

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**CV 2009-04042**

**BETWEEN**

**PAUL WELCH**

**CLAIMANT**

**AND**

**THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO**

**DEFENDANT**

**BEFORE THE HONOURABLE MR JUSTICE R. BOODOOSINGH**

**APPEARANCES:**

J. Mobota for the Claimant

R. Singh for the Defendant

### **JUDGMENT**

1. This is an assessment of damages arising from constitutional proceedings brought by the claimant against the defendant. By Fixed Date Claim Form filed on 3 November 2009, the claimant sought certain declarations and compensation for breaches of his

constitutional rights due to the failure of the prison authorities to deliver his Notice of Appeal within the stipulated time period.

2. The brief facts are these. On 6 February 2002 the claimant was arrested and charged with possession of marijuana for the purpose of trafficking. On 7 February 2002 he pleaded guilty to the charge and was sentenced to 4 years hard labour by the Magistrate. On that same day, the claimant says he dated and signed a notice of appeal against sentence and gave it to the prison officials. However, the notice of appeal was only received by the Magistrates' Court on 21 February 2002 – after the stipulated time for filing had passed.
  
3. The claimant spent six months on remand awaiting his appeal before securing bail. The appeal came up for hearing on 27 February 2003. The claimant was not present in court. The Court of Appeal dismissed the appeal holding it to be out of time and a nullity. There was thus no hearing on the merits. The claimant's conviction and sentence was affirmed and a warrant issued for his arrest with the sentence to run from the date of arrest.
  
4. The claimant was arrested pursuant to the warrant on 6 June 2008 – some 5 years after his appeal was dismissed. Upon his arrest, he was placed at the Maximum Security

Prison at Golden Grove. He then filed this motion on 3 November 2009 supported by an affidavit dated 9 October 2009. No affidavits in reply were filed by the State and as such the claimant's evidence remained unchallenged.

5. By Order of 25 January 2010, I declared that the actions of the State through its servants and/or agents in failing to transmit the claimant's notice of appeal on time constituted:

(a) a contravention of the applicant's right to protection of the law under section 4 (b) of the Constitution;

(b) a contravention of the applicant's right not to be deprived of his liberty without due process of law under section 4 (a) of the Constitution; and

(c) a contravention of the applicant's right not to be deprived of his right to such procedural provisions as are necessary for the purpose of giving effect and protection of the rights and freedoms guaranteed under section 5(2) (h) of the Constitution.

6. I further ordered, as one of the reliefs, the immediate release of the claimant from serving the 4 -year sentence imposed on him by the Magistrate on 7 February 2002. As at the date of the court's order, the claimant had spent 745 days in prison, 6 months and 2 weeks of which were on remand.

7. The issue of damages and costs was reserved as agreed between the parties. No agreement having been reached, the court ordered written submissions to be filed by both parties on the assessment of damages.
8. By its submissions the defendant accepts that the claimant is entitled to a declaration for breach of his constitutional rights and monetary compensation for the breach of those rights. Counsel for the State submits that based on the authorities a sum in the range of \$ 7,500.00 to \$ 10,000.00 would be reasonable compensation in the circumstances of this case for breach of the claimant's rights.
9. Counsel for the defendant submitted that damages for the breach should remain distinct and separate from damages consequent upon the breach. He argues that the different elements contributing to an award of damages must be examined as the consequent loss suffered by claimants will vary. Not every breach of a constitutional right he says is followed by a period of unconstitutional detention.
10. The court must determine, therefore, whether, in addition to damages for breach of his constitutional rights, the claimant should recover for distress and inconvenience as a result of the breach; time spent in prison awaiting the hearing of his appeal; time spent in prison

upon his arrest subsequent to the dismissal of his appeal including loss of income; and vindictory damages for the breach of his constitutional rights.

11. The defendant submits the claimant is not entitled to recover damages for the time spent in prison awaiting the hearing of the appeal or for loss of income prior to securing bail on appeal. Counsel argued that since convicted persons cannot seek constitutional relief in respect of time spent in prison even if their appeal is ultimately successful, the claimant could not be put in a better position in relation to the period of his incarceration than if his appeal had in fact been heard and upheld by the Court of Appeal. He cites the cases of **Clinton Forbes v Attorney General of Trinidad and Tobago** PC Appeal No. 2 of 2001 and **Independent Publishing Company v Attorney General of Trinidad and Tobago** PC Appeals Nos 5 and 7 of 2003.

12. Regarding the period following his arrest after the dismissal of his appeal (June 2008 to January 2010), the defendant also submits that the claimant is not entitled to any further compensation. He says this submission is supported by the authorities where claimants have recovered for periods of unconstitutional incarceration – that is time in excess of the sentence imposed on them when remission for good behaviour is factored in. See **Perry Matthew v Attorney General HCA No 3342 of 2004** and **Bryan Lynch v Attorney General CV 2008-01595**.

13. There is no period of unconstitutional detention here. Counsel argues that for the constitutional court to award damages to the claimant for this period would be tantamount to it finding as a matter of fact that the claimant would have been successful on his appeal.

14. If the court does not accept the above submission, counsel submits, alternatively, that any damages to which the claimant may be entitled for this period (June 2008 to January 2010) should be assessed under the doctrine of lost chance - see **Dereck Hamilton v The Commissioner of Prisons and the Attorney General HCA No. 950 of 2005**. What the court would be undertaking is an analysis of the probabilities of the various outcomes on the facts presented and attempt to value the damage suffered as a result of the lost chance of appeal. He suggests that the probabilities should be apportioned equally among three possible outcomes:

- (i) the claimant's appeal would have been successful and converted to a fine (resulting in a period of 19 months unconstitutional imprisonment);
- (ii) it would have been partially successful and his sentence reduced from 4 years to 2 years with account being taken of the time spent in prison awaiting appeal (with remission this would amount to 6 ½ months unlawful imprisonment); and
- (iii) the appeal would have been unsuccessful and his sentence affirmed with account being taken of the time spent in prison awaiting appeal.

15. He submits that on the above approach and taking account of the unchallenged evidence of distress and inconvenience and the prison conditions endured by the claimant, the claimant's consequential damages should be valued at \$133, 333.00.

16. The claimant, on the other hand, essentially submits that a holistic approach or exercise should be undertaken in assessment of damages in constitutional matters. He commends the approach of Jones J. in **Hamilton** be similarly adopted by this court and submitted that to create a dichotomy of damages for 'breach of constitutional right' and 'unconstitutional detention' is artificial.

17. The claimant's attorney submits that the claimant is entitled to no less than \$ 450,000.00 plus interest when the court considers the ample evidence presented by the claimant of the distress suffered as a result of the breach; his loss of income and loss of family; the period of incarceration; and the clear likelihood of success of his appeal.

18. The court was referred to a number of authorities and the type of damages awarded in those cases.

19. In **Christopher Lezama and Others v The Commissioner of Prisons and the Attorney**

**General HCA No 2098 of 2002** (delivered 13 February 2003), Stollmeyer J., as he then was, awarded the sum of **\$5,000.00** to each of the applicants. This followed a consent order entered into by the parties that the failure of the respondent to transmit the applicants' notices of appeal in time breached their right to the protection of the law under section 4 (b) of the Constitution. The applicants had all pleaded guilty to assault occasioning actual bodily harm and were sentenced to 12 months imprisonment with hard labour. They appealed *against sentence only*, having regard to their guilty pleas and obtained bail pending the hearing and determination of their appeals. On the matter coming up for hearing the Court of Appeal held that their appeals were filed out of time and were nullities. They were ordered to be returned to prison to serve their sentences, time already spent to be counted as time served on the original sentence.

20. In making this award Stollmeyer J. noted that the applicants did not claim to have suffered any pecuniary or other consequential loss and that there was no evidence of distress or inconvenience actually suffered by the applicants as a result of the breach. The applicants had also not shown that there was a real chance of their sentences being reduced on appeal. The learned judge, however, accepted that the loss of opportunity to appeal, or pursue their appeals, must have caused the applicants some distress and inconvenience. That, however, of itself, did not in the judge's view justify a substantial award or the award of any additional damages.



21. In **Dereck Hamilton** (delivered 2 May 2007) Jones J. took a holistic approach in awarding the sum of **\$125,000.00** in damages for breach of the applicant's constitutional right under section 4 (a). Here the applicant had also claimed breach of his rights under sections 4 (a), (b) and 5 (2) (e) and (h) for the failure of the respondent to file his notice of appeal within time. Hamilton was found guilty and convicted and sentenced to 7 years hard labour on a charge of armed robbery. He had appealed his conviction. From the facts of the case there was no evidence of the length of the applicant's incarceration including how long he spent in prison after the dismissal of his appeal.

22. In assessing the amount of damages payable, the judge considered the element of distress and inconvenience suffered by the applicant as evidenced by the prison conditions as well as the mental torment he must have experienced in having, what he considered to be a good appeal, thwarted by the action or non-action of the prison authorities. On the facts before her Jones J. was also of the view that the applicant had at least an arguable appeal both as to conviction and sentence. The judge found this was also an appropriate case for an additional award of \$25,000. in exemplary damages.

23. In **Perry Matthew** (delivered 21 June 2007), the applicant was charged with possession of marijuana and was tried, convicted and sentenced to 36 months hard labour. He appealed against both conviction and sentence but his appeal was struck out for being out of time. He was however released on the same day having already completed his sentence. He was

unlawfully detained for 409 days prior to his release. By consent, the court agreed to a sum of **\$6,000.00** for breaches of the applicant's constitutional rights. Jamadar J., as he then was, also made a separate award of **\$ 350,000.00** for distress and inconvenience suffered *during the period of unconstitutional detention.*

24. In **Bryan Lynch** (delivered 30 November 2009) the claimant again sought declarations and damages as a result of the failure of the prison authorities to deliver his notice of appeal within the stipulated period, and for his alleged unlawful detention from 24 July 2000 to 27 May 2002. On 24 July 1998 Lynch had been convicted for possession of marijuana for the purpose of trafficking and sentenced to 36 months imprisonment with hard labour. He signed a notice of appeal *against conviction and sentence* on the same day but this was not delivered to the Magistrates' Court until 25 days after. When his appeal came on for hearing on 27 May 2002 it was struck out for being filed out of time. His conviction and sentence were affirmed but the Court of Appeal declared that he had already served his sentence and ordered he be discharged from prison the same day. He was incarcerated for a total of 46 months and 3 days. Des Vignes J. held, allowing for remission for good behavior claimed, that the claimant would have become eligible for discharge on 24 July 2000 (i.e. after 24 months) and found the claimant's continued imprisonment beyond 24 July 2000 until his release on 27 May 2002 (672 days) was unlawful and that he was entitled to compensation. The judge was of the view that separate sums should be awarded for breach of the

claimant's constitutional rights under sections 4 (a) and (b) and for his unlawful and unconstitutional detention for the period of 672 days.

25. The sum of **\$7,500.00** was awarded for breach of the rights and **\$ 450,000** as compensation *for distress and inconvenience suffered during the period of unconstitutional detention*. The judge took into account the cramped, insanitary conditions and mental anguish which the claimant alleged he suffered while incarcerated and that he spent 672 days in excess of the period of his sentence. He however found that the claimant had presented no evidence as to the likelihood of success of appeal and that there was insufficient evidence for an award for loss of income during the period of incarceration.

26. This case does not traverse entirely new territory. The cases have all clearly established that the failure of the State/ and or its agents to deliver prisoners' notices of appeal within time constitutes a breach of constitutional rights. Damages are recoverable for breaches of rights without proof of consequential loss – see **Attorney General v Lakhan Civil App No 1544 of 1997**. What differs according to the particular facts of each case is the quantum of damages awarded for breaches of constitutional rights and the consequential loss suffered.

27. It is clear that awards have take into account different factors, the weight attached to each invariably influencing the size of the award. The trend as gleaned from the authorities

reflect that compensation for consequential damage has largely been awarded for periods of unconstitutional or unlawful imprisonment - that is time spent incarcerated in excess of the lawful sentence imposed on the claimant – see *Perry Matthews* and *Bryan Lynch* above. It appears in those cases that factors of distress and inconvenience, conditions endured, loss of income were taken into account for this period of unlawful detention.

28. A key distinguishing feature of the instant case is that the claimant was ordered to be released while still serving his sentence. In other cases, claimants' actions appear to have been brought after their lawful sentences had already been served. The larger awards given have also been for periods of unconstitutional imprisonment spent beyond claimants' original sentences.

29. At the time the claimant was ordered to be released, he would have served some 19 months of his four-year sentence. He was also in custody for 6 months on remand awaiting his appeal. Assuming his sentence would have been upheld and both the remand period and the remission period taken into account, the time actually spent incarcerated may amount to less than that for which the claimant was originally sentenced. This by itself may be viewed as "effective relief" not warranting any further substantial relief by way of monetary compensation.

30. As it is, the claimant has not suffered any period of detention in excess of his lawful sentence. But the question remains whether he is still entitled to any consequential damages for the breach of his rights. The answer I think is yes. The court must examine each case where a constitutional breach has occurred and fashion the most effective mix of relief appropriate to that case. Constitutional rights are fundamental and the Constitution is the supreme law. The unjustified interference with a citizen's constitutional rights requires full and effective relief.

31. The claimant's claim for damages can only be premised upon the loss of chance or opportunity to present his appeal, and the distress and inconvenience suffered as a consequence of being deprived of the opportunity to do so. This is distinct and separate in my view from damages for actual time spent in prison before or after appeal and whether or not there was an unlawful period of detention.

32. In **Hamilton** it was not clear what period of detention the award of \$ 125,000.00 in damages was intended to cover. But it seems that the above factors were considered by the judge as arising generally from the breach of the claimant's constitutional right, and not only in relation to any period of unlawful detention. Similarly, in **Lezama**, it does not appear on the facts that the applicants were incarcerated beyond their lawful sentences. The judge noted that there must have been an element of distress and inconvenience as a result of the breach of the applicant's right to protection of the law. What was lacking, however, was any

evidence of such distress and inconvenience or pecuniary loss actually suffered by the applicants or that they had any real chance of success on appeal. Stollmeyer J. therefore declined to make a substantial award.

33. In this case at paragraphs 14 to 23 of his affidavit the claimant gives evidence of the prison conditions endured both while on remand and at the maximum security prison. He gives details among others of the overcrowded and unsanitary cells and lack of regular 'airing', particularly while on remand. As in **Hamilton** and **Lynch**, this evidence has not been challenged by the State and the court accepts it.

34. At paragraphs 6 through 12, the claimant also itemises the facts that led him to believe that he had a valid appeal pending and the likelihood of its success. At paragraph 12 he alleges, and his attorney submits, that based on the facts of his case and the decisions of several magisterial appeals with similar facts he had a high possibility of a successful appeal. He cites the authorities of **Shurland Lambkin v Dwayne Martinez** Mag Appeal No. 122 of 2003, **Richard Govia v The State** Cr. Appeal Nos. 1,2,3 & 4 of 2006 and **Kello James v The State** Mag Appeal No. 126 of 1999.

35. In this regard, the approach of Jones J. at pages 24 and 25 of **Hamilton** is instructive:

*“Although the reasons adduced by the Applicant for his assumption that the appeal had a real likelihood of success must of necessity have some bearing on an assessment of damages this court is in no position to determine what the Court of Appeal may have done if the appeal had been properly before it. In my opinion the most that this court can do is to examine the grounds raised by the Applicant to ascertain whether there is any validity in the Appeal. In other words, if on the facts before me I can only conclude that the appeal had no chance of success that conclusion ought to be reflected in the damages awarded. Similarly if I can conclude that the Applicant had an arguable case to present to the Court of Appeal that too ought to be reflected in the award of damages.”*

36. It must be noted that in this case, unlike **Hamilton**, the claimant pleaded guilty and his appeal was against sentence only. This is an important distinction. The judge in **Hamilton** emphasized that the applicant has appealed his conviction and that what was lost was the opportunity to plead his case for a reversal of that conviction. This lost opportunity may or may not have resulted in an acquittal or decrease in sentence.

37. I agree with the defendant’s submission that a claimant with a strong appeal against conviction should attract higher damages than a claimant who pleaded guilty and appealed his sentence only - even if there is a good prospect of success. On the facts presented it would seem to me that the claimant had at least an arguable case for reduction of his sentence. At the same time, given the Magistrate’s reasons and the

Court of Appeal's decision in **James**, it may well be that the sentence would have been upheld. To go beyond whether the claimant had an arguable case therefore, would be engaging in speculation and attempting to anticipate what the Court of Appeal would have done.

38. The claimant also alleges loss of income for 745 days of "virtual unlawful imprisonment". He sets out at paragraphs 25 to 31 details of business and trade activities engaged in as well as loan and other documentation and to show his earning capacity. He computed a monthly income based on his activities in the months leading up to June 2008 of \$ 7,228.00. There are many gaps, however, in the evidence presented, and I am of the view that it is insufficient to justify compensation under this head. This is more so when there was no period of unlawful incarceration for which the claimant suffered loss of income.

39. Similarly, I do not find the claimant's evidence of loss of family life due to his incarceration cogent enough for an award of damages under this head.

40. On the facts, the claimant has placed unchallenged evidence of distress and inconvenience suffered while incarcerated by way of the prison conditions endured as well as the undoubted mental anguish of awaiting what was always going to be a futile



appeal. The late delivery of the notice of appeal meant that the claimant's "appeal" was invalid and wholly ineffective from the start. There was never a chance of the appeal being heard or upheld. The position of at least an arguable appeal on sentence must therefore also be taken into account.

41. The claimant, in my view, is entitled to compensation for the lost chance of appeal and the distress and anxiety suffered as a result of having what he believed to be a valid appeal pending rendered nugatory by the failure / omission of the State to transmit his appeal on time. This is in addition to damages for the breach of his constitutional rights.
42. Having considered the authorities and submissions, together with the particular circumstances of this case, I am of the view that there should be fair compensation for the breach of the claimant's constitutional rights and consequential loss suffered, particularly the lost chance of appeal.
43. For the breach of the claimant's rights under sections 4(a), (b) and 5 (2) (e) of the Constitution, I award the sum of \$ 20,000.00. This sum is higher than some of the previous awards. Here breaches were found of 3 sections. The nature of the breaches is also significant giving support to a higher award. As I have already noted, this was an important constitutional right which was breached which affected his entitlement to his

appeal being heard and adjudicated upon. For his distress and inconvenience suffered and loss of chance of pursuing the appeal, I award the sum of \$ 50,000.00.

44. In making these awards, I have taken account of the distinguishing features of this case, the grant of effective relief earlier, and that the court cannot speculate on precisely what the appeal court would have done if they had heard the appeal. On the other hand, the failure of the State authorities by denying a claimant the chance of pursuing an appeal which the law affords him and which **arguably** may have resulted in a reduced sentence is not a circumstance that the court can simply ignore and give no compensation for. I should note, however, that I did not agree with the State's alternative approach which appeared to introduce a mathematical assessment based on competing possibilities of what would happen on the appeal. Compensatory principles are better served by the court making a determination based on the gravity of the resulting consequence of the denial of opportunity in each case. Here the consequence is the claimant being denied the opportunity to advance an arguable case for a reduced sentence which may have given him a shorter term of imprisonment and thus impact on his liberty. In a case where the constitutional court gave effective relief by ordering the claimant be released before the full term was served, a lower benchmark of monetary compensation is appropriate. Further, given the facts set out above, I do not think this is an appropriate case for any additional award of vindicatory damages or exemplary damages.

45. Interest is to run on these sums at the rate of 6 % per annum from the 3 November 2009 to the date of judgment. The defendant must pay the claimant's costs on the prescribed scale based on an award of \$70,000.00. I am grateful to the attorneys and to Mr Ramcharitar, my Judicial Research Assistant.

Ronnie Boodoosingh

Judge

23 April 2012