REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No CV2013-01916

BETWEEN

MATTHEW KENRICK JAMES

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr. Justice V. Kokaram
Date of Delivery: 11th July 2013
Appearances:
Mr. Vashist Maharaj for the Claimant
Mr. Lee Merry and Ms. Coreen Findley instructed by Ms. Amrita Ramsook for the Defendant

JUDGMENT

1. Matthew Kenrick James (the Claimant) a gardener and fishmonger from Tobago, filed a constitutional motion against the Defendant[1] seeking relief for breaches of his fundamental rights under the Constitution of Trinidad and Tobago. Those rights are his "due process" rights, the right to the protection of the law, the right to privacy and family life and freedom from arbitrary detention, imprisonment or exile. These rights he claimed were breached by police officers of the State in detaining and incarcerating him for the offence of murder of his uncle, one John James.

2. The Claimant contends that he was falsely detained and imprisoned by officers of the State on two occasions in relation to this offence. The first period of detention occurred between

[1] The fixed date claim form was filed May 3rd 2013

the 17th March 2005 to Sunday 20th March 2005 when he was detained at the Scarborough Police Station for questioning in relation to the said murder. The Claimant claims that he had learnt of the murder of his uncle on 17th March 2005 and went to the Scarborough Police Station to clear his name. He was however arrested. While in custody he gave a statement as to his whereabouts on 16th March 2005, the day of the murder, to the effect that he did encounter Mr. James who had a verbal altercation with him. He then left home to go to "the bush to pray" and when he returned he learnt of the murder. The Claimant was eventually released without being charged for any offence. During that period he claims that the investigating officer Sergeant Adams fraudulently induced the Court to issue two search warrants to search his home and that of his mother. Subsequently articles of clothing belonging to him were submitted to the Trinidad and Tobago Forensic Centre for analysis.

3. The second period of detention occurred during the period 31st December 2005 to 13th May 2009. On 31st December 2005 he was re-arrested for the same offence. An information was laid against him for the murder of John James. He was prosecuted for the offence and 11 witnesses in support of the prosecution were called at the Preliminary Inquiry conducted by Her Worship Senior Magistrate Annette Mc Kenzie. As he was charged for a non bailable offence he remained incarcerated for the duration of the Preliminary Inquiry. The Claimant contends that there was absolutely no evidence on which he could have been charged. There were three statements obtained from witnesses who implicated the Claimant in the murder. However at the Preliminary Inquiry those witnesses denied that they gave any of the alleged statements to the police. Two of the witnesses were treated as hostile witnesses during the Preliminary Inquiry. The Claimant's attorney successfully made a no case submission and the Claimant was discharged. The Claimant contends that the evidence of the prosecution was fabricated and from the outset lacked any basis in fact or law to substantiate the information laid against him and was in fact a malicious and illegal act.

4. Subsequent to his discharge, the Claimant states that he encountered great difficulty readjusting to life after his detention and his livelihood as he knew it, was destroyed. He was now impecunious as his savings was used to defend himself in the matter. His house was vandalised while he was away. His garden by which he earned his income was overgrown

due to the fact that it was unattended to while he was in prison. Due to his impecuniosity he was forced to live with his mother.

5. As a result of the unsuccessful prosecution, the Claimant seeks damages inclusive of exemplary damages and a declaration that his arrest and detention was unconstitutional and illegal. Counsel for the Claimant submitted that both periods of detention must be examined holistically as a pattern of oppressive and malicious conduct meted out to the Claimant on the part of the officers of the State. The Claimant also seeks a declaration that the two search warrants issued by the Magistrate were illegal, void and unconstitutional.

6. Before the hearing of the first Case Management Conference, the Defendant filed an application[2] to strike out the Claimant's claim pursuant to Part 26.2(1)(b) of the Civil Proceedings Rules 1998 as amended (CPR) as constituting an abuse of the process of the Court on the ground that:

> "*A claim for redress under the Constitution cannot be maintained in the circumstances of this case, where the Claimant's grievance was susceptible to adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction."*

7. At the first Case Management Conference the Court heard brief arguments on whether this claim was really a claim for false imprisonment and malicious prosecution and not genuinely a claim for constitutional relief. The Claimant subsequently filed written submissions and further oral submissions were made by the parties. Essentially the Defendant submitted that there is a parallel remedy available to the Claimant for damages for the tort of false imprisonment, malicious prosecution and the malicious procurement of a warrant. Relying on **Harrikisson v AG[3]; Thakur Persad Jaroo v The Attorney General of Trinidad and Tobago[4]**; **Attorney General of Trinidad and Tobago v Siewchand Ramanoop[5]** the Defendant contended that resort therefore to a claim for the infringement of a constitutional right in light of these alternative common law remedies is an abuse. Further there is no cogent explanation for the delay in commencing these proceedings. See **Felix Durity v The**

[2] Together with written submissions a procedure which is to be commended.
[3] [1980] AC 265
[4] [2002] 1 AC 871
[5] PCA 13 of 2004

Attorney General of Trinidad and Tobago[6]. Additionally it contended that this is a complex matter where the facts as alleged by the Claimant will be hotly contested and not suitable to the summary procedure of a constitutional motion.

8. The Claimant however countered that the availability of alternative remedies does not on its own make resort to the "constitutional court" an abuse. There must be special features and genuine breaches of the constitutional right. In this case the Claimant contends that there is no dispute on the facts which demonstrate clearly an arbitrary malicious and oppressive abuse of state power. He also contends that no adequate means of redress exists in common law. He contends that the preliminary enquiry is a ministerial act and not a judicial function and therefore a discharge at a preliminary enquiry cannot be described as a termination of a prosecution in the Claimant's favour as an acquittal. As a result there is a missing element in the tort of malicious prosecution. On the question of delay it was submitted that the Claimant's impecuniosity was the cause for the delay.

9. I am cognizant of the fact that the Court should not lightly strike out claims alleging an abuse of state power which are in breach of citizens' fundamental rights. Similarly the Court's process cannot be abused so that claims that are not a bona fide resort to rights under the Constitution or which seek to raise stale claims ought to be rejected. In this case the Claimant was discharged at the Preliminary Inquiry in May 2009. The constitutional motion complaining of alleged breaches of his fundamental rights as a result of that prosecution was filed some four years later. I am not convinced that the Claimant has adequately explained the reason for this delay. Nor in my view is there any attempt by the Claimant to do so in his affidavit. The Claim on this ground alone is an abuse of the process and should be struck out. Additionally I am of the view that this is not a genuine resort to the Court to seek relief for breaches of his fundamental rights. The Claimant plainly had available to him the common law actions in tort to ventilate his claim of the alleged abuse of state power. The motion in my view is a device to circumvent the limitation period for the common law action for false imprisonment arising from his initial incarceration in 2005, the malicious procurement of a search warrant in 2005 both of which actions are now statute barred. At the time of filing the claim the Claimant could still have filed an action for malicious prosecution but he would not

[6] [2002] UKPC 20

have been able to recover any damages for the initial period of detention and the issue of the search warrants. The motion is a dressed up common law action, a contrived invocation of the facilities of constitutional redress and is a plain abuse falling squarely within the admonishment of such strategies as explained by the Privy Council in **Jaroo**. For these reasons which are amplified in this judgment I dismiss this claim as an abuse of process.

The Claim

10. The nub of the Claimant's case is set out in paragraph 2 of the Claim Form:

> "That the Defendant without reliable evidence wrongly by his servants or agents detained the Claimant at the Scarborough Police Station from Thursday 17th March 2005 to Sunday 20th March 2005, infringing his rights and freedom. That on the 31st December 2005 by information laid in the County of Tobago alleging that the Claimant had murdered John James the Claimant was rearrested and kept in custody at the District Prison Tobago from 31st December 2005 to 13th May 2009. The Claimant was kept in custody and maliciously prosecuted for the murder of John James in the absence of any credible evidence to substantiate the allegation. That on the 13th May 2009 the Prosecutor conceded that they had failed to make out a prima facie case and as result the enquiring magistrate discharged the Claimant."

11. The reliefs sought by the Claimant are as follows:

(i) That the servant or agents of the Defendant had concocted and fabricated testimony implication the Claimant in the murder of John James denying the Claimant the protection afforded by section 4(a) and (b) of the Constitution.

(ii) That there was no justification in law for the obtaining and issuing of the Search Warrants to allow the servants and agents of the Defendant to enter search the Claimant's home and that of his mother and to seize his property contained thereon.

(iii) That the Information laid before the Magistrate Court of the County of Tobago on the 31st of December 2005 containing allegations of facts which were fabricated

and concocted by the servants or agents of the Defendant in violation of the protection afforded by sections 4(a) and (b) of the Constitution.

(iv) That the Information laid before the Magistrate Court for the County of Tobago on the 31st of December 2005 was maliciously and illegally laid denying the Claimant the protection as afforded by section 4(b) of the Constitution.

(v) That there was not any reason or any sufficient reason in law for the arrest, detention and imprisonment of the Claimant during the period from Wednesday 16th March 2005 to Sunday 20th March 2005, which was in violation of protection of section 4(a) of the Constitution of Trinidad and Tobago.

(vi) That there was not any reason or any sufficient reason in law for the issue of a warrant of apprehension on the Claimant on Saturday 31st December 2005 and thus the warrant so issued was in violation of sections 4(b), 4(c) and sections 5(2)(h) of the Constitution of Trinidad and Tobago.

(vii) That there was not any reason or any sufficient reason in law to justify the arrest and imprisonment of the Claimant on the 31st day of December 2005. The Claimant was arrested taken into police custody on the said date at approximately 7:00a.m. until the end of the Preliminary Enquiry three and a half years later on the 13th May 2005 (2009), in violation of his constitutional rights enshrined in section 4(a), (b), (c), 5(2)(a) and 5(2)(c) of the Constitution of the Republic of Trinidad and Tobago which protect citizen against arbitrary detention and imprisonment.

(viii) That the arrest and detention of the Claimant was illegal, void and in violation of the Claimants constitutional rights as contained in section 4 and 5 of the Constitution:

(a) Equality before and protection of the law[7] as contained in section 4(b).

(b) The right to privacy and family life as contained in section 4(c).

[7] Counsel for the Claimant conceded that the Claimant is not pursuing any right under the equality before the law provision.

(c) Freedom from arbitrary detention, imprisonment or exile of a person as contained in section 5(2)(a).

12. The essence of the Claimant's claim is the manner in which the police officers in particular – Sergeant Winston Adams set the prosecution in motion with fabricated evidence. It is a complaint about a prosecution which was launched without any or any credible evidence against him. On its face it is a complaint of malicious prosecution and an unlawful arrest. Counsel for the Claimant however contends that this is a plain case of an abuse of state power and an obvious breach of his constitutional rights: that the procurement of the search warrants on false testimony is an unlawful interference with his right to privacy and family life; that his detention was arbitrary as it was based on concocted evidence; and that he was denied the protection of the law when a prosecution was simply conducted maliciously and without any basis in law and in fact. Immediately it must be appreciated that in determining whether there was an abuse of power by the officers of the State and therefore a breach of the Claimant's fundamental rights, it necessarily involves investigating the reasonableness of the action of the officers in light of the evidence in their possession, their state of minds and their reasonable belief in the guilt of the Claimant. Put simply, by whatever means it is presented, this constitutional motion involves the investigation of the issue of reasonable and probable cause for the arrest of the Claimant and whether the prosecution acted maliciously.

13. It can be presumed from the affidavit of the Claimant that he was re-arrested based on the statement which Sergeant Winston Adams recorded from the civilian witnesses, as without that there would have been nothing else to make a case against the Claimant. The forensic report was negative and the Claimant said nothing to incriminate himself as having committed the crime.

14. From his affidavit evidence it appears that there are three main grounds upon which the Claimant complains that this arrest was unlawful and the prosecution malicious and an abuse of power. First that he had given an exculpatory statement, the basis of which he was released without charge. Second that the forensic examination of his personal belongings did not reveal any traces of blood. Finally that in the conduct of the prosecution, the civilian witnesses on whom the prosecution relied recanted on the statements they allegedly gave to the officers to the extent that two had to be treated as hostile witnesses. In so far as the

officers conduct of the prosecution is concerned, the following facts are being relied upon to make the allegation of oppressive conduct, arbitrariness and abuse of power:

"19. Prior to the convening of the Preliminary Enquiry the Prosecution disclosed the witness statements of two witnesses recorded by Sergeant Winston Adams that on Sunday 20th March 2005. In those statements recorded by Sergeant Adams he recorded two (2) first from Dwayne Clarke and the second from Claude Elliott. The statements gave details of two (2) separate incidents which were alleged to have occurred, on the night of Wednesday 16th March 2005, at or about 8pm which implicated me in the killing of John James.

20. Firstly, from the Statement allegedly recorded by Sergeant Winston Adams from Dwayne Clarke Sergeant Adam that I told Dwayne Clarke, while he was in the company of Anton Augustus and Keon Taylor, that I had just killed a man and they would hear about it. The second statement recorded by Sergeant Adams from Claude Elliott where he stated that Claude Elliott said to him that he saw me in the vicinity of the Crown Point Fire Station at about 8p.m. on the night of Wednesday 16th March 2005 which was about the time John James was murdered.

21. A further statement was also disclosed which was recorded by Sergeant Winston Adams from Anton Augustus on Monday 21st March 2005. In that statement it is also alleged by Sergeant Winston Adams that Anton Augustus gave details of the alleged encounter with me while in the company of Dwayne Clarke and Keon Taylor on the night of Wednesday 16th March 2005, at about 8pm, where it was again alleged that I told them that I had just killed a man and they would hear about it.

22. A statement of Keon Taylor was also disclosed. In that statement it is also alleged by Sergeant Winston Adams that on Tuesday 22nd March 2005, he then spoke to Keon Taylor and recorded a statement from him giving details of an alleged encounter with me while he was in the company of Anton Augustus and Dwayne Clarke on the night of Wednesday 16th March 2005, at about 8pm, where I told Keon Taylor, Anton Augustus and Dwayne Clarke that I had just killed a man and

they would hear about it. The statement of Dwayne Clarke, Anton Augustus, Keon Taylor and Claude Elliott is hereto attached and Marked "**K.J.6", "K.J.7", K.J.8" and K.J.9" respectively.**

23. During the preliminary inquiry into the homicide of the deceased, John James held at the Scarborough Magistrates' Court, the prosecution presented three (3) of the four (4) civilian prosecution witnesses who Sergeant Adams allegedly recorded statements from, namely, Dwayne Clarke, Keon Taylor and Claude Elliott under oath and they all denied their Alleged Statements contained, statement made by them implicating me in the murder of John James. The prosecution was forced to seek leave of the court to have them all declare as hostile witnesses. The fourth person that is Anton Augustus never appeared in the inquiry to testify and the prosecution did not see to rely on his evidence.

24. When Keon Taylor took oath to testify and during the evidence in chief he testified under oath that he was taken by a party of police officers headed by Sergeant Winston Adams to a location called Pleasant Prospect where he was told to singed "three empty paper" because he was a suspect in a fraud enquiry and he did give three specimen signatures but he denied giving the police any statement. He further denied knowing a person by the name of Anton Augustus or being in his presence at Mora Avenue on the night of 16th March 2005. The Prosecution applied to the Court for leave and leave was granted to treat Keon Taylor as a hostile witness.

25. In consequence of the matters aforesaid, I was injured in my reputation and was put into significant trouble, inconvenience, anxiety, stress and financial costs, both to myself and my family.

26. Again, during the evidence in chief of the prosecution's witness Dwayne Clarke, the witness denied that he had given the statement allegedly recorded by Sergeant Winston Adams on the 20th March 2005, and with the leave of the Court the witness Dwayne Clarke was given the opportunity to refresh his memory. He continued to deny the statement was his and at that point the Prosecution applied

to the Court for leave which was granted to treat Dwayne Clarke as a hostile witness.

27. During the evidence in chief of the prosecution's witness Claude Elliott, and after the Court granted leave to the Prosecution for the witness to have the opportunity to refresh his memory form the alleged statement, the witness Claude Elliott maintained that he never gave any evidence incriminating me to indicate that I was in the vicinity of Crown Point Fire Station at 8pm. Prosecution informed the Court that the witness had departed from the statement allegedly given to Sergeant Winston Adams on the 20th March 2005."

15. The notes of the preliminary enquiry were not exhibited to these proceedings. Nor are there any particulars of malice of the alleged arbitrary or oppressive conduct by the officers save for these facts. The claim therefore jumps from these facts to a claim that the testimony was concocted and fabricated. Unless the State is conceding this matter, and I have been assured in very strong terms by Counsel for the Defendant that they are not, this Court will have to investigate in this motion the circumstances in which a conclusion that the testimony was concocted or fabricated can be drawn from these facts and from the evidence which the State submitted will be filed on the reasons for the prosecution.

16. From the facts as presented by the Claimant, the prosecution relied on the evidence of three civilians Dwayne Clarke, Keon Taylor and Claude Elliot. Two were treated as hostile witnesses. This does not on its own necessarily mean that the evidence was concocted and the motives for the witnesses' testimony equally fall for scrutiny as well as the Court's assessment of the motives of the officers and the circumstances surrounding the recording of these statements. Another witness gave evidence which departed from this statement. This witness giving inconsistent evidence may not necessarily mean that his evidence was fabricated or concocted by the officers.

17. Counsel for the Claimant however submitted that this case is similar to the oppressive and abusive acts of the State as in **Ramanoop**[8]. However **Ramanoop** was firstly an exceptional case not meant to depart from the warning against the inappropriate filing of constitutional

[8] **The Attorney General of Trinidad and Tobago v Ramanoop** [2005] UKPC 15

motions as explained in **Jaroo**. Secondly it dealt with an appalling and obvious misuse of power described by Lord Nicholls as "appalling" and "a shameful misuse of the coercive power of the police" where the police mercilessly assaulted and battered the plaintiff. There was no defence filed by the State and what was before the Court was the issue of damages. The abuses were not defended by any plea of justification or reasonable force and prima facie it established a breach of a constitutional right.

18. In contrast, the challenge for the Claimant in the instant case[9], is to prove a malicious prosecution by showing that these civilian witnesses were in fact either manipulated into giving statements against the Claimant or that the police themselves made up the statements. Treating a witness as a hostile witness on its face carries the imputation that the witnesses are departing from their original testimony or statements. It does not necessarily mean that their original evidence was untruthful[10]. This is not as clear cut a case of an abuse as the Claimant seems to suggest and the Claimant's submission really amounted to an implication of improper motive out of his bare facts. To determine whether this motion is an abuse of process the following issues therefore arise for consideration:

    (a) Whether the claimant slept on his rights and is guilty of inordinate delay.
    (b) Whether there is no genuine claim for constitutional relief.
    (c) Whether the claimant had available to it the common law action of malicious prosecution, false arrest and malicious procurement of a warrant.
    (d) Whether the claim is a device to circumvent the limitation periods for such common law actions.

Abuse of Process: Delay

19. I begin with the issue of delay as in my view there is no real nor credible explanation for the delay of 4 years to commence this claim for relief under the Constitution. The prosecution came to an end in the Claimant's favour when he was discharged at the Preliminary Inquiry

[9] and no similar case of a constitutional motion being filed on an allegation of a malicious prosecution was drawn to my attention

[10] In **R v Golder and Others** it was stated that "when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statements whether sworn or unsworn, do not constitute evidence upon which they can act."

on 13th May 2009 and these proceedings were launched on 3rd May 2013, without any pre action protocol correspondence. There is no express limitation period to seek redress under our Constitution for breaches of fundamental rights[11]. Indeed the delay of the Claimant has nothing to do with any failure to observe any period of limitation prescribed by statute such as the Public Authorities Protection Act Chap 8:03[12] of the Limitation of Certain Actions Act Chap 7:09. Section 14 of the Constitution is quite open ended and clear words are required in the Constitution if any time limit is to be imposed on citizens who seek redress under the Constitution. However equally our Courts have repeatedly underscored the value and importance of approaching the Court for constitutional relief in a timely manner. Complaints of breach of constitutional rights are of a fundamental nature, one which calls upon the Court to exercise a jurisdiction under the Constitution our fundamental law. It is described as an exceptional remedy and one of last resort. A Claimant cannot however idly sleep on his constitutional rights nor be guilty of laches. In cases where there has been delay in moving the Court there must be an explanation for this delay in seeking to enforce ones right to constitutional relief. Ventour J in **Smith v the Commissioner of Police and the Attorney General of Trinidad and Tobago** (1997) 51 WIR 409 observed:

> *"when one is aggrieved as a result of a violation of one's fundamental rights, one should seek redress before the court with utmost expedition. In matters of this nature the court has a duty to help those who are vigilant and who do not slumber on their right. More importantly, if there is any delay in bringing the motion, the Applicant is under an obligation to explain the delay."*

20. The urgency with which such breaches are to be treated was emphasised by Sealy J in **Farouke Warris v The Comptroller of Customs and Excise and The Attorney General of Trinidad and Tobago** HCA No. 2354 of 1990:

> *"It is the applicant who has a duty to act promptly. An applicant who has slept on his rights should not come to the court to allege a breach of constitutional rights....section 14 of the Constitutions exists and demands urgent application, by an aggrieved person....the Court must be afforded some explanation for the delay in order to exercise its jurisdiction so that the court might understand why the*

[11] See **Durity v AG** para 30
[12] See **Rosie Blanchfield v AG [2002] UKPC 1** and **Durity v AG**

applicant would wait such a long period before availing himself of the rights guaranteed under the Constitution."

21. In making reference to **Tilok Chand Motichand v. H.B. Munshi**[13] and reference to article 32 (2) of the Indian Constitution Seales J observed that a fundamental principle of the administration of justice is that "stale claims should not be given effect to".

22. **Durity v the AG** makes it quite plain that not only must there be reason for delay but if the complaint being made was susceptible to adequate redress, had a timely application been made, then the delay in seeking constitutional relief would work against the Claimant unless there is some compelling reason:

> "[35] In this context the Board considers it may be helpful if it makes certain general observations. When a court is exercising its jurisdiction under s 14 of the Constitution and has to consider whether there has been delay such as would render the proceedings an abuse or would disentitle the claimant to relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction. If it was, and if such an application was not made and would now be out of time, then, failing a cogent explanation the court may readily conclude that the claimant's constitutional motion is a misuse of the court's constitutional jurisdiction. This principle is well established. On this it is sufficient to refer to the much repeated cautionary words of Lord Diplock in Harrikissoon v A-G (1979) 31 WIR 348 at 349. An application made under s 14 solely for the purpose of avoiding the need to apply in the normal way for the appropriate judicial remedy for unlawful administrative action is an abuse of process."

23. The Claimant initially did not address the issue of delay in his submissions and further time was granted to deal with this matter in supplemental written and oral submissions. Counsel for the Claimant contends that the Claimant was impecunious and relies on the following evidence as the reasons for his delay:

[13] [1969] 2 SCR 824

"29. I was eventually released from Prison on 13th May 2009 having been incarcerated for three and a half years my home was vandalized and all the contents removed. Further my crops that were grown had all been destroyed and the land was abandon. I had no money as I had spent the little I had in my defense and to support myself while in prison. I was impecunious.

30. Having been incarcerated for three and half years all of my furnishings from my house was lost and there was no one to attend to my garden as a result it was overgrown with bushes and I had lost everything that I had cultivated at the time of my arrest.

31. After my release from prison I had used all of my savings in presenting my defense so I was impecunious and could not afford a home or furnishings so I was forced to live at my mother's home and to save and buy new furniture."

24. This explanation falls far short of a proper explanation to account for four years of delay in seeking relief under the Constitution. Indeed this is compounded by the fact that a common law action for false imprisonment on the first period of detention expired in 2009. So too did the common law action for the malicious procurement of a search warrant. The motion was filed mere days before the expiration of the common law action for malicious prosecution. Indeed it would appear that pursuing such an option under the common law was eliminated recognising clearly that the Claimant would not have been able to obtain any damages under those common law actions for the alleged illegal detention in 2005 and the procurement of the warrant.

25. Against this backdrop the evidence as to impecuniosity is bare and insufficient. The Court takes judicial notice of the availability of legal aid and the many junior and senior lawyers in this jurisdiction who are willing to work "pro bono" in matters of constitutional importance to protect the rights of the citizen against abuse from the State. Counsel for the Defendant referred to the judgment of **Jones v Solomon**[14] on the issue of the nature of the evidence to explain delay. Admittedly that case does not deal with delay in commencing constitutional motions. However it does rightly criticise the practise of making blanket statements of

[14] [1989] 41 WIR 299

impecuniosity without more in an attempt convince a Court that the Claimant is deserving of relief or is genuine in his belated approach to the Court.

> "Further, the respondent said he did not have any money. This was essentially a bold statement made in his affidavit. A practice has developed in this jurisdiction where a party is seeking an indulgence from the Court makes general and bold statement without condescending to the kind of particularity from which a Court can infer or deduce its genuineness. In *Evelyn v. Williams* 1962 4 WIR 265, Lewis J. in dealing with an application for an extension of time to time an appeal out of time said at p. 226 E G: "In my view, it is not sufficient for an applicant to make a bare statement that he was financially embarrassed, as has been done in this case. He must set out in his affidavit sufficient material to satisfy the Court of his financial circumstances and that they were such as to constitute such an exceptional circumstance as entitled him to ask the indulgence of the Court and that he may be relieved of the legal bar which arises under the rules by lapse of time. It was suggested by learned counsel for the applicant that the statement that he was financially embarrassed put upon the respondent the onus of showing that that was not so, and that that fact not having been denied, the Court should take it as proof that there was this alleged financial embarrassment. The answer to that, in my view, is two-fold. First of all, circumstances which create financial embarrassment are in the personal knowledge of the applicant and it must, therefore, be for him to allege and prove them; secondly, it is the duty of the applicant to satisfy the Court that his allegation is correct and for that reason, as I have said before, it is necessary for him to set out a sufficiency of material.
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> And the Civil Appeal 8 of 1985 between **Aggaram Maharaj v. Dhanraj Jagoo and Another**, Bernard J.A (as he then was) in dealing with a similar allegation, said at p.7 "Whatever that may be, it is trite law that it not sufficient merely to assert that one is financially embarrassed in order to obtain a Court's indulgence".

26. Without providing particulars in relation to his impecuniosity I have nothing of value to act upon. I am none the wiser as to whether over this period of time he had been gainfully employed or whether he has resurrected his garden or whether he has savings and what

approaches he made to obtain legal advice and representation. Whether he obtained any legal advice at all at the end of his prosecution by his legal representative who we are told is the same attorney that commenced this claim on his behalf. Indeed there is no pre action protocol correspondence to ascertain from the State their position on this motion which is a cheap and available means to ascertain any prospect of successfully bringing this claim and, if the State is conceding, negotiating a settlement.

27. I am more inclined to view this evidence when it is read in its proper context as a factual basis to claim damages rather than an explanation for the delay in bringing this motion. It explains how the oppressive conduct has affected the Claimant materially and financially and does not in my view really deal with the issue of explaining 4 years of delay.

28. The Claim can be dismissed on this ground of delay alone. However I am also of the view that this motion is a device to circumvent more appropriate common law remedies which were available to the Claimant and constitutes an abuse.

Abuse of Process: parallel remedies

28. The Courts have consistently denounced the use of constitutional motions as a procedural lifeline merely to facilitate an early hearing or to circumvent time bars or to avoid recourse to legitimate and adequate parallel remedies. The mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the Court if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the Court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom. See **AG v Ramanoop.**

29. Lord Diplock in **Khemraj Harikissoon v The Attorney General of Trinidad and Tobago**[15] at page 349 said that:

> *"The right to apply to the High Court under section 6 of the Constitution for redress when any human right is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is*

[15] [1979] 31 WIR 348

allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom." (Emphasis added).

30. Subsequently, the Privy Council in **Jaroo** painted a very clear picture of the Court's view of what it perceives to be an overuse of constitutional motions for claims which did not genuinely articulate constitutional rights.

> "[38] The appropriateness or otherwise of the use of the procedure afforded by s 14(1) must be capable of being tested at the outset when the person applies by way of originating motion to the High Court. All the court has before it at that stage is the allegation. The answer to the question whether or not the allegation can be established lies in the future. The point to which Lord Diplock drew attention was that the value of the important and valuable safeguard that is provided by s 14(1) would be diminished if it were to be allowed to be used as a general substitute for the normal procedures in cases where those procedures are available. His warning of the need for vigilance would be deprived of much of its value if a decision as to whether resort to an originating motion was appropriate could not be made until the applicant had been afforded an opportunity to establish whether or not his human rights or fundamental freedoms had been breached.
>
> [39] Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or

pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it. If, as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances will also be an abuse."

31. Despite the Privy Council's dim view of such strategies, **Jaroo** did not shut the door on the legitimate recourse to the Court as the guardian of the Constitution. In the case where a parallel remedy exists only in exceptional circumstances, one could still seek constitutional relief. In **Ramanoop** at paragraph 25, it states that;

> "As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the Court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power."

32. The Privy Council in **Ramanoop** also went on to state:

> "In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.
>
> [26] That said, their Lordships hasten to add that the need for the courts to be vigilant in preventing abuse of constitutional proceedings is not intended to deter citizens from seeking constitutional redress where, acting in good faith, they

believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled. But "bona fide resort to rights under the Constitution ought not to be discouraged": Lord Steyn in Ahnee v Director of Public Prosecutions[16], and see Lord Cooke of Thorndon in Observer Publications Ltd v Matthew[17].

[28] Despite these warnings, abuse of the court's jurisdiction to grant constitutional relief has been "unrelenting" until brought to a "sudden and welcome halt" by the decision of the Board in Jaroo v Attorney-General of Trinidad and Tobago [2002] 1 AC 871: see Hamel-Smith JA in George v Attorney-General of Trinidad and Tobago (8 April 2003, unreported). The explanation for the continuing misuse of this jurisdiction seems to be that proceedings brought by way of originating motion for constitutional relief are less costly and lead to a speedier hearing than proceedings brought by way of writ.

[29] From an applicant's point of view this reason for seeking constitutional relief is eminently understandable. But this reason does not in itself furnish a sufficient ground for invoking the constitutional jurisdiction. In the ordinary course it does not constitute a reason why the parallel remedy at law is to be regarded as inadequate. Proceedings brought by way of constitutional motion solely for this reason are a misuse of the s 14 jurisdiction."

33. Sharma CJ in **Belfonte v AG**[18] made it clear that the availability of appropriate alternative remedies is not a determinative factor on its face:

"What is evident from Jaroo and other similar cases is that the determining factor in deciding whether there has been an abuse of process is not merely existence of a parallel remedy but also that the pursuance of the application to the High Court

[16] [1999] 2 AC 294, 307
[17] [2001] 58 WIR 188, 206
[18] [2005] 68 WIR 413

must be viewed as being made for the sole purpose of avoiding the normal judicial remedy for unlawful administrative action."

34. In **Francis v AG** I culled the following principles from these authorities[19] as follows:

(a) An applicant must make an informed decision prior to initiating proceedings as to whether the rights being infringed are common law or constitutional rights. The applicant must consider the true nature of the right contravened. Not every application will be appropriate for relief by constitutional motion. Applicants must recognize that constitutional remedies are to be sparingly used and only availed to assert genuine constitutional rights. The Court will not countenance the "dressing up" of a common law action under the guise of constitutional redress. Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled.

(b) If the true nature of the right allegedly contravened is a common law right (a parallel remedy exists) but also fits the definition of a right protected by the Constitution, the applicant must demonstrate some exceptional feature of his case that would make resort to the constitutional procedure more appropriate. Such features will include an absence of a dispute of facts[20], the arbitrary use of state power, a fundamental subversion of the rule of law[21], the assertion of a "mixed claim" of breaches of rights some of which are common law rights and the others only capable of redress under the constitution.[22]

(c) Usually where it subsequently emerges from the Respondent's response to the application that there is a dispute of fact the originating motion procedure may not be the appropriate mechanism. Although the constitutional motion is not to be used as a device to avoid the necessity of a trial, in circumstances where the alleged facts, if proved would call for constitutional relief, the Applicant

[19] **Harrikissoon, Jaroo, Ramanoop and Belafonte**
[20] See **Ramanoop**
[21] **Forbes v The Attorney General** Privy Council no 2 of 2001
[22] See **Belafonte** page 13

should as soon as possible apply for directions or the court can give directions for a trial as though the proceedings begun by way of writ.

(d) However, where there is on the face of the application an arguable case for constitutional relief a litigant ought not to be deprived of utilizing the remedy even where there are minor differences of fact. Where there is no substantial dispute of facts in cases which call for constitutional relief the trial judge should proceed to make findings of fact rather than prolong the proceedings by requiring the applicant to file new proceedings and present the case all over again before a different judge.

(e) Similarly where it subsequently emerges that a claim for constitutional relief is no longer appropriate, the Court can also make directions that the proceedings continue as though begun by writ with the necessary amendments to the relief sought to pursue the parallel remedy. However before doing so a Court must be satisfied that the constitutional motion was properly launched in the first place.

(f) For these reasons, there is an onus on the Respondent to bring to the attention of the Applicant as soon as it can, probably by way of letter before action, the grounds upon which it refuses to entertain the applicant's claim for redress under the Constitution.[23]. This is to allow the applicant the opportunity to properly assess his claim and to make an informed choice as to his procedural options. Failure to do so may result in an order for costs being made against the State if its response could have averted the course of action taken by the applicant.

True Nature of the Right Contravened

[23] The requirement of the Pre Action protocols in the Civil Proceedings Rules (1998) may hopefully make the days of silent respondents springing surprises on the applicant at the last moment a practice to be condemned to prehistoric litigation.

35. The true nature of the right which has been contravened must be properly examined in order to ascertain whether or not there has in fact been a breach of a constitutional right. In this case the Defendant has conceded that on the face of the motion the allegation of imprisonment and detention raises the constitutional breach of deprivation of liberty without due process. However I agree with counsel for the Defendant that the rights being articulated in this motion are inextricably intertwined with a parallel remedy of the common law action of false imprisonment and malicious prosecution which are adequate and suitable common law remedies to deal with and compensate the Claimant for the abuse of state power. Indeed the awards of exemplary damages in this area has been routinely made by the Court as a means of punishing the wrongdoers and designed to curb the abuse of coercive powers, the perversion of the prosecutorial process and the subversion of the Courts process by ill motives and oppressive and arbitrary conduct.

36. The Claimant's main contention however is that an action in malicious prosecution cannot be maintained and therefore the abuse of power complained of are genuine breaches of constitutional rights and the abuse of state power qualifies as an exceptional feature. That reasoning is flawed when the available parallel remedy is examined.

Common law action against the police:

37. The complaint made in his motion is a disguised common law action in malicious prosecution. The four elements that must be present for a successful claim in this tort is as stated in Clerk and Lindsell on Torts 20th Ed p 1042, at paragraph 19-05 states that:

> *'In an action of malicious prosecution the plaintiff must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge; secondly, that in so far as they were capable of doing so the charges were determined in his favour; thirdly, that it was without reasonable and probable cause for the defendant instituting or carrying on those proceedings; fourthly, that the defendant was actuated by malice; fifthly, that he suffered damage. The onus/burden of proving every one of these is on the plaintiff on a balance of probabilities.'*

38. Counsel for the Claimant contends that no action in malicious prosecution can lie in this case as the Claimant cannot satisfy the following elements of the tort which were set out in Civil

Actions Against the Police, Clayton and Tomlinson[24]: that there was a prosecution that caused him damage, that the prosecution was instituted or continued by the Defendant, that the prosecution was terminated in his favour.

39. Surprisingly he contends that these three elements cannot be satisfied because a Preliminary Inquiry is not a prosecution and that since a discharge is not an acquittal the prosecution has not been terminated in favour of the Claimant. I can find no such proposition in the said text relied upon. Counsel also relies on the authority of **DPP v Chief Magistrate.**[25] There is nothing in that case which supports such a proposition. At best Nelson JA in his judgment describes the Magistrate as exercising a ministerial function. However the Magistrate is still a judicial officer. It is at the Preliminary Inquiry that the Magistrate must make a determination as to whether a prima facie case exists for the charge which was laid against the accused. It is pellucid that in laying the information the law was set in motion; that the Claimant was subject to the prosecutorial process of the Preliminary Inquiry where evidence was led. Further where the Magistrate was of the view that the evidence was not sufficient to make out a prima facie case and discharged the accused, the fact that the Magistrate is not pronouncing on the guilt or innocence of the accused is of no moment. In terms of the prosecution of the Claimant, the Magistrate has brought the prosecution at an end. The State can go no further with the prosecution unless they "set the law in motion" again.

40. Interestingly in the very text relied upon by Counsel for the Defendant it makes this proposition quite plainly:

> "On the standard view a prosecution consists in setting a judicial officer in motion. In theory this is done by the laying of an information before a Magistrate. In practice however proceedings often begin with the charging of a suspect without a formal information being laid. It is clear that once a Claimant is actually brought before a court a judicial officer is in motion and a prosecution has been instituted."[26]

[24] 3rd Edition by Richard Clayton QC and Hugh Tomlinson QC with Edwin Buckett and Andrew Davies
[25] [2003] 67 WIR 240
[26] Para 8-023

41. Indeed the question is not whether the Magistrate acted judicially but whether the informant has done all he can do to launch criminal proceedings. In **Mohammed Amin v Bannerji**[27] the Privy Council held:

> "18. The action for damages for malicious prosecution is part of the common law of England, administered by the High Court at Calcutta under its letters patent. The foundation of the action lies in abuse of the process of the court by wrongfully setting the law in motion and it is designed to discourage the perversion of the machinery of justice for an improper purpose. The plaintiff must prove that the proceedings instituted against him were malicious, without reasonable and probable cause that they terminated in his favour (if that be possible) and that he has suffered damage. .... That the word "prosecution" in the title of the action is not used in the technical sense which it bears in criminal law is shown by the fact that the action lies for the malicious prosecution of certain classes of civil proceedings, for instance falsely and maliciously presenting a petition in bankruptcy or a petition to wind up a company: Quartz Hill Gold Mining Company v. Eyre (1883) 11 Q.B.D. 674. .....
>
> 19. From this consideration of the nature of an action for damages for malicious prosecution emerges the answer to the problem before the Board. To found an action for damages for malicious prosecution based upon criminal proceedings the test is not whether the criminal proceedings have reached a stage at which they may be correctly described as a prosecution; the test is whether such proceedings have reached a stage at which damage to the plaintiff results."

42. The author of Civil Action Against Police also go on to state quite clearly:

> "The third element to be established by the claimant is that there was a "favourable termination" of the prosecution instituted or continued by the defendant. The usual situation will be an acquittal after a criminal trial but favourable termination has a much wider sense. The Claimant does not have to show that there was an acquittal on the merits. If a justice refuses to commit at the end of the committal proceedings this is a favourable termination even though new proceedings could be brought."[28]

[27] (1947) 49 BOMLR 584
[28] Para 8-30

43. This learning is also consistent with the statement of the law in *Clerk and Lindsell on Tort*:

> "Determination need not be conclusive so long as proceedings are pending no action lies on the ground that they have been wrongfully instituted. "It is a rule of law that no one shall be allowed to allege of a still depending suit that it is unjust."[120] It must appear that the proceedings were brought to a "legal end"...
>
> The end, however, need not be a final and conclusive one. If a magistrate refuses to commit for trial a person charged before him,[122] the particular prosecution is concluded, although it may be lawful to institute a fresh prosecution for the same offence."[29]

44. Further the Canadian authorities of **Pirruccio v. Canada**[30] and **Harmiden v. Larochelle**[31] demonstrate that indeed for the tort of malicious prosecution the Claimant simply need to demonstrate that the law was set in motion and in the case of committal proceedings it is sufficient if it has come to an end in his favour notwithstanding the State's ability to launch a fresh information or continue with the prosecution after it has been stayed.

45. Counsel also relies on **Gregory v Portsmouth**[32] for the proposition that the law of malicious prosecution is not to be extended beyond a criminal proceeding. The authority is not relevant as there is plainly no extension of the traditional principles of the tort as explained above.

46. The arguments of the Claimant that there is no parallel remedy are therefore fundamentally flawed. The fact scenario painted by the Claimant all fit neatly within the ambit of criminal proceedings which commenced in 2005 and concluded in his favour on 13th May 2009 and it was quite open to launch a common law action for false imprisonment and malicious prosecution.

47. More importantly, the State even though it has not as yet filed an affidavit in response to the motion, indicated that it will file an affidavit to resist this motion and set out the reasons why the prosecution was instituted. This already raises the alarm bells of a highly contested dispute of fact on a very fact sensitive area of the law as to the motives for the prosecution

[29] Para 16-29
[30] [1994] 2 C.T.C. 413
[31] [2007] CarswellOnt 440
[32] [2000] 1 AER 560

and the subjective and objective assessment of the grounds for putting the law in motion against the Claimant. See **Cecil Kennedy v Donna Morris.**[33]

48. In so far as the malicious procurement of the search warrant is concerned this is adequately addressed by a common law action. See **Gregory v Portsmouth** p 566 letter b. "It has long been recognised to be an actionable wrong to procure the issue of a search warrant without reasonable cause and with malice".

49. It is clear that this case bears all the hallmarks of a common law action and it is exactly the type of abuse dealt with by the Law Lords in **Jaroo** which our Court of Appeal also denounced. The special features that the Claimant alleges which exist in his case take him no further. They are exactly the type of abuse of power which is dealt with in the common law tort of malicious prosecution and had he properly examined the true nature of the rights being alleged he would not have come for relief under the Constitution.

50. In any form or manner it is dressed or presented the Claimant cannot escape the fact that his complaint is one of detaining him without reasonable cause and the malicious setting in motion of criminal proceedings against him without any basis so to do and without any credible evidence. Of course he will have hurdles to overcome in proving lack of reasonable and probable cause and malice, but they are more appropriately and adequately dealt with in a full blown trial of the tort of a malicious prosecution, unlawful detention and malicious procurement of a search warrant.

51. Unfortunately for the Claimant however the litigation period for commencing those actions have expired but this does not necessitate a Court making an exception for this Claimant to come through as it were in a crack in the constitutional doorway to ventilate what is in reality his common law rights.

52. It is noted that in spite of a query by the Court on the ability to convert motions into normal claims the Claimant has not submitted that any such procedure should be adopted. As in **Jaroo** he has elected to stand or fall on his constitutional motion and so be it.

[33] CA 87/2004

Conclusion

53. The claim will be dismissed as an abuse of process. The Claimant shall pay to the Defendant costs of the claim including the Defendant's application to be assessed by this Court.

Vasheist Kokaram
Judge