

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW & EQUITY DIVISION
2017/CLE/gen/00983

BETWEEN

MARTIN ORR

Plaintiff

AND

THE ATTORNEY GENERAL OF THE
COMMONWEALTH OF THE BAHAMAS

First Defendant

AND

THE COMMISSIONER OF POLICE

Second Defendant

AND

THE MINISTER OF IMMIGRATION

Third Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: Avrom Thompson and Crystal Rolle for the Plaintiff

Gary Francis for the Defendants

13 January 2020, 22 July 2020 (Plaintiff's Submissions) and 20 November 2020
(Defendants' Submissions)

JUDGMENT

WINDER, J.

This is the case of Martin Orr (Orr) who claims for various breaches of his constitutional rights and Unlawful Deportation which emanate from his arrest on 20 May 2016.

Background

1. On 20 May 2016 the cruise ship MSC Divina (Divina) docked in Nassau Harbour for a port call. During this time Orr's employer had cause to search his quarters. During the search, which was conducted in Orr's presence, a white powder was found by Divina's security personnel in the cabin which he shared with another employee.
2. The Royal Bahamas Police Force (RBPF) was contacted and Orr and his cabin-mate were taken to Central Police Station for questioning. Orr was subsequently charged with Possession of Dangerous Drugs with Intent to Supply, Importation of Dangerous Drugs, Conspiracy to Possess Dangerous Drugs with Intent to Supply and Conspiracy to Import Dangerous Drugs. On 24 May 2016 Orr was formally arraigned in the Magistrates Court on these offences. He pleaded not guilty to the charges. He was remanded and taken back to the Bahamas Department of Corrections (BDOC) following the arraignment.
3. On 22 September 2016 Orr appeared before the Magistrates Court once again and on this occasion he was discharged. Following his discharge by the Magistrate, Orr was detained by Officers from the Department of Immigration and transported to the Carmichael Road Detention Center (Detention Center) where he was detained.
4. On 18 October 2016 Orr was deported from The Bahamas to his country of origin, Jamaica by The Bahamas Department of Immigration.

Procedural History

5. The action was commenced by specially indorsed Writ of Summons on 28 August 2017. The Statement of Claim indorsed thereon sought relief in respect of the following:

Arbitrary Arrest and False Imprisonment

- 25) That notwithstanding the dismissal of the case against the Plaintiff, the Plaintiff was further and unlawfully detained at the Detention Center and the Department of Corrections in Nassau, The Bahamas from September 23rd, 2016 to October 18th, 2016 contrary to Article 19(1) of the Constitution of The Bahamas.
 - 26) That it is of note that the Plaintiff was detained at the Detention Center because the Police Officers could not locate the Plaintiff's travel documents. That the Immigration Officers did not have a Deportation Order in place against the Plaintiff. That a Court did not authorize the Plaintiff's detention at the Detention Center.
 - 27) That as such, the Unlawful Detention of the Plaintiff also amounts to the Tort of False Imprisonment.
6. The Defence filed on 7 November 2017, was struck out following the breach of an *unless order* imposed following the failure of the defendants to comply with a further Case Management Order given by this Court on 4 December 2019. This second Order was made to allow the defendants to file their witness statements before the imminent trial date.
 7. Up to the date of trial, no witness statements were filed on behalf of the defendants. No application was made seeking relief from any of the sanctions which came into effect by virtue of the *unless order*. This matter was attended to with no care or urgency by the defence and the order could not be ignored. Orders of Court must be complied with.

Orr was the sole witness to give evidence at the trial. His evidence was given in a witness statement filed on 20 February 2019. He was subject to cross examination on his witness statement.

The Evidence of Orr

8. Orr was 61 years old when the incident took place, he was 64 years old at the time of the hearing. He was employed by MSC Cruises (USA) as a Kitchen Utility Crew Member on the Cruise Ship "Divina".
9. He told the Court that on 20 May 2016 while the Divina was docked at Nassau Harbour he saw his cabin mate put something under his pillow.
10. He said that prior to this he had been advised by the management of the Divina while in Jamaica on a port call that he should report any "illegal" activity he saw to them immediately. This he says was after two other crew members were arrested for illegal drugs while docked in Jamaica. He reported the activity of his cabin-mate and the RBPF was called to the ship.
11. Orr deposed that he was present for the initial search of the cabin by ship management and when Officers of the RBPF did the same.
12. Following the search and the finding of 'a white powder' in the shared cabin, Orr says police officers advised him to accompany them to the Police Station to give a statement. Orr says that he went with police officers to the Police Station but this was done under protest.
13. While there, Orr says he was arrested and charged with four counts of possession with the intent to supply illegal drugs (cocaine). This he says despite having been the person who alerted authorities to the alleged drugs that were present in the cabin. While at the Police Station, Orr says he advised police officers that the Divina would return to Nassau in three days and that they should get more

information from the management which he indicated would exonerate him. However, Divina returned and he remained detained.

14. When he was arrested Orr says that his Jamaican passport was taken from him by the police. The passport contained visas for several countries. His mobile phone, watch, a bracelet and \$199USD and \$3,500JD were also taken from him.
15. Orr says that following his arrest on 20 May 2016, he was taken before the Magistrates Court on 23 May 2016 having his hands and feet shackled during his appearance before the Court. He pled not guilty to the charges.
16. He deposed that he retained Counsel for the appearance in the Magistrates Court in the sum of \$5,000BSD.
17. Following his appearance in the Magistrates Court, Orr says he was remanded to the BDOC where he described the conditions as 'cruel and harsh'. His evidence was that BDOC's cells were overcrowded. He says he was given cold meals and suffered mentally and physically.
18. On 22 September 2016 Orr appeared before Magistrate Andrew Forbes at which time he was discharged. However, he avers that despite being told by the Magistrate that he was free he was immediately detained; placed in handcuffs and taken to the Detention Center. He says that he was told by Police Officers that he could not return to Jamaica because his passport which was in the possession of the RBPF could not be found.
19. During his time at the Detention Centre Orr deposed to the fact that Hurricane Matthew hit the country. His evidence was that on or about 5 October 2016 he and other detainees were transported from the Detention Center to BDOC in anticipation of the landfall of the storm. While at BDOC Orr says that he received

little food or other care. Within a few days of the passage of Hurricane Matthew Orr says that he was returned to the Detention Center.

20. On 14 October 2016 Orr says his sister facilitated the purchase of a ticket to transport him to Kingston, Jamaica from Nassau on-board Caribbean Airlines at a cost of \$272.50USD.

21. On 18 October 2016 he says he was taken to the airport in shackles to be deported. The shackles only taken off after he was aboard the flight; this act he says caused him to be embarrassed and humiliated. Orr says he felt as though he was being treated like a criminal in front of the other passengers.

22. Due to the fact that his passport was not returned to him for the journey to Kingston, Orr says that he was subject to hours of further detention by Jamaican Immigration Officers until he managed to prove his citizenship.

23. He says that on 19 October 2016 he consulted with a physician in Jamaica, Dr Rohan I. Williams (Dr Williams) who diagnosed him with Uncontrolled Hypertension, Muscular Strain to the lower back, fungal skin infection and anxiety and/or depression. He was prescribed medication for his conditions and referred to psychiatrist Dr Clayton Sewell (Dr Sewell) for a psychiatric consultation.

24. Orr says that he consulted with Dr Sewell on 13 January 2017 and the report produced by Dr Sewell dated 9 March 2017 is a part of the evidence in these proceedings. He was according to the evidence diagnosed with Major Depressive Disorder and PTSD by Dr Sewell. The report says that he would need both pharmacotherapy and psychotherapy for the conditions. These interventions should result in him functioning within a normal range within 12 months of treatment.

25. On 9 July 2018 through the Ministry of Foreign Affairs and Foreign Trade Orr's passport and other documents were returned to him.
26. During cross-examination Orr indicated that the vessel was searched as a result of his reporting to his boss the incident of seeing his roommate hiding something under his pillow. His roommate was Everton Steel.
27. Orr indicated that he told the police officers who said that *"they need me to accompany them outside, which the ship board and I was not comfortable, refusing. They said they need me to give a statement. I went outside with them and they took a statement. I tell them I am the informant who told management. I tell them I'm the informant. I told him whatever more information they need to go back to the ship, [when] ship came back three days time, and they [could] go back and they get what they need from the ship and they still detained me, sir."*
28. According to Orr he and the ship management questioned why he needed to accompany the police and they said that they only needed that statement from him. Further, the ship took nothing from him as he was leaving with the police and everything remained in his possession, suggesting that they expected him to return. He says that the police locked him up when he went outside the ship.
29. Counsel for the defence asked Orr if he was a Bahamian citizen. Orr replied that he was not. Counsel contended that since that was the case Orr was subject to immigration control while in the country. Orr's reply was that he did not enter the Bahamas illegally.
30. Orr's evidence was that he was asked to accompany the police so as to give a statement against the roommate. The roommate, Everton Steel who was also arrested and charged, pleaded guilty to the offenses when taken before the Magistrate.

31. Further in his oral testimony Orr went on to say that he becomes teary eyed whenever he sees the sea and that he has had to undergo counselling after returning to Jamaica. Orr says that he acquired high blood pressure due to the time he spent detained in The Bahamas. In addition to diagnosing him with the aforementioned high blood pressure on his consultation upon his return to Jamaica, the general practitioner Dr. Rohan Williams also diagnosed him with muscular strain, a fungal skin infection, depression and anxiety and advised him to see a psychiatrist.

32. On 13 January 2017, Orr stated that he consulted with forensic psychiatrist, Dr Clayton Sewell who diagnosed him with Post Traumatic Stress Disorder (PTSD) and Major Depressive Disorder resulting from his arrest and detention in the Bahamas.

33. During re-examination Orr said that he was never charged with an immigration offence. He was not brought before the Court after he was discharged in the drugs case.

34. Orr's evidence was that he was unable to return to work after his arrest and return to Jamaica without his passport which contained his necessary travel visas. This document he says was not returned to him until Summer of 2018.

Orr's Claims:

35. Orr claims that he was subject to arbitrary arrest and false imprisonment (inclusive of any restriction of his freedom of movement which are a breach of his constitutional rights under Article 19(1) and Article 25(2)(e)), malicious prosecution, examples of aggravated damages and general damages.

36. Counsel for Orr contends that the burden is on the Defendants to prove according to the test laid down in ***O'Hara v Chief Constable of the Royal Ulster***

Constabulary [1996] UKHL that there was reasonable and/or probable grounds that Orr committed the offences for which he was charged. They say that the suspected cocaine was found under his cabin-mate's pillow and not Orr's, and it was Orr who alerted the authorities.

37. Orr's claim for arbitrary arrest has its genesis in his arrest by RBPF officers. Immediately following his discharge by the Learned Magistrate on 23 September 2016 he says he was detained by Immigration authorities. However, the defence has not shown that the plaintiff was detained due to any immigration law violation. Exacerbating this particular circumstance, his passport was seized by police officers who apparently could not locate it at the time of his discharge by the Learned Magistrate, thereby preventing him from being able to lawfully and perhaps expeditiously leave the country.

38. Orr was detained without charge by Immigration authorities during the aforementioned period. I accept that Orr had entered the country legally, with his passport. He was taken or lured off the vessel by the police. Following his discharge no reason or explanation has been given or suggested as to why his freedom of movement was restricted, pending his return to Jamaica, considering that it was the RBPF that lost his passport.

39. Orr claims for malicious prosecution and maintains that he was the informant that caused the RBPF to come to the Divina and that he was not the perpetrator of the drug offences that were committed on-board despite being charged with the crimes set out at paragraph 3 of this decision. He contends that in light of the circumstances as he described them that Police Officers had no reason to arrest him.

40. Orr says that malice may be inferred and relies on **Halsbury's Laws of England/Tort (Volume 97 2015) Inference of Malice for Want of Reasonable and Probable Cause in Bringing Prosecution** which states:

737. Inference of malice from want of reasonable and probable cause in bringing prosecution.

In a claim for malicious prosecution, those facts which constitute the want of reasonable and probable cause may also supply evidence of malice. However, if there is no other evidence of malice than what in the judge's opinion. Establishes a want of reasonable and probable cause, any jury, upon the question of malice, is not bound by that opinion, but may determine for itself whether there was such a want of reasonable and probable cause as to amount to malice. If the defendant, in prosecuting the claimant, honestly believed in his guilt, the jury should not infer malice if the only evidence of it is the absence of reasonable and probable cause."

41. Orr says that when he was arrested he was in possession of several items which were confiscated by Police Officers, namely: Jamaican passport containing travel visas; Mobile phone; Watch; Bracelet and \$199USD. This he pleads was a breach of his Constitutional rights under Article 27. There is no indication that any of the mentioned items were returned except for the passport. He also claims that he was subjected to cruel, inhumane and degrading treatment at the hands of the authorities detaining him contrary to the provisions of the Constitution. Orr cites being unable to contact anyone initially when he was detained at the Detention Centre, being shackled and handcuffed from time to time during the course of his detention and the general inhabitable unsanitary and overcrowded conditions at the detention facilities and BDOC.

42. Orr claims that he was diagnosed with the following, having contracted and/or suffered from them as a direct result of his incarceration:

- i. Uncontrolled Hypertension
- ii. Muscular Strain to the lower back
- iii. Fungal skin infection
- iv. Anxiety/ depression
- v. Post-Traumatic Stress Disorder (PTSD)
- vi. Major Depressive Disorder

43. Orr claims that immigration officials did not have the requisite authorization to carry out his deportation resulting in his unlawful deportation. He argues this on several

bases. The first being that he had entered the country lawfully. The second that he was never convicted of a crime within the jurisdiction, but in fact had been discharged by the Magistrates Court of the charges that were initially brought against him. The third that his passport was taken by the RBDF which did not allow him to return under his own volition. These he says were an infringement of his Article 25 Constitutional rights.

44. Counsel for Orr submits that there is no power under the Immigration Act to have ordered the plaintiff's detention and deportation until a Court had considered any right to remain. Accordingly, any detention order and/ or deportation order would be invalid. They rely on ***R v Beckford [2004] BHS J. No 430*** and say that there must be "strictest compliance with the law" when such decisions are made. Further paragraph 13 states the following:

13. Thus is incumbent upon those who seek to detain the Applicant and interfere with his personal liberty to disclose to the Court that they possess the lawful authority to do so."

45. Orr further relies on the case of ***Atain Takitota v The Attorney General (SCCivApp No. 54 of 2004)***. In that case an Order was made under the Immigration Act to detain the applicant, whose detention lasted for more than 8 years. In that case ***Sawyer P*** (as she then was) opined the following:

"The fact that the appellant is not a Bahamian citizen does not mean that he is not entitled to all the protection of the laws of The Bahamas. As their Lordships emphasized in Khawaja's case, in cases where the executive is given power to restrict human liberty, the courts should always regard with extreme jealousy any claim by the executive to imprison a citizen without trial and allow it only if it is clearly justified by the statutory language relied on – see per Lord Bridge of Harwich at p.122. This principle applies equally to everyone within the jurisdiction of the court whether or not he is a citizen of the country – see Khawaja's case at p.111-112 per Lord Scarman."

46. In addition to the above cases Counsel for Orr submits that while there is power to arrest persons without warrant under the Immigration Act section 9, the suspect must be brought before a Magistrate within 48 hours. Moreover, a deportation

order would need to be made upon the basis that Orr would have breached the Immigration laws of the country.

47. Orr says that his constitutional rights have been violated and he relies on the seminal case of ***Merson v Cartwright & AG [2005] UKPC 38*** as follows:

“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.”

Counsel for Orr admits that there is an overlap between the claims for Assault and Battery; and false imprisonment, however they aver that this overlap is not complete which is why they rely on the ***Merson*** case for an additional award in this matter.

Analysis and Disposition

48. Orr claims to have been wrongfully detained for the entire period from his arrest on 20 May 2016 through to his removal from The Bahamas on 18 October 2016 a period of 5 months. The first period of 4 months at the hands of the police as a result of the unlawful arrest and subsequent prosecution and detention at the Bahamas Department of Corrections. The last month of his detention being at the hands of the immigration authorities at the Immigration Detention Center. Having heard and observed Orr as he gave his evidence (which was not seriously challenged by the Defendant) I find him to be truthful.

49. I am satisfied that Orr has made out all of the claims alleged of wrongful arrest and wrongful detention by both the police and immigration authorities, malicious prosecution and violation of his constitutional rights. The evidence was clear that it was Orr who alerted management on the cruise ship as to his suspicions concerning the contraband in his room, which his roommate, Everton Steel, ultimately pleaded guilty to possessing. There was no reasonable basis to suspect that he committed any offence with respect to drugs possession or importation. There is therefore no basis to arrest him, much less detain, charge or prosecute

him. To add insult to injury, when discharged by the Court from the criminal prosecution he was detained for deportation for an additional 25 days. This further detention, pending deportation, occurred in the absence of any engagement with the court process concerning his immigration status as mandated by the Immigration Act (see case involving Charles J). That ad hoc deportation process itself was further delayed as a result of the police authority having mislaid Orr's passport.

50. Orr claims for loss of earnings and the loss of his job as a seaman with MSC. He says that he lost wages from July 2016 to present, as a result of his arrest and detention in the amount of \$824.34USD per month. I will award the loss of income for the period of his 5 month detention. This amounts to \$4,121.70. I am satisfied that activities of the Respondents have caused Orr his job at MSC a job he was engaged in for 14 years. Cognizant of his age, I will award him the additional sum of \$12,000 for the loss of employment.

51. I award Orr the following:

- (1) \$1,000 for the loss of the items removed from his possession and not returned;
- (2) \$600 for medical related costs and expenses.
- (3) \$450 for transportation expenses;
- (4) \$5,000 for attorney's fees for his defence before the Magistrates Court; and,
- (5) \$272 for the cost of the return ticket to The Bahamas.

52. In respect of the award of damages for false imprisonment, the Court of Appeal provides a useful discussion in the case of ***Jamal Cleare v Attorney General and others [2013] 1 BHS No. 64***. At paragraphs 47-49 the Court stated:

“47. 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 the breach of such an important constitutional right as the right to personal freedom.

48. Needless to say, in our view, it would be most invidious to put a price tag or tariff on the deprivation of personal liberty. But it is

undoubted that the right to personal liberty is, next to the right to life, an elemental right on which the enjoyment of most, if not all, of the other rights guaranteed in the Constitution is dependent. Personal liberty truly is priceless.

49. It is for these reasons that we are unable to support the quantum of damages of seven hundred and fifty dollars (\$750.00) awarded by the learned judge; nor for that matter do we think the measure of damages of two hundred and fifty dollars (\$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.

53. In that case Cleare was awarded the sum of \$25,000 following a detention of 3 days. Following *Cleare*, *Chales J* made an award of \$386,000 in the case of *Douglas Ngumi v AG et als*, Ngumi had been detained for 2,316 days. In this case Orr was detained for a period of 151 days initially at the hands of the police (including the period which he was held upon the Magistrate's Order on the strength of the wrongful prosecution) and latterly at the hands of the immigration authorities. I accept the daily rate awarded in *Takitota* of a sum of \$250 per day, which would have resulted in an award of \$37,750, would not adequately compensate Orr. In the circumstances I find that a fair and reasonable sum for compensation for Orr's arbitrary arrest, false imprisonment and malicious prosecution (inclusive of any overlap or otherwise relative to breaches of the constitution) would be sum of \$140,000. In making the award I have taken into account the pain and suffering and loss of amenities sustained by Orr.

54. Orr also claims exemplary and aggravated damages. Exemplary damages are awarded to punish arbitrary, oppressive and unconstitutional behaviour perpetrated by agents of the state. The object of aggravated damages is to compensate the plaintiff for the wrong or mental distress or injury to his feeling in circumstances where the injury is caused or increased by the manner in which the defendant committed the wrong. Having regard to the constitutional breaches of the plaintiff's rights I find that an award under these headings are also appropriate. Indeed it appears that there was reckless and outrageous disregard of Orr's rights under the constitution. I award damages under this combined head of \$15,000.

Conclusion

55. The awards to Orr are summarized below:

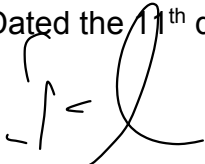
i.	Damages for arbitrary arrest, false imprisonment, malicious prosecution and constitutional breaches	\$140,000.00
ii.	Loss of Employment	\$ 12,000.00
iii.	Exemplary & Aggravated Damages	\$ 15,000.00
iv.	Special damages	\$ 11,473.70
TOTAL AWARD:		\$178,473.70

56. Judgment is awarded to Orr in the amount of \$178,473.70.

57. Interest is awarded at 3% pursuant to the Civil Procedure (Award of Interest) Act from the date of the Statement of Claim and to bear interest thereafter at the statutory rate.

58. Orr is to have his reasonable costs to be taxed if not agreed.

Dated the 11th day of February 2021



Ian R. Winder

Justice