

EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO.: BVIHCV2016/0319

BETWEEN: Wakeem Guishard

Claimant

and

The Attorney General of the British Virgin Islands

Defendant

Appearances:

Mr. Jamal Smith with Mr. Daniel Davies of Counsel for the Claimant
Mrs. Vareen Vanderpool-Nibbs with Ms. Maya Barry of Counsel for the Defendant

2018: July, 18th
October, 4th

JUDGMENT

[1] MOISE, M.: This is an application for an assessment of damages. The claimant commenced this action on 2nd December, 2016 seeking damages for wrongful arrest, false imprisonment and malicious prosecution. He obtained a judgment in default on 17th March, 2017. An application to set this default judgment aside was denied by Master Raulston Glasgow (as he then was) on 24th October, 2017. The claimant now seeks an assessment of the damages to which he is entitled.

The facts

[2] The claimant states that on 28th May, 2014 he was at his residence in Carrot Bay on the island of Tortola. Whilst there **he observed a motor vehicle “rush” into his yard. He noticed a number of persons** jumping out of the vehicle with guns drawn. According to his evidence, these persons included Detective Constable 104 Jumo Shortte and other members of the Royal Virgin Islands Police Force. He was handcuffed and informed that he was being arrested on suspicion of murder. He

was handed a search warrant and observed the police officers searching his residence. He was then escorted to the West End Police Station where he was placed in a cell **“with a plywood bed.”**

[3] The claimant further asserts that he was later escorted to the Road Town Police Station on the same night and placed in another cell with plywood beds. The following day he was interviewed in **his lawyer’s presence.** He asserts that 24 hours later he had not had the courtesy of being allowed to take a shower and had nothing to eat. He was then charged with the offence of murder and escorted to the prison after being placed on remand by a Magistrate.

[4] The claimant describes his life in prison as horrible. He was first placed on the “A wing” of the prison. He describes the cell as having **“an iron frame with a sponge on it for a bed, straight ahead was a metal sink with a little counter and a metal toilet attached to the side.”** At the time of his admission to the prison he had not had a shower in 3 or 4 days. At the prison, inmates were locked down for 23 hours a day. During his time in the “A wing” he witnessed many fights and **“bloody attacks”.** He recounts one instance of a fight between a prisoner and a guard which ended in the guard being stabbed. He also recounts one incident where an inmate got stabbed in the neck and fell right in front of him. This he described as **“the bloodiest and the scariest.”** All of this took place in circumstances where, according to the claimant, he had never been arrested and imprisoned before.

[5] In describing his first day in prison, the claimant states that he was only offered sardines and dry bread to eat; which he refused to accept. He was only able to eat after his sister brought him some microwavable soups, cornflakes, milk, water and juices. He states that the only highlight of his time on the “A wing” was visits from his family on Tuesdays and Thursdays. However, these were limited to 15 minute periods. This was all the time he had to interact with his daughter and other members of his family. After 648 days in prison, he was transferred from the A wing to the general population. He states that the conditions there were less harsh than the A wing.

[6] The claimant goes on to state that the indictment in his case was not filed by the Director of Public Prosecutions until 8th January, 2015. As a result of this, his matter could not be heard until the next criminal assizes. He was charged with 3 other co-accused. On 10th March, 2015 his case was adjourned due to the unfortunate **passing of the judge’s father.** The trial commenced on 13th March,

2015 and, after 11 days of testimony, a mistrial was declared by the trial judge. Subsequent to that, the claimant made 2 applications for bail, which were both denied. During the hearing of his second application for bail, on 16th December, 2015, there was initially no appearance from the prosecution. After the matter was stood down for 30 minutes, crown counsel appeared and informed the court that they were unaware of the date and the bail application was then adjourned to 19th January, 2016. The claimant then abandoned his application, as the transcripts of the previous proceedings were then available and the trial was to commence during the next assizes.

[7] The claimant and his co-defendants were re-tried on 8th March, 2016. However, after 4 days of evidence the entire jury was discharged. On 12th April, 2016 a third trial commenced and, after 16 days, the claimant was acquitted and released from custody. The claimant contends that the only **evidence presented by the prosecution was the testimony of a “convicted murderer”**. This fact was however not expounded upon and the evidence filed by the claimant does not provide much detail regarding the charge and the issues which were raised during the trial. On the basis of these facts, he alleges that he was prosecuted maliciously and without reasonable or probable cause.

[8] It must be observed that due to the failure of the state to file a defense to this case, the evidence and pleadings of the claimant have remained uncontroverted. The claimant therefore claimed damages, including damages for loss of income and other special damages, general damages, interest and costs.

Special Damages

[9] The claimant makes 2 claims for special damages. Firstly, he claims compensation from the state for an amount which he would have had to pay in child support to his 5 children. Counsel for the claimant, in his written submissions, asserts that the practice of the family court in the British Virgin Islands is to award a minimum of \$200.00US per month per child. Given that the claimant has 5 children who he was not able to maintain during the course of his incarceration, he claims damages in the sum of \$1000.00US per month from the state.

[10] The defendant, on the other hand, argues that this is an expense of the claimant which is not recoverable in damages. This expense, it is argued, would have been incurred regardless of whether

the claimant was incarcerated or not and as such it is not an expense which was a direct consequence of the actions of the state in this instance.

[11] I agree with the submissions **of the defendant. The expense of maintaining the claimant's children** is one which would naturally be met out of his income on a monthly basis. Given that he has claimed loss of income, it would not be appropriate to grant him an award for child support. In any event, he has not provided any documentary evidence to prove that there was ever any order from the court for child maintenance in relation to any of his children. I will therefore make no award for compensation for child maintenance in this matter, as I am not of the view that it is the type of damages which is generally recoverable in such cases.

[12] The claimant also claimed damages for loss of income in his statement of claim. In his pleadings he states that prior to his arrest he **was employed with Smith's Trucking where he earned \$120.00US per day**. He elaborates in his witness statement by stating that he worked on Monday through to Saturday and sometimes on Sundays. He estimates that he had the potential to earn approximately \$72,480.00US during the period of his incarceration.

[13] The defendant argues that the claimant has not provided any evidence to substantiate this claim. There is no schedule of damages for loss of earnings contained in his statement of claim and he has provided **no documentary evidence to prove that he was in fact employed with Smith's Trucking**. There is also nothing by way of pay slips or other form of evidence to show if and what his actual income was prior to his incarceration. In fact, the only evidence provided was that of the **claimant's employment after he was released from prison. In support of their submissions, the defendant** relies on the case of ***Steadroy Matthews v. Garna O'Neal***¹ where the following was stated in an appeal against the **master's award for special damages**:

"In light of the failure of the respondent (as the claimant in the court below) to comply with the requirements of rule 8.9 (5) of the CPR by including in or attaching to the claim form or statement of claim a schedule of the special damages claimed for loss of earnings, and in the absence of both specific pleading and strict proof of the damages awarded, it was not open to the master to make the award that she did for special damages of \$197,155.00 for loss of earnings. I will accordingly set aside this award."

¹ BVIHCVAP2015/0019

[14] I generally agree with the submissions of the defendant. However, the court has, on occasion, accepted that a claimant may not always be in a position to provide documentary proof of his loss of income. A self-employed tradesman, for example, may not always be in a position to provide concise evidence of his source and levels of income. Likewise a farmer, who plies his trade on a small farm. As Master Taylor-Alexander (as she then was) once stated, “[m]any persons engage in odd jobs, or day jobs, what we traditionally knew to be a bob-a-job, proof of which is difficult to provide, as it is often paid in cash”².

[15] That however, would not absolve such a claimant from specifically pleading the facts upon which he would rely, even if only to show that his employment was of the type for which strict proof of loss of income is difficult or impossible. Where the right circumstances exist, the court is empowered to make an award of nominal damages. As Mason J stated in the case of *Cosmos William v. The Comptroller of Customs*³, “when the necessary evidence is not provided but the circumstances warrant it, it is open to the court to give consideration to an award of nominal damages.” Indeed, the defendant has invited the court to consider an award of nominal damages if the court is minded to give any damages for loss of earnings at all. The question for consideration is whether the circumstances of this case warrant the award of nominal damages in the absence of evidence to strictly prove that the claimant has lost income during his period of incarceration. The circumstances under which such an award can be made can only be ascertained from the facts which have been pleaded by the claimant.

[16] In the case of *Hamilton Edward v. The Attorney General*⁴ Phulgence J considered the issue of nominal damages in circumstances where the claimant, a taxi driver by profession, had had his minibus seized by the Comptroller of Customs. Phulgence J states that “Mr. Edward gave evidence that he is a taxi driver and this is not disputed. It is generally the case that minibus drivers and taxi drivers do not issue receipts and may not have documentation to show their earnings.” In such a case where there was undisputed evidence that the claimant operated as a taxi driver, it would stand to reason that some loss of income would be inevitable if his minibus

² See *David Balcombe v Vaughn Lowman*

³ SLUHCV2006/0259

⁴ SLUHCV2015/0669

was unlawfully seized by the government. This is an approach which the court is entitled to take when considering the issue of damages. The circumstances of that case was such that there was sufficient evidence to prove the loss, but insufficient evidence to quantify it as would normally be the case in an award for special damages. On that basis the court would proceed to award a reasonable sum in nominal damages.

[17] In the present case, the claimant simply states that he worked for a trucking business and earned \$120 per day. He provides no evidence to substantiate this and gives no explanation as to why he was unable to do so. In my view, **the court's powers to grant a nominal award should not be used as a means of circumventing a claimant's duty to specifically plead and prove his special damages.** I am not satisfied that the claimant has provided sufficient evidence to allow for an award of damages for loss of earnings, whether as a substantive or nominal award. I will therefore make no such award.

Damages for wrongful arrest and false imprisonment

[18] The factors which the court must consider in assessing damages for wrongful arrest were outlined in the Trinidadian case of *Millette v. McNicolls*⁵ where de la Bastide CJ stated as follows:

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

⁵ Civil Appeal No. 14 of 2001

compartments (initial shock, length imprisonment, etc) but by taking all such factors into account and then approaching the **appropriate figure in the round**” compartments, one for initial shock, the other for length of imprisonment and so **on. All the factors are to be taken into account and an appropriate figure awarded.”**

[19] Further guidance can be found in the decision of Ramdhani J (a.g.) in the case of *Everette Davis v The Attorney General of St. Christopher and Nevis*⁶. Although this was a case brought by the claimant for breach of constitutional rights, it has been determined that the principles also apply in a claim at common law for wrongful arrest and false imprisonment. At paragraph 46 of his decision he states as follows:

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

[20] Further to this, Ramdhani J then went on to adopt an approach which was similar to that encouraged by de la Bastide C.J. as cited above. He goes on to state the following at paragraph 60 of his judgment:

“In matters such as this where the detention period is not a short one as in a few hours or days, I am of the view that an initial sum should be given for the initial period of detention, and then a fixed sum should be given for each day that the claimant was detained. I have chosen to take this approach in recognition of the shock and humiliation, which would have been felt by the claimant initially on being

⁶ SKBHCV 2013/0220

arrested by the police. The aggravation is more at this stage. A fixed sum is appropriate for this initial act of detention. Thereafter, I consider that it is only proper that a sum be fixed for every day of detention having regard to those relevant factors that are set out above.

[21] The starting point therefore, in assessing the compensation for false imprisonment and wrongful arrest, is to determine a reasonable sum for the initial period of detention. As I have already noted, the claimant described in detail the initial circumstances of his arrest. Police officers alighted from a motor vehicle with guns while he was relaxing at his own residence. His home was searched and he was escorted to two different police stations within the space of a few of hours. He was denied a shower and was not satisfied with the provisions made for his meals. He states that he had never been arrested before and that he found the conditions of prison life from the inception to be horrible.

[22] Counsel for the claimant argues that the sum of \$288,000.00US is a reasonable award to be made for this initial period of arrest. He premises this submission on the case of *Elihu Rhymer v. The Commissioner of Police*⁷ where the sum of \$20,000.00US was awarded for 3 hours of unlawful detention. He submits therefore that this amounts to \$666.67US per hour. Taking inflation into consideration, he invites the court to award the sum of \$12,000.00US per hour for the first 24 hours of **the claimant's incarceration.**

[23] I wish to state from the onset that this submission is entirely unsustainable and way above a reasonable sum which the court ought to award for the initial period of detention. The damages referred to in *Elihu Rhymer*, was not the same as what the court would generally award for the initial period of detention. In that case the court awarded \$1000.00 in nominal damages for wrongful arrest and \$20,000.00 as exemplary damages⁸. This is not what the court is concerned with at this stage. The award for the initial shock is not necessarily calculated as an hourly rate, but is an award which is reasonable enough to compensate the claimant for the initial shock of his arrest

⁷ BVI Civil Appeal No 13 of 1997

⁸ See paragraph 8 of the decision of Edwards J in the case of *Bernadette Matthew v. The Attorney General of Montserrat*, Suit No. 15 of 1999.

and detention. This is not designed to be a windfall and the exemplary damages awarded in *Elihu Ryhmer* is of no assistance in determining what this initial award should be.

[24] As Lord Wolf stated in the case of *Thompson v. Commissioner of Police of the Metropolis*⁹, “a plaintiff who has been wrongly kept in custody for – hours should for this alone normally be regarded as entitled to an award of about £3,000. For subsequent days the daily rate will be **on a progressively reducing scale.**” Ramdhani J took a similar approach in *Everette Davis*. He states the following at paragraph 64:

“I am of the view, having regard to all the factors set out above, that for the initial period of detention, this claimant is entitled to at least EC\$20,000.00 for the initial act of detention, and a sum of EC\$500.00 per day for each day of detention beyond the initial act of detention.”

[25] Therefore, the approach is not one in which the court is to set an exorbitant hourly rate for the first period of detention. The courts have adopted a more general approach in fixing a reasonable sum for this period and then to go on to set a daily rate for the remainder of the time which the claimant had spent in custody. I have considered the circumstances of the present case and addressed my mind to the fact that the award in *Everette Davis* is quoted in Eastern Caribbean dollars as oppose to the US currency, which is officially in use in the British Virgin Islands. In the circumstances I am of the view that the sum of \$20,000.00US is a reasonable sum to be fixed for the initial period of **the claimant’s detention.**

[26] It is left now for me to determine a reasonable daily figure for compensation for the remaining period of the claimant’s detention. Counsel for the claimant invites the court to award compensation at a daily rate of \$6,000.00US for the period in which the claimant was on the “A wing” and to reduce this amount to \$5000.00US daily for the period during which the claimant was transferred to the general population of the prison. At this rate, the claimant asserts that he is entitled to approximately \$4,178,000.00US for 706 days in prison. No doubt, the purpose of an award is to vindicate the claimant for the injustice he may have suffered. However, I can find not one authority which supports the proposition that the award of damages in this case can be made at the levels submitted by counsel for the claimant. The court is concerned with the fact that the defendant was wrongfully

⁹ [1998] QB 498

deprived of his liberty. The conditions which he was called upon to exist, are such that no reasonable person would ever want to endure. The award must vindicate him in his claim. However, there must be some justification for an award which is that far outside of the range which has been awarded by the court in previous cases. I am not satisfied that this justification has been established.

[27] In the Bahamian case of *Takitota v. The Attorney General*¹⁰, the Privy Council had some difficulty in determining the daily rate of the award initially made by the court. However, the sum of \$250.00 was initially fixed as reasonable compensation for false imprisonment. In *Everette Davis*, Ramdhani J fixed the daily rate at \$500.00EC. In the more recent case of *Michael Stephens v. the Attorney General of Saint Lucia*¹¹ Wilkinson J also fixed the daily rate at \$500.00EC. I have again taken into consideration that the rates fixed in two of the 3 cases referred to were in Eastern Caribbean dollars. However, the case of *Takitota v. the Attorney General*, compensation was fixed in the currency of the Commonwealth of the Bahamas, which is approximately on par with the US Dollar.

[28] I am in a similar position to Ramdhani J where he states in *Everette Davis* **that** “*there is hardly any definitive guidance even in the cases as to how the courts arrive at the final figures, and I have not been able to locate any literature to guide me in this process.*” It would seem that the sum of \$500.00EC has emerged as an acceptable figure in the other territories of the Eastern Caribbean. This is approximately \$185.00US, which is lower than the rate initially fixed in the Bahamian case of *Takitota* which was decided over a decade ago. In the circumstances I am of the view that the sum of \$300.00US per day is reasonable compensation for the period of the **claimant’s incarceration. I am not inclined to place different rates for the period in which the claimant was removed from the “A Wing” of the prison.** It would suffice to say that I have taken all of these factors into consideration in arriving at this figure.

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

¹⁰ [2009] UKPC 11

¹¹ SLUHCV2013/0425

Damages for malicious prosecution

[30] In the case of *Sylvanus Leslie v. Ryan Oilivierre*¹², Byron CJ described the tort of malicious prosecution in the following manner:

“It is well settled on the authorities that an action only lies for the malicious prosecution of criminal cases or the malicious presentation of insolvency proceedings.

“In an action for malicious prosecution the plaintiff must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge; secondly, that the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause; fourthly, that it was malicious.”

[31] The first two factors set out in the criteria have no doubt been met. As it relates to the lack of reasonable and probable cause as well as the motive of malice, I note that the claimant obtained a judgment in default and that the judgment was not based on the merits of the case. However, there being no alternative set of facts on which the court is to rely, **the claimant’s pleadings will be taken** as establishing liability for malicious prosecution. In the case of *Danny Ambo v Michael Laudat et al* Master Lanns highlighted the factors which she considered in assessing damages for malicious prosecution. She stated as follows:

[22] In regard to malicious prosecution, the Claimant is entitled to recover for injury to reputation as well as injury to feelings, indignity, humiliation and disgrace caused to him for maliciously putting the law in motion against him – by the fact of preferring charges against him.

[23] Murder and conspiracy to commit murder are very serious charges. There was no reasonable or probable cause as set out in the particulars in the pleadings. The charges were dropped. But the Claimant was faced with the fear and anxiety of a groundless prosecution and conviction against him. His reputation is likely to have suffered as a result of those charges. The Claimant was humiliated and distressed by the attendance of the crowd in and out of court seeking to get a glimpse of him.

[32] The charges against the claimant in the present case were indeed serious. He was charged with murder. He complains that he was deliberately paraded before journalists and other members of

¹² CIVIL APPEAL NO.27 OF 2001 (Saint Vincent and the Grenadines)

the public during one of his hearings before the court. He suffered the humiliation, indignity and disgrace referred to by Master Lanns. In his evidence he also states that at the time of his arrest he **had only recently had a case against him dismissed in the Magistrate's court for want of prosecution**. I am not at all sure that there was any link between the two cases. However, the claimant states that soon after that case was dismissed a warrant was obtained by Detective Constable Jean Avril who swore to having a reasonable belief that the claimant was in possession of an **unlicensed firearm and ammunition**. **It is the claimant's assertion that there was no basis** for that belief.

[33] I also note that the claimant suffered the ordeal of undergoing 3 trials for this offence, two of which were declared a mistrial; only to be acquitted by a jury on the third attempt by the prosecution. His numerous applications for bail during this period were denied.

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

Interest and Costs

[35] Counsel for the claimant relied on the case of ***Steadroy Matthews v. Garna O'Neal*** for the submission that the court is empowered to award pre-judgment interest at a rate of 3% up to the date of the judgment and 6% from the date of judgment. He also relies on the cases of *Clifton Belfon v. The Attorney General*¹³ and *Shawn Chinnery DBA Car Rentals and Charters v. Department of Customs et al*¹⁴ as examples of cases in which the court adopted such an approach. The defendant on the other hand, argued that the claimant never prayed for pre-judgment interest in his statement of claim. It was also argued that there is no basis for pre-judgment interest.

[36] The court would normally allow for pre-judgment interest on special damages, as these are expenses which the claimant may have had to undertake from the date of the incident. Although pre-judgment interest was granted in the cases referred to by the claimant, no explanation was given by either master as to the basis for adopting that approach. However, I note that in *Shawn Chin-*

¹³ GDAHCV2007/0439

¹⁴ BVIHCV2013/0195

nery DBA Car Rentals, the award of interests covered general as well as special damages. In the present case I have made no award for special damages. I will therefore award interest at the statutory rate of 5% from the date of judgment.

[37] The defendant will pay prescribed costs to the claimant, discounted for the fact that the assessment has taken place after judgment was entered in default. I have calculated prescribed costs to amount to \$34,400.00US, 45% of which is \$15,480.00US. I would allow a further \$1,500.00US in costs on the application for assessment.

The Court's Order

[38] In the circumstances I make the following orders:

- (a) The defendant is to pay the sum of \$231,500.00US in damages to the claimant for wrongful arrest and false imprisonment;
- (b) The defendant is to pay the sum of \$25,000.00US in damages to the claimant for malicious prosecution;
- (c) Interest is awarded on damages at a rate of 5% per annum from the date of judgment;
- (d) Prescribed costs to be paid in the sum of \$15,480.00US.
- (e) Costs in the sum of \$1,500.00US in favour of the claimant on his application for assessment of damages.

Ermin Moise
Master

By the Court

Registrar