REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2008 – 01595

BETWEEN

Bryan Lynch **Claimant**

and

The Attorney General of Trinidad and Tobago **Defendant**

Before the Honourable Mr. Justice des Vignes

Appearances:

Mr. A. Hosein instructed by Mr. R. Deena for the Claimant

Mr. R. Singh for the Defendant

J U D G M E N T

The Claim

1. By Fixed Date Claim Form filed on 1st May 2008, the Claimant commenced proceedings against the Attorney General pursuant to S. 14(1) of the Constitution

of the Republic of Trinidad and Tobago. He sought certain declaratory orders as well as monetary compensation, including aggravated and vindicatory damages, as a result of the failure of the Prison Authorities to deliver his Notice of Appeal within the seven (7) day period prescribed by S. 130 of the **Summary Courts Act Chap. 4:20,** and also as a result of his alleged unlawful detention from the 24th July 2000 to the 27th May 2002.

The Reliefs sought

2. The Claimant sought the following three (3) Declarations:

(i) A Declaration that the Claimant's right to liberty and the right not to be deprived thereof without due process of law has been breached by his imprisonment in excess of the period ordered by the Court, that is to say between the period 24th July 2000 to 27th May 2002, in contravention of section 4(a) of the Constitution of the Republic of Trinidad and Tobago Chapter 1:01.

(ii) A Declaration that the Claimant's right to equality before the law and the protection of the law has been breached in that although the Claimant signed his Notice of Appeal on the 24th July 1998, his Notice of Appeal was only forwarded to the Magistrate's Court by the Prison Authorities on the 25th August 1998 when other similar circumstanced individuals have

had the opportunity of having their appeals heard in contravention of Section 4(b) of the Constitution of the Republic of Trinidad and Tobago.

(iii) A Declaration that the Claimant's right to equality of treatment from any Public Authority in exercise of any functions has been breached in that the Prison Authority failed to transmit the Claimant's Notice of Appeal to the San Fernando Magistrate's Court within seven (7) days although it has done this for many other prisoners.

3. In addition to these Declarations, the Claimant sought the following:

   (a) an order that monetary compensation be paid to him, including aggravated and vindicatory damages;

   (b) all such orders, writs and directions as the Court may consider appropriate for the purpose of enforcing, or securing the enforcement of and/or redressing the contravention of the Human Rights and the Fundamental freedoms to which he is entitled under the Constitution;

   (c) Costs and such further and other relief.

Facts

4. The Claimant's Claim was supported by an Affidavit in his name filed on 1st May 2008. No Affidavits were filed by the Defendant in these proceedings neither was the Claimant cross-examined. The relevant facts are therefore to be gleaned from the Claimant's Affidavit, and are as follows:

(i) On 24th June 1996, the Claimant was charged with possession of marijuana for the purpose of trafficking, contrary to Section 5(4) of the **Dangerous Drugs Act**.

(ii) On 24th July 1998, he was tried before Magistrate Gillian David, presiding in the San Fernando Magistrates' Court. He was not represented by Counsel at the trial. The Magistrate found him guilty and he was convicted and sentenced to 36 months imprisonment with hard labour.

(iii) The Claimant informed the Magistrate that he wished to appeal. The Magistrate told him that he would have to wait until he arrived at the Prison to sign his Appeal. He was not admitted to bail, and the Claimant was taken to the Golden Grove State Prison.

(iv) On his arrival at the Prison, on the said 24th July 1998, the Claimant informed the Prison Authorities that he wished to appeal his conviction and sentence. He completed and signed a Notice of Appeal, which he returned to a Prison Officer. That Notice of Appeal was not delivered to the Magistrates' Court until 25th August 1998, 25 days after the 7 days limitation for doing so had expired.

(v) The Claimant discovered that his Notice of Appeal was lodged out of time when his appeal[1] came on for hearing on 27th May 2002. On that day, when the Claimant appeared before Mesdames Justices of Appeal Permanand and Warner in the Court of Appeal, his appeal was struck out for being filed out of time. His conviction and sentence of the 24th July 1998, were affirmed and it was ordered that his term of imprisonment was to be computed from the 24th July 1998. The Court declared that he had already served his sentence and ordered that the Claimant be discharged from prison. The Claimant was released on the same day, that is, 27th May 2002. He was incarcerated for a total of 46 months and 3 days.

(vi) The Claimant alleged that during his incarceration he suffered a loss of profits of his health store called "Café Zozo" situate at Chaconia Avenue, Pleasantville, loss of income from his farming of a 2 acre lot of land on Chaconia Avenue and loss of rental income from renting out two properties at No. 8 Newbold Street, Mon Repos, San Fernando and No. 21 Hibiscus Drive.

(vii) The Claimant alleged that he was innocent and he lost the opportunity to be heard on appeal as a consequence of the failure of the Prison Authorities to lodge his appeal in time. During his incarceration, he was never charged with any disciplinary offences and was of good behaviour.

[1] Magisterial Appeal No. 59 of 2002

(viii) He also alleged that during his incarceration he endured cruel and unusual conditions that were harsh, oppressive and inflictive of physical and mental suffering and anguish and he experienced feelings of embarrassment and indignity.

History of the proceedings

5. This matter was initially docketed to my brother, Mr. Justice Moosai. When it came on for hearing on 28th July 2008, it was indicated to the Court that the parties were exploring settlement. The proceedings were therefore adjourned to the 10th November 2008. At the next hearing on the 10th November 2008, the Defendant conceded liability that the failure of the Prison authorities to deliver the Claimant's Notice of Appeal on time amounted to a denial of his constitutional rights under S. 4(a) and (b) of the Constitution.

6. As a consequence, the following Order was made by Justice Moosai on 10th November 2008:

"(i) There will be a Declaration that the failure, neglect or omission of the Prison Authorities to deliver to the Clerk of the Peace of the San Fernando Magistrates' Court the Claimant's Notice of Appeal against conviction imposed on him by Magistrate Gillian David within the prescribed

statutory period for so doing, contravenes the Claimant's constitutional rights guaranteed to him by Section 4(a)[2] and (b)[3] of the Constitution.

(ii) Damages are to be assessed by a Judge in Chambers.

(iii) Defendant's advice on quantum to be filed and served on the Claimant on or before 2nd January 2009.

(iv) The Claimant's advice on quantum to be filed and served on the Defendant on or before 20th February 2009."

The matter was then adjourned to 16th March 2009.

7. On 16th March 2009, Justice Moosai granted leave to extend time for the filing of the Claimant's submissions to 31st March 2009, and for the filing of the Defendant's submissions to 4th February 2009. Leave was also granted to the Defendant to file and serve submissions in reply, if necessary, on or before 21st April 2009. The matter was then adjourned to 21st April 2009. However, on 20th April 2009, the parties were informed that the matter was rescheduled to 22nd April 2009.

[2] "(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law."

[3] "(b) the right of the individual to equality before the law and the protection of the law."

8. On 4th February 2009, the Defendant had filed its Submissions on Quantum pursuant to the said Order of Justice Moosai made on 10th November 2008, and the Claimant filed its Submissions on 31st March 2009.

9. These proceedings first came before me on 22nd April 2009. On that day, I granted leave to the Defendant to file Submissions in Reply on or before the 15th May 2009, and the matter was adjourned to 29th May 2009.

10. Supplemental Submissions on Quantum were filed by the Defendant on the 15th May 2009 and on the 29th May 2009, I heard oral submissions on behalf of both parties.

The Declaration granted by Justice Moosai on 10th November 2008

11. The Claimant sought three (3) distinct declarations. These declarations are set out above[4].The Declaration granted by the Honourable Justice Moosai on 10th November 2008, was in the following terms:

> *"(i) ... that the failure, neglect or omission of the Prison Authorities to deliver to the Clerk of the Peace of the San Fernando Magistrates' Court the Claimant's Notice of Appeal against conviction imposed on him by Magistrate Gillian David within the prescribed statutory*

[4] *Supra* p. 2 - 3

period for so doing, contravenes the Claimant's constitutional rights guaranteed to him by Section 4(a) and (b) of the Constitution."

12. On examining the Order, it seems to me that the declaration was made only in respect of the breach of the Claimant's right to liberty and the right not to be deprived thereof except by due process of law (relief (1) of the Claim) and his right to protection of the law, by reason of the late filing of the Claimant's Notice of Appeal by the Prison Authorities, (part of relief 2 of the Claim) since no order was made by the Judge in relation to inequality of treatment as compared to other similarly circumstanced individuals/prisoners (as set out in the second and third declarations sought by the Claimant in his Claim Form).

13. Counsel for the Defendant submitted that in the light of the declaration made by Mr. Justice Moosai, the Claimant is not entitled to recover any monetary compensation for his time spent in prison awaiting the hearing of his appeal. He argued, firstly, 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. In support of this submission, he relied on the judgments of the Privy Council in ***Clinton Forbes v. The Attorney General of Trinidad and Tobago, Privy Council Appeal No. 2 of 2001*** *and* ***Independent Publishing Company Limited v. Attorney General of Trinidad and Tobago, Privy Council Appeal Nos. 5 and 7 of 2003***. Secondly, he argued

that the Claimant is not entitled to monetary compensation for the time spent in prison in excess of his sentence pending the hearing of his appeal for the reason that the declaration sought by the Claimant in his Claim Form in relation to his period of imprisonment was not pursued by the Claimant and that there was no declaration made by Justice Moosai in respect thereof.

14. The Claimant, on the other hand, denies abandoning this relief and argued that the declaration made by Justice Moosai was wide enough to cover the Claimant's imprisonment in excess of the period ordered by the Magistrate. Since he was sentenced on the 24th July 1998, for a period of 36 months and his "appeal", being out of time, was a nullity, he was to be treated as a convicted prisoner serving his sentence and not a "defendant awaiting trial". Further, since his evidence as to his good behaviour was not contradicted by the Defendant, he should have been granted a remission of one-third of his sentence, thereby reducing his period of incarceration to twenty-four months. Accordingly, he ought to have been released on the 24th July 2000. The Claimant was actually released on the 27th May 2002, and therefore, he argued, he should be compensated for the period 24th July 2000 to the 27th May 2002, a period of 672 days.

15. I agree with the arguments advanced on behalf of the Claimant that since the "appeal" lodged out of time by the Prison Authorities was a nullity the Claimant

was de facto a prisoner serving his sentence and not a defendant awaiting the hearing of his appeal. Support for this proposition is to be found in the following passage of the judgment of Jamadar J. (as he then was) in ***Perry Matthew v. The Attorney General of Trinidad and Tobago, H.C.A. No. 3342 of 2004 at p. 6****:*

> "*First, as a matter of law, the late delivery of the notice of appeal meant that the Applicant's appeal was "out of time and therefore wholly ineffective." Second, as Chief Justice de la Bastide also pointed out in* ***Ricky Bernard*** *in identical circumstances: "The position of law is no different from a situation in which no appeal was filed." And third, as Chief Justice de la Bastide noted as the consequence of the appeal being a nullity: "In those circumstance, it follows that the sentences of imprisonment which were imposed …. must run from the dates of the their respective convictions and not from today."*

16. Therefore, the maximum period of time which the Claimant ought to have served, pursuant to the sentence imposed on him by Magistrate David, was 36 months from the 24th July 1998. Therefore, once he had served his sentence, he should have been released by the 24th July 2001, at the latest. The only reason he was kept in custody was because the Prison Authorities were of the view that the Claimant had a valid appeal pending. That view was mistaken because, in fact, the Claimant did not have a valid pending appeal which was a direct consequence of the failure and/or omission of the Prison Authorities to deliver the Claimant's Notice of Appeal in time.

17. So, the question to be answered is whether the Claimant was deprived of his liberty without due process of law. In my opinion, the answer to that question must be in the affirmative since there is no legal justification for his detention beyond the term of his sentence.

18. The next question is, therefore, whether the Claimant is entitled to claim damages for this deprivation of his liberty based on the wording of the declaration made by Moosai J. In my opinion, when the Defendant conceded that the Claimant was entitled to the declaration that his constitutional rights guaranteed to him by sections 4 (a) and (b) of the Constitution had been contravened by the failure, neglect or omission of the Prison Authorities to deliver the Claimant's Notice of Appeal in time, it conceded that the Claimant's right to liberty and his right not to be deprived thereof except by due process of law had been infringed by the Prison Authorities. Therefore, in my opinion, the declaration made by Moosai J. is wide enough to cover the Claimant's claim for damages for his unlawful incarceration beyond the end of his lawful sentence.

19. This leads to the next issue, that is, whether the period of unlawful incarceration ran from the 24th July 2000 or 24th July 2001. The answer depends on whether the Claimant is correct in his contention that he was entitled to a remission of one third of his sentence.

20. At paragraph 14 of his affidavit, the Claimant stated as follows:

> *"14. I was incarcerated from the 24th July 1998 to the 27th May 2002 that is to say for 46 months and 3 days. Further, I was never*

charged with nor found guilty of any disciplinary offences whilst incarcerated and was a person of good behaviour while in prison. In the circumstances and taking into account the practice of the prison service where prisoners of good behaviour actually served 8 months for each year of their sentence. I would have been at liberty after 24 months of incarceration. That is up to one third of my sentence would have been remitted for good behaviour."

21. This practice of granting remissions of sentences to which the Claimant referred derives from the **Prison Rules** made under the **West Indies Prisons Act, 1838**. Rule 285 thereof provides as follows:

> *"285. With a view to encouraging good conduct and industry and to facilitating the reformative treatment of prisoners, arrangements shall be made by which a convicted prisoner serving imprisonment, whether under one sentence or consecutive sentences or under any such sentence or sentences and the remanent of a previous sentence, for a period exceeding one month, may become eligible for discharge when a portion of his term of imprisonment, not exceeding one-third of the whole term of imprisonment, has yet to run: Provided that nothing in the said arrangements shall authorize the reduction of any period of imprisonment to be served to less than thirty days."*

22. In answer to the Claimant's contention that he was entitled to a remission of one third of his sentence, the Defendant argued that the Prison Authorities could not release the Claimant before the expiration of his sentence. Further, since according to section 128A of the **Summary Courts Act**, the Claimant's status changed from a convicted prisoner serving a sentence to a defendant in custody awaiting trial upon the filing of his notice of appeal, Rule 285 of the **Prison Rules** did not apply to him and "*it was only until the Court of Appeal dismissed his appeal on the 27th May 2002 and ordered that his sentence was to run from the date of his conviction, could the Prison Authorities reclassify the Claimant as a convicted prisoner serving a term of imprisonment….In reality, the Prison Authorities could only start to apply Rule 285 of the Prison Rules on the 27th May 2002.*"

23. Having regard to my earlier finding that the Claimant was de facto a convicted prisoner serving his sentence, I reject this submission and find that Rule 285 applied to the Claimant. In the absence of any evidence from the Defendant to contradict the facts stated by the Claimant at paragraph 14 of his affidavit, I accept his testimony and, allowing for full remission, the Claimant would have become eligible for discharge on the 24th July 2000.

24. Accordingly, I find that the Claimant's continued imprisonment beyond the 24th July 2000 until his release on the 27th May 2002 was unlawful and that he is entitled to be compensated for this infringement of his right to liberty and the right not to be deprived thereof except by due process of law.

Prison Conditions

25. The Claimant has also given testimony as to the conditions to which he was subjected while incarcerated. His description of prison conditions are set out at paragraphs 17 and 18 of his affidavit and once again this evidence has not been contradicted. Without going into full detail, the essence of the Claimant's evidence is that the prison cells were overcrowded so that sleeping was uncomfortable and painful and that the cells were very unsanitary and he was not aired on a regular basis or provided with reading materials. These conditions caused him physical and mental suffering and produced in him feelings of embarrassment and indignity

Lost Opportunity to overturn conviction

26. The Claimant also complained that he was innocent and he lost the opportunity to be heard on appeal and, by virtue of his appeal being rendered nugatory, he would always have the conviction hanging over his head. However, unlike the facts in ***Dereck Hamilton v. The Attorney General***[5], the Claimant has not set out in his affidavit any grounds of appeal to enable this Court to ascertain whether there was any validity in the appeal. Accordingly, I am unable to express any opinion on the likelihood of success of the Claimant's appeal and, in my

[5] H.C. 950/2005

assessment of the damages payable herein, I cannot place much weight on this complaint of lost opportunity of overturning the conviction on appeal.

Loss of Income

27. As earlier stated, the Claimant alleged that, as a consequence of his incarceration, he sustained a loss of income from his health store, his farming and his rental of two properties. However, in my opinion, the Claimant failed to provide sufficient evidence to establish this "loss of income" to justify the inclusion of an award for such loss. In particular, the following questions readily come to mind in relation to the three different sources of income:

    (i) In relation to income from Café Zozo, how long had the Claimant been running this business? Did he keep records of this business? What products were sold in this health store? What were the expenses of this business such as rent, salaries, income tax? What was the gross income and the net profit after deduction of expenses?

    (ii) In relation to the rental income allegedly lost, what were the names of the tenants and what were the terms of their tenancies? Were receipts issued to the tenants of the properties and why were these receipts not produced? What did the will of his grandmother provide and why was it not annexed? Did his grandmother own the property at Newbold Street? Did his father own the property at Hibiscus Drive?

Who are the beneficiaries of his father's estate? Have grants of probate/administration been made in favour of the Claimant which would entitle him to rent out these properties and collect the rents?

(iii) In relation to the loss of farming income, who owned the land on which the farming was conducted? What were the expenses of the farming business such as rent and salaries? What records did the Claimant have to support his income from this business?

28. The Claimant's affidavit did not supply answers to any of these questions. Accordingly, I am not satisfied that the Claimant has provided sufficient evidence to establish on a balance of probabilities that he suffered a loss of income of approximately $7,000 to $8,000 per month. Accordingly, I do not propose to make any award to the Claimant for loss of income during his period of incarceration.

Quantum of damages payable to the Claimant for the breach of his constitutional right and for his unlawful detention?

29. The Defendant has conceded that the Claimant is entitled to an award for the breach of his constitutional right, per se, and that the sum of $6,000 - $7,000 would be reasonable compensation in the circumstances and has relied on the following authorities:

(i) ***Christopher Lezama and Ors v The Commissioner of Prisons and The Attorney General of Trinidad and Tobago[6];***

(ii) ***Ronald Gordon v The Attorney General of Trinidad and Tobago[7]; and***

(iii) ***Matthew Perry v The Attorney General of Trinidad and Tobago[8].***

30. The Claimant, on the other hand, has contended that a greater and appropriate award in the sum of $125,000 would suffice and has relied on the authority of ***Dereck Hamilton v The Commissioner of Prisons and the Attorney General of Trinidad and Tobago[9]***

31. In ***Lezama*** (2003), a decision of Justice Stollmeyer (as he then was), Christopher Lezama and two others were jointly charged with assault occasioning actual bodily harm. They pleaded guilty to the offence and were sentenced to twelve (12) months imprisonment with hard labour. They completed and signed Notices of Appeal against their sentences on 16th July 1997, which they left with a

[6] HCA No 2098 of 2002

[7] HCA No. 1760 of 2001

[8] HCA No. 3342 of 2004

[9] HCA No. 950 of 2005

Prison Officer, but those Notices were not filed until 27th July 1997, after the time for filing them had passed.

32. They were subsequently admitted to bail pending the hearing and determination of their appeals. When their appeals came on for hearing the Court of Appeal held that their appeals were filed out of time and were nullities. The Court of Appeal ordered that the Applicants be returned to prison to serve their sentences and that time already spent was to be counted as time spent on the original sentence. The Applicants claimed that their constitutional rights were violated and sought a series of reliefs including monetary compensation.

33. In this case, Justice Stollmeyer approved a consent order entered into by the parties, that the failure and/or neglect and/or omission of the Respondent to transmit the Applicants' Notices of Appeal on or before the expiration of the seventh day of their sentence and conviction constituted a contravention of the Applicants' right to the protection of the law under S. 4(b) of the Constitution. The Applicants did not pursue the other reliefs claimed in respect of the alleged breaches of Sections 4(a), 5(2)(e) and 5(2)(h) of the Constitution.

34. Justice Stollmeyer awarded the sum of **$5,000.00** to the Applicants for breach of their constitutional rights. The learned Judge did not feel persuaded to make a substantial award in this case. He identified a number of factors that set this case

apart from others. Firstly, while Justice Stollmeyer acknowledged that the loss of the opportunity to appeal or pursue their appeals must have caused the Applicants some distress and inconvenience, he took into account the fact that there was no claim by the Applicants that they had suffered any pecuniary or other consequential loss as a result of the breach of their constitutional rights. Secondly, they conceded that there was no deprivation of their liberty because of their guilty plea. Thirdly, the Applicants had placed nothing before the Court to show that there was a real chance of their sentences being reduced by the Court of Appeal.

35. The Claimant's case may be distinguished from ***Lezama***. Unlike in ***Lezama*****,** there is unchallenged evidence before the Court of the distress and inconvenience suffered by the Claimant as a consequence of the cramped and insanitary prison conditions.

36. Like ***Lezama*****,** however, the Claimant has placed no evidence before the Court as to the grounds of appeal or the likelihood of success of his appeal, other than the bare assertion of his innocence.

37. In ***Ronald Gordon*** (2005), Justice Ventour granted, inter alia, a declaration that *"the failure of Officers of the police service of Trinidad and Tobago and/or other servants and/or agents of the Respondent between the 29th October 1992*

and the 12th November 1992 to afford the Applicant an opportunity of lodging an appeal against his conviction and sentence recorded and imposed on 29th October 1992 contravened the Applicant's right to protection of the law contrary to section 4(a) of the Constitution." The plaintiff was awarded the sum of **$5,000.00** in damages for the loss of opportunity to pursue an appeal from conviction and sentence. Justice Ventour considered the distress and anxiety that the plaintiff must have experienced after his several requests for the opportunity to lodge his appeal were ignored or went unanswered, and which must have increased when he received correspondence from his Attorney that he was the author of his own misfortune. An award of $40,000.00 was also made by the Judge for unlawful detention for 36 days.

38. ***Perry Matthew*** (2007) was charged with possession of marijuana for the purpose of trafficking contrary to S.54 (1) of the Dangerous Drugs Act. He was tried and convicted and sentenced to 36 months hard labour. He completed and signed a Notice of Appeal against his conviction and sentence but that Notice was not filed by the Prison Authority until some seventeen (17) days after the expiration of the seven day limitation period.

39. Some three years and 44 days after his conviction, Mr. Perry was taken before the Court of Appeal. His appeal was struck out for being filed out of time and he was released on the same day, as he had already completed his sentence. He was unlawfully detained for a period of 409 days prior to his release. The Applicant claimed that his rights under S. 4(a) and (b) of the constitution were breached and sought declaratory relief a well as monetary compensation. The parties in

this case agreed to an award of **$6,000.00** for the breaches of the Applicant's constitutional rights. A separate award of $350,000 was made by Justice Jamadar for distress and inconvenience suffered during the period of unconstitutional detention.

40. ***Dereck Hamilton*** (2007), was found guilty, and convicted and sentenced to seven (7) years imprisonment with hard labour, on a charge of armed robbery. The Applicant completed and signed a Notice of Appeal against his conviction on 11th December 1997, which he gave to a Prison Officer. That Notice was not received by the Clerk of the Peace until the 6th January 1998. Mr. Hamilton sought declarations with respect to the failure of the Commissioner of Prisons to file with the Clerk of the Peace his Notice of Appeal as well as the Commissioner of Prison's failure to file the reasons for appeal, within the time prescribed by the Summary Courts Act.

41. Justice Jones awarded the Applicant the sum of **$125,000.00** for the breach of his constitutional right. In assessing the amount of damages payable, the learned Judge considered the following factors:

    (i) The 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.

(ii) The fact that the applicant had at least an arguable appeal both as to conviction and sentence.

42. The Judge distinguished ***Hamilton's*** case from that of ***Lezama*** on the bases that:

(i) there was no evidence of distress or inconvenience actually suffered by the applicants in ***Lezama*****;** and

(ii) the fact that the appeal in ***Lezama*** was an appeal as to sentence rather than conviction.

44. Justice Jones also distinguished the case of ***Ronald Gordon*** and highlighted the fact that in that case, in addition to the $5,000.00 award for breach of the constitutional right, the plaintiff was also awarded $40,000.00 for unlawful imprisonment. Therefore, according to Justice Jones, the Judge in ***Gordon*** was mindful of the principle against the award of double damages.

43. In ***Dereck Hamilton*** the Court was able to determine from the evidence before it that Mr. Hamilton had an arguable case to present to the Court of Appeal. This is lacking in the case before this court. The Claimant has provided no such evidence other than the bare assertion that he was innocent. However, like ***Dereck Hamilton***, there was evidence of the distress and inconvenience suffered by the Applicants.

44. ***Winston Gittens v The Attorney General of Trinidad and Tobago*** (2007)[10] was decided by Justice Jones two months after delivering her judgment in ***Derrick Hamilton.*** Justice Jones held that the failure of the prison Authorities to file with the Clerk of the Peace, the Claimant's Notice of Appeal in similar circumstances as ***Derrick Hamilton***, amounted to a breach of the Claimant's fundamental human rights, in particular S. 4(a) of the Constitution. The learned Judge granted him a declaration to that effect and awarded damages in the sum of **$15,000.00** for that breach, as well as including a sum for exemplary damages.

45. At page 5 of the Judgment, Justice Jones in justifying the disparity between the awards, distinguished ***Gittens'*** case from that of ***Hamilton*** on the following three (3) grounds:

    (i) In ***Gittens'*** case, no evidence was placed before the Court as to the likelihood of success of the appeal. The most that the Claimant told the Court was that in Counsel's view and his own he had an arguable appeal with good prospects of success.

    (ii) No evidence was placed before the Court as to distress and inconvenience suffered by the Claimant as a result of the inaction of

[10] CV 2005-00518

the Prison Authorities and in particular the conditions in the prison at the time.

(iii) No evidence was before the court as to the length of time the Claimant spent in prison. The only evidence of the Claimant in that regard was that he was sentenced to serve three (3) years hard labour on the 10th February 1994, and on the 7th November 2003 he was brought before the Court of Appeal and his sentence reaffirmed. The Court therefore found that the Claimant was incarcerated for nine (9) years.

46. In this case, the Claimant has presented no evidence as to the likelihood of success of the appeal. However, there is evidence regarding the distress, inconvenience and mental anguish that he suffered while he was incarcerated, as well as the conditions that existed in Prison. There is also unchallenged evidence before the Court that the Claimant spent a total of 22 months and 3 days or 672 days in prison in excess of the period of his sentence after taking full remission into account.

47. Taking all these factors into account, in the circumstances, I am of the view that I should separate the award for the breach of the Claimant's constitutional rights per se from the award for his unconstitutional and unlawful detention for the period of 672 days.

48. In respect of the breach of the Claimant's constitutional rights under section 4(a) and (b) of the Constitution, therefore, I award the Claimant the sum of **$7,500.00**

49. In respect of his unlawful detention for 672 days, I am required to compensate the Claimant for his distress and inconvenience and to take into account any aggravating factors which may justify an uplift in the award. I must also take into account comparable awards for unlawful detention. I have considered the following recent awards which may permit me to identify a trend in awards for lengthy periods of unlawful detention:

    (i) In ***Abraham v. A.G. of Trinidad and Tobago, H.C.A. No. 801 of 1997***, Smith J., in February 1999, awarded **$125,000** for a period of detention of 70 days. There was evidence of deplorable and crowded prison conditions and the Court took into account that the period of detention included the Christmas season and New Year.

    (ii) In ***Josephine Millette v. Sherman Mc Nicholls, C.A. Civ 14/2000***, the Court of Appeal, in November 2000, upheld an award of **$145,000.00** made by the Master for a detention of 132 days. The Court remarked that they considered the award to be on the low side but did not disturb the award. The Court took into account the age of the appellant who was 72 years old at the date of her imprisonment, that she was made to do fairly heavy work for a

woman of her age and that there was no evidence of the conditions under which she was kept in prison. The Court of Appeal rejected any mathematical computation for damages and gave tacit approval of the subjective nature of the loss. However, they also gave approval of approaching assessments "in the round" in which all the relevant factors should be taken into account and emphasized that the most important factor to be considered is the length of the imprisonment.

(iii) In ***Anneson Stanisclaus v. A.G. of Trinidad and Tobago, H.C. 1785/2000*** C. Hamel-Smith J. in May 2002, awarded **$225,000** for 691 days of detention. In that case, the Judge found there were no aggravating circumstances to increase the award beyond the amount awarded;

(iv) In ***Ronald Gordon v. The A.G. of Trinidad and Tobago***, Justice Ventour in February 2005 awarded the Applicant **$40,000** for a detention of 36 days;

(v) In ***Dereck Hamilton v. The Commissioner of Prisons and the A.G. of Trinidad and Tobago***, Justice Jones in May 2007 awarded the Claimant **$125,000** although it was not clear what period of detention this award was intended to cover.

(vi) In ***Perry Matthew v. The A.G. of Trinidad and Tobago***, Justice Jamadar in June 2007 awarded the Claimant **$350,000** for 409 days of unlawful detention;

50. On the facts of this case, the Claimant has given evidence of his embarrassment and indignity at being imprisoned in cramped and insanitary conditions. There is no evidence that the failure of the Prison Authorities to lodge the Claimant's Notice of Appeal was either deliberate or reckless and no evidence of physical violence or abuse of the Claimant during his period of incarceration. Accordingly, having regard to the recent trends in awards over the past ten years, I am of the opinion that an appropriate award for compensation is **$450,000.00**.

The Claim for an additional award

51. The Claimant has claimed an additional award of $50,000 *"to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach and deter further breaches"* and has relied on the judgment of the Privy Council in ***A.G. of Trinidad and Tobago v. Siewchand Ramanoop, Privy Council Appeal No. 13 of 2004*** and the judgment of Jones J. in ***Dereck Hamilton v. A.G. of Trinidad and Tobago***[11].

[11] H.C. 950/2005

52. In ***A.G. of Trinidad and Tobago v. Ramanoop***, the Privy Council affirmed the power of the Court to make an additional award over and above the compensatory award for infringements of constitutional rights. In delivering the opinion of the Board, Lord Nicholls stated as follows:

> *[17] Their Lordships view the matter as follows. Section 14 recognises and affirms the court's power to award remedies for contravention of chapter 1 rights and freedoms. This jurisdiction is an integral part of the protection chapter 1 of the Constitution 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 this 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 conterminous 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 damage" are better avoided as descriptions of this type of additional award."

53. In ***Merson v. A.G. of Bahamas, Privy Council Appeal No. 61 of 2003***, the Privy Council reiterated the statement of principle of Lord Nicholls as quoted above and stated further as follows:

"If the case is one for an award of damages by way of constitutional redress … 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 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."

54. More recently, in December 2006, the Court of Appeal, in ***Subiah v. A.G. of Trinidad and Tobago, C.A. Civ 10/2005,*** considered an award of damages made by a Master which did not include an award for exemplary damages. Archie J.A. (as he then was), with whom Weekes J.A. agreed, explained his approach to an assessment as follows:

*"(10) How then is the sum that exceed merely compensatory relief to be quantified? The cases are of limited assistance. In **Ramanoop** the Privy Council said it should be "not necessarily of substantial size" but it is*

more 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 the retribution" although punishment in that sense was said not be to be its object. In ***Merson*** *it was said that the sum "would depend on the nature of the particular infringement and the circumstances relating to that infringement". One must avoid duplication since the 'circumstances' are usually addressed in some measure by the common law concept of aggravated damages (which are compensatory in nature).*

(11) Consistent with the view expressed in ***Ramanoop*** *that breaches of fundamental rights bear a special character, it would be appropriate, though not always necessary, to award a sum of money in addition to granting a declaration. That would help to underscore the importance of the constitutional right. For the reason that follows that objective can ordinarily be achieved by the award of a small conventional sum.*

(14) I now turn to the other objectives of an award of damages in constitutional motion. If a deterrent award is to have any meaningful effect, then, as in the case of punitive damages it must be more than a merely token amount. On the other hand, if a substantial deterrent award were made in each case the courts would only succeeded in 'bumping up' the general 'tariff'. By the same token 'public outrage' as reflected in a substantial award ought to be reserved for the unusual or extreme case.

(17) In my view that is the proper approach. For that reason also, the latter proposition must be approached with caution. It will only be in the most rare cases that one can envisage a justification for the deterrent and public outrage factors outweighing the compensatory element especially if one bears in mind that the compensatory element takes account of aggravating factors….."

55. As already indicated, there is no evidence in this matter that the failure of the Prison Authorities to lodge the Claimant's appeal on time was deliberate. This appears to be an example of institutional inefficiency of the Prison Authorities in failing to lodge the Claimant's appeal on time. In terms of the length of time that the Claimant remained in prison beyond the 24th July 2000, this was based on the erroneous assumption by both the Claimant and the Prison Authorities that the Claimant had properly filed an appeal on time and that therefore he was a "defendant awaiting trial" and not "a convicted prisoner serving his sentence". There is no evidence that the Claimant called upon the Prison Authorities to release him after two years or three years and this is consistent with his assumption that he was awaiting the listing of his appeal.

56. In the circumstances, on the basis of the guidance provided by the Privy Council in ***Ramanoop*** and ***Merson*** and by the Court of Appeal in ***Subiah*** and taking into account the need to avoid duplication in the award of damages, I am not minded to make an additional award of damages in this case. In my opinion, the declaration made by Moosai J. and the award of compensatory damages which I intend to make are sufficient vindication of the Claimant's constitutional rights.

CONCLUSION

57. Accordingly, I order that the following monetary compensation be paid to the Claimant as a consequence of the infringements of his constitutional rights under sections 4(a) and (b) of the Constitution:

    (a) $7,500 for breach of the constitutional rights per se;

    (b) $450,000 as compensation for distress and inconvenience suffered during the period of unconstitutional detention for 672 days.

58. These figures attract interest at the rate of 12% per annum from the date of service of the Claim Form to the date of judgment. This amounts to $85,659.00.

59. I also order that the Defendant pay the Claimant's costs of this action certified fit for counsel, which costs are to be assessed by a Master sitting in Chambers unless otherwise ordered or agreed.

Dated this 30th day of November 2009.

Andrė des Vignes

Judge