COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

CRIMINAL DIVISION

2015/CRI/VBI/23/1

IN THE MATTER OF THE QUEEN V DEXTER DAVIS
(INFO NO. 23/1/2015)

IN THE MATTER OF THE ASSESSMENT OF DAMAGES PURSUANT TO THE ORDER OF THE HONOURABLE MRS JUSTICE ESTELLE G. GRAY EVANS MADE ON 21ST JULY 2015

B E T W E E N:

DEXTER DAVIS

APPLICANT

AND

THE QUEEN

RESPONDENT

BEFORE: The Assistant Registrar (Acting), Mr. R. Dawson Malone

APPEARANCES: Mr. Simeon Brown and Miss Simone Brown for the Applicant

Mrs. Eurika Coccia, Mr. John Kemp, Mrs. Anishka Missick, and Mr. Audirio Sears for the Respondent

HEARING DATES: 5th November, 2020 and 3rd December, 2020

JUDGMENT
ASSESSMENT OF DAMAGES

Introduction

1. This is an assessment of damages pursuant to the Order of then the Honourable Mrs. Justice Estelle G. Gray Evans (now Senior Justice) contained in the Judgment herein delivered on 21st July, 2015 in which the learned Judge held as follows:

> *"22. . . . the charge as laid in the charge sheet was not laid in accordance with the provisions of section 58 [**of the Criminal Procedure Code**] and is therefore invalid and that all proceedings, including the applicant's remand to H. M. Prison and the subsequent issuance of the aforesaid Voluntary Bill of Indictment and information, based on the said unsigned charge sheet are also invalid."*
>
> *. . .*
>
> *"31. It seems to me that if the charge and information issued pursuant thereto are invalid and they were the basis of the applicant's remand and continued detention at H. M. Prison, then the applicant's remand and detention at H.M. Prison must also be invalid and therefore, unlawful and, if unlawful, **in contravention of his constitutional rights under Article 19 of the Constitution** not to be deprived of his personal liberty save as may be authorized by law, and I so find.*
>
> *32. The applicant seeks an order that upon the determination that his constitutional rights under **Article 19 have been violated that he be paid compensation pursuant to Article 19(4) of the Constitution**.*
>
> *33. . . .*
>
> *34. In light of my finding that the detention of the application, in custody pursuant to an invalid charge and information is or was unlawful and a contravention of Article 19 of the Constitution, **the applicant** is, in my judgment, **entitled to the relief he seeks**.*

35. So, in addition to the order quashing the information and discharging the applicant, it is also hereby ordered:

(a) . . .

(b) That the respondent do pay ***compensation to the applicant for his unlawful detention****, to be assessed by the Registrar of the Supreme Court.*

(c) . . ."

Assessment Proceedings

2. The Respondent appealed the judgment of Gray Evans J however the same was dismissed for want of prosecution by the Court of Appeal on 21st February, 2019 at a call over hearing.

3. Even though the appeal did not operate as a stay, it appears from the court file that efforts for listing of the assessment did not take place until after the dismissal of the appeal.

4. A directions hearing was held to ascertain the status of the matter, witnesses, papers filed and any other procedural issues on 8th October, 2020 and, after hearing from Counsel, the following directions were given:

- **The Affidavits of Simone Rochelle Brown filed herein on the 21st August, 2019, the 4th February, 2020, the 19th June, 2020 and the 22nd June, 2020, the Affidavit of Dexter Davis filed herein on the 6th March, 2019 and the Affidavit of Patrick Joseph Moss, filed herein on the 24th June, 2020, shall stand as evidence in chief, for the Plaintiff/Applicant;**

- The Plaintiff/Applicant is at liberty to file and serve any additional or supplemental Witness statement by 15th October, 2020;

- The Affidavit of Sgt. 2676 Etric White filed on 31st January, 2020, shall stand as evidence in chief for the Defendant/Respondent;

- The Defendant/Respondent is at liberty to file and serve any additional or supplemental witness statement by 22nd October, 2020;

- Any notice to cross examine a witness shall be filed and served by 29th October, 2020. If there is no notice to cross examine, there is no need to cross examine or appear as witness statements are sworn. Should a witness who is given notice to appear for cross examination fail to appear his or her witness statement or affidavit shall stand struck out and or disregarded;

- Any preliminary objections or preliminary issues shall be filed and served by 29th October, 2020;

- There is a final adjournment of this Assessment to the 5th and 6th November, 2020 at 10 a.m on each day;

- After the taking of evidence, the Court shall adjourn for Closing Submissions and Arguments.

5. Thereafter, the Plaintiff:-

a. on 13th October, 2020 obtained a Writ of Subpoena Duces Tecum issued to Superintendent Robert Lloyd, Complaints & Corruption Branch of the Royal Bahamas Police Force, Freeport, Grand Bahama;

b. on 15th October, 2020 filed an affidavit sworn by Harold Anderson Simmons; and

c. on 29th October, 2020 filed a notice to cross examination Sgt. 2676 Etric White.

6. Having regard to the coordination for conducting an in person hearing given the Covid-19 Emergency Orders, the Court reviewed the paperwork and convened a mention hearing on 4th November, 2020 to discuss with Counsel the papers filed and the way to proceed.

7. After discussing the various affidavits filed and required witnesses for the hearing, Counsel duly advised that a number of affidavits would be withdrawn at the hearing scheduled on 5th November, 2020 and the matter was adjourned on the understanding that the assessment would continue without any cross examination or calling of witnesses and to the extent that a notice to cross examine and subpoena had already been issued and served, those persons would still be required to appear and so as to be discharged.

The Assessment Hearing

8. On 5th November, 2020 the stenographer had difficulties hearing via Zoom and the court recording system did not generate a clear recording and notwithstanding the same, an Order was duly prepared and filed on 3rd December, 2020 which outlined what transpired as follows:

ORDER
[Day 1 of Assessment of Damages Trial; Evidence; Directions for Closing Submissions]

BEFORE the Assistant Registrar (Acting) of the Supreme Court, Mr. R. Dawson Malone, sitting, at the Supreme Court for the Northern Region, Garnet Levarity Justice Centre in the city of Freeport, Grand Bahama;

UPON HEARING Mr. Simeon R. Brown appearing with Ms. Simone R. Brown of Brown Law Chambers Co. Ltd., Counsel and

Attorneys for the above-named Applicant ("Counsel for the Applicant") and Mrs. Eurika Coccia appearing with Mr. John Kemp, Ms. Anishka Missick in person with Mr. Audirio Sears appearing via Zoom of the Office of the Attorney General, Counsel and Attorneys for the above-named Respondent ("Counsel for the Respondent");

AND UPON Counsel for the Applicant withdrawal of the following affidavits of evidence:

1. Affidavit of Simone Rochelle Brown filed on 21st August, 2019;
2. Affidavit of Simone Rochelle Brown filed on 19th June, 2020;
3. Supplemental Affidavit of Simone Rochelle Brown filed on 22nd June, 2020;
4. Affidavit of Patrick Joseph Moss filed on 24th June, 2020;
5. Affidavit of Harold Anderson Simmons filed on 15th October, 2020;

AND UPON Counsel for the Defendant's withdrawal of the Affidavit of Sgt. 2676 Etric White filed on 31st January 2020 save for paragraphs 6, 7, and 8 thereof;

AND as a consequence of the withdrawal of the various affidavits aforesaid by Counsel for the Applicant and Counsel for the Defendant, Counsel for the Plaintiff also withdrew

1. the Applicant's [SIC] Notice for Cross Examination of Deponent Sgt. 2676 Etric White ("Sgt. White") filed on 29th October, 2020 ("Notice to Cross Examine"); and

2. the Applicant's [SIC] Writ of Subpoena Duces Tecum issue to Superintendent Robert Lloyd filed on 13th October, 2020 ("Subpoena");

AND WHEREAS in compliance with the Notice to Cross Examine Sgt. White duly appeared;

IT IS HEREBY ORDERED that in light of the Applicant's withdrawal of the Notice to Cross Examine, Sgt. White be and is hereby excused from being cross examined in respect of his Affidavit filed herein on 31st January, 2020;

AND WHEREAS in compliance with the Subpoena Superintendent Robert Lloyd duly appeared;

IT IS HEREBY FURTHER ORDERED that in light of the Applicant's withdrawal of the Subpoena, Superintendent Robert Lloyd be and is hereby excused from appearing to give evidence as required by the said Subpoena;

AND WHEREAS pursuant to the Order [Directions for Assessment of Damages] dated 8th October, 2020 and filed on 22nd October, 2020 ("the Directions Order") there are no pending notices to cross examine any of the deponents in respect of the affidavits of evidence being relied upon for the assessment of damages;

IT IS HEREBY FURTHER ORDERED that:

1. The affidavit sworn by Dexter Davis and filed on 6th March, 2019 be and hereby deemed admitted into evidence on behalf of the Applicant; and

2. Paragraphs 6, 7, and 8 of the Affidavit of Sgt. White filed on 31st January, 2020 be and hereby deemed admitted into evidence on behalf of the Respondent; and

3. Pursuant to the Directions Order, the evidence has been entered the matter stands adjourned for closing arguments;

AND WHEREAS the evidence having been entered, it is hereby directed as follows:

1. The Applicant is at liberty to file and serve upon the above-named Respondent written closing submissions on or before the 12th November, 2020;

2. The Respondent is at liberty to file and serve upon the above-named Applicant written closing submissions on or before the 26th November, 2020;

3. The Applicant is at liberty to file and serve upon the said Respondent a reply to the Defendant/Respondent's closing submissions on or before the 30th November, 2020;

4. This matter is adjourned for the oral presentation of the aforesaid closing submissions at 10 o'clock in the fore-noon on

the 3rd December, 2020 via Video Conference, pursuant to the Covid-19 Court Protocols;"

The Evidence

9. By the Plaintiff's affidavit filed on 6th March, 2019 having been duly admitted, the Plaintiff's evidence therein is follows:

> I, Dexter Davis of the Settlement of Eight Mile Rock on the Island of Grand Bahama, one of the Islands of the Commonwealth of the Bahamas, make oath and say as follows:-
>
> 1. That I am the above-named Applicant and a citizen of the Bahamas by birth having been born on the 23rd day of March, 1981. I am represented herein by Brown Law Chambers, Counsel and Attorneys-at-law.
>
> 2. That I swear this Affidavit to supplement my Affidavit dated the 1st July, 2015 and filed herein on the 2nd July, 2015 which is referred to by the Honorable Justice Estelle Gray-Evans on pages 2 and 3 of her Decision herein which was delivered in the Supreme Court on the 21st day of July, 2015. (A copy of the said Decision is attached hereto and marked Exhibit "D.D.1").
>
> 3. That after Justice Evans delivery of the said Decision, I was taken by Police Officers to the Cell Block area of the Magistrate's Court here in Freeport where I was physically and verbally abused, particularly by Sgt.2676 White who choked me and punched me about my face, head and body. I was then told that I could leave and as I tried to do so I was further attacked by the Police Officers and purportedly re-arrested without ever leaving the building.
>
> 4. That I was then taken to Central Police Station and placed in a Cell naked without my clothing.

5. That in the circumstances, I was not released from custody as Ordered by Justice Evans and was continuously detained until on or about the 15th day of February, 2016.

6. That consequently, I verily believe that I was unlawfully detained in custody and falsely imprisoned for a continuous period of Thirteen (13) months, comprised as follows:-

   Six months (Jan.,2015 to 21st July, 2015- date of Justice Evans' Decision);
   Seven months (21st July, 2015 to February, 2016 - date of release from custody);

7. That in the month of August, 2015, my Attorneys and myself were served with a Notice of Appeal by the above-named Respondent to the Court of Appeal dated the 7th day of August, 2015 against the said decision of Justice Estelle Gray-Evans. A copy of the said Notice of Appeal is attached hereto and marked Exhibit "D.D.2".

8. That thereafter, the Respondent failed to pursue a hearing of the same, resulting in inordinate delay in excess of three years.

9. That after serving the said Notice of Appeal on us in August, 2015, we received no communication from the Respondent in any form.

10. That as a result, commencing in April of 2016, we made a multiplicity of enquires [SIC] of the Court of Appeal with a view to securing a hearing date for the aforesaid Appeal, without success. This is evidenced by copies of the following emails which are exhibited hereto:-

    Email dated 10th May, 2018 of letter dated 8th May, 2018- marked Exhibit "D.D.3";

    Email dated 11th of July, 2018 of letter dated 9th July, 2018- marked Exhibit "D.D.4";

    Email dated 11th of July, 2018 of letter marked D.D.5 to Neil Brathwaite of A.G. Office - marked Exhibit "D.D.5";

    Email dated 28th August, 2018 of letter dated 26th July, 2018 to Court of Appeal - marked Exhibit "D.D.6";

    Emails dated 5th September, 2018 from Court to

Brown Law Chambers and response thereto - marked Exhibits "D.D.7A & B", respectively.

11. That eventually, the said Appeal was set down for hearing on the 21st February, 2019 by the Court of Appeal. That at this Hearing of the Appeal in the Court of Appeal, the Court after hearing submissions by the parties, dismissed the Appeal for want of prosecution. (A copy of the Court's ruling is attached hereto and marked Exhibit "D.D. 8").

12. That I verily believe that the delay in the hearing of the aforesaid Appeal was inordinate and unjust and contravened my constitutional right to a fair hearing within a reasonable time in aggravation of the previous breaches of my constitutional rights.

13. That as a result, I am only now able to pursue the Assessment of damages herein as ordered by the Supreme Court in July, of 2015, in an attempt to relieve my suffering and misery which has been imposed upon me since the beginning of my unlawful detention.

14. That prior to my arrest and unlawful detention in January of 2015, I was self employed as a Mason and was performing contract services earning approximately $900.00 per week. I lived in an Apartment in the Bootle Bay Subdivision near West End, where I kept my personal property which included a Television, a Rolex Watch, a 14 carat Gold Chain set and clothing.

15. That during my unlawful detention, all of these items which I owned were stolen and never found or recovered after my release from custody.

16. That prior to my unlawful detention, I paid for private school education for my dependent Son and Daughter at Nassau Christain Academy in Nassau and Freeport Bible Academy, respectively, at a total cost of just over $600.00 per term. Due to my unlawful detention, I was unable to provide financially for them and they were thrown out of these Schools.

17. That during the period of my unlawful detention I was forced to endure sharing a Prison Cell with Five (5) other men measuring 6 feet by 12 feet in size with no toilet, having to use a single shared bucket to excrete faeces and having to eat and sleep therein.

18. That further, during my unlawful detention, I was shot by a Prison Guard with a rubber bullet in the head and stabbed by a fellow inmate in the face compounding my pain, suffering and distress.

19. That during my unlawful detention, I was placed in a Block at the Prison which was infected with the Scabies disease and thus became infected with the same. I suffered extreme pain during my recovery therefrom.

20. That I was released from custody in February, 2016 only after pleading guilty to the charges of Disorderly Behaviour, Resisting Arrest and Assaulting a Police Officer, which were alleged to have occurred at the Cell Block area of the Magistrate's Court after the aforementioned Decision of Justice Evans Ordering my release on the 21st day of July, 2015. My Attorney was not present at the time and it seemed to be the only way out.

21. That since my release from custody, I have been unable to secure long term employment, despite continuous efforts to do so, resulting in my being unemployed most of the time.

22. That in these circumstances, I seek constitutional, punitive, aggravated and compensatory damages for the breach of my Constitutional rights herein and I swear this Affidavit in support of the same.

23. That the statements herein contained are to the best of my knowledge, information and belief, true and correct.

10. The Judgment of Gray-Evans J is exhibited to the said affidavit and at paragraph 5 thereof, the Learned Judge quoted the entirety of the body of the Plaintiff's affidavit filed on 2nd July, 2015 which

indicates his affidavit quoted above is supplemental to and such facts shall also be taken into account.

11. On behalf of the Respondent, paragraphs 6, 7, and 8 of the Affidavit of Sgt. Etric White filed on 31st January, 2020 reads as follows:

> "I, Sgt. 2676 Etric White of the Eastern [SIC] district of the island of Grand Bahama, make oath and say as follows:-
> …
> 6. That with respect to the charge of Attempted Murder, I am advised and verily believe that the Applicant was arraigned before the Supreme Court on a new indictment No. 160/7/2015, in August 2015, and that the matter concluded when the Applicant was acquitted on 15th February 2016, after the complainant in the matter, Jamaal Deloach, took the witness stand in the trial and indicated that he wished to withdraw the charge. A copy of this indictment is attached hereto and exhibited as "EW 1".
>
> 7. That I have checked the Royal Bahamas Police Force Information System, and there is no report of any allegation of any stolen property at Mr. Davis' [SIC] address in Bootle Bay, West End.
>
> 8. That I am advised and verily believe that the checks have been made at the Bahamas Department of Corrections with respect to the allegations that [SIC] Mr. Davis was shot by a rubber bullet and stabbed by another inmate, but no information has been received. The allegations are therefore neither confirmed or denied.

Submissions of Counsel

12. Pursuant to the directions for the filing of submissions in advance of the hearing on 3rd December, 2020, the parties filed submissions

and at the hearing also elected to make additional oral submissions.

13. By way of written submissions, on 12th November, 2020 the Applicant filed Final Skeleton Arguments which state as follows:

> INTRODUCTION :-
>
> These arguments and submissions are in furtherance of the Applicant's case herein on the Assessment of Damages.
>
> They concern a question that is fundamental to the laws of the Commonwealth of the Bahamas, its sovereignty and the liberty and security of the person herein.
>
> Simply put: How much is the price of liberty in the Commonwealth of the Bahamas?
>
> This question must be answered with particular care given that the overwhelming majority of its citizens share a legacy of more than 300 years of slavery having been brought to these islands from Africa during the Slave Trade. Indeed from then to now throughout the western world there has been a continuous cry for freedom.
>
> It is thus not surprising that the Constitution itself establishes the Bahamas as a "Free and Democratic Sovereign Nation" which recognizes the "Fundamental Rights and Freedoms of the Individual."
>
> The issue of question of damages for constitutional breach in the Bahamas is as laid out by Her Majesty's Privy Council in the Trinidadian Case of Attorney General of Trinidad and Tobago vs. Ramanoop (2005) UK PC 15 which was approved in the Bahamian case of Takitota vs. The Attorney General of the Bahamas. (2009) UKPC11.
>
> In paragraphs 17 to 20 of the Judgement of Lord Nicholls of Birkeahead, the Privy Council refers to 2 sets of damages or compensation. Fristly, compensation directed to address damage suffered by the person wronged (See Para. 18). This is comparable to the common law measure of damages which may be used as a guide in this regard. It is to be noted that ultimately, the amount of compensation hereunder is for the discretion of the Judge. Secondly, the Court is able to award an "Additional Award,"

where needed to reflect the sense of public outrage, emphasizing the importance of the constitutional right, the gravity of the breach and as a deterence to future breaches.

The Privy Council approved this clarification in Takitota, concluding that the "Additional Award" may be referred to as "vindicatory damages."

For these reasons, we shall address the issue of damages/compensation herein under the heads:-

- "Compensatory Award" and (b) "Additional Award/Vindicatory Damages."

COMPENSATORY AWARD :-

As Bahamians, we are privileged to have a line of local cases on this area of the law. We have already referred to the Takitota Case, but in addition thereto there were cases like Tynes vs. Barr, Merson vs. Cartwright, Gilford Lloyd vs. Chief Supt. Cunningham and recently, Robert Kane vs. The Attorney General in which the Supreme Court made its ruling on the Assessment of damages on the 24th July, 2019.

In this case, Dexter Davis was unlawfully detained and imprisoned from the 23rd January, 2015 to the 21st July, 2015. This is a period of approximately 6 months or 179 consecutive days.

There is only one case where the detention period is for a greater period and that is the case of Takitota, a foreign national. Dexter Davis is a Bahamian citizen with a right to liberty in his country. Every other Bahamian case that comes to mind involve much shorter periods of unlawful detention. For example:-

In Tynes vs. Barr (1994), the detention period was 2 ½ hours and was worth atleast $25,000. $75,000 when combined with Assault and Battery.

In Merson vs. Cartwright, the detention period was 57 hours assessed at $90,000.00 combined with Assault and Battery.

In Takitota vs. A.G., Justice Longley in the Supreme Court had awarded, the sum of $250 per day for each day of Takitota's detention, which was then tapered to arrive at a sum of $400,000. This was rejected by the Privy Council which resulted this issue back to the Court of Appeal to be re-assessed. The Court of Appeal then reassessed the same at $500,000.

The reasoning Justice Longley in Takitota was followed by him in the case of Jamal Cleare vs. A.G. (2011). In this case he again

awarded the sum of $250.00 per day for 3 days of unlawful detention. This was appealed to the Court of appeal and in its Judgement President Anita Allen stated in paragraph 49 thereof: "We are unable to support the quantum of damages of $750.00 awarded by the learned Judges nor for that matter do we think the measure of damages of $250 per day, used to arrive at that quantum is justified or appropriate. As we have stated, we are convinced and satisfied that Takitota did not intend to lay down a general tariff for the unlawful detention of an individual." The Court therein then substituted an award for compensatory and vindicatory damages in the sum of $25,000 for the 2 days of unlawful detention.

In Gilford Lloyd vs. Chief Supt. Cunningham (2016), the sum of $30,000 was awarded for less than an hour of unlawful detention and false arrest.

Having received guidance from these cases, the question is: Which formulas should we use to calculate Dexter Davis loss in this case? The formulas range from approx. $5,000 per day as in cases like Jamal Cleare to much greater ums as evidenced by the substantial awards for merely hours of detention. It is to be noted that this figure of $5,000 also arises from Richard Kane vs. A.G.

This sum of $895,000 represents past loss and as noted by the Privy Council in Takitota, cannot be tapered as in the case of future loss. (see paragraph 9 of Takitota's Judgement) Full restitution thereof is required in law. Accordingly, we claim the same herein.

ADDITIONAL AWARD/VINDICATORY DAMAGES:-

These are discretionary. They arise if the Court sees a need to reflect the sense of public outrage, emphasize the importance of the constitutional right infringed, its gravity and a desire to deter further breaches. The Court is concerned with vindicating the right contravened.

In this case, we must look at the circumstances of his detention. Dexter Davis was detained for the most part at Her Majesty's Prison at Fox Hill. This is a facility with a history of being considered a centre for harsh, cruel and inhumane treatment, having been found and proven in a number of previous cases before the Courts. Indeed, Dexter davis allegations of being exposed to Scabies and the other circumstances of his detention

as contained in paragraphs 14 to 19 of his Affidavit of 6th March, 2019.

Further, he was detained in such conditions for a period of 179 consecutive days. We submit that this period is alarming and sends shock waves. Is this not outrageous? I submit that it is oppressive and ugly. It demands correction and deterrence. In Takitota, the sum of $100,000 was ordered under this head. Takitota did not cause the Authorities in the Bahamas to take heed. Merson, in which the Court ordered $100,000 had no deterrence. We submit that given that Dexter Davis was a citizen of the Bahamas, unlike Takitota, the gravity of this breach is greater. We thus submit that a greater sum of money would better deter the Government of the Bahamas from future unconstitutional behavior. We thus seek an additional award in the sum of $200,000 to vindicate the loss of freedom suffered by Dexter Davis.

We further seek interest on all compensation ordered herein at the rate of 6% from the date of Justice Evans ruling herein until fully paid in addition to our costs.

We so urge the Court.

14. Counsel for the Applicant, by way of oral arguments, submitted that the Applicant relied on his written submissions however he wished to highlight the following:

a. In terms of local authorities for lengthy periods of unlawful detention, the cases of **Takitota** and **Ngumi** are closest to the Applicant's case which was a period of more or less than six months however, unlike the Plaintiffs in those cases the Applicant herein is a Bahamian with the right to work and live in The Bahamas and in accordance with **Ngumi**, judicial notice should be taken of the harsh and inhumane and degrading treatment at the prison where the Applicant was detained.

b. From the various trends in various judgments, there appears to be a culture by not only the police but also the Department of Immigration applied to foreign nationals and Bahamian citizens whereby officers exhibit a culture of being inhumane

to one's fellow man, and show an abiding lack of respect for the fundamental right of others and freedom of others as guaranteed by The Constitution.

c. He urged the Court to step up and attempt to prevent such behavior by making a substantial award of damages.

d. He concluded by taking umbrage to the submission of the Respondent indicating that the "*technical error*" in this case (i.e. charge sheet not signed by the complainant) rendered the incarceration unlawful and replied rhetorically that even wars have been started for technical errors however, if the country is serious about the systems of laws intended to protect everyone, this matter cannot be viewed as one where nominal damages should be awarded.

15. In response to the Applicant's case, the Respondent filed Submissions on 23rd November, 2020 which read as follows:

> **These Assessment proceedings are governed by Order 37 of the Rules of The Supreme Court Law, Chapter 53 of the Statute Laws of The Bahamas. A copy of Order 37 is attached hereto at Tab 1.**
>
> **BRIEF [SIC] FACTS AND PERIOD FOR CONSIDERATION:**
>
> **1. First, it is submitted that, from the judgment of the Hon. Mrs. Justice Estelle Gray Evans delivered on 15th July, 2015 (hereinafter referred to as the subject court order), which is attached and exhibited hereto at Tab 2, and which is the basis upon which the Plaintiff proceeds on the Assessment of Damages hearing, the following can be noted.**
>
> **i. Dexter Davis was arraigned on the offence of Attempted Murder, before S & C Magistrate Gwendolyn Claude, on the 23rd January, 2015;**
>
> **ii. A Voluntary Bill of Indictment moved the matter into the Supreme Court and the applicant was again arraigned;**

iii. By way of a Notice of Motion the Plaintiff successfully sought a Constitutional Order which quashed the Indictment No. 23/1/2015 and ordered compensation;

iv. On the 21st July, 2015, the learned Judge quashed the information and discharged Dexter Davis;

2. It was ordered that Dexter Davis be compensated pursuant to Article 19 (4) of the Constitution, such compensation to be assessed by the Registrar of the Supreme Court;

3. It was also ordered that the Respondent (i.e. Defendant) pay the Dexter Davis's Costs, to be taxed if not agreed.

4. It is submitted that 179 days is the period of consideration inclusive of the 23rd January 2015 and 21st July, 2015. Counsel for the Plaintiff also submitted this period of 179 days consecutive, which the Crown accepts.

COMPENSATION:

5. It must be emphasized that this matter proceeded by way of a Notice of Motion as opposed to a Writ of Summons. Again, the Plaintiff was successful on his Order for unlawful detention, as so ordered by the Court. However, he now seeks constitutional, punitive, aggravated and compensatory damages, whereas the only measure of damages sought in the Notice of Motion was compensatory damages.

6. Moreover, the only thing ordered by the learned Judge was compensatory damages pursuant to Article 19 (4).

7. The Plaintiff relies on the cases Atain Takitota vs. AG et al [2009] UKPC 11; Merson vs. Cartwright & Anor (Bahamas) [2005] UKPC 38; Jamal Cleare vs. AG et al [2011] Bah CA, SCCiv.App 110 of 2011; and Lloyd vs. Chief Superintendent Cunningham et al [2017] 2 BHS J. No.76 (See Tabs 3 – 6) in support of his claim. Counsel for the Plaintiff in his submission makes reference to the 'additional award/vindicatory damages'. It is our submission that these cases relied on by the Plaintiff are not helpful to his claim, but only acts as a guide to the Court. All of these cases proceeded

by Writ. In Merson and Takitota the court awarded the extra measure of damages.

8. In this instant case, which is not a Writ action, this extra measure of damages has not been awarded by the learned judge, again only compensatory damages is awarded, and therefore available to be assessed.

9. In the decision of Shawn Scott vs. A G & COP [1999] unrecorded (Tab 7), although a personal injury case which could be distinguished on its facts is an assessment ruling by Assistant Registrar Charlton is instructive as a general guide. This decision demonstrates that there is no exact science to quantification and it examined a number of cases reference to general damages. It dealt with items of special damages, which in fact relates to quantifiable losses that must be specifically pleaded; As opposed to general damages that has to be quantified and are sometimes considered calculated guesstimates. Respectfully, it is submitted that applying similar principles it is to be borne in mind that comparable figures are not the essence of an award, but only a guide. What is fair and reasonable is the overriding factor, given the nature of the case. The award cannot be made in a vacuum.

10. It is respectfully submitted that the Court of Appeal held at paragraph 46 and 47 of Jamal Cleare that:

> *"We respectfully venture to think that the Court in Takitota did not intend to lay down an across- the board measure of damages for breach of the right to personal liberty guaranteed in Article 19 of the Constitution. The case was clearly a special case with especially disturbing features in which the claimant, a foreigner, had, due to some administrative bungling, spent some eight years in detention. This was on the unsubstantiated charge that he had entered The Bahamas illegally.*
>
> *The measure of and quantum of damages for unlawful detention would of course depend on the nature and circumstances of each case. There can hardly be one size fits all formula for breach of such an important constitutional right as the right to personal freedom."*

Therefore, $250.00 per day was found to be inappropriate in that Cleare case, and we submit that is also inappropriate in this case.

11. Hence, it is submitted that there is no ambit in this assessment hearing to go beyond the type of relief that was ordered by the trial court. This assessment hearing is merely to assess the amount that is due and owing as a result of the subject Court order. The learned judges findings are quite clear and succinct.

12. Respectfully, therefore, and turning now to paragraph 33 of the judgment, a salient features that ought to be highlighted firstly is that 'compensation is to be awarded pursuant to Article 19 (4) of the Constitution. Paragraph 34 reiterates that detention was unlawful in contravention of Article 19 and he is entitled to the relief he seeks. (What was the relief sought?) Reference is made to paragraph 2 of the learned judge's ruling and the Plaintiff's claim.

13. Nowhere in the Plaintiff's claim or in the judgment was there any mention or finding of redress other than pursuant to Article 19 (4). At no time did the learned judge in her judgment award punitive damages, exemplary damages.

14. It is further submitted that in Merson, the Respondents were found liable for assault, battery, false imprisonment, malicious prosecutions, and breach of constitutional rights, while in Takitota the Applicant had been unlawfully detained for over eight years. In each case the wrongs were egregious, but in neither case are the facts similar to the case under consideration.

15. On the facts the instant case, where the detention of the Applicant was found to be unlawful because of a failure to sign the docket, it is submitted that the breach was of a very technical nature. And it was only upon this technicality that the detention of the Plaintiff had become unlawful. In this regard, the Defendant relies on the case of R (Lumba) v SS Home Dept. [2011] UKSC 12, 2011 WL 806813 (Tab 8), a decision of the UK Supreme Court, which was formerly the House of Lord. In that case, the claimants

had been detained pursuant to unpublished policies. The court concluded that their detentions were unlawful, but that if the correct policies had been applied, they would have lawfully detained. They were therefore entitled to nominal damages only. The court noted as follows at paragraphs 95 and 96:

> *"95. The question here is simply whether, on the hypothesis under consideration, the victims of the false imprisonment have suffered any loss which should be compensated in more than nominal damages. Exemplary damages apart, the purpose of damages is to compensate the victims of civil wrongs for the loss and damage that the wrongs have caused. If the power to detain had been exercised by the application of lawful policies, and on the assumption that the Hardial Singh principles had been properly applied (an issue which I discuss at paras 129-148 below), it is inevitable that the appellants would have been detained. In short, they suffered no loss or damage as a result of the unlawful exercise of the power to detain. They should receive no more than nominal damages.*
>
> *96. I should add that this approach" is consistent with the observation by Lord Griffiths in Murray v Ministry of Defence [1988] 1 WLR 692, 703 A-B: "if a person is unaware that he has been falsely imprisoned and has suffered no harm he can normally expect to recover no more than nominal damages."*

16. Applying this reasoning to the instant case, it is to be noted that the Plaintiff's detention was found to be unlawful because the docket was not signed, as required by the Criminal Procedure Code. If the docket had been signed, his detention would not have been unlawful. It is therefore submitted that he is entitled to nominal compensation only.

17. The court in Lumba also considered the Privy Council authorities, and concluded as follows at paragraph 100:

> *"100. It is one thing to say that the award of compensatory damages, whether substantial or nominal, serves a vindicatory purpose: in addition to compensating a*

claimant's loss, it vindicates the right that has been infringed. It is another to award a claimant an additional award, not in order to punish the wrongdoer, but to reflect the special nature of the wrong. As Lord Nicholls made clear in Ramanoop, discretionary vindicatory damages may be awarded for breach of the Constitution of Trinidad and Tobago in order to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach and deter further breaches. It is a big leap to apply this reasoning to any private claim against the executive. McGregor on Damages 18th ed (2009) states at para. 42-2009 that "It cannot be said to be established that the infringement of a right can in our law lead to an award of vindicatory damages." After referring in particular to the appeals to the Privy Council from the Caribbean countries, the paragraph continues: "the cases are therefore far removed from tortuous claims at home under the common law." I agree with these observations. I should add that the reference by Lord Nicholls to reflecting public outrage shows how closely linked vindicatory damages are to punitive and exemplary damages.

101. The implications of awarding vindicatory damages in the present case would be far reaching. Undesirable uncertainty would result. If they were awarded here, then they could in principle be awarded in any case involving a battery or false imprisonment by an arm of the state. Indeed, why limit to such torts? And why limit it to torts committed by the state? I see no justification for letting such an unruly horse loose on our law. In my view, the purpose of vindicating a claimant's common law rights is sufficiently met by (i) an award of compensatory damages, including (in the case of strict liability torts) nominal damages where no substantial loss is proved, (ii) where appropriate, a declaration in suitable terms and (iii)again, where appropriate, an award of exemplary damages. There is no justification for awarding vindicatory damages for false imprisonment to any of the FNPs."

18. Again, given the facts of the instant case, where the breach was purely technical, and there is no evidence of malfeasance on

the part of the Defendant, it is submitted that a nominal award would be appropriate. In considering the appropriate amount, it is noted that in Takitota, where there was a long period of unlawful detention, the Court of Appeal seemed to accept figure of $250.00 per day as the basis for an appropriate award. The Privy Council disagreed with the findings of the Court of Appeal, but seemed to do so on that basis that it was unclear when the unlawful detention should be considered to have started, and that arithmetical calculations could yield a figure of as low as $166.66 per day. It was on that basis that the matter was remitted to the Court of Appeal for proper consideration of the amount to be awarded. On the facts of the instant case, where the detention was for a period of 179 days, the use of the higher figure would yield the sum $45,000.00, while the lower figure would yield an amount of under $30,000.00 even if one approaches the matter from a position of pure loss. We humbly submit therefore that the award in this case ought to be calculated on a nominal basis and around a lump sum figure of $24,000.00 or no more than perhaps $135.00 per day.

19. The Plaintiff relies on Jamal Cleare and quotes a figure of $5,000.00 per day. It is submitted that in the circumstances of the instant case, it would be quite unfounded on the factual matrix present to use $5,000.00 as yardstick figure in determining damages in favour of this Plaintiff in such particular and exceptional set of circumstances.

20. The Plaintiff states that he has earned some $900.00 per week prior to his incarceration, and he claims to have lost personal belongings during the period of his incarceration. He has not pleaded any such particulars of facts as to when and how such losses occurred. Hence, there is no way to determine whether this occurred while he was unlawfully detained. There is also no proof beyond his word of such losses, or with respect to the value of any such losses, either in earning or earning capacity and/or the loss of any personal belongings or dependency. The plaintiff has proffered no evidence beyond his mere words of any record of a police complaint concerning any alleged theft.

21. It is submitted that in Takitota a separate award of $100,000.00 was made for breach of constitutional rights. It is submitted firstly that the egregious nature of the breaches in those

cases may have justified a separate award. That factor is absent in the instant case. But more importantly, the only award ordered by the learned judge is one for compensation. It is therefore repeated that there is no basis for a separate award, and in reliance on the principles in Lumba, a nominal award only is appropriate.

22. It is further submitted that that the Plaintiff's affidavit does not indicate when he was injured in prison, if it is accepted that he was in fact injured. There has been no medical report proffered in evidence. There is no way to determine if this actually occurred and whether it occurred during the period of unlawful detention. Consequently, this cannot be an aggravating factor or circumstance to his detention.

23. It would be remiss not to add that, but for the technicality, and had the charge sheet been signed, there would not have been an unlawful detention and breach or violation of his constitutional right, where he would have been indicted before the Supreme Court on a very serious offence.

INTEREST

There is no interest as of right on the damages to be awarded in the instant case and interest, we respectfully submit should be awarded at a prescribed rate in accordance with section 2 (1) of the Civil Procedure (Award of Interest) Act, Ch.80 (Tab 9). This section provides that every judgment debt shall carry interest at such rate as shall be prescribed by the Rules of Court (i.e. the prime rate of the Central Bank plus 2% per annum). The court has a wide discretion as it relates to interest.

COSTS

24. The amount of costs claimed by Counsel for the plaintiff in the amount of $200,000.00 seems preposterous. It is submitted that this Court grants a fix amount of costs on the assessment to avoid a further hearing by way of taxation, in order that more costs be avoided.

25. Order 59 (12) of the Rules of the Supreme Court, Chapter 53 (Tab 10) provides as follows:

'The Registrar shall have the power to tax –
(a) the costs of or arising out of any cause or matter in the Supreme Court;
(b) the costs directed by an award made on a reference to arbitration or pursuant to an arbitration agreement to be paid; and
(c) any other cots the taxation of which is directed by an order of the Court.'

26. It is submitted that there was no order for costs from the Court of Appeal, and it is has respectfully submitted that the Registrar of the Supreme Court has no jurisdiction to tax the costs of an appeal without a specific Ruling by the Court of appeal for a 'Costs Order Here and Below'. We humbly submit that all Costs relating to the Court of Appeal be disallowed with respect to any Costs order made in these Assessment proceedings.

CONCLUSION:

27. The purpose of an assessment hearing is only to determine quantum of damages, i.e. the amount of compensation to the Plaintiff (the type of compensation having been previously directed or awarded by a Court).

28. It appears as if the Plaintiff seeks a very sizable award which is not in conformity with the nature of the case weighed against the comparable law. In fact the award sought is preposterous to say the least. It should not and must not escape this tribunal, that despite the decision of a finding of unlawful detention, it was predicated upon a mere technicality of an unsigned charge sheet. This in and of itself amount to an exceptional feature of this particular case that sets it apart from all the other cases relied upon in which sizeable and additional awards were granted.

29. There is no need to test on cross-examination or contradict irrelevant evidence, where there is no proof and which relates to matters that have not been pleaded and ought not to be a subject of debate in the proceedings. There is no such thing as implicit

order or matters that flow from. What has not been ruled upon is not compensable [SIC].

30. For these reasons advanced above, it is respectfully submitted that a nominal figure of damages be awarded in these proceedings; That this Court is urged to find that compensatory damages only be awarded on such nominal basis. Further, that no un-pleaded matters warrant consideration for award in these proceedings; Further, that no factors which are not contained in or form part of the decision of the learned judge be taken into consideration; Further, that any costs ordered be ordered only in relation to the Assessment Hearing and if the Court is not so minded to fix such costs, that cost be taxed if not agreed. Finally, that any rate of interest run from the date of the learned judge's decision, in accordance with section 2 (1).

31. We respectfully submit, unless any further assistance can be rendered in the proceedings the Crown rest.

16. By way of oral arguments, the Respondent submitted that the Respondent relied on the written submissions however elaborated on the "*technicality point*" which, as I understand it, the Respondent submitted that but for the mere failure of the complainant to sign the charge sheet, the incarceration of the Applicant and entire process was lawful and not in breach of any law. Counsel for the Respondent further submitted that the scope of review was limited to what was actually pleaded, being compensatory damages and that is what the Court ordered to be assessed and not exemplary and or vindicatory damages. In terms of what damages should be allowed, the sum total of $100,000 was proposed by the Respondent.

Discussion and Analysis

17. The purpose of an assessment of damages hearing in the instant case is to determine the compensation ordered by Gray Evans J on 21st July, 2015 to the Applicant resulting from his unlawful detention from 23rd January, 2015 to 21st July, 2015, some 179 days detained at the Department of Corrections (formerly known as Fox Hill Prison) ("*prison*").

18. Firstly, any facts in the Applicant's affidavit arising after the order of Gray Evans J the Court does not take the same into account as falling outside the scope of assessment pursuant to the said order to which Counsel for the Applicant accepted.

19. The facts which relate to the unlawful detention period in respect of which there was no cross examination or evidence lead by the Respondent are as follows:

    a. the Applicant was deprived of his liberty and suffered loss and damage and also being a father of two he was unable to provide for his children who consequently suffered hardship.

    b. the Applicant had a weekly income of $900.00 per week as a self-employed mason.

    c. the Applicant was unable to pay the required $600 per term for each of his two children to attend private school.

    d. the Applicant was detained in a prison cell, 6 feet by 12 feet, with 5 other men with no toilet, sharing a single bucket to excrete feces and eat and sleep in the said cell.

    e. The cell block at the prison where the Applicant was detained was infected with the Scabies disease to which the Applicant contracted and suffered pain.

20. Moreover, while the Court makes no adverse finding as to credibility in respect of either witness in light of there being no cross examination (applying Sawyer CJ (as she then was) in *Hepburn & Anor v Attorney General*, Supreme Court Action No. 765 of 1991, Rulings (unreported) dated 9th September, 1994 and 25th July, 2001) there are some facts which the Respondent offered evidence in respect of.

    a. In response to the Applicant's evidence that his television, Rolex watch, and 14 carat Gold Chain set and clothing was stolen while he was in custody, the Respondent has provided evidence that no police report was made of any stolen goods from the Applicant's property; putting aside the issue of remoteness which was not argued by either Counsel and while these proceedings being by way of Constitutional Motion may not require the usual specificity of special damages and proof, the Applicant failed to adduce any supporting evidence for the costs of such items and also did not in his arguments, written or oral make submissions seeking damages for the stolen goods.

    b. In response to the Applicant's evidence that he was shot by a Prison Guard with a rubber bullet in his head and stabbed by an inmate in the face, the Respondent neither admitted nor denied the same on the basis that the prison does not have a record of the same.

21. Hereinafter the Court does not repeat the aforesaid facts in detail however in determining the sum of damages to award, all will be taking into account unless the Court specifically states otherwise.

22. Counsel has provided the Court with numerous authorities in support of their respective cases, the Court hereinafter only

discusses a number of them which the Court deems are most relevant to the matters in dispute.

23. The learned Judge found that the Applicant was entitled to compensation pursuant to Article 19(4) of The Constitution which provides that:

> **"Any person who is unlawfully . . . detained by any other person shall be entitled to compensation . . ." [Emphasis Added]**

24. The oft-cited dicta of Sawyer J (as she then was) in the case of *Merson v Cartwright* [1994] BHS J No. 54 at [254] is that damages are "*at large*" for assessment of damages for breach of constitutional rights since Article 19(4)does not set any limit on the amount of damages. At [256], in defining "*at large*" the learned Judge stated that "*it means that there is in fact no actual yardstick by which they can be measured*".

25. The Privy Council, in considering whether to restore damages awarded to Merson for breaches of her Constitutional rights (such damages having been overturned by the Court of Appeal) their Lordships at [17] and [19] provided guidance on the function of constitutional damages by reference to then recent case of *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15 as follows:

> **" 17. As to the first issue, the function of constitutional damages has been reviewed recently by the Privy Council in Attorney-General of Trinidad and Tobago v Ramanoop [2005] UKPC 15; [2005] 2 WLR 1324. The case involved claims for damages for "quite appalling misbehaviour by a police officer" (para 2 of the judgment). A police officer had, quite unjustifiably, roughed up, arrested, taken to the police station and locked up for some few hours the unfortunate Mr Ramanoop. Mr Ramanoop instituted proceedings against the Attorney-General for constitutional redress, including exemplary damages. He did not claim damages for the nominate torts that had certainly been committed. Counsel**

for the Attorney General submitted that constitutional redress, in so far as it took the form of an award of damages, should be confined to compensatory damages. The Privy Council dealt with this submission in paragraphs 17 to 20 inclusive of the judgment delivered by Lord Nicholls of Birkenhead.

> "17. Their Lordships view the matter as follows. Section 14 recognises and affirms the court's power to award remedies for contravention of chapter I rights and freedoms. This jurisdiction is an integral part of the protection chapter I 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.
>
> 18. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of 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 coterminous with the cause of action at law.
>
> 19. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, 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 section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution,

> punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award.
>
> 20. For these reasons their Lordships are unable to accept the Attorney General's basic submission that a monetary award under section 14 is confined to an award of compensatory damages in the traditional sense. Bereaux J stated his jurisdiction too narrowly. The matter should be remitted to him, or another judge, to consider whether an additional award of damages of the character described above is appropriate in this case. Their Lordships dismiss this appeal with costs."

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

26. This case does not involve an overlapping of claims as the allowance was for compensation under the Constitution which as the Court understands it, damages are at large, and *"should always be vindicatory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount."*

27. Pursuant to the Privy Council's guidance aforesaid, the damages to be awarded should vindicate the Applicant's Article 19 right to not

be unlawfully detained. In this regard, the sum which is appropriate to achieve this aim "*will depend upon the nature of the particular infringement and the circumstances relating to that infringement*."

28. Moreover, the Privy Council in the case of *Innis v Attorney General of Saint Christopher and Nevis* [2008] UKPC 42 at [25] provided further guidance that the award of damages for breach of constitutional rights should encompass an award to reflect the sense of public outrage, emphasize the gravity of the breach and to deter further breaches.

29. In terms of quantification of compensatory damages under the Constitution for prolonged unlawful detention, the Privy Council considered various principles of law and provided guidance for the assessment. In the case of *Takitota v Attorney General of The Bahamas et al* [2009] UKPC 11 the applicable dicta at [13] through to [19] however, as the Court understands it and such view is also expressed by both Counsel appearing before me (save that Counsel for the Respondent holds the view that this is not a case for an additional award), their Lordships upholding of an additional award for constitutional or vindicatory damages in the sum of $100,000 which having been adjudged due in the circumstances is to be added to compensatory damages so that when added together reflect the global award for damages for breach of a person's constitutional right. Further at [17], their Lordships referred the quantification of compensatory damages back to the Court of Appeal and directed as follows:

> **"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."

30. For completeness, at [9] their Lordships stated:

> "There are two further substantial difficulties in the calculation carried out by the Court of Appeal. First, the respondents' argument is quite correct that it is usual and proper to reduce the level of damages by tapering them when dealing with an extended period of unlawful imprisonment: cf *Thompson v Commissioner of Police of the Metropolis* [1998] 1 QB 498, 515, per Lord Woolf MR. Secondly, where a figure is to be awarded to represent a period of future financial loss or loss of amenities, it is correct to reflect in the calculation that the claimant will receive an immediate capital sum, being the present value of the future annual losses, which is materially less than their total. The same does not apply, however, when the award represents past loss or damage. In that case full restitution for the loss sustained by the claimant should ordinarily be awarded and there is no basis for reducing it on the ground that the claimant will receive a capital sum."

31. It would be a great injustice to summarize or to paste the very cogent, detailed and chronological analysis that Gray Evans J did in the case of *Robert Kane v Attorney General et al*, 2011/CLE/gen/FP/00170, dated 24 July, 2019 as to the law and applicable approach to the award of damages for inter alia unlawful detention by reference to local and leading case law (including the guidance of the Privy Council cited above) and in the circumstances, I simply refer to [51] to [100] which the Court directed itself to apply as it relates to compensatory damages under Article 19 (4) of the Constitution in this case.

32. Finally, in the recent Judgment of Charles J in the case of *Ngumi v Attorney General et al*, 2017/CLE/gen/01167, delivered 27th

November, 2020, the learned Judge considered the claim for damages for the Plaintiff who had been unlawfully detained for 2,395 days in the Detention Centre, at [104] to [113] Charles, J awarded damages for "*vindication and compensation for breaches of [the Plaintiff's] constitutional rights*" in the sum of $105,000. As with the previous awards discussed, in that case the Court considered a claim for general damages which also awarded by the learned Judge in that case.

33. Moreover, the guidance of the various cases as to limiting damages awarded for the breach ordered by way of compensation under the Constitution due to potential overlap with damages in common law torts does not apply as this assessment solely relates to compensatory damages for breach of Article 19 of the Constitution.

34. In light of the foregoing principles, I am required to apply the same to the facts of this case. I remind myself before applying the foregoing principles that, and I borrow the sentiments expressed by Gray Evans J in *Robert Kane* (supra) that "*counsel's assertions, observations, arguments and or submissions are not evidence [or the facts].*"

Special Damages

35. In terms of special damages, Counsel for the Respondent objected to any special damages being awarded.

36. While the general rule is special damages must be specifically pleaded and specifically proved unless agreed (*Robert Kane v Attorney General et al*, (supra) upon considering the instant case I make several observations. This is an action commenced by a Constitutional Motion and not by a Writ of Summons which requires the Court to assess compensation under Article 19(4) of The Constitution in respect of which damages are "*at large*", and to the

extent that the evidence which may be categorized as special damages relates to the Applicant's loss of income in the sum of $900.00 per week and $1,200 for the school fees of Applicant's children (both of which were unchallenged by the Respondent and deemed admitted), I was prepared to hold that on the peculiar circumstances of this case however, in closing arguments, both written and oral, the Applicant did not seek compensation for the same by way of special damages and appears to rely on such facts as forming part of the aggravating circumstances to which the Applicant endured during the unlawful detention. In the circumstances, no award of special damages is made.

Compensatory Damages

37. In terms of computing compensatory damages, in various judgments cited above as well as Counsel's submissions, often mathematical calculations of days unlawfully detained multiplied by a set daily rate with a reduction to take into account the lump sum has been employed. Counsel for the Respondent suggested using the sum of $135.00 per day resulting in the sum of $24,000, and without repeating the entirety of the submissions set out above, on the basis of what Counsel for the Respondent refers to the "technical nature" of the breach. Whereas, Counsel for the Applicant suggested using the sum of $5,000 per day resulting in the sum of $895,000 and without repeating the entirety of the submissions set out above in light of the previous allowances in other cases.

38. A distinguishing factor in the cases relied upon by the Applicant is that the Plaintiff in those cases obtained damages for both unlawful arrest and unlawful detention and not only the detention. In addition, in those cases the Plaintiff was being compensated for breaches of more than just Article 19 of the

Constitution such as in *Jamal Cleare* and *Merson* whereby findings of the breach of Article 17 of the Constitution were also made.

39. Applying the guidance of the Privy Council, as the nature of the particular infringement and the circumstances relating to that infringement, the evidence of the Plaintiff which I accept that the Applicant was unlawfully detained for 179 days at the prison and the conditions and state of mind he endured for 179 days he gave evidence about and not merely the finding was as a result of the mere failure of the complainant to sign the charge sheet.

40. From the authorities when Plaintiffs have been detained for short periods (i.e. hours to days) a global award fixed figure without reference to the day x rate formula is used. This case falls somewhere in the middle as in *Merson, Tynes, Cleare, Lloyd, Lockwood, Kane,* and *Farquharson*, the detention ranged from hours to days whereas in *Ngumi* and *Takitota* the detention was years.

41. I do take note of the decision of the Court of Appeal in *Cleare*, assessing periods by way of daily allowance is not a one size fits all rule such that the Court is not required to make an allowance on a daily rate basis. Notwithstanding the same, considering the length of detention in this case, I find it appropriate to do so.

42. In *Ngumi*, being a judgment which I ought to paid heed, a daily rate of $250 per day for 2,316 day with a 1/3 deduction to taper the same for extended period of allowance for unlawful detention at the Detention Centre to which the learned Judge, (at [76]) took judicial notice that prison was "*less satisfactory and comfortable for obvious reasons*".

43. In *Takitota*, the plaintiff was detained in prison for 2922 days and allowed a compensatory award of $500,000.

44. The evidence of the Plaintiff, the evidence is not as detailed and comprehensive as Takitota never the less, if in Ngumi, which is more recent judgment $250 per day for unlawful detention in a more favourable environment was adequate, I consider on the facts of the Plaintiff's case particularly the period of the Applicant's detention in prison and emphasis on his loss of a salary of $900.00 per week, injuries and emotional hardships while detained, and such damages being at large and having regard to the distinguishing factors of this case and that there is no overlap with damages for the tort of unlawful detention the sum of $500 a day would be the appropriate award for compensatory damages which I calculate to be $89,500. While it is common to discount and or reduce damages for extended periods, I elect not to apply such discount given that the time period of about 6 months is not an extended period warranting the same.

45. While Counsel for the Respondent's primary submission is that that the Court ought not to consider making an additional award to vindicate the Plaintiff's Constitutional rights on the basis that the act causing the unlawful detention was technical in nature, by way of oral argument, Counsel for the Respondent submitted that a sum of $100,000 rather than $200,000 as suggested by the Applicant would be more appropriate. I take into account the fact of the error which led to the entire detention being unlawful and that the cases relied upon by the Applicant do relate to circumstances where more egregious facts were led and accepted by the Court. However I am of the view that the compensatory damages are not sufficient on their own to reflect public outrage at a 179 day unlawful detention, to emphasize the gravity of the breach and to fulfill the objective of deterring further breaches as in this case. The Applicant was detained for 179 days unlawfully on pending charges when the charge sheet failed to comply with section 58(3) of the Criminal Procedure Code. Therefore, I award an additional sum of $100,000.00 by way of vindicatory damages.

46. Accordingly, the total award of compensation under Article 19 (4) of The Constitution for the unlawful detention of the Applicant is $189,500.00.

Interest

47. As it relates to interest, Counsel for the Applicant sought in his submissions interest at the rate of 6% from the date of Gray Evans J (i.e. 15th July, 2015) to which Counsel for the Respondent submitted that the Court has a wide discretion to award interest and should be guided by section 2(1) of the Civil Procedure (Award of Interest) Act.

48. The learned Judge did not refer to the issue of interest nor was the same pleaded therefore, I make no order as it was not within the scope of the assessment however, and it would be remiss of me not to direct Counsel to the authority of *Garland v Perez et al*, Supreme Court No. FP148 of 1995 (formerly 674/1993) Ruling of Deputy Registrar Gray Evans (as she then was) dated 27th February, 1998 wherein the application of interests post judgment is discussed.

Costs

49. Upon conclusion of the closing arguments, Counsel were directed to provide written submissions in respect of the costs of the assessment proceeding so that the costs could be fixed.

50. Rather than provide submissions, Counsel for the Applicant filed a Bill of Costs on 8th December, 2020 purporting to be pursuant to an order of the court with the sum total of $116,792.00 plus VAT claimed.

51. In response, on 29th December, 2020 Counsel for the Respondent filed very detailed Submissions on Costs and provided a marked up copy of the Bill of Costs which appeared to be a "taxing off" conducted by Counsel to support her submissions that costs in the sum of $46,125 would be reasonable costs for the assessment.

52. It is my view that when considering costs on a party and party basis, it is settled law that in applying *Order 59 Rule 26(2)* of the Rules of the Supreme Court ("RSC"), the item claimed must first be assessed as to whether it was proper or necessary to attain the interest of justice and thereafter what would be the reasonable costs for such task.

53. In applying the same, I take into account the large portion of costs claimed in respect of preparation of documents which were withdrawn on the basis that they were not relevant to the assessment and makes no allowance.

54. Moreover, the rate of $800 per hour for Counsel for the Applicant is not consistent with costs on a party and party basis applying the principles of *Parker v Roberts* [1997] BHS J No. 85 at [35] and [36] and having regard to all the circumstances of the particular case, the assessment could have been effectively and capably handled by a hypothetical counsel or whether this is a matter which required the services of counsel with the degree of skill, expertise and knowledge, the sum of $600 an hour would be reasonable.

55. Finally, in terms of fixing costs, Charles J in the case of *West Bay Management Limited (t/a Sandals Royal Bahamian) v Registrar of Trade Unions and another* [2018] 1 BHS J No. 193 stated in considering what is reasonable as to costs and in doing so it must "*have regard to all the circumstances of the case in determining what costs are reasonable*."

56. Having reviewed the costs claimed alongside the foregoing principles, the Court awards the sum of $50,000.00 as the reasonable costs of the assessment proceedings to be paid by the Respondent to the Applicant.

Conclusion

57. Damages are assessed for the Applicant as representing compensation under Article 19(4) of The Constitution for the period of his unlawful detention in prison from 23rd January, 2015 to 21st July, 2015 in the global sum of $189,500.00 comprised of $89,500.00 for compensation and an additional award for vindicatory damages in the sum of $100,000.00 with costs of the assessment to be paid by the Respondent to the Plaintiff in the fixed sum of $50,000.00.

Delivered this 5th day of February, 2021

[Original Signed & Sealed]

R. Dawson Malone
Assistant Registrar (Acting) of the Supreme Court