In Eastern Caribbean Supreme Court

In The High Court of Justice

ST. LUCIA

CLAIM NO. 261 OF 2006

BETWEEN:

LEONARD OGILVY — Claimant

AND

THE HON. ATTORNEY GENERAL
DIRECTOR OF PUBLIC PROSECUTIONS
THE HON. JUSTICE SANDRA MASON
HELEN TELEVISION SYSTEM
HOT F.M.
SAM "JOOK BOIS" FLOOD — Defendants

BEFORE: The Hon. Justice Albert Redhead [Ag]

Appearances:

Mr. Horace Fraser for the claimant
Mrs. Georgis Taylor-Alexander, For the Hon. Attorney General &
The Director of Public prosecutions
Mr. Dexter Theodore for Helen Television System
Mr. M. Maragh – for Hot F.M. & Sam 'Jook Bois" Flood

2006: May 12, 13

JUDGMENT

In Court

[1] The claimant Leonard Ogilvy filed a motion in the High Court of St. Lucia on 18th September, 2001, in which he sought an order to be admitted to practice as a Barrister- at - Law in the Eastern Caribbean Supreme Court (St. Lucia circuit)

[2] Mr. Ogilvy was engaged in the private practice as an Attorney –at – Law from 9th August 2004 until the 18th March 2006 when the Attorney General obtained an order of injunction restricting him from practicing as an Attorney –at Law. The returned date fixed for the hearing of that injunction was 22nd March 2006. The claimant did not attend court for the hearing of the injunction. , but was represented by counsel.

[3] On that date the claimant was arrested at about 6: 55 p.m at the Hewanorra International Airport as he was about to board a British Airways Flight to London. He was charged with seven counts of working without a permit contrary to section 3 (4) (a) of the Foreign Nationals Citizen Employment Act No. 3 of 1971.

[4] After the claimant was arrested, he was taken to the Marchand Police Station where he was detained until Monday 25th of March 2006.

[5] At the hearing of the application on 22nd March 2006 to discharge the order granting the injunction against the claimant, the claimant's lawyer made an application to the learned trial judge that the matter should be held in camera. The learned trial judge refused that application and the matter was heard in open court. Present in court at the hearing of the application were members of the press. As a result the proceedings were reported in the press.

[6] On 7th April 2006 Mr. Ogilvy filed an originating motion supported by an affidavit filed on the same date. On 10th April 2006 he filed an amended originating motion with an amended claim form.

[7] In the amended claim form the claimant seeks the following orders and declarations.

(2) A declaration that the first and second defendants' action of detaining him unreasonably for a period in excess of 72 hours before he was taken before the magistrate court was a violation of his fundamental rights as a person in detention.

(3) A declaration that the decision of the third defendant in hearing interlocutory proceedings in open court created the avenue for publication of adverse prejudicial material to the public at large and the actions of the first defendant in using the said avenue thus created to read verbatim from documents which certain adverse and prejudicial material is a violation or infringement of his constitutional right contained in section 8 (11) and violative of his fundamental right to a fair hearing in relation to the criminal charges brought against him by the second defendant.

(4) A declaration that the publication of adverse and prejudicial material by the first defendant at a press conference hosted by him on the 11th April, 2006 and on the television programme "Newsmaker Live" on the 12th April, 2006 was a violation or infringement of his fundamental right to a fair hearing in the criminal charges brought against him by the second defendant.

(5) A declaration that the various publication of adverse and prejudicial material by the fourth, fifth and sixth defendants on the 23rd March, 2006 and thereafter were violative or infringed his fundamental right to a fair hearing in the criminal charges brought against him by the second defendant.

(6) An order that the criminal proceedings sustaining on cases number 1019 and 1020 of 2006 be stayed.

(7) An order that the criminal proceedings sustaining on cases number 1012-1018 of 2006 be stayed.

(8) An order that the defendants do pay compensation to the claimant for the infringements of his rights and for the inconvenience and distress suffered.

(9) Further and other relief.

(10) Costs

[8] The claimant has withdrawn the case against the third named defendant, the Honourable Justice Sandra Mason. In the claim against the third named defendant, the claimant was seeking a declaration against the judge that the action of the trial judge on 22nd March in open court was a violation or infringement of his fundamental rights to a fair hearing.

[9] I recognize that the claimant has withdrawn the case against the third named defendant. However the issue was before me and in my judgment merits some comments.

[10] It is difficult for me to conceptualize that a judge in determining an issue, whether, or not an injunction should be maintained against the claimant would have violated or infringed the fundamental rights of the claimant by hearing the case in open court rather than in chambers.

[11] I cannot contemplate any situation in which a judge hearing an action such as the one under consideration could be said to have violated or infringed the constitutional rights of the claimant, unless it can be established that the judge had an ulterior motive other than seeking the honest resolution of the case or at most had a malicious motive in hearing the case in open court rather than in chambers.

[12] I now look at the affidavit evidence as it relates to this issue.

Paragraphs 20 to 23 of the claimant's affidavit evidence speak to that issue.

"20 that on 21st March, 2006 I filed an application before this Honourable court wherein I sought to have the said order for an injunction discharged. It has been the practice of this Honourable court to hear such proceedings in chamber court wherein members of the public are excluded from being present at such hearings.

[13] "21 that I am informed by counsel and verily believe that he made application before the Honourable court presided over by Honourable Justice Sandra Mason Q. C. on 22nd March 2006 to have the matter of any application to discharge the injunction order to be heard in camera but the said application was refused.

[14] "22 That the Honourable learned judge, not only refused the said application but also failed to direct herself in law that the proceedings were interlocutory in nature and therefore fit for chambers and not in open court in keeping with section 8 (11) (a) of the constitution.

[15] "23 that the Honourable learned judge committed a specific wrong in failing to take into account that the interlocutory application heard in open court would allow publicity to prejudice my right to a fair hearing.

[16] I cannot appreciate how publicity could prejudice the rights to a fair hearing". Adverse publicity may have that effect. I shall return to this issue later.

[17] In Scott v Scott[1] which began as a divorce for nullity which was held in chambers at the instance of the petitioner. After the decree nisi had been pronounced, the petitioner through her solicitor obtained an official transcript of the official shorthand notes of the proceedings at the hearing of the cause and sent copies of the transcript to certain persons in defence of her reputation.

[18] The respondent took out a motion to commit the petitioner and her solicitor for contempt of court for publishing copies of the transcript in contravention of the order directing that the cause should be heard in camera. Bargrave Deane J. found that the petitioner and her solicitor were guilty of contempt of court and order them to pay the costs of the motion.

[19] On appeal the matter was dismissed by the Court of Appeal. On appeal to the House of Lords the arguments centered primarily on the jurisdiction of the court to hear a case in chambers.

[1] /913 A.C. 417

Vicount Haidane L.C. said[2]

"As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence can be dealt with by the judge as resting on his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity.

I think that if the principle of secret process be what I have stated; it affords guidance in other cases. In Rex v Clement[3] where under special circumstances it was held that the daily publication of the evidence in a particular criminal trial in defiance of the judge had impeded justice, and was, therefore, an offence against it, we have different illustration of a rule which may have manifold application, and may cover cases of the class before us in this appeal. But unless it be strictly necessary for the attainment of justice, there can be no power in the court to hear in camera either a matrimonial cause or any other where there is a contest between the parties ……

In either case he must satisfy the court that by nothing short of the exclusion of the public can justice be done. The mere consideration that the evidence is of an unsavory character is not enough, any more that it would be in a Criminal Court, and still less is it enough that the parties agree in being reluctant to have their cases tried with open doors"

The judge has a discretion where and how to deal with a case.

Rule 2. 7 of the Civil Procedure Rules provides.

"The court may deal with a case at any place and time that it considers appropriate".

[2] At pp 437 and 438
[3] 4 B and Ald. 218

[20] The authorities establish that in order to protect the integrity of the proceedings, the court may issue a ban on reporting the proceedings during the currency of the hearing. The authority of the court to impose a ban on reporting the proceedings of the court is for the duration of the trial only.

[21] In Rex v Clement (Supra) Holroyd J. expressed this opinion:-

"Now, I take it to be clear, that a court of record has a right to make orders for regulating their proceedings and for the furtherance of justice in the proceedings before them which are to continue in force during the time such proceedings are pending."

(See also Independent Publishing Company Limited) vs. (1) The Attorney General (2) The Director of public Prosecutions et al[4].

[22] It should be noted that in the instant case there was no ban on reporting. Even if there was, the ban could only have lasted for the duration of the proceedings, in this case, at most for one day. Moreover even if the matter was conducted in chambers and a ban was imposed a ban on reporting would have also been for the duration of the proceedings. The information which was published by the fourth, fifth and sixth defendants would have been available to them in any event.

[23] There was nothing which challenged or put the fourth, fifth and sixth defendants on notice that they could not exercise their constitutional right of freedom of expression.

[24] I have gone on at some length on this issue, notwithstanding the claimant withdrew the case against the third named defendant. In my judgment the success or failure of the claimant's action against the forth, fifth and sixth defendants impinges in some measures on what I have said above. It also impacts upon the relief the claimant is seeking in grounds 5, 6 and 7.

[4] Privy Council Appeal No. 7 of 2003

[25] If the law gives the judge a discretion as to where, when and how to deal with a matter and it cannot be shown that when she sat in open court she exercised that discretion wrongly, can it be said that by so doing, she created an avenue for adverse publicity? I think not.

[26] In Remesh Lawrence Maharaj v Attorney General of Trinidad and Tobago No. 2[5]
Lord Diplock said:
"In the first place, no human right or fundamental freedom recognized by chapter 1 of the constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to the higher court. When there is no higher court to appeal to then no one can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringement of the rights protected by section 1 (a) and no mere irregularity in procedure is enough, even though it goes to jurisdiction, the error must amount to a failure to observe one the fundamental rules of natural justice".

[27] I now consider the second declaration as prayed for by the claimant i.e. the preferring of criminal charges to exist concurrently with the claim filed by first defendant and the Bar Association touching on similar issues puts him in double jeopardy and is therefore, prejudicial to a fair hearing of criminal matters.

[28] I cannot appreciate that the bringing or preferring of a criminal charge together with another charge or charges against the claimant could put the claimant in double jeopardy and could be prejudicial to a fair hearing. Double jeopardy relates to prosecutorial abuse in criminal proceedings. It is expressed in the latin maxim nemo debet bis pro una et ed cadem causa. (Res judicata in civil proceedings) It is a golden and time honoured rule in English law that a person may not be put in peril twice for the same offence. This concept is enshrined section 8 of the St. Lucia constitution.

[5] 30 W.I.R. P 310 at 32

[29] The issue of double jeopardy arises when an accused person can show that he was convicted or acquitted of the same offence for which he is now being tried (See Connelly v Director of Public Prosecution[6])

[30] However Learned Counsel, Mr. Fraser did not cite any authorities to support his concept of double jeopardy i.e. the bringing of more than one charge against the claimant. But contended that he was using the term, double jeopardy, very loosely.

[31] Mr. Fraser argued that the bringing of the criminal charges along with the Attorney General and the Bar Association bringing an action against the claimant to have his name removed from the roll would prejudice the fair hearing of the criminal trial. He contended that in order to answer the allegations leveled at him in the application to strike him off the roll, he would have to make admissions and that the admissions could be used against him in the criminal charge, thereby destroying his right to silence given to him under the constitution (section 8 (1)).

[32] Learned Counsel for the claimant in support of his concept of double jeopardy also argued that negative findings in the Civil Court would impact on his presumption of innocent. He contended that the civil proceedings before the court are not true civil proceedings, as they are disciplinary proceedings and the standard of proof in these proceedings is proof beyond reasonable doubt.

[33] The final argument seems to me to suggest that it is the defendant, rather than the claimant, in the disciplinary proceedings who has to satisfy that burden.

[34] Notwithstanding that the action to strike Leonard Ogilvy from the roll and the standard of proof is beyond reasonable doubt, I agree with the submission of the Solicitor General that the issue of double jeopardy could never arise where one of the charges is civil or civil in nature and the other is criminal. (See Warner v Attorney General et al[7])

[6] 1964 A.C. 1254
[7] Civil Appeal No. 12 of 1995 St. Vincent and the Grenadines

[35] I now deal with declarations 4 and 5 together as they touch on the same issue that is adverse publicity. The claimant is arguing that because of adverse publicity by the first named defendant and the wide spread and adverse publicity by the fourth, fifth and sixth defendants, it is impossible for him to get a fair trial and therefore the criminal proceedings against him should be dismissed.

[36] I first of all address the question whether a claim for constitutional redress lies against the fourth, fifth and sixth defendants.

[37] Mr. Maragh, learned counsel, for the fifth and sixth defendants submitted that the protection afforded to the constitutional rights sought to be invoked by the claimant relates only to protection against contravention of those rights or freedoms by the state or some other public authority endowed by law with coercive powers. The constitution creates public law and not private law remedies.

[38] In support of that submission Mr. Maragh referred to Maharaj v Attorney General of Trinidad and Tobago (Supra).

Lord Diplock in giving the advice of the Board said at page 318.

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

[39] I would have thought that the above passage is crystal clear and devoid of any ambiguity. However, Carberry J. in Grant v Director of Public Prosecutions[8] did not think that constitutional redress is available only against the state or some other public body. He opined -

[40] "So far as the Director of Public Prosecutions' argument was based on the observations in Maharaj's case the constitutional redress is available only against the state or some such public body. Campbell J. found the argument conclusive and White J. also accepted it, with respect, we agree with Smith C.J. that the argument is not conclusive. We do not as at present advice; agree that the remedies provided by the redress section of the constitution are never available against or in respect of contraventions by private citizens. In Oliver v Buttigieg[9] the successful respondent sued directly and personally the appellant who was the government minister responsible for issuing the order that banned his political periodical from hospitals of Malta alleging infringement of his fundamental rights and freedom of expression."

[41] In my view Carberry J. A. had in mind the constitution of Jamaica when he expressed this opinion which was based on the difference in the wording which he saw between the Jamaica and Trinidad constitutions.

[42] Even without the benefit of the Malta constitution, I venture to say that a minister of government, although not strictly the state or a public authority, nevertheless the power he wields is on behalf of the state or public authority by virtue of his being a minister. In that regard, in my humble opinion, the minister fits the bill whether in his personal or official capacity.

[43] It is of significance to note that in spite of the opinion expressed by Carberry J.A., he left the issue open when he said:[10]

[8] (1980) 30 W.I.R 246 at p 273
[9] (1966) 2 A.H. E.R. 459
[10] 30 W. I.R at page 275

"As regards such actions against private persons it may well be that on most occasions, the existing remedies in tort will be such that the constitution court mindful of the proviso to section [25 (2) [section 16 (2)] St. Lucia constitution] will decline to exercise its powers because it is satisfied that adequate means of redress for the contravention are available. It is not, however, necessary for us to make any final decision in this matter, because we are concerned in this case with a potential contravention by the state, a failure to protect the due course of justice."

[44] Except "without discrimination" in the Trinidad and Tobago constitution which is omitted from the St. Lucia Constitution, sections 1 of both constitutions are substantially identical.

[45] I am inclined to the view that "constitutional redress is available only against the state or some such public authority endowed by law with coercive powers" and to my mind that does not admit to any interpretation.

[46] Even if I would be inclined to the other view i.e. remedies provided for by the redress provisions of the constitution are available against contraventions by private citizens. I would have declined to exercise the constitutional powers under the proviso to section 16 (2) of the constitution, because I hold that adequate means of redress are available to the claimant (See Harrikisson v Attorney General of Trinidad and Tobago[11].)

[47] What the claimant is contending is that the fourth, fifth and sixth defendants published extensively prejudicial material about him which will deny him a fair trial. Although the claimant did not alleged that the material which were published were defamatory, however if they are, then he will have an action in the law of tort against the defendants. In my view the publication, if untrue, are prima facie for deformatory

[48] I now deal with the issue of the adverse pre-trial publicity.

[11] (1980) A.C. 265

[49] Before I embark on this issue I wish to state that St. Lucia is a democratic society with a written constitution which is the Supreme Law of the land. The right of a free press and a free trial are fundamental rights and freedoms guaranteed by the constitutions.

[50] It is obvious that there are times when one would come into conflict with the other. When this happens, it is inevitable that the court will be called upon to resolve the conflict, if indeed there is a conflict.

In doing so the court must perform a delicate balancing exercise in resolving the conflict. In this regard I think it is pertinent to remind ourselves of the dicta of Renfret C.J (Canada) in Boucher v R[12] quoted by Shama J. A. in Boodram v Attorney General [13]when he said:

"…….. to interpret freedom as a licence is a dangerous fallacy. Obviously pure criticism, or expression of opinion, however severe or extreme, is, I might almost say, to be invited. But, as said elsewhere, there must be a point where, restriction on the individual freedom of expression is justified and required on grounds of reason, or on the ground of the democratic process and the necessities of the present situation". It should not be understood ……. that persons subject to the Canadian jurisdiction "can insist on their alleged unrestricted right to say what they please and when they please, utterly irrespective of the evil results which are often inevitable". It might well be said in such case, in the words of Milton, "Licence they mean when they cry Liberty," or as expressed by Mr. Edouard Herriot, "La liberté doit trouver sa limite dans l'autorité légale".

[51] The claimant by paragraphs 20 to 34 of his affidavit filed on 7th April 2006 has set out the matters of adverse pre-trial publicity on which he relies.

[52] He alleges first of all that the fourth named defendant on the evening of 22nd March 2006 in the evening news programme publicly broadcasted the events that took place in open

[12] (1957) 2 D.C.R. 369 at page 379
[13] 47 W.I.R. 459 at page 471

court and displayed documents and their contents and made comments in an adverse way in his case.

[53] The claimant in his affidavit also alleges that on 7th April 2006 the fourth named defendant on its programme "the week in review" did broadcast the said news item and further displayed other documents in particular, two of them allegedly showing that he was imprisoned for theft and contempt of court. That the comments and analysis coupled with disclosure were negative and prejudicial to a fair hearing of his case.

[54] The six defendant who regularly airs a patois programme "Jook Bois" on that morning read out documents on the fifth defendant's radio station and made comments on the accuracy of the said documents in a manner which was prejudicial to his interest and fair hearing of any criminal charges against him.

[55] The claimant filed a further affidavit on 18th April, 2001. He alleges that the first named defendant on 11th April, 2006 held a press conference in respect of one Nandi Deterville who had caused her name to be removed from the Roll having practiced for sometime as an Attorney.

[56] At the press conference the first named defendant was reported to have said:

"Because I know that persons may be anxious to find similarities or differences between the case of Nandi Deterville and Leonard Ogilvy. Let me just state that the Attorney General Chambers which initiated proceedings against Mr. Ogilvy has no evidence that Ms. Deterville has broken any law in St. Lucia. She did not overstay any time allowed her in St. Lucia; she did not violate work permit laws of St. Lucia nor falsify any documents or made any fake documents or make any false declaration for gain".

[57] The claimant alleges that the first named defendant's conduct is calculated to cause prejudice to his right of a fair trial.

[58] I understand the claimant's contention is that the adverse publicity against him was so widespread that it would not be impossible for him to have a fair trial. Particularly in light of the fact that St. Lucia is a small community, it would be difficult to find a pool of jurors who were not affected by the prejudicial materials.

[59] In this regard Learned Counsel, for the claimant argued that the pool of jurors from which the jurors are drawn is so small that it would be impossible to find anyone in St. Lucia who was not exposed to the prejudicial material particularly in light of the fact that the prejudicial materials were aired at "prime time" on the fourth and fifth defendants' stations.

[60] He agued that a temporary ban would not be appropriate having regard to the fact that the claimant is not a St. Lucian. He is unemployed with no means of support in St. Lucia. Mr. Fraser contended that a stay would be prejudicial to the claimant.

[61] In support of this argument. Mrs. Cheryl Darcheville deposed to an affidavit in which she said among other things, in paragraph 3 and 4:

The H.T.S. news stated clearly that Mr. Ogilvy has several names and that he was "no stranger to prison since he has served time in prison for contempt of court and also theft." It was stated that Mr. Ogilvy was arrested as he attempted to flee the country and he was charged with over twenty counts of fraud and forgery …….. Mr. Ogilvy is indeed a fraud and will most likely be arrested when he returns to England".

4 ….. following the news excerpt many St. Lucian bombarded the call in programmes to voice their opinion……"

[62] She said in cross examination that in her affidavit in paragraph 7 that she was led to believe what was said. But in spite of that she remained objective on all matters. She insisted that H.T.S. the fourth named defendant, never issued an objective report.

[63] The answers in cross examination of this witness, demonstrated quite clearly, to my mind that in spite of what may be said in the media, what may be thrown at the listening public,

there are persons that don't just "swallow" everything before siftying what they heard. In other words they can discern an objective report or bias report from one which is unobjective and unbiased.

[64] Moreover, Caribbean people are said to be a "nine day wonder" as one writer puts it. That is to say that when something happens, it is talked about by nearly everyone only to be forgotten in a short while.

[65] In that way the poison of any prejudicial material even if ingested by some members of the populace time, would as it were, act as an antidote to such poison.

[66] In this regard I cannot, notwithstanding the apparent difficulty the claimant faces, agree with learned counsel for the claimant when he said that a stay would be prejudicial to the claimant. In any event over two months have elapsed since the publication of the materials complained of.

[67] Mr. Fraser is asking for the extreme remedy of dismissal of the action rather than postponement. As Winter J. observed in Rideau v Louisiana[14]

"A defendant who has unused means to protect his rights should not lightly be granted the extreme remedy of dismissal of the charges against him unless there is a conclusive showing that the unused means would be ineffective".

[68] The court went on to observe:

"There is the interest of society in the enforcement of the law, and the available methods, not yet tried of minimizing the prejudicial effects i.e. challenge to the jury, change of venue and postponements.

[69] Even if the complainant establishes that there was pre-trial publicity he must go on to discharge the heavy burden that his right to a fair hearing has been or is likely to be infringed.

[14] 373 us. 723

[70] In Boodram v Attorney General of Trinidad and Tobago
Warner J. said:
"I am persuaded to accept the arguments presented on behalf of the respondents that pre-trial publicity does not necessarily lead to an unfair trial".

[71] I make the observation that the matters complained of in that case the potential prejudicial effect on the trial was much more serious that in the case at bar.

[72] In Boodram (Supra) Shama J.A. opined:[15]
"The trial judge has at his disposal the several common law options available to him on the application of the accused to ensure whether it would be proper to postpone the trial, or to carry on with it, if the accused has not, established prejudice on the part of the potential jurors, or whatever he thinks necessary to ensure the accused gets a fair trial.

[73] It seems to me, that in fact, the criminal court is by far the more suitable forum for the accused to pursue his application. The prospective jurors would actually be there, and he would have the ideal opportunity to demonstrate "live" any alleged prejudice with some degree of certainty and not to leave it to the cold and clinical constitutional court to conjecture whether or not he is likely to get a fair trial or not.

[74] This is not to say he is being driven away from the constitutional court. His motion is simply stayed or dismissed if the judge is so satisfied and the more effective method can then be resorted to by the accused to ensure the fair trial which he so passionately craves".

[75] In Light of the foregoing I hold that the claimant has not displaced the burden of his right to a fair hearing has been or is likely to be infringed. He is therefore denied the constitutional relief which he seeks. In this regard declarations 2, 3, and 4 and consequential orders 5 and 6 are denied.

[15] At page 484

[76] I consider declaration 1, the first and second defendants' action in detaining him for a period in excess of 72 hours before he was taken before a magistrate was in violation of his fundamental right as a person in detention.

[77] Section 3 (3) of the constitution of St. Lucia mandates.

Any person who is arrested or detained –

(a) For the purpose of bringing him before a court in the execution of the order of a court or

(b) Upon reasonable suspicion of his having committed, or being about to commit a criminal offence under any law

and who is not released shall be brought before a court without undue delay and in any case not later than seventy two hours after such arrest or detention".

[78] Section 3 (5)

"If any person arrested or detained as mentioned in 3 (b) of this section is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to and such condition may include bail so long as it is not excessive".

[79] Section 3 (5) is what I would refer to as the bail section and section 3 (3) mandates that if a person is taken into custody on suspicion of committing an offence he must not be kept longer than seventy two hours and if he is not tried he should be brought before the court when he should be released on bail (with certain exceptions).

[80] The Solicitor General with candor in her written submission said:

"It is accepted that a person charged with a criminal offence should be prosecuted without delay, and that section 3 (3) is one of the provisions designed to ensure that he is. Section 3 (3) is an absolute provision"

[81] It is beyond doubt that the clamant was kept in police custody for more than seventy two hours. He was detained about 6:55 p.m on Friday 18th March 2006. Seventy two hours would have expired on Sunday 20th March 2006 at about 6:55p.m. He was taken before the magistrate at about 9:00 a.m. on Monday 21st March 2006. His period of unlawful detention would have been just over fourteen hours.

[82] No reason or explanation was given for the unlawful detention. It is common knowledge that the magistrate's court does not sit on Sunday when seventy two hours would have expired, but this does not provide an excuse.

[83] The Solicitor General submitted that the court should decline to exercise its powers under section 16 (1) and (2) because, the claimant has been released on bail, he is no longer incarcerated and this constitutes an adequate means of redress".

[84] I do not agree. A wrong cannot be put right by doing what was supposed to have been done in the first place. In this regard a breach cannot be put right by doing something which should have been done which occasioned the breach.

[85] The Solicitor General further submitted that the remedy available to the claimant is dependent on the prejudice occasion by the claimant and any damage occasion by such prejudice can and ought appropriately to be dealt with by the trial court, which court would be better placed to deal with the effect of the prejudice at the claimant and the trial process. Again I do not agree.

[86] I hold that there was an infringement of the claimant's fundamental rights in detaining him in excess of seventy two hours.

[87] However it was not a breach which began with an illegal detention. But rather a breach which began with a lawful detention. The period of detention in excess of which turned out to be unlawful. This was, to my mind, not a contumacious breach.

[88] In the circumstance I consider that damages to be an adequate remedy. What sum should be awarded?

[90] The Solicitor General submitted that any award of damages can only be nominal. She relied on Maharaj. (Supra)

[91] In giving guidance on the subject Lord Diplock at page 321 says:

"Finally their Lordships would say something about the measure of monetary compensation recoverable under section 6 where the contravention of the claimant's constitutional rights consists of deprivation of liberty otherwise than by due process of law. The claim is not a claim in private law for damages for the tort of false imprisonment (under which damages are recoverable at large and would include damages for loss of reputation) It is a claim in public law for compensation for the deprivation of liberty alone.

[92] Such compensation would include any loss of earnings consequent on the imprisonment and to recompensate for the inconvenience and distress suffered by the appellant during his incarceration…."

[93] Mrs. Georgis Taylor-Alexander also submitted that the defendant is restrained from practicing as an Attorney – At – Law; therefore he is not entitled to earn an income at the time of the alleged contravention. I agree.

[94] Damages are awarded against the first named defendant only, in other words against the state. The arrest and detention of the complainant was effected by the executive arm of the state – Maharaj[16].

[16] At page 318

Order

[95] In this regard I assess damages for inconvenience and distress for the fourteen hours of his illegal detention. In my judgment distress or anxiety would have began after 6:55 p.m. on Sunday. He would have known that his initial detention was lawful but anxiety would have begun after 6:55 p.m. when he knew he ought to have been released.

[96] I assess the damages in the sum of $1500.00 to the claimant for the breach of his fundamental right.

……

Albert J. Redhead

High Court Judge (Ag)