not sufficient; an award of damages is necessary to compensate the Claimants. The damages awarded have been referred to as vindicatory damages, being as they are, damages to vindicate the breach of the claimant's constitutional rights.

[29] Lord Kerr in **Romauld James v The Attorney General of Trinidad and Tobago**⁵ had this to say:-

“.....In the context of constitutional violation, compensation can be seen to perform two functions. It may, of course, provide redress for the in personam damage suffered. But it may also be an essential part of the vindication of the constitutional right. This has a broader concept than compensation for the personal wrong. Although it is clear that compensation in this area should not include an exemplary or punitive element – see para 19 of Ramanoop – part of the function of an award of compensation in this setting is to mark the fact that a constitutional breach has occurred. Lord Nicholls was therefore observing that when that extra ingredient is required, one of the forms that it may take is monetary compensation when the person who has been the victim of the breach of the constitutional protection has suffered damage. He was not suggesting that some specific type of damage suffered by the victim of the constitutional breach was necessary before the question of monetary compensation could be considered.”

[30] The circumstances in which such an (additional) award will be appropriate are stated by Lord Nicholls in paragraph 19 of the Ramanoop case:-

“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. All these elements have a place in this additional award. “Redress” in s 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

⁵ Privy Council Appeal No 0112 of 2009 [2010] UKPC 23

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."

- [31] Lord Bingham of Cornhill in the Privy Council decision of **Alphie Subiah v The Attorney General of Trinidad and Tobago**⁶, in addressing the above question, had this to say:-

"Having identified an appropriate sum (if any) to be awarded as compensation, the court must then ask itself whether an award of that sum affords the victim adequate redress or whether an additional award should be made to vindicate the victim's constitutional right. The answer is likely to be influenced by the quantum of the compensatory award, as also by the gravity of the constitutional violation in question to the extent that this is not already reflected in the compensatory award. As emphasized in Merson, however, the purpose of such additional award is not to punish but to vindicate the right of the victim to carry on his or her life free from unjustified executive interference, mistreatment or oppression...."

- [32] Based on the facts and the evidence before the Court in the instant case, there was no evidence of torture, inhuman and /or degrading punishment inflicted on the Claimants by the police or the authorities during the period of their unlawful detention. There is also no evidence of mistreatment or oppressive behaviour by the authorities towards the Claimants.

- [33] Counsel for the Defendant in her closing submission states: - "It is important here to mention also that in the lack of any evidence before the Court that the conduct of the Defendant or its lawful agents were so outrageous or so oppressive the imposition of exemplary damages should respectfully be avoided." As stated in paragraph 30 above, in cases dealing with breach of constitutional rights, the expression "punitive" or "exemplary" damages are to be avoided. The object of these damages is not punishment or retribution.

- [34] The constitutional violation in the instant case was the failure to bring the Claimants before the Court every Monday during the period of their unlawful detention, namely, for a period of almost five months. Although the breach in the instant case does not rise

⁶ [2008] UKPC 47

to the level of misconduct or malicious or oppressive conduct towards the Claimants, this is a case of gross negligence and sheer incompetence on the part of the relevant authorities, which, in my view, is totally inexcusable and unacceptable.

- [35] In conclusion, I feel constrained to mention the following words of Dryden John, which in my view, serve to illustrate that not only is the deprivation of liberty a breach of one's constitutional rights, but that man instinctively yearns to be free:-

"Oh give me liberty, for were even paradise my prison, still I should long to leap the crystal walls."

- [36] I also wish to make the following comments: - Every person who is detained is entitled to the protection of his or her constitutional rights. A violation of any of those rights is harmful not only to the individual, but is harmful to society in general. While financial resources in many of our islands in the region may well prevent our prisons from being "adequate" and, while no one will ever compare a prison with a five-star hotel, it is totally unacceptable that persons detained are allowed to be victims of "procedural errors" or omissions, due to either the gross negligence, carelessness or sheer incompetence of those in authority .

- [37] In the instant case, I am of the view that an additional award of \$ 5,000.00 to each Claimant is needed to deter further breaches of this nature. This additional award of \$5000.00 is to be added to the sum of \$10,000.00 awarded to each Claimant as compensation.

CONCLUSION

- [38] The Defendant, having admitted liability for the unlawful detention of the Claimants, the Order of the Court is as follows:-

ORDER

1. The Court declares that the right of the Claimants to personal liberty guaranteed under section 5 of the Antigua and Barbuda Constitution Order 1981 was breached;
2. The Defendant is to pay to the Claimant Mark Smith compensatory damages in the sum of \$10,000.00.
3. The Defendant is to pay to the Claimant Mark Smith vindicatory damages in the sum of \$5,000.00.
4. The Defendant is to pay to the Claimant Andy Sharpe compensatory damages in the sum of \$10,000.00.
5. The Defendant is to pay to the Claimant Andy Sharpe vindicatory damages in the sum of \$5,000.00.
6. The Defendant is to pay to the Claimants prescribed costs in accordance with the Civil Procedure Rules (CPR) 2000.


JENNIFER A. REMY
High Court Judge