

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2015-02212

BETWEEN

RYADELL DEFOUR

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before The Honourable Madam Justice Margaret Y Mohammed

Dated the 19th January, 2018

APPEARANCES:

Mr. Vashist Maharaj Attorney at law for the Claimant.

Ms. Ronelle Hinds instructed by Ms. Nisa Simmons Attorneys at law for the Defendant.

JUDGMENT

1. On the 5th February 2010 the Claimant was charged for: possession of a dangerous drug, namely marijuana, possession of a weapon namely a knife, and assaulting a police officer. On the 30th June 2011 a no case submission was upheld in the Magistrate's Court and the charges were dismissed.
2. The Claimant instituted the instant proceedings alleging that the aforesaid charges were laid against him maliciously and without reasonable and probable cause. He has sought an

order for damages including exemplary and/or aggravated damages for malicious prosecution.

3. In this matter it was not in dispute that there was an incident on the 13th October 2010 in La Romaine involving the Claimant and the officers of the State namely: PC Daniel Gerald (“PC Gerald”), PC George, Private Justin Edmund-King (“Private Edmund-King”) and Private Bradshaw which resulted in the Claimant being shot in the buttocks by PC Edmund-King. The Claimant was arrested and subsequently charged for the aforesaid offences. The manner in which the events unfolded were in dispute by the parties since they have presented opposing accounts of the events of that fateful day.
4. The Claimant alleged that on 13th January 2010 at around 7 pm, he went to a house at Ethel Street in La Romaine to meet Ms Lynette Alexis (“Ms Alexis”) who wanted him to do a plumbing job. While he was waiting for Ms Alexis’ arrival he went to a shop and purchased two soft drinks and a pack of cigarettes. When Ms Alexis arrived at home, the Claimant inspected the toilet area of her home and made an inventory of the list of parts that were needed for the job. The Claimant then went outside to urinate as the toilet was not useable at the time.
5. Whilst he was outside, the Claimant noticed two persons approaching him and a bright light flashed on him. The Claimant heard one of the persons, whom he later learned was a police officer say “*Look him dey shoot*”. The Claimant, unaware of what was taking place and out of fear, attempted to jump a chain link fence. While in mid air, the Claimant felt a sharp and powerful force push him into and through the said fence causing him to fall to the ground immediately. He felt immense and excruciating pain and he then screamed out for help. PC Gerald approached the Claimant and pointed a gun to his head. The Claimant was blinded by a light which was shone onto his eyes and when he opened his eyes he saw two figures which looked like an elderly couple looking down at him from a kitchen window.
6. Another police officer came over the fence and had a conversation with PC Gerald. Ten minutes later, a police van came to Lillian Street La Romaine with three officers. PC Gerard

approached the Claimant and told him to get up. However, the Claimant was unable to move his legs. The Claimant alleged that he was then dragged and placed in the back of the police vehicle. PC Gerald forcefully shoved the Claimant's leg into the police vehicle causing the Claimant to scream in pain. He was also ridiculed by PC Gerald. An officer then searched the Claimant who had in his possession a pack of cigarettes, one lighter, \$400.00 in cash, a notepad and a pencil. The Claimant alleged that he pleaded with the officers to call an ambulance but they failed to do so.

7. The Claimant averred that the police officers then drove around La Romaine for some time before proceeding to the San Fernando Police Station where they left him in extreme pain in the police vehicle while they entered the police station. The Claimant alleged that he "blacked out" for a while and when he woke up he realized that he was still locked in the trunk of the police vehicle and he was surrounded in a pool of his own blood. He propped himself up and he saw the police officers laughing and talking inside the police station. The Claimant banged his hands against the windows in an effort to attract the attention of some passersby when a police officer approached the police vehicle and said to the Claimant "*you aint dead yet?*" The Claimant then made more noise and opened the trunk by pulling the lever which caused the police officer to draw the attention of the other police officers inside the police station. The officers then returned to the police vehicle and proceeded to drive towards the hospital. While on the way to the hospital the Claimant heard PC Gerald saying "*give him back his belongings*" and one of the army officers in the back seat placed the items in the Claimant's front pocket.
8. On arrival at the hospital the Claimant was pulled out of the police vehicle onto a stretcher. The Claimant was asked by an orderly if he had personal effects to which the Claimant replied that he had cigarettes, a lighter and \$400.00 in cash. One of the police officers pulled the items out from the Claimant's pocket and the orderly examined them where it was discovered that the cigarette packet contained drugs. The Claimant was detained in the hospital by the police and handcuffed to a bed. The Claimant averred that the only cigarettes which were taken from his custody which he had purchased earlier that day on

Charles Street were of the brand “Broadway” and were contained in a package marked “Broadway”.

9. The Claimant also pleaded that he suffered pain and injury and sustained loss and damages. He pleaded that he had surgery and requires another surgery to correct his injury. He is unable to walk without the assistance of a walking stick and he walks with a limp. He incurred legal fees in the amount of \$125,000.00, traveling expenses in the amount of \$5000.00 plus medication to ease the continuing pain in the amount of \$5,000.00 and continuing to date. He also incurred additional expenses to attend court in the amount of \$11,250.00.
10. The Defendant’s version was that, on the 13th January 2010 there was a joint patrol consisting of members of the Trinidad and Tobago Police Service and members of the Trinidad and Tobago Regiment in the San Fernando district. They were patrolling in a marked police vehicle PCL 9799, a Ford Everest seven seater. In the patrol there were two police officers: PC Gerald and PC Clevon George (“PC George”) and two regiment officers: Private Edmund-King and Private Bradshaw (“Private Bradshaw”).
11. At around 10:00 pm while patrolling Charles Street, La Romaine, PC Gerald observed a man wearing a white jersey and dark coloured pants standing in the roadway. The man looked in the direction of the police vehicle and fled. The area was poorly lit and the officers decided to give chase using flashlights.
12. PC George and Private Bradshaw went in the direction in which the man fled while PC Gerald and Private Edmund-King ran to an adjoining street, Ethel Street, in an attempt to apprehend the man. PC Gerald was able to see PC George and Private Bradshaw from his position. The man exited from his concealed position in a bushy area and approached PC George and Private Bradshaw, whose backs were to him. PC Gerald and Private Edmund-King observed that the man who was the Claimant was holding an object in his hand which resembled a knife. Private Edmund-King shot the Claimant to prevent him from causing harm to either PC George or Private Bradshaw. After the Claimant was shot he fell to the ground and the officers identified themselves to him as police officers and searched him.

They found a “du Maurier” cigarette box containing three packages of plant like material which appeared to be marijuana. PC Gerald informed the Claimant that he was of the opinion that the plant-like substance was marijuana and cautioned the Claimant who remained silent. The police officers also found a knife next to the Claimant. They denied that he was in possession of \$400.00 at the time. The officers took possession of the knife and the plant-like substance which appeared to be marijuana.

13. When the officers realized that the Claimant was shot in the buttocks, they brought the police vehicle closer to him and lifted him into the police vehicle. The officers admitted that the Claimant showed signs of being in pain but they denied that he cried or pleaded for an ambulance to be called. They denied that he was placed in the trunk of the police vehicle but stated that he was placed on the seats at the back of the police vehicle which they flattened to make room for him. They also denied laughing at and ridiculing the Claimant. They stated that the Claimant remained conscious throughout the entire incident.
14. The Defendant admitted that on the way to the hospital, the officers briefly stopped at the San Fernando Police Station to collect a medical form after which the Claimant was taken to the hospital where he was taken directly to the emergency ward for immediate treatment.
15. The Defendant has maintained that there was reasonable and probable cause for laying the aforesaid charges against the Claimant and that the officers were acting in the execution of their duties with the belief that they were performing a public duty imposed on them as police officers. The Defendant also denied that the Claimant is entitled to any exemplary or aggravated damages.
16. Based on the pleadings it was not in dispute that Private Edmund-King shot the Claimant; the Claimant was searched after he was shot; the Claimant was arrested after he was searched; the four officers took the Claimant to the San Fernando General Hospital; the four officers stopped at the San Fernando Police Station before they went to the hospital; and the Claimant was charged for the aforesaid offences after he was discharged from the hospital.

17. The facts in dispute centered on the time of the incident; the activity the Claimant was engaged in before his arrest; the items which were found on the Claimant after he was searched; the manner in which he was put in the police vehicle and the time the Claimant arrived at the hospital. In determining the version of the events more likely in light of the evidence the Court is obliged to check the impression of the evidence of the witnesses on it against the: (1) contemporaneous documents; (2) the pleaded case: and (3) the inherent probability or improbability of the rival contentions. (**Horace Reid v Dowling Charles and Percival Bain**¹ cited by Rajnauth –Lee J (as she then was) in **Mc Claren v Daniel Dickey**²).
18. The issues to be determined by the Court were:
- (a) Did the PC Gerald have reasonable and probable cause to charge the Claimant for the offences of possession of marijuana, possession of a weapon namely a knife intended for the purpose of committing an arrestable offence and the assault of PC George?
 - (b) Was PC Gerald actuated by malice in initiating proceedings against the Claimant?
 - (c) If the Claimant has established liability, what is the appropriate measure of damages to be awarded to the Claimant?
 - (d) What is the appropriate costs order?
19. At the trial two witnesses testified in support of the Claimant’s case: the Claimant and Ms. Annike Gordon. Two witnesses testified on behalf of the Defendant namely: PC Gerald and Private Edmund-King.

Did the PC Gerald have reasonable and probable cause to charge the Claimant for the offences of possession of marijuana, possession of a weapon namely a knife intended for the purpose of committing an arrestable offence and the assault of PC George?

¹ Privy Council Appeal No. 36 of 1897

² CV 2006-01661

20. It was submitted on behalf of the Claimant that PC Gerald fabricated the charge of assault with full knowledge that there was no evidence of an assault based on his observations and that his decision to initiate a charge of assault was without any evidential basis. It was also submitted that PC Gerald fabricated the marijuana charge and the possession of a weapon namely a knife charge since he had the opportunity to do so.
21. On the other hand the Defendant argued that PC Gerald had reasonable and probable cause to arrest and charge the Claimant since he failed to provide cogent evidence to establish that the marijuana and the knife were planted by PC Gerald.
22. The law with respect to malicious prosecution is settled. The essential ingredients for malicious prosecution as set out in **Clerk & Lindsell on Torts**³ are:
- “In an action for malicious prosecution the claimant must first show 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 the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause; fourthly, that it was malicious. The onus of proving every one of these is on the claimant. Evidence of malice of whatever degree cannot be invoked to dispense with or diminish the need to establish separately each of the first three elements of the tort.”
23. The test to determine reasonable and probable cause for a prosecution is set out at in **Halsbury Laws of England**⁴ as:
- “Reasonable and probable cause for a prosecution has been said to be an honest belief in the guilt of the accused based on a full conviction, founded upon reasonable grounds, of the existence of a state of the circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime imputed.”

³ 20th ed. At page 1070, para 16:09

⁴ 4th ed. Vol 45 (2) at para. 472

24. The test whether there is reasonable and probable cause has both subjective and objective elements. In **Harold Barcoo v the Attorney General of Trinidad and Tobago**⁵ Mendonca J. (as he then was) quoted from the 1987 edition of the text *Civil Actions Against the Police* by R. Clayton Q.C. and Hugh Tomlinson Q .C., where the authors laid out the test as to whether there is reasonable and probable cause at page 147:

- “(i) Did the officer honestly have the requisite suspicion or belief?
- (ii) Did the officer, when exercising the power, honestly believe in the existence of the "objective" circumstances which he now relies on as the basis for that suspicion or belief?
- (iii) Was his belief in the existence of these circumstances based on reasonable grounds?
- (iv) Did these circumstances constitute reasonable grounds for the requisite suspicion or belief?”

25. The first two questions are subjective and the second two are objective. If the answer to any of these questions is “no” then PC Gerald did not have “reasonable grounds” to charge the Claimant for the aforesaid offences.

26. Mendonca J (as he then was) continued his explanation at page 6 as follows:

“The person who must entertain the requisite suspicion (belief) is the arresting officer (prosecutor). It is his mind that is relevant. The arresting officer in order to satisfy the subjective elements of the test must have formed the genuine suspicion in his own mind that the person arrested has committed an arrestable offence and he must have honestly believed in the circumstances which formed the basis of that suspicion. The objective test was put this way by Diplock L. J. in *Dallison v Caffery* [1965] 1 QB 348 (at page 619):

The test whether there was reasonable and probable cause for the arrest or prosecution is an objective one, namely whether a reasonable man, assumed to know the law and possessed of the information which in fact was possessed by the defendant, would believe that there was reasonable and probable cause.”

⁵ H.C.A. No. 1388 of 1989

27. Kokaram J, referring to the guidance from Rajnauth-Lee JA in a Court of Appeal decision in this jurisdiction **Juman v The Attorney General of Trinidad and Tobago** ⁶ described the test as:

“In determining whether the arresting officer had reasonable and probable cause to prosecute the Claimant, the first enquiry therefore is to ascertain what was in the mind of the arresting officer and to determine whether the grounds on which the arresting officer relied as the basis for his suspicion were reasonable, or that the circumstances were such as to lead an ordinary prudent man to conclude the person charged was probably guilty.”

28. There is no duty on the part of the officer to determine whether there is a defence to the charge but only to determine whether there is reasonable and probable cause for the charge (see **Herniman v Smith**⁷ per Lord Atkin, “It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is reasonable and probable cause for a prosecution.”).

29. Based on the aforesaid learning it was not in dispute that the Claimant has proven that he was charged with the aforesaid offences⁸ and that the proceedings were terminated in his favour in the Magistrate’s Court⁹. The onus was on the Claimant to prove that PC George did not have reasonable and probable cause to arrest the Claimant for the aforementioned offences and that PC George instituted and carried out the proceedings against the Claimant maliciously.

The Offences

30. On 5th February 2010, the Claimant was charged with the following offences:

⁶ CV 22 of 2009

⁷ [1938] AC 305

⁸ Exhibit DG 1 of PC Gerald’s witness statement

⁹ Exhibit RD 1 Extract from the Magistrate’s case book for the San Fernando Magistrate’s Court

- i. “On Wednesday 13th of January 2010 at Charles Street La Romaine in the County of Victoria, had in his possession a certain dangerous drug namely Cannabis Sativa “L” commonly called marijuana contrary to section 5(1) of the Dangerous Drugs Act¹⁰ ;
 - ii. On Wednesday 13th of January 2010 at Charles Street La Romaine in the County of Victoria, had in his possession a weapon namely a knife intended for the purpose of committing an arrestable offence namely to wound contrary to section 46(c) of the Summary Offences Act¹¹;
 - iii. On Wednesday 13th of January 2010 at Charles Street La Romaine in the County of Victoria, assaulted Number 17667 Police Constable Clevon George contrary to section 30 of the Offences Against the Person Act¹².”
31. Section 5(1) of the **Dangerous Drugs Act** provides:
- “5. (1) Subject to subsection (2), a person who has in his possession any dangerous drug is guilty of an offence and is liable-
- (a) upon summary conviction to a fine of twenty-five thousand dollars and to imprisonment for five years;
 - (b) upon conviction on indictment to a fine of fifty thousand dollars and to imprisonment for a term which shall not exceed ten years but which shall not be less than five years.”
32. Section 3(1) of the **Dangerous Drugs Act** defines a “dangerous drug “ as a narcotic drug listed in the First Schedule or a thing that contains such a drug or a psychotropic substance listed in the Second Schedule or a thing that contains such a drug. In the First Schedule Cannabis (marijuana) is listed as item 3.
33. Section 46 (c) of the **Summary Offences Act** states:

¹⁰ Chapter 11:25

¹¹ Chapter 11:02

¹² Chapter 11:08

“46. A person convicted a second time of being an idle and disorderly person, and a person apprehended as an idle and disorderly person violently resisting any constable apprehending him and who is subsequently convicted of the offence for which he was apprehended, and a person who commits any of the offences mentioned below in this section, may be deemed a rogue and vagabond, and shall be liable to imprisonment for two months-

.....

(c) any person armed with, or having upon him, any weapon or instrument which there is reasonable cause to believe is intended for the purpose of committing any indictable offence; and every such weapon and instrument shall, on the conviction of the offender, be forfeited.”

34. Section 30 of the **Offences Against the Persons Act** provides that:

“30. Any person who is convicted upon an indictment of any assault occasioning actual bodily harm is liable to imprisonment for five years; and any person who is convicted upon an indictment for a common assault is liable to a fine of four thousand dollars and to imprisonment for two years.”

35. The definition of an assault was stated in **Andrew Lee Kit v Carol Charles**¹³, by Stollmeyer J (as he then was) as:

“The long standing definition of assault is an overt act by word or deed indicating an immediate intention to commit a battery, together with the capacity to carry the threat into action, or to put a plaintiff in fear of an immediate assault. It is an intentional act. There is an assault if there is a menace of violence with a present ability to commit it, but there will be no assault if the threat cannot be put into effect.”

¹³ CV. 3870 of 1995

36. In **Fabien Garcia v The Attorney General of Trinidad and Tobago**¹⁴, Dean-Armorer J. explained that:

“An assault is established once the Claimant can prove that a reasonable man, if placed in his position at the relevant time, might have feared that unlawful physical force was about to be applied to him.” The Honourable Judge in the said case defined battery as “the application of force to another, resulting in harmful or offensive conduct. The elements necessary to constitute a battery are the application of physical force and the absence of a lawful basis for applying same.”

37. In determining whether PC Gerald had reasonable and probable cause to institute the prosecution or whether he acted with malice in instituting the prosecution, the Court is required to consider the information that was in his mind at the time the charges were laid namely PC Gerald’s own account of the information¹⁵.

38. The particulars of malice/or absence of reasonable and probable cause which were pleaded by the Claimant were:

“Particulars of Malice and/or Absence of Reasonable and Probable Cause

- (i) Illegal and without any justification wounding the Claimant.
- (ii) Fabricating and concocting evidence containing the illegal drug marijuana.
- (iii) Fabricating and concocting evidence in the form of a metal objective with a wooden handle namely a knife.
- (iv) Failure to disclose to the Defense the identity of any civilian who had witness the Arrest and Detention of the Claimant.
- (v) Presenting falsely testifying that the Du Maurrier Box and the Knife was in the Claimant possession and that he used the latter to attempt inflicting harm to a Police Officer Daniel George.
- (vi) Without any credible evidence proffering charges against the Claimant to justify the use of force in the inflicting the wound to the Claimant.

¹⁴ CV. 2009/00959

¹⁵ O’Hara v Chief Constable of the Royal Ulster Constabulary (1997) 1 ALL E.R. 129.

- (vii) Without reasonable or probable cause continued to prosecute a charge that was unsustainable.
- (viii) The Claimant would rely on the absence of reasonable or probable cause as evidence of malice.”

39. In essence the Claimant’s case was that PC Gerald fabricated and concocted evidence against him namely that he was carrying a du Maurier cigarette box which contained three packages containing the illegal drug marijuana and that PC Gerard fabricated evidence in the form of a metal object with a wooden handle namely a knife. The Claimant’s evidence was that neither a du Maurier box nor a knife was in his possession and that he had a box of Broadway cigarettes when he was arrested.

40. Where there is an allegation of fabrication the onus is on the party making the allegation to provide cogent evidence to prove the allegations. Indeed the approach the Court has taken has been that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger the evidence should be before the Court concludes that the allegation is established beyond a balance of probability. In **Re H and Others (minors)(sexual abuse: standard of proof)**¹⁶ the Court explained:

“Where the matters in issue are facts the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability. This is the established general principle. ...

The balance of probability standard means that a court is satisfied that an event has occurred if the court considers that, on the evidence, the occurrence of the event is more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on a balance of probability. Fraud is less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury...

¹⁶ (1996) AC 563

Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether on a balance of probabilities and deciding whether, on a balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on a balance of probability, its occurrence will be established. Ungood-Thomas J. expressed it neatly in *In re Dellow's Will Trusts* (1964) 1 W.L.R. 451 at 455: “The more serious the allegation the more cogent the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.”

This substantially accords with the approach adopted in authorities such as the well-known judgment of Morris L.J. in *Hornal v. Neuberger Products Limited* (1957) 1 Q.B. 247, 266. This approach also provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters.”¹⁷ (Emphasis added).

41. The onus was on the Claimant to prove with cogent evidence that PC Gerald fabricated or concocted the following evidence: namely that on the night of the incident the Claimant was carrying a weapon namely a knife, the Claimant assaulted a police officer and he was carrying a plant-like substance marijuana.
42. The evidence to support the Claimant's case was from the Claimant and Annike Gordon.

¹⁷ At page 586, paragraphs C - H

The Claimant's evidence

43. The Claimant's evidence was that on the evening of the 13th January 2011 he had a job to repair a toilet for Ms Alexis who lived at Ethel Street, La Romaine. He hired Kevin Cox a taxi driver to take him to Ms Alexis' house and he arrived at 5:55 pm but she was not at home so he visited some of his relatives nearby while he waited for her arrival. He also purchased two soft drinks and a pack of 'Broadway' cigarettes on his way back to Ms Alexis' property to do the job. He inspected the toilet and made a list of the parts that were required for the job. After doing so, he saw a bunch of bananas and asked Ms Alexis for a hand of the bananas. Ms Alexis then went into the house for a knife and he proceeded to the back of the outdoor toilet to urinate because the said toilet was not functional at the time. While doing so he noticed a bright light flashing at him and he saw the shadows of two persons walking towards him. He heard one of them say "*look him there, shoot*". He said upon hearing those words he became frighten and he tried to jump a chain link fence which was on the boundary but he was shot while doing so.
44. According to the Claimant, while he was lying on the ground he saw a person dressed in police uniform, who he later learnt was PC Gerald, approached him with a gun and pointed it to his head. He was searched by one of the officers who found: a pack of 'Broadway' cigarettes, one lighter, \$400.00, a notepad and a pencil. No weapons or drugs were found on him. He pleaded with the police to call an ambulance but he was dragged by PC Gerald and PC George to the police vehicle that was parked some distance away on Lillian Street and he was placed in the back of it. His left leg was hanging out of the police vehicle and he was screaming at the officers in pain, however PC Gerald lifted his foot and threw it into the police vehicle. He said the pain was unbearable and he continued to plead with the officers to get him an ambulance but they ignored his pleas. He stated that he was left in the back of the trunk of the police vehicle while the officers laughed at and harassed him. He said they taunted him and hit his wounded leg. After entering the police vehicle the officers drove around for a while and eventually went to the San Fernando Police Station where they all exited the police vehicle and left him in it. He said he passed out and woke up to find himself in a pool of blood while he was still in the back of the police vehicle. He

drew the attention of some passersby by banging on the windows. Shortly thereafter a police officer approached the police vehicle and looked in and said to him “*you ain’t dead yet*” and he turned around and went back in to the police station. He was later taken to the San Fernando General hospital and his belongings were returned to him. An orderly at the hospital opened the cigarette pack and found something in a silver packet inside the cigarette pack. He was taken into surgery and later charged for the offences of possession of marijuana and a knife and assault of a police officer.

45. The Claimant raised the allegation that he was threatened by PC Gerald after the first day of the trial. PC Gerald filed a supplemental witness statement to address this allegation. However, the Claimant did produce any evidence to the Court that he made a police report in this matter. Counsel for the Claimant did not cross examine PC Gerald on his supplemental witness statement even though the allegations were serious in nature. In my opinion the lack of cross examination and lack of a police report demonstrated that there was no credibility in the Claimant’s allegation of being threatened.
46. In cross examination the Claimant stated that he lived in La Romaine all his life and he knew Ms Alexis before visiting her but he was not familiar with her property prior to the incident. He agreed that said he would now say that the area Ms Alexis lived was a known “drug block” and he admitted that he was previously arrested for possession of marijuana. He confirmed that he went to Ms Alexis’ house on that day to give her a quotation for a plumbing job and that he arrived at Ms Alexis’ house at 5:55 pm and she took about 5 to 10 minutes to arrive. He denied that he was Ms Alexis home at 10:00 pm that night. He said at the time of the incident he thought there was a fence at the back of the right side of Ms Alexis’ house but when he returned after the incident he realized it was a chicken coup.
47. The Claimant’s evidence in cross examination on the sequence of his actions was as follows. The Claimant stated that he heard “*look him dey, shoot*” and he ran. He said he became frighten and attempted to cross the fence. He testified that the force of the shot sent him through the chain link wire fence. However he later changed this position when he stated he did not run when he heard them say “*look him dey shoot*” but that he ran when

the police light flashed on him. Yet he denied running when the police came and he testified that he had no reason to run from the police. The Claimant also stated that he was searched while he was on the ground. He denied having in his possession marijuana in a du Maurier box. When Counsel for the Defendant asked him whether he was in possession of marijuana and a knife he responded “*marijuana is a small fine and a knife is not illegal*”.

48. The Claimant also confirmed that after he was shot it took about an hour or 45 minutes before the officers placed him in the trunk of the police vehicle. He said none of the windows in the police vehicle were able to open; the seats were not placed so he could lie down; nor was he placed on the 6th and 7th seats of the police vehicle. He could not say how long it took for him to get to the hospital or how long he passed out for. He testified that the police officers stopped at the police station but it was not a brief stop. However he admitted that according to his hospital accident and emergency card which he annexed to his witness statement¹⁸ he arrived at the hospital at 10:30pm. He said his relatives were not at the police station but when he arrived at the hospital they were there waiting. He testified that the marijuana was not weighed or labelled in his presence and that he did not personally make any complaints or cross charges against the officers but that he was harassed regularly by the officers especially PC Gerald.
49. In determining the credibility of the evidence of a witness the Court of Appeal in **The Attorney General of Trinidad and Tobago v Anino Garcia**¹⁹, took the position that any deviation by a Claimant from his pleaded case immediately calls his credibility into question.
50. Based on the facts in dispute the Claimant’s consistent position was that: he was at Ms Alexis’ property to do a plumbing job for her ; while he was waiting for Ms Alexis he purchased some items including a pack of Broadway cigarettes and not du Maurier which was the brand of cigarette box which PC Gerald found on him; when he was searched one of the officers found a pack of Broadway cigarettes, a lighter, \$400.00 cash, a notepad and

¹⁸ Exhibit RD 2

¹⁹ Civ. App. No. 86 of 2011 at paragraph 31

a pencil; he was treated badly by the officers when he was put into the police vehicle and while he was in it.

51. However the Claimant's evidence was inconsistent in three material aspects namely the time he was at Ms Alexis' house; how he came into possession of a knife and the sequence of his actions immediately before he was shot.
52. The Claimant's pleading, his evidence in chief and in cross examination was that he was shot sometime shortly after 6 pm. Yet he admitted that the contemporaneous document which he attached to his witness statement, his accident card at the hospital stated that he arrived at the hospital at 10:30 pm. Even if I accepted all of the Claimant's evidence at best he would have arrived at the hospital long before 10:30 pm. Therefore the Claimant's contemporaneous document did not support the Claimant's claim that he was shot shortly after 6 pm.
53. The Claimant's pleading was silent on the Claimant having a knife on the night of the incident. The Claimant pleaded that when he was searched the officers found several items but there was no mention of a knife being anywhere close to him. However the Claimant added a new dimension to his case when he stated in his witness statement for the first time that he had a knife which Ms Alexis had given him to cut a hand of bananas. In my opinion this new information appeared to be a deliberate attempt by the Claimant to offer an explanation of how he came into possession of a knife which was material to his case since he knew that he was charged with possession of a weapon namely a knife. In my opinion this material change in this aspect of the Claimant's evidence undermined the credibility of his case that he did not have a knife when he was shot.
54. The Claimant also did not assist his case when his response to the question whether he was in possession of a knife and marijuana when he was held by the police officers was not a resounding denial but "*marijuana is a small fine and a knife is not illegal*". In my view the Court is entitled to make an adverse finding based on this response since if the Claimant was not in possession of these items he would have been adamant in his denial.

55. The Claimant's case and his evidence in chief described the sequence of events immediately before he was shot and arrested as follows: he was outside at the back of Ms Alexis house; he noticed two persons approaching him and a bright light flashed on him. He heard one of the persons say "*look him dey shoot*" and then out of fear he attempted to jump a chain link fence which was when he was shot.
56. In cross examination the Claimant changed the sequence on two occasions. First he said that he ran after hearing someone say "*look he dey shoot*". He made no mention of the light from the flashlight or shadow from two persons. He later changed his evidence to state that he did not run when he heard someone say "*look he dey shoot*" but he ran when the light from the flashlight shone on him. Yet he later changed his evidence to deny that he had no reason to run.
57. Therefore based on the totality of the Claimant's evidence there were four versions of the sequence of the Claimant's action immediately before he was shot. In my opinion the inconsistency in this aspect of the Claimant's evidence severely undermined his credibility on his recount of the incident.
58. While there were some consistency in the Claimant's evidence with his case in my opinion the inconsistencies of the time the Claimant was at Ms Alexis' house, the explanation for having a knife on him and the sequence of his actions immediately before he was shot were material and undermined the credibility of his case. Therefore based on the material inconsistencies, I was not convinced that the Claimant was entirely truthful with the Court.
59. To support his case the Claimant relied on the evidence of Ms Annike Gordon, his common law wife. Ms Gordon admitted that she was not present when the incident occurred on the 13th January 2010. According to Ms Gordon's evidence in chief she received a phone call around 7:00pm when she was told that her husband was shot by the police and he was being taken to the San Fernando General Hospital. At the hospital she saw the Claimant being carried on a stretcher into the Casualty area. She said he looked

like he had passed out and there was blood all over him and she was told that he was under police arrest and that she could not stay with him.

60. In cross examination, Ms Gordon testified that on the day of the incident, the Claimant arranged with her cousin who was a taxi driver, Mr Kevin Cox to take her and the Claimant to her mother's home. She testified that they arrived at her mother's house around after 3:00 pm and Mr Cox and the Claimant left around 5:30pm so they would have arrived at Ms Alexis' house around 6:00pm. She confirmed that a stranger called her around 7:00 pm and told her that the Claimant was shot and that he was taken to the hospital. When she arrived at the hospital around 7:30pm she stated that the Claimant was already there on the stretcher and he was being taken into the hospital.
61. Ms Gordon also admitted that although Ethel Street is a known "drug block", it is not the only area on la Romaine known for drugs. She admitted that he was found in possession of marijuana before but that case was dismissed and he went to rehab.
62. Ms Gordon's evidence corroborated the Claimant's evidence that he was in La Romaine to do a plumbing job for Ms Alexis. However Ms Gordon's evidence did not assist the Claimant's case since she was not present with the Claimant in La Romaine; when he allegedly purchased the Broadway cigarettes while he was waiting on Ms Alexis to arrive; she was not at Ms Alexis' home and when he was shot. Therefore her evidence was of no assistance to the Court in assessing the time the Claimant was at Ms Alexis home; if he had a knife when he was shot, if he had any pack of cigarettes with him; what the Claimant did immediately before he was shot and if the officers delayed before taking the Claimant to the hospital.
63. Indeed Ms Gordon's evidence on the time the Claimant arrived at the hospital was contradicted by the Claimant's own contemporaneous document namely his accident card at the hospital. In my opinion Ms Gordon was not a witness of truth on this matter.
64. The witness who could have assisted the Claimant's case in proving that he was standing at the roadside at 6:00pm and not 10:00pm in La Romaine was Mr Kevin Cox the taxi

driver who took him to Ms Alexis' house and who Ms Gordon said was her cousin. Similarly, Ms Alexis could have assisted the Claimant's case in proving the time he was at her house; the reasons he was at her house, the time she met with him and the reasons he was in possession of a knife when he was shot. However while witness statements were filed for both Ms Alexis and Mr Cox neither attended Court so their witness statements were not put into evidence. To facilitate their attendance the trial was adjourned for 2 months after it started to give the Claimant the opportunity to call these witnesses but they failed to attend and the Claimant provided no reason for the absence of the said witnesses on either day of the trial. In those circumstances I am entitled to conclude that both Mr Cox and Ms Alexis did not attend Court since they knew that they could not corroborate the Claimant's evidence.

65. The only credible evidence presented by the Claimant in support of his case was that he was in La Romaine to do a plumbing job since his pleading, evidence in chief and evidence from cross examination was consistent and this was corroborated by his sole witness Ms Gordon.
66. However there was no credible evidence adduced by the Claimant to prove that he was in La Romaine at 6:00pm and not at 10:00pm. The Claimant's evidence on the sequence of his actions immediately before he was shot was inconsistent. There was no corroborating evidence to support the Claimant that when he was searched he had a pack of Broadway cigarettes, one lighter, \$400.00 cash, a notepad and a pencil. His evidence on the time he arrived at the hospital was contradicted by his own document and there was no corroborating evidence to support his evidence that he was treated harshly by the officers from the time he was shot until his arrival at the hospital.

The Defendant's evidence

67. According to PC Gerald's evidence in his witness statement on the 13th January 2010, he was on joint patrol in the La Romaine area with Private Edmund-King and Private Bradshaw at 10:00pm. While driving along Charles Street, he observed a man wearing a white jersey and dark coloured pants standing in the open roadway. The man looked at the

police vehicle, suddenly turned away, he jumped over a drain and ran off into a bushy area behind a house in a nearby yard.

68. The sequence of the events which followed according to PC Gerald's evidence was:
- (a) All the officers alighted from the police vehicle and gave chase because of the man's suspicious behaviour. PC George and Private Bradshaw ran behind the man and he and Private Edmund-King and ran to the adjoining street, Ethel Street with a flash light.
 - (b) While attempting to rejoin the group, a man suddenly appeared near to where PC George and Private Bradshaw were searching. The man was wearing a white jersey and his back was turned to Private Edmund-King and him. They were some distance behind the man.
 - (c) PC Gerald shone his flashlight on the man and observed that he appeared to be holding a shiny object resembling a knife in one of his hands. The man did not appear to notice Private Edmund-King and PC Gerald were behind him. The man was slowly approaching PC George and Private Bradshaw. Private Bradshaw was walking ahead of PC George so the man was closer to PC George.
 - (d) PC Gerald became fearful for the life of PC George so he called out to the officers who did not respond.
 - (e) The man continued to approach PC George and Private Bradshaw.
 - (f) Private Edmund-King fired one shot in the direction of the man from his service Galil rifle.
 - (g) The man fell to the ground.
 - (h) PC Gerald approached the man whom he noticed was the Claimant, whom he knew for several years since they grew up in the same area in La Romaine and that he was familiar with the Claimant's family.
 - (i) PC George and PC Gerald then identified themselves to the Claimant as police officers.
 - (j) PC Gerald told the Claimant about his observations and suspicions. He also told him that he fitted the description of the person they saw running and that the area

was known as a drug block. He informed the Claimant that he suspected that he was in the area for illegal activities.

- (k) PC Gerald and PC George searched the Claimant and found a du Maurier cigarette box with three packages of a plant like material which appeared to be marijuana inside it.
 - (l) PC Gerald informed the Claimant that he formed the opinion that the plant like substance was marijuana.
 - (m) PC Gerald cautioned the Claimant who remained silent.
 - (n) PC Gerald also found a knife approximately 8 inches long with a wooden handle on the ground next to the Claimant.
 - (o) PC Gerald took possession of the knife and the plant like material which appeared to be marijuana.
69. After the Claimant was shot, PC Gerald stated that the Claimant appeared to be in some pain. Upon examination, PC Gerald observed blood coming from what appeared to be a gunshot wound. The Claimant was unable to stand. PC Gerald thereafter drove the police vehicle as close as possible to the Claimant's position and all four officers carried the Claimant into the police vehicle. The 6th and 7th seats in the police vehicle were laid flat to make room for the Claimant to lie down and he was placed there and not stuffed into the police vehicle as alleged by the Claimant. PC Gerald stated that the Claimant was not locked in the trunk nor was he crying but he did seem to be in pain.
70. PC Gerald denied pointing a gun at the Claimant's head or finding any money on the Claimant. He stated that the officers did not drag the Claimant to the police vehicle nor did he shove the Claimant's injured leg.
71. According to PC Gerald, after the officers left the scene they stopped at the San Fernando Police Station to collect a medical form before proceeding to the San Fernando General Hospital. The Claimant was informed that they were stopping to get the form. The Claimant was conscious and awake at the time. Both PC George and PC Gerald went into the police station and Privates Edmond-King and Bradshaw stayed in the police vehicle with the Claimant. Ten minutes later they left the police station and headed to the San Fernando

General Hospital where the Claimant was treated. PC Gerald indicated that he was unaware that the Claimant “blacked out” while on his way to the hospital, because he was driving the police vehicle. He stated that he could not recall seeing any of the Claimant’s relatives at the hospital when he arrived.

72. The day after the incident, PC Gerald stated that he submitted a report to his seniors. The cigarette box with the plant like material weighed 4.0 grams and the knife were lodged at the San Fernando Police Station. He placed markings on the items in order to identify them easily. He stated that he could not officially mark them as exhibits at that time because the Claimant was hospitalized.

73. PC Gerald attached as exhibit “DG 3” a copy of the Station Diary extract which recorded the events of the 13th October 2010. The entry was made in the Station Diary on the following morning at 4:00 am. The following is the relevant text of the Station Diary extract:

“...PC. GERALD reported that around 10.00 pm on 13/01/2010 PC GERALD in company with PC GEORGE dressed in Police Uniform in a marked police vehicle along with PTE EDMUND-KING and PTE BRADSHAW of the Trinidad and Tobago Regiment was on mobile patrol along Charles Street La Romaine when PC. GERALD Observed a man approximately 5’ 11” tall wearing a white jersey and dark coloured pants looked in the direction of the police vehicle and suddenly ran into a dark area behind a house. PC. GERALD became suspicious of his behaviour, had a conversation with the other occupants of the vehicle, caused the vehicle to stop exited and the subsequently gave chase after the said man. PC. GEORGE and PTE BRADSHAW entered the dark area first followed by PC. Gerald and PTE EDMUND-KING. The area was dark and vision was aided only by the use of flashlights. Whilst in pursuit PC GERALD observed the said man appeared from a concealed position with his right hand upraised with a shiny metal object within to the rear PC. GEORGE and PTE BRADSHAW. PC. GERALD became fearful for the life of P.C. GEORGE and PTE BRADSHAW, had a conversation with PTE EDMUND-KING; as a result PC. GERALD heard a loud explosion and observed the man fall to the ground. PC. GEORGE, PC. GERALD and PTE EDMUND-KING and PTE BRADSHAW approached the man identified as Rydel Defoe age 27 years, afro trini of Alexander Street, La Romaine. A searched was conducted of his person and found in his left front pants

pocket one (1) Red Du Maurier Pack containing two (2) transparent plastic packages with a plant like material and one foil packet containing a plant like material. PC. GERALD formed an opinion and told the said man he was of the opinion that the said plant like material is Sative L commonly called Marijuana. PC. GERALD also observed lying next to he said a man had a knife approximately 8” long observed that the said man was in pain and on checking observed blood on his right pants bottom and upon further checking an injury on his right buttock resembling a gunshot entry wound. He was taken to the San Fernando General Hospital where he is presently receiving medical treatment. Enquiries Continuing.”

74. The Station Diary Extract corroborated PC Gerald’s account of the incident with respect to the time of the incident which was around 10:00pm and not 6:00pm. It also supported PC Gerald’s evidence of the sequence of the events immediately prior to the Claimant being shot and arrested as follows:
- (a) PC Gerald observed a man wearing a white jersey and a dark coloured pants run away when he saw the police vehicle on patrol;
 - (b) The officers in the police vehicle alighted from it.
 - (c) PC George and Private Bradshaw entered the area the man ran to followed by PC Gerald and Private Edmund- King.
 - (d) The area was dark and the officers used a flashlight to assist with vision.
 - (e) PC Gerald observed a man with his right hand upright with a shiny metal object in the same hand. The man was behind PC George and Private Bradshaw.
 - (f) PC Gerald became fearful for the life of PC George and he had a conversation with Private Edmund-King
 - (g) PC Gerald heard explosion and saw the man fall to the ground.
 - (h) The officers approached the man who was identified as the Claimant.
 - (i) The Claimant was searched and a red du Maurier pack containing 3 packets of plant like material was found.
 - (j) A knife measuring 8” long with a wooden handle was found near to the man.
 - (k) The man was cautioned.
 - (l) The man was bleeding and he was taken for medical treatment.

75. PC Gerald was cross examined on the sequence of the events, and the officers' actions. Before the incident, PC Gerald stated in cross examination that before the incident he knew the area was a "bad block". He confirmed that he was very familiar with the Claimant before the incident and that on the night of the incident he first saw the Claimant standing on Charles Street close to Ethel Street but the area was not well lit. He admitted that he had only seen the Claimant for about 15 to 20 seconds but he did not see the Claimant's face although the Claimant looked in the direction of the police officers. Yet he was adamant that the person he saw on Charles Street was the Claimant because he was wearing the same clothes.
76. PC Gerald admitted in cross examination that he became suspicious when he saw the man jump over the drain and run. He stated that when he saw the Claimant at the back of Ms Alexis' property he was not far away from the fence. He stated in cross examination that the flashlight he had carried a beam for 100 feet and that Private Edmund-King was about 2 to 3 feet in front of him. The Claimant was about 5 to 10 feet from the other officers and he could have seen that the Claimant was getting close to the officers. He admitted that he became anxious when he saw the shiny blade in the Claimant's hand when he shone his flashlight and that while he could not see the Claimant's face he saw the knife since it was up in a raised position. He said the Claimant was never able to touch the officers with the knife and he never did so.
77. PC Gerald also testified that he shouted several times but the officers did not hear him shouting. He said he could not hear the Claimant speak to the officers from the distance and that they were unaware the man was in their presence. He said he was not allowed to give warning signals with his firearm and that after he called out to the other officer the shot was fired. He testified that he did not give Private Edmund-King any instructions to discharge his firearm. He also stated that immediately after the Claimant was shot while he was lying on the ground he suspected the Claimant for the offence of assault.
78. In cross examination, PC Gerald accepted that the Claimant was shot on private property. He said he did not know who owned the property or whether it was inhabited. He then said that the Claimant was not shot near to Ms. Alexis' property since he knew where Ms Alexis

lived. PC Gerald then stated that the Claimant was shot between two properties. He denied that the Claimant was shot on Lillian Street and then he accepted that the Claimant was shot on Ms Alexis' property. He also said he did not know if she permitted the Claimant to be there. In my view this inconsistency in PC Gerald's evidence on who owned the property where the Claimant was shot was not material since there was no evidence that the property where the Claimant was shot was owned by Ms Alexis.

79. PC Gerald admitted that the exhibits were in his possession when he entered the police station. He said the property keeper was not on duty at the time and he did not make an entry in the Station Diary about the exhibits and that the first record he had of the exhibits was after the Claimant was in the hospital. He admitted that the exhibits were not always in the same place as the Claimant. He denied that he created the offence to cover the fact that he had wounded a person wrongly. Counsel for the Claimant suggested that the reason why he did not lodge any marijuana is because he did not find any on the Claimant, to which PC Gerald responded "*that is not true*".
80. In cross examination PC Gerald said that when he saw the Claimant he was at the back of Ms Alexis property and not far away from the fence. Before the Claimant was shot he shouted at him several times. He admitted that he became suspicious of the Claimant when he saw him jump over the drain and run.
81. PC Gerald's evidence in chief and in cross examination was in a large part consistent with the Defendant's case and it was supported by the contemporaneous document the Station Diary extract. The material inconsistencies which arose from his evidence were as follows.
82. In his evidence in chief and cross examination, PC Gerald had stated that when he became fearful for the life of PC George he called out to the officers who did not respond. This is new information on the actions of PC Gerald since both the Defence and the Station Diary extract is noticeably silent on this material warning to PC Gerald's colleague. In my opinion this inconsistency undermined the credibility of PC Gerald's evidence that he called out to the officers.

83. PC Gerald's evidence in chief is silent on any conversation he had with Private Edmund-King just before the Claimant was shot. In cross examination he specifically denied that he instructed Private Edmund-King to discharge his firearm. However in the Station Diary Extract it was stated that he had a conversation with Private Edmund-King before the Claimant was shot. In my view, the Station Diary Extract being the document closer in time to the incident is the accurate position and that PC Gerald's silence in his witness statement and in his denial in cross examination is an attempt by him to distance himself from any motive for Private Edmund-King shooting the Claimant. I therefore did not think that PC Gerald was a witness of truth when he said that he did not speak with Private Edmund-King immediately before the Claimant was shot.
84. The other anomaly was PC Gerald's identification of the Claimant. The Defence, the Station Diary Extract and PC Gerald's witness statement were consistent that the first time PC Gerald identified the Claimant was after he was shot. However, in cross examination, PC Gerald introduced a new dimension to his evidence when he stated that he saw the Claimant jump over the drain and run into some bushes. He went further to explain that the area was poorly lit and he did not see the Claimant's face since he had 15-20 seconds to see the Claimant. In my opinion PC Gerald's evidence on cross-examination that he saw the Claimant jump over the drain and run was not plausible since he could not have identified the Claimant even if he was familiar with him since by his own admission he did not see the Claimant's face and the area was poorly lit. As such PC Gerald's evidence that he saw the Claimant as the man who jumped over the drain and run was not credible and I do not accept it. In my opinion PC Gerald became suspicious when he saw a man jump over the drain and run when the man saw the police vehicle and the officers were searching for a man who was wearing the same clothes as the man whom PC Gerald saw jumped over the drain.
85. Before I leave PC Gerald's evidence I will deal with the evidence that PC Gerald did not lodge the exhibits namely the knife and the du Maurier cigarette box with the packets of plant like material of marijuana when the officers stopped at the San Fernando Police Station to collect a form before taking the Claimant to the hospital. It was suggested by

the Claimant that the failure by PC Gerald to do so meant that PC Gerald had the opportunity to fabricate this evidence against the Claimant. I do not accept this suggestion since I do not find that it was unusual that PC Gerald did not lodge the exhibits namely the knife and the marijuana at the police station and he did not make an entry in the Station Diary when he stopped to collect the form before taking the Claimant to the hospital. There was no cogent evidence to support the suggestion by the Claimant. In my opinion it would not have been reasonable for PC Gerald to do so since the officers had to act with some degree of urgency to get the Claimant to the hospital and therefore PC Gerald did not have time to do so.

86. Private Edmund- King testified that on the day of the incident he was stationed in La Romaine and he was on nighttime joint patrol in the Southern Division along with Private Bradshaw and two police officers: PC Gerald and PC George. They were in a marked police vehicle, this was his first patrol and he was not familiar with the area.
87. While patrolling the area PC Gerald observed some suspicious activity in the vicinity of Charles Street. He said PC Gerald saw someone running away into a large bushy, unfenced area. The four officers got out of the police vehicle and split up in an attempt to capture the man. He was with PC Gerald. The route was unlit however PC Gerald had a flash light which allowed them to see ahead. As they were walking towards the other officers, PC Gerald said he saw the same man jump out of some bushes ahead of them. He stated that the man was approaching PC George and Private Bradshaw from behind and the man had something shiny in his hands. PC Gerald called out to alert PC George and Private Bradshaw of the potential danger but they did not respond to his calls neither did the man.
88. Private Edmund-King also stated that he was armed with a Galil rifle. He fired a shot at the man in an effort to protect the lives of PC George and Private Bradshaw and the only reason he fired the shot was because he thought that the man was going to harm his colleagues and he only shot him to keep them safe. He said he was standing too far away from the man to be able to prevent him from harming them. After the man was shot, they guarded the area and searched the man. He said saw a knife on the ground near to the man but he did not recall seeing any packages. The man was placed in the back of the vehicle and taken to the

hospital. They made one stop at the San Fernando Police Station. However he could not recall whether they went to the police station before or after taking the man to the hospital.

89. Private Edmund King testified that the Claimant was not “manhandled” into the police vehicle as he claimed. Nor did PC Gerald forcefully shove his injured leg into the vehicle. He stated that none of the officers in the party laughed at the man or abused him in any way and he never heard or saw PC Gerald tell the man “*Ent yuh is badman*”, neither did he see him point a gun at the Claimant’s head.
90. Private Edmund-King was cross examined on his knowledge of the area, the events leading up to and after the shooting of the Claimant. He stated that he was not familiar with La Romaine; he did not know Charles Street and he was unaware that the area was a drug block.
91. He corroborated PC Gerald’s evidence that the police vehicle stopped on the same street where a man jumped over the drain and he did not see a man jump over a drain and ran. At first he said he stayed in the police vehicle and he never got out. Then he said he got out of the police vehicle but not on the same street that the man jumped over the drain.
92. Private Edmund-King stated in cross-examination that after he got out of the police vehicle, PC Gerald alerted him that he saw something ahead and he went to PC Gerald’s side. PC Gerald brought to his attention the suspicious man. Private Edmund-King said that he was able to identify the other officers from the light that was pointing away from him and that the Claimant was moving towards the officers. He stated that before he shot the Claimant he did not discharge a warning shot and he admitted that he shot the Claimant on his right buttocks with one shot. He testified that the Claimant was standing between him and PC George and Private Bradshaw and that he was only able to see the Claimant’s back. He testified that PC Gerald was an arm’s length in front of him; he was not in front of PC Gerald at any point in time and they were not standing in a straight line. He said he had the Claimant in view for some seconds before he shot him and when he shot the Claimant he did not know that he was the man PC Gerald had seen jumped over the drain.

93. Private Edmund-King was able to recall that the property on which he shot the man had a fence and using the Courtroom to measure the distance, it was three Courtrooms length away from him. He said that the Claimant was between the out house and the fence. He said he had never seen the Claimant before the incident and when he fired the shot he did not know of the connection between him and the man on the road. He testified that when he shot the Claimant he did not know of any suspicion that PC Gerald had.
94. Private Edmund-King was consistent in cross examination that he did not search the Claimant and he did not recall seeing any cigarette pack that night. He said he was more concerned with securing the area and that while they were leaving people were on the road and some were peeping from the surrounding houses but he did not see anyone from the house on the property where the Claimant was shot.
95. Private Edmund-King corroborated PC Gerald's evidence that after the Claimant was shot he was put into the police vehicle by all four officers who lifted him and that he held him at the shoulder. He said he could not recall the type of vehicle the police vehicle was but that the back seats were folded down and they placed the Claimant in the back. He said they stopped at the San Fernando Police Station around 22:55 hours for about 5 minutes and not longer. He was certain because he timed since he had his phone and his watch. He could not recall the time they arrived at the San Fernando General Hospital but it would have been around 10:15pm. He left the hospital at 11:00 pm but PC Gerald and PC George stayed on at the hospital.
96. He confirmed that he did not attend to the Claimant while he was in the back of the police vehicle and he did not assist him because he is not a paramedic. Two days after the incident, he learnt that packages with plant like substance of marijuana were found.
97. Having observed Private Edmund-King in cross examination he was willing to answer the questions posed to him by Counsel for the Claimant but he appeared to have great difficulty in understanding the questions on distances. For example when he was asked about the distance he and PC Gerald was away from the Claimant immediately before he shot the Claimant at first he stated that they were 2 ½ feet away. However having admitted that he

was not mathematically inclined he was able to approximate the distances using the dimension of the Courtroom.

98. Before I deal with my assessment of Private Edmund- King’s evidence it is important that I address a particular line of questioning which Counsel for the Claimant pursued with Private Edmund-King. Counsel for the Claimant questioned Private Edmund-King on whether he had knowledge of any presidential order to allow to shoot on patrol. In my opinion Private Edmund-King could not have this within his knowledge. In any event this was not relevant to the issue since it was not the Claimant’s case that the members of the Defence Force are not permitted to use firearms and the Claimant never made a complaint that the shooting was unlawful. Further, section 6(2) (b) of the **Firearms Act**²⁰ permits members of the Defence Force to carry prohibited weapons including firearms. The Court is therefore entitled to find that Private Edmund King shot the Claimant lawfully in the exercise of his duty and in an effort to protect his colleagues.
99. Private Edmund-King was also question by Counsel for the Claimant as to why a “warning shot” was not fired before the Claimant was shot. In my opinion, the failure by Private-Edmund King to fire a warning shot was not unreasonable since Private Edmund -King believed that his colleagues’ lives were in immediate danger and there was no need to fire a warning shot.
100. In my opinion Private Edmund-King in a large part corroborated PC Gerald’s evidence and supported the Defendant’s case on the time of the incident; the sequence of the events from the time PC Gerald saw the man jump over the drain until the Claimant arrived at the hospital; the officers treatment of the Claimant after he was shot; and the time the Claimant arrived at the hospital. He also corroborated PC Gerald’s evidence that he called out to the officers when PC Gerald saw the man behind them, although this was not part of the Defence, Station Diary extract and PC Gerald’s witness statement.

²⁰ Chapter 16:01

101. Private Edmund-King's evidence was consistent that he only saw the knife next to the Claimant after he was shot and that he did not see any cigarette pack. In my opinion, it was highly probable that Private Edmund-King did not see the cigarette pack since he admitted that he did not search the Claimant but that it was PC Gerald and PC George who searched the Claimant and that he was focused on securing the area which was dark, after the Claimant was shot. In those circumstances Private Edmund-King would not have been focused on the Claimant but the area.
102. However, there was one material inconsistency in Private Edmund-King's evidence. His witness statement was silent on any conversation that he had with PC Gerald during the search for "the man". However in cross examination he changed his position and stated that it was PC Gerald who brought the suspicious man to his attention. He did not state how PC Gerald did so. The Station Diary Extract stated that PC Gerald had a conversation with Private Edmund-King but there was no evidence from PC George about any conversation which he had with Private Edmund-King. In my opinion Private Edmund-King's evidence on this conversation was more probable since it was PC George who saw the suspicious man and upon seeing the impending danger he drew this to Private Edmund-King's attention. Therefore on this issue PC George's evidence was not credible.
103. Having found PC Gerald's evidence that he did not call out to Private Edmund King when he saw the suspicious man was not credible and that PC George was not being a witness of truth when he said that he called out to PC George and Private Bradshaw to warn them of the Claimant's presence, in my opinion this was not sufficient to undermine and call into question all of PC Gerald's evidence.
104. Therefore based on the evidence of PC Gerald and Private Edmund-King which were credible and the Station Diary Extract, the Defendant's case was support in terms of the time of the incident, the sequence of the events before and after the Claimant was shot, the time the Claimant arrived at the hospital and the treatment the Claimant received from the officers after he was shot and before he arrived at the hospital.

105. According to Private Edmund-King, PC George also searched the Claimant after he was shot. In my opinion PC George could have corroborated PC Gerald's evidence that they found a du Maurier pack of cigarettes which contained 3 packets of plant like substance of marijuana but PC George was not called as a witness for the Defendant.
106. Having accepted the Defendant's version it is now apt to address the questions posed in **Harold Barco**. Did PC Gerald honestly have the requisite suspicion and belief that the Claimant assaulted a police officer and he was in possession of a weapon namely a knife, in possession of marijuana? The observations made by PC Gerald was that it was around 10:00 pm and it was dark when he was in a marked police vehicle on patrol when he saw a man jump over a drain and ran away. He became suspicious when he saw the man run and all four officers left the police vehicle to search for the man. During the search PC Gerald saw the man with his hand raised in the air holding a shiny object. At that time the man was behind PC George and Private Bradshaw. PC Gerald was consistent that when he saw this he was in fear for his colleagues' safety. In my opinion there was sufficient grounds for PC Gerald to believe that the man was about to assault PC George and Private Bradshaw.
107. Further, after the man was shot, PC Gerald saw a knife on the ground next to the man and having searched the man he found a du Maurier cigarette box which contained 3 packets of a plant like substance namely marijuana. In my opinion, based on PC Gerald's observations he had sufficient reasons to determine that the Claimant had the knife on him which he intended to use as a weapon and that he was in possession of marijuana. Therefore PC Gerald had the requisite suspicion and belief to arrest and charge the Claimant for the aforesaid offences.
108. Did PC Gerald, when exercising the power, honestly believe in the existence of the "objective" circumstances which he now relies on as the basis for his suspicion and belief? PC Gerald was consistent in his evidence that he became suspicious when he saw a man look at the marked police vehicle at 10:00pm and run away. While he was searching for the man, he saw the man with his arm raised with a shiny object in his hand behind the

officers. After the man was shot he found a knife next to the man and he found 3 packets of plant like substance, marijuana.

109. Was his belief in the existence of these circumstances based on reasonable grounds? The basis for PC Gerald's belief was his observations and what he found on the Claimant after the latter was searched. In my opinion, this constituted reasonable grounds.
110. Did these circumstances constitute reasonable grounds for the requisite suspicion or belief? The time of the incident, the actions of the Claimant by running away when he saw the marked police vehicle at 10:00 pm, the sequence of the events, the observations of PC Gerald and the items he found on and next to the Claimant all satisfied the test that the circumstances constituted reasonable grounds for PC Gerald to arrest and charge the Claimant for the said offences.
111. On whether PC Gerald had reasonable and probable cause to charge the Claimant for possession of marijuana the Court was only presented with evidence of the Claimant who said that he had a pack of Broadway cigarettes and who denied throughout having any du Maurier pack of cigarettes on him. On the other hand the evidence of PC Gerald was that he found a du Maurier pack which contained 3 packets of plant like material, marijuana. The onus was on the Claimant to prove that PC Gerald fabricated the du Maurier pack with the 3 packets of plant like material, marijuana. He has provided no evidence to corroborate his evidence. Based on his evidence he is asking the Court to find that the evidence was fabricated since Private Edmund-King did not see any cigarette pack and PC Gerald did not lodge it at San Fernando Police Station when he stopped to collect a form before taking the Claimant to the hospital. In my opinion, those circumstances could be easily explained as set out above and therefore this do not amount to the cogent evidence which the Claimant is required to adduce to prove fabrication of evidence on a balance of probabilities.

Was PC Gerald actuated by malice in initiating proceedings against the Claimant?

112. The Claimant pleaded that he relied on the particulars of the absence of reasonable and probable cause as evidence of malice. The onus was on the Claimant to show that the

Defendant was actuated by malice in instituting the prosecution²¹. In **Brown v. Hawkes**²² at page 722 Cave J defined “malice” as:

“Now malice, in its widest and vaguest sense, has been said to mean any wrong or indirect motive; and malice can be proved, either by showing what the motive was and that it was wrong, or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor. In this case, I do not think that any particular wrong or indirect motive was proved. It is said that the defendant was hasty and intemperate ... He may also have been hasty, both in his conclusion that the plaintiff was guilty and in his proceedings; but hastiness in his conclusion as to the plaintiff’s guilt, although it may account for his coming to a wrong conclusion, does not show the presence of any indirect motive ...”

113. At page 728, Lord Justice Kay continued that:

“As I understand the argument for the plaintiff, it was said that the evidence to prove malice was that the defendant did not make proper inquiry as to the facts of the case. If that is all, and if that evidence is sufficient, the result would be that the finding on the first question put to jury, that the defendant did not take proper care to inquire into the facts of the case, would, without more, determine the action in favour of the plaintiff. That cannot be so and when I look at the evidence (as I have done with care) to find what evidence there was of a sinister motive, I can find none on which the jury could reasonably find that the defendant was actuated by malice.”

114. The Privy Council in **Trevor Williamson v The Attorney General of Trinidad and Tobago**²³ at paragraphs 11-13, described the ingredients of malice as:

²¹ per Mc. Shine JA in *Wills v Voisin* (1963) 6 W.I.R. 50 at 67 B.

²² [1891] 2 QB 718

²³ [2014] UKPC 29

“11. ... Secondly, malice must be established. A good working definition of what is required for proof of malice in the criminal context is to be found in **A v NSW [2007] HCA 10; 230 CLR 500**, at para 91:

“What is clear is that, to constitute malice, the dominant purpose of the prosecutor must be a purpose other than the proper invocation of the criminal law -an ‘illegitimate or oblique motive’. That improper purpose must be the sole or dominant purpose actuating the prosecutor.”

12. An improper and wrongful motive lies at the heart of the tort, therefore. It must be the driving force behind the prosecution. In other words, it has to be shown that the prosecutor’s motives is for a purpose other than bringing a person to justice: **Stevens v Midland Counties Railway Company (1854) 10 Exch 352, 356 per Alderson B and Gibbs v Rea [1998] AC 786, 797D**. The wrongful motive involves an intention to manipulate or abuse the legal system **Crawford Adjusters Ltd (Cayman) v Sagicor General Insurance (Cayman) Ltd [2013] UKPC 17, [2014] AC 366 at para 101, Gregory v Portsmouth City Council [2000] 1 AC; 426C; Proulx v Quebec [2001] 3 SCR 9**. Proving malice is a “high hurdle” for the claimant to pass: **Crawford Adjusters para 72a per Lord Wilson**.

13. Malice can be inferred from a lack of reasonable and probable cause – **Brown v Hawkes [1891] 2 QB 718, 723**. But a finding of malice is always dependent on the facts of the individual case. It is for the tribunal of fact to make the finding according to its assessment of the evidence.”

115. If there is no proof of malice in the prosecution, the claim in malicious prosecution must fail, even if there is a finding of lack of reasonable and probable cause²⁴. In the case of **Hicks v Faulkner** (supra) at page 174 it was stated that:

“In an action of this description the question of malice is an independent one-of fact purely - [T]he malice necessary to be established is not malice in law such as may be assumed from the intentional doing of a wrongful act (see

²⁴ Wershof v. Commissioner of Police (1973) 3 AER 540

Bromage v Prosser (1) per Bayley H) but malice in fact-maus animus-indicating that the party was actuated either by spite or ill-will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feelings towards anybody.”

116. At page 175 of the judgment it continued that:

“Evidence of malice is a question wholly for the jury, who, even if they should think there was want of probable cause might nevertheless think that the defendant acted honestly and without ill-will, or any other motive or desire than to do what he bona fide believed to be right in the interest of justice –in which case they ought not, in my opinion, to find the existence of malice.” (Emphasis added).

117. The Claimant relied on the particulars of lack of reasonable and probable cause to support a finding of malice.

118. The Defendant submitted that there was no evidence advanced on behalf of the Claimant to suggest on a balance of probabilities that the Defendant was actuated by malice.

119. The evidence of PC Gerald was that he was very familiar with the Claimant before the incident. There was no evidence of how he knew the Claimant and for how long. However there was no evidence that the Claimant knew PC Gerald before the incident and there was no evidence adduced by the Claimant that PC Gerald’s actions in charging and prosecuting the charges against him was done with malice.

120. Further, PC Gerald stated in his witness statement that he weighed the plant like substance in the Claimant’s presence on the 4th February 2010 and after he had charged the Claimant for being in possession of marijuana he submitted the plant-like material which he had found on the Claimant to the Forensic Science Centre for testing and he received the Certificate of Analysis on the 25th October 2010 which confirmed that the plant-like substance was marijuana.

121. While it was not in dispute that PC Gerald knew the Claimant before the incident, it was Private Edmund-King who did not know the Claimant before this incident therefore no preconceived notion of malice, spite, ill-will or improper motive can be inferred.
122. In light of the aforesaid reasons, I have not found that PC Gerald acted with malice in charging and prosecuting the Claimants for the aforesaid charges.
123. The Claimant having failed to establish liability there is no need to address the issue of damages.

What is the appropriate costs order?

124. The prescribed costs rule is set out in Part 67.5 which provides:
 - “(1) The general rule is that where rule 67.4 does not apply and a party is entitled to the costs of any proceedings those costs must be determined in accordance with Appendices B and C to this part and paragraphs (2)-(4) of this rule.
 - (2) In determining such costs the “value” of the claim shall-
 - (a) In the case of a claimant, be the amount agreed or ordered to be paid;
 - (b) In the case of a defendant-
 - i. Be the amount claimed by the claimant in his claim form; or
 - ii. If the claim is for damages and the claim form does not specify an amount that is claimed, be such sum as may be agreed between the party entitled to, and the client liable to, such costs or if not agreed, a sum stipulated by the costs as the value of the claim ;or
 - iii. If the claim is not for a monetary sum , be treated as a claim for \$50,000.00”
125. In the Claimant’s Statement of Case the Claimant pleaded legal fees in defending the action in the Magistrate’s Court in the sum of \$125,000.00; travelling expenses in the sum of \$5,000.00 and medication in the sum of \$5,000.00; additional expenses to attend Court in

the total sum of \$11,250.00. In my opinion the sum to calculate the prescribed costs to be paid by the Claimant to the Defendant should be the amount claimed in the Statement of Case which was the total sum of \$146,500.00.

126. Costs is therefore prescribed in the sum of \$ 30,975.00.

Order

127. The Claimant's action is dismissed.

128. The Claimant to pay the Defendant's costs in the sum of \$ 30,975.00.

.....
Margaret Y Mohammed
Judge