

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2015-03348

BETWEEN

DARRYL BISHOP

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. R. Maharaj S.C. and Ms. V. Maharaj instructed by Ms. N. Badal for the claimant

Ms. K. Bello instructed by Ms. N. Simmons for the defendant

Judgment

1. By Claim Form filed on the 8th October 2015, the claimant seeks damages inclusive of aggravated and/or exemplary damages for malicious prosecution. The incident which gave rise to the claimant's claim occurred on the 28th August, 2011 during a State of Emergency when twenty uniformed police officers entered the claimant's business place, Nickel's 174 Hideaway Bar ("the bar") situate at Lot 84 Light Pole No. 10, Greg Street, Balmain, Couva. The claimant who was present at the bar was informed by Corporal Jason McDonald ("Corporal McDonald") that he was under arrest for being a member of a gang. The claimant alleges that although he denied that he was a member of a gang, the police officers ignored his statements and continued to arrest him. The claimant further alleges that he was given no further details of the reason for his arrest. The arrest was purportedly made pursuant to the Ant Gang Act which was at the time in force for merely some days.

2. According to the claimant, the other police officers then proceeded to search the patrons at the bar and arrested two other individuals, Andy McKnight ("Andy") and Rampersad Gobin ("Rampersad"). Subsequently, the police officers searched the claimant's residence located at the upper level of the bar and seized cash in various currencies. The claimant alleges that the police officers thereafter returned to the bar and seized the cash from the cash register and the cash from five gaming machines. The police officers also seized the cash from the prior day's sales which was stored in a room located to the back of the bar. The claimant avers that he was not shown an arrest or a search warrant.

3. Thereafter, the claimant, Andy and Rampersad were placed in handcuffs and taken to the Organized Crime, Firearms and Narcotics Bureau in Port of Spain. On the 30th August, 2011 the claimant was informed that he had been charged by Corporal McDonald with two counts of being a member of a gang. On the 1st September, 2011 the claimant appeared before the Couva Magistrates' Court. The matter was adjourned but the claimant could not be granted bail as Section 5(6) and (7) of the Bail Amendment Act No. 11 of 2011 provided that a person charged with an offence under the Anti-Gang Act No. 10 of 2011 shall not be granted bail except upon an application to a Judge if after 120 days from the charge no

evidence has been taken. The matter was thereafter adjourned again to the 12th October, 2011.

4. According to the claimant, on the 12th October, 2011 the State prosecutor offered no evidence against him and made an oral application to have the proceedings discontinued. The claimant avers that the Magistrate terminated the proceedings in his favour by discontinuing the proceedings and granting the prosecutor leave to withdraw the proceedings.
5. By Defence filed on the 29th July, 2016 the defendant admitted that the claimant was arrested on the 28th August, 2011 at his bar but avers that the arrest was effected by a party of approximately nine officers led by then Sergeant Eric Farris (“Sergeant Farris”). The defendant further avers that Sergeant Farris identified himself to the claimant and informed the claimant that the officers were there to conduct a search for firearms, ammunition and dangerous drugs. Moreover, the defendant avers that Sergeant Farris informed the claimant that he had reason to believe that he was a leader of a gang and cautioned the claimant.
6. The defendant claims that the claimant was known by police officers to be involved in illegal activities with Andy and Rampersad. That based on the information Corporal McDonald had received coupled with his personal observations, he formed the opinion that there was sufficient evidence to conclude that the claimant belonged to a gang. As such, the defendant claims that at all material times Corporal McDonald acted without malice or ill will in arresting the claimant.

Disposition

7. The order of the court is as follows;
 - i. The defendant shall pay to the claimant general damages for malicious prosecution inclusive of aggravated damages in the sum of \$250,000.00 with interest thereon at the rate of 2.5% from the date of institution of the proceedings to the date of judgment.

- ii. The defendant shall pay to the claimant exemplary damages in the sum of \$50,000.00.
- iii. The defendant shall pay to the claimant the sum of \$10,000.00 as special damages for malicious prosecution.
- iv. The defendant shall pay to the claimant the prescribed costs of the claim.

Issues

8. It is settled law that in a claim for malicious prosecution, the claimant must prove (a) that the law was set in motion on a charge for a criminal offence by the defendant, (b) that he was acquitted of the charge or that the proceedings were otherwise determined in his favour, (c) that in instituting and continuing the prosecution the defendant did so without reasonable and probable cause, (d) that the defendant was actuated by malice and (e) as a consequence the claimant suffered damage: see **Manzano v The Attorney General of Trinidad and Tobago**¹.
9. Since (a), (b) and (c)² are not in dispute, the issues of law in this case are as follows;
 - i. Whether Corporal McDonald was actuated by malice when he set the law in motion against the claimant; and
 - ii. If it is found that Corporal McDonald was actuated by malice in setting the law in motion against the claimant, what is the appropriate measure of damages.

The case for the claimant

10. It is necessary to set out the evidence in some detail. Both parties agree that the resolution of this claim is highly dependent on the court's assessment of the facts. The claimant gave evidence for himself. The claimant who is proprietor and a fisherman lives at Lot 84, Greg

¹ Civil Appeal No.151 of 2011

² On the date of trial, the defendant conceded that the evidence contained in the witness statements provided by its witnesses was insufficient to demonstrate that there was reasonable and probable cause to charge the claimant.

Street, Balmain Village, Couva. He owns two bars in Couva, Club 175 situate at Calibay Road, Couva (“the club”) and Nickel’s 174 Hideaway Bar (“the bar”) which is situated at the ground floor of his house. The club is partly owned by the claimant’s brother, Earl Bishop (“Earl”). The claimant also owns two boats, one named “Ashanti” and the other named “Jamal”. He has people working the boats for him and he sells the fish to the public at Calibay, Couva. He exhibited his fisherman’s certificate and his certificates of registry for the two boats.

11. According to the claimant, in 1991 he was convicted for possession of marijuana and was ordered to pay a fine of \$5,000.00. In 1996, he was charged for trafficking in cocaine by Police Officer Dindanath Ramkissoon who called two witnesses in the matter, one was Corporal McDonald (the arresting officer in this matter). The claimant testified that the trafficking in cocaine matter was tried in the Magistrates’ Court and was dismissed because the court felt that the Prosecution had failed to prove its case beyond a reasonable doubt. The State appealed the matter but the appeal was also dismissed.
12. The claimant testified that in 2006, he sent out men on his boat to do fishing and when they returned to shore, there were a lot of police officers onshore including Corporal McDonald. The officers searched the boat and the two men onboard the boat, one of the men was Andy. Nothing illegal was found. The claimant testified that Andy sometimes worked for him on his boat. Officers have also searched the club and the bar since the claimant opened same in 2006 and nothing illegal was ever found.
13. According to the claimant, on the 28th August, 2011 (“the said date”) between 4:00 pm and 5:00 pm he was at his bar with about six or seven patrons at the time. When he looked outside, he saw a convoy of about five vehicles, some were marked police vehicles and some were unmarked. He was selling behind the counter at the time. About twenty or more police officers including Corporal McDonald entered the bar. The claimant testified that Corporal McDonald told him that he was a member of a gang, he was under arrest and was going to be taken down to the Port of Spain Police Station. He further testified that all of the officers were pointing guns and that he was scared as he was being accused of being a

gang member which is a serious offence. He was also feeling ashamed since everything was taking place in front of his customers, all of whom were regulars at his bar.

14. The claimant testified that Corporal McDonald was also pointing a gun and told everyone to lay down. All the customers laid down and some officers searched them. The claimant told the officers that he was not a member of a gang but they paid no heed to him and began a search of his premises. Corporal McDonald was the only officer who spoke to the claimant and Corporal McDonald was the only officer the claimant recognized.
15. Corporal McDonald informed the claimant that he wanted to search his home located on the upper floor of the bar. Whilst searching the claimant's home, Corporal McDonald asked the claimant if he had any money therein and he stated that he did. Corporal McDonald informed him that if anything over \$20,000.00 was found, the officers would have to take it with them.
16. Whilst the officers were searching the claimant's master bedroom, they found some money in a drawer and they took some and placed it in a black plastic bag. The claimant testified that none of the officers told him why they took his money and further did not ask him why he had the money in his drawer. He had Venezuelan, Canadian, British and United States of America ("US") currency in the drawer. He testified that he got the Canadian, the US and the Pounds from customers who visited the bar and paid in those currencies. He kept them in case he had to travel to Canada or to the US. He used some of the money to do his business. He has a friend in Venezuela and travelled to Venezuela often and the last time he went to Venezuela he did not spend out all of his money so he kept whatever remained for whenever he goes back.
17. The officers searched the claimant's house for about half an hour and seized nothing besides the money. Thereafter, Corporal McDonald informed the claimant that he wanted to search his bar and so the officers took the claimant back to the bar. The claimant testified that he was not told what the officers were searching for. Whilst on his way back to the bar, the claimant felt ashamed because he saw people and his neighbours in the roadway looking on and talking amongst themselves.

18. Corporal McDonald took the claimant behind the bar and the officers who were with them upstairs also went behind the counter and began searching the cupboard at the top and bottom of the counter. Corporal McDonald then told the claimant to open the cash register and took all the money therein and placed it in the same black plastic bag. The claimant could not recall the amount of money contained in the cash register but he testified that it there were about two days' sale. The money from the claimant's gaming machines were also taken by the officers and placed in the black plastic bag. Thereafter, the officers searched the bar's stockroom. The claimant had a small amount of money on one of the shelves in the stockroom which was also taken and placed in the black plastic bag. He did not know how much money there was in the stock room. The courts notes however that the amount of money which was seized is not an issue in this case as the claimant accepted that the sum of money listed at paragraph 10(e) of the Defence comprising \$39,237.00 TT, \$1,546.00 US, \$5.00 sterling and \$86,262.00 Bolivars was the sum which the officers took from his home and the bar. Further, the money was eventually returned to the claimant.
19. Subsequently, the officers proceeded to the outside of the bar and searched the entire yard. Upon their returned inside, Corporal McDonald recognized that Rampersad and Andy were among the customers in the bar and he informed them that they were also members of a gang and that they would be taken to the Port of Spain Police Station with the claimant. The other persons in the bar were allowed to leave.
20. Corporal McDonald then asked the claimant if he had any more land in the area and the claimant told him that he had a lot of land one house away from the bar. Corporal McDonald informed the claimant that he wanted to search that land. On their way to the bar, the claimant observed that his neighbours were still on the road watching and talking amongst themselves. He testified that he was feeling humiliated because his neighbours looked up to him and showed him great respect. When he opened his bar, his neighbours supported him and they were his regular customers.
21. On the way to the land, Corporal McDonald and another officer searched the claimant's vehicle registration number TBP 3810 which was parked at the front of the premises. At

the land, the officers searched the entire parcel but found nothing. The claimant testified that he heard Corporal McDonald tell the officers that they would not find anything on the land because the claimant was very careful. The claimant testified that he did not know what Mc Donald meant.

22. Thereafter, they left and returned to the front of the bar. As the claimant was about to be placed in handcuffs, he handed the keys for his house and bar to his neighbour, Clyde Boodoo (“Clyde”) who was in his yard looking on. The claimant instructed Clyde to give the keys to Kemba (the claimant’s common-law wife). The claimant, along with Rampersad and Andy were then handcuffed in full sight of his neighbours, customers and other persons looking on. They were placed in the back of an unmarked police vehicle, a Nissan X-Trail SUV and told that they were being taken to town. The claimant was made to sit in the tray of the trunk on the floor with no seat or cushion. He testified that it was a very small space and as there were two other people with him he felt uncomfortable because his legs were folded up.

23. They left the bar at about 6:00 pm and up to that time, the claimant was not shown any documents such as search warrants or an arrest warrant. He was also not informed of his rights. They arrived in Port of Spain at about 7:00 pm. Upon arrival, Corporal McDonald told the claimant that he was at the Organized Crime, Firearms and Narcotics Bureau (“the Bureau”). The claimant was taken out of the police vehicle and by then his legs were cramped. He was in an accident in 1998, the femur of his right leg had been shattered in the accident and a metal plate and screws were inserted. Consequently, his entire right leg was in pain by the time he got out of the vehicle.

24. At the Bureau, he was told to sit on a bench and Corporal McDonald informed him again that he was being arrested because he was a member of a gang. The claimant reiterated that he was not a member of any gang. The claimant testified that Corporal McDonald did not show him any documents. He further testified that neither was anything read to him nor was he asked to sign anything. The claimant denied reading the station diary extract dated the 28th August, 2011 which recorded the events which transpired relative to the search of his property and his arrest. He also denied that he was asked to sign the diary and that he

refused to sign same. The station diary entry at 9:00 pm on the 28th August, 2011 stated that Sergeant Farris read over the entries relative to search to the claimant and that whilst the claimant agreed that the entries were accurate, he refused to sign same. The claimant further testified that he was not given anything to eat or drink and that he did not ask to use the washroom. He was also not allowed to make a phone call.

25. The claimant sat on the bench from 7:00 pm to about 2:00 am on the 29th August, 2011. He could not sleep because of his state of mind and it was uncomfortable to sleep sitting up on a wooden bench. His right leg was also in pain from the drive to Port of Spain. Around 2:00 am Corporal McDonald asked the claimant if he wanted a mattress and he said yes. The mattress was placed in an office and he lay there and fell asleep. He awoke at about 4:00 am but remained on the mattress because he was feeling dizzy. It is his evidence that he suffers from hypertension and the stress of the circumstances made him dizzy. He laid on the mattress until he saw Corporal McDonald at about 7:00 am. At this time he informed Corporal McDonald that he suffered from hypertension and that he needed his medication. He then asked for a telephone call to Kemba so that she could bring his medication for him. He denied that Corporal McDonald offered to take him to the hospital as stated in the station diary.³

26. Thereafter, an officer offered the claimant breakfast but they were serving meat sandwiches. The claimant is a vegetarian and so he told them that he did not eat meat. He took a glass of water. He then asked to call Kemba to bring something for him to eat and he was allowed to make that call. He told Kemba what he wanted to eat and about his medication during this telephone conversation. He was told to sit on a bench until Kemba came to the Bureau. She brought him clothes, a towel, medication and a subway sandwich. He was allowed to speak to Kemba in the presence of an officer. She stayed for about ten minutes. He instructed Kemba to get into contact with Ms. Pamela Elder (“Ms. Elder”), an attorney-at-law to visit him at the Bureau because the police did not tell him of his right to speak to an attorney. He denied that Sergeant Farris granted him a phone call to speak to

³ See station diary entry at 6:43 am on the 29th August, 2011.

Ms. Elder and to Kemba as stated in the station diary⁴. After Kemba left, he was allowed to eat his sandwich and take his medication.

27. Subsequently, Sergeant Farris brought out the black plastic bag with the money that the officers had taken possession of and checked it in his presence. Whilst counting the money, Sergeant Farris informed the claimant that someone would have been coming to interview him. The claimant was asked to sign the bag in which the money was placed and he complied. He testified that he was not asked anything about the money. As mentioned, this money was returned to the claimant after the criminal charges against him were dismissed.
28. On the 29th August, 2011 Mr. Owen Hinds (“Mr. Hinds”), an attorney-at-law from Ms. Elder’s office visited the claimant and he conferred with him. Thereafter, Mr. Hinds left and informed the claimant that he would keep in contact.
29. Subsequently, a man from the Financial Intelligence Unit visited the Bureau and Sergeant Farris took the claimant into a room with the man. The man asked the claimant his name and address and the claimant gave him that information. The man did not inform the claimant why he was being accused of being a member of a gang. The man told the claimant that he wanted to interview him and the claimant informed him that he was not doing any interviews. The man did not say anything else and the claimant was returned to where he was being kept.
30. Thereafter, Corporal McDonald told the claimant that he knew that he owned a club with Earl and that the officers would have to go to Couva to search the club. The claimant, Rampersad and Andy were then placed in handcuffs and placed in a police vehicle. The officers left the Bureau in about two or three police vehicles. They stopped at the Couva Police station where Corporal McDonald asked for some assistance to search the club. The claimant testified that about three or four police vehicles from the Couva Police Station accompanied them to the club. He further testified that Corporal McDonald gave him his cell phone to call Earl who had the keys for the club. Earl however, did not answer the call.

⁴ See station diary entry at 12:15 pm on the 29th August, 2011

31. When they arrived at the club, the officers from the Couva Police Station remained in the middle of the road to stop traffic from going up or down the street. The claimant testified that the officers caused a commotion and so people from the houses around the club began to come out to see what was happening. He was born in Couva and used to live in that area from 1975 to 1978 and then from 1986 to 2002. As such, he knows everyone who lives in that area. He was embarrassed as he was in handcuffs and was being escorted by so many officers like he was a big criminal. He saw his neighbours looking at him and talking amongst themselves.
32. The club was closed when they arrived. Corporal McDonald took a piece of iron and broke the lock on the burglar proof and then broke the glass from the glass door. One of the officers put his hand through the broken glass to open the lock from inside. When the officers entered the bar, they began to search the inside of same. Whilst the search was being conducted, Earl arrived with the keys and the officers used the keys to open the stockroom. The officers also searched the music room and the entire yard around the club but nothing illegal was found nor was anything seized.
33. Corporal McDonald informed Earl that they wanted to search the upper portion of the club. Earl, the claimant and the officers proceeded to the upper floor of the club and same was searched by the officers. The upper floor of the club was clear as the claimant wanted to open a bar therein and was fixing it up at that time. Nothing illegal was found in the upper floor of the club. Andy and Rampersad were left in the police vehicle during the search.
34. After the club was searched, the officers went to Andy's house and then to Rampersad's house which was a short distance away. The claimant was in the car when the houses of Andy and Rampersad were searched. He did not see the officers come out with anything after those searches. Thereafter, they returned to the Bureau.
35. They arrived at the Bureau at around 6:00 pm on the 29th August, 2001 and the claimant was again placed on the same bench. Around 9:00 pm whilst he was sitting on the bench Corporal McDonald again accused him of being a member of a gang and the claimant told him "*I ain't no gang member*". Corporal McDonald then told him that he, Andy and

Rampersad had to be taken to Police Headquarters in Port of Spain. The claimant was feeling very weak since he did not eat a proper meal since he left his home on the said date.

36. Shortly thereafter, the officers took the claimant, Andy and Rampersad to the Police Headquarters and placed them in a cell with about five or six other persons. The claimant testified that the cells were very dirty and that there was a little concrete ledge on the side for them to sit on. He further testified that the only place to sleep was on the concrete floor and that it was cold. There were newspapers in the cell and he had to use same to sleep on. The cell contained a bucket in the corner which the claimant had to use as a toilet. He testified that the bucket was not emptied whilst he was in the cell and so the cell smelt like feces. He did not get much sleep because the cell was cold, it smelt bad, he was stressed and he wanted to go home.
37. The next day (the 30th August, 2011) he was taken to the Belmont Police Station where he was placed in a cell which he shared with about five other persons. The size of the cell was about 10 feet by 10 feet. He testified that he was not told anything about why he was being held. He was offered food with meat but as he is a vegetarian, so he did not take anything to eat. He was not given any other food options and was only given water to drink.
38. On the 30th August, 2011, whilst in the cell at Belmont Police Station, he was handed a paper by Officer Farrell who informed him that he was being charged for being a gang member and that he would be taken to court on the first working day after the Independence Day holiday. Andy and Rampersad were also charged.
39. The claimant denied that on the 30th August, 2011 he left the Belmont Police Station to accompany the police officers on enquiries in the Central Division as stated in the station diary.⁵ He testified that he did not leave the Belmont Police Station until the day he had to go to court. He spent the night in the cell with the five other persons. The cell was an open space with nothing inside it but a bucket which was the washroom. He testified that the cell

⁵ See station diary entry at 3:10 pm on the 30th August, 2011

bore a very bad stench because of the bucket. He was forced to sleep on floor because there was no other place to sleep. The ground was cold and dirty.

40. He was not able to get much sleep due to stress and the coldness of the ground. Also the plate in his right leg was affecting him, his back was hurting from lying flat on the ground, he was hungry and just wanted to go home. On the 1st September, 2011 he spent the entire day in the cell. He was given food to eat but was not allowed to shower. He had no choice but to use the bucket in the cell in front of all the other people in the cell. He felt humiliated and embarrassed.
41. On the 2nd September, 2011, he was handcuffed and taken to the Couva Magistrates' Court. Prior to leaving the station to attend court, he was neither allowed to shower nor offered anything to eat or drink. When he arrived at the Magistrates' Court, Ms. Elder appeared on his behalf. He was not called upon to plead. He was remanded in custody for thirty days and the matter was adjourned to the 30th September, 2011.
42. After court, he, Andy and Rampersad were taken to the Arouca Remand Yard ("the remand yard"). At the remand yard, the claimant was made to strip naked, squat and was searched in front of some officers. He felt ashamed to be in the position he was in knowing that he did not do anything to be there and that he had to take off all of his clothes in front of all the prisoners and about four to five prison officers. After being searched, his clothing was returned to him and he was placed in a cell with three other persons which included Andy and Rampersad.
43. He was kept in the remand yard from the 2nd September, 2011 to the 12th October, 2011 when the prosecution against him was dismissed. He spent his entire days in the cell and was only allowed to come out for about two minutes to collect food on mornings, lunchtimes and at dinner. Most of the times he would get peas and rice for lunch and two hops bread with butter for breakfast and dinner. He was also allowed to leave the cell to shower once a day. The shower was outside and the instruction given by the prison officers was to "*wet and move*". He did not get more than three minutes to shower.

44. He was taken outside for “airing” for about an hour once or twice a week in groups of about one hundred prisoners. Every time he was at the airing, many stabbing and fights would break out and the prison officers would have to intervene and beat the prisoners with batons. He felt like his life was at risk because he could have been a victim of someone who did not like him in the prison. As such, he mostly kept to himself when in was in the yard.
45. There were many times he felt dizzy, faint and as if he wanted to black out. He informed the prison officers of this and they told him that they did not have any medication there and that he just had to remain in that condition. He saw the prison’s doctor twice while he was in the remand yard and he told the doctor that he suffered from hypertension. The doctor told him that he would order some special food and prescribe special medication for him but he never got any special food whilst at the remand yard.
46. He testified that he did not get any medication the doctor told him he was going to prescribe. He further testified that he told a prison officer that the next time the doctor came, he would tell him that he was not receiving any medication. The prison officer gave the claimant a loose tablet in his hand and told him that it was part of the medication the doctor had prescribed. The claimant did not take the tablet because the prison officer did not know the name of the tablet, it was not the tablet he was accustomed to and he did not trust anyone. He took some medication that he had from when his family and friends brought for him when they visited.
47. According to the claimant, one day some prisoners were complaining about being in their cell for too long and they started to empty the buckets with their feces and urine in the corridors. He testified that some of the prisoners were taken out of their cells and beaten by the prison officers. The prisoners were then transferred out of the remand yard.
48. The claimant testified that he saw a lot prisoners falling sick and contracting diseases such as chicken pox. He started to feel paranoid that he would get chicken pox because he knew that it is very contagious. He also testified that one of the prisoners looked like he was losing his mind because he was jumping around his cell, screaming and bawling down the

place and he was not like that when the claimant first went to the remand yard. The claimant was feeling as though that could happen to him because he was frustrated with being in the cell locked up for so long. He barely slept at night and most of his days, he would spend sitting by himself waiting on the days to past.

49. He testified that he was missing his family and that he was concerned about his bills being left unpaid as his businesses were not open and his fishing boats did not go out to sea. He was the only one who would get men to go out and catch for the day as he did not have regular workers. Also Andy and Rampersad who sometimes worked for him were also detained with him. Additionally, he was the only one who would sell the fish caught in Cali-bay.
50. The bar was closed whilst he was in prison because he was not there to manage it. The claimant's common law relationship with Kemba of five to six years ended when he was in prison.
51. On the 30th September, 2011, he was taken to the Couva Magistrates' Court in a van along with other prisoners and was placed in a holding cell at the Couva Court. When his matter was called, he was taken to court and Mr. Hinds represented him. Corporal McDonald was in attendance and informed the court that he was awaiting some instructions from the Office of the DPP and so he asked for an adjournment. The claimant testified that when he went before the court on this day, he felt confident that he was going home because he knew he was not a member of a gang and that the officers did not have any evidence against him.
52. The matter was adjourned to the 12th October, 2011. Consequently, the claimant had to go back to the remand yard and wait a further fourteen days to return to court to find out if he was being released. On the 12th October, 2011 he was taken to the Couva Magistrates' Court and Mr. Hinds again appeared on his behalf. One of the attorneys for the State told the court that there was no evidence in the matter against the claimant and that the State wanted permission to withdraw its case. According to the claimant, the Magistrate then

dismissed the charges against him. The charges against Andy and Rampersad were also dismissed.

53. According to the claimant, he was detained for a period of forty-five days. He testified that the detention including the conditions of the detention caused him great distress, inconvenience, loss and damage. When he returned home on the 12th October, 2011 he spoke to some of his neighbours who were cold with him and did not talk to him in the same way as they did before he got arrested. Some of his family members told him that they read in the Trinidad Express that he was arrested and charged with being a gang member under the Anti-Gang Act and that he was released. His family also told him that they read another article in the Express which stated that his house was searched and the amount of money that was found at his house. On the 14th October, 2011, the claimant read an article in the Guardian Newspaper entitled "*More alleged gangsters freed*".
54. The claimant testified that for about a month after he was released, he did not open the bar because he felt as though he could not face the public again and he also wanted some rest and time for himself to prepare his mind to face the public again. He reopened the bar in November, 2011. When he reopened the bar, customer attendance was poor.
55. The claimant testified that he paid Ms. Elder the sum of \$10,000.00 in legal fees to represent him at the Magistrates' Court. He also paid Mr. Hinds the sum of \$5,000.00. He was unable to find the receipts for the money he paid to Ms. Elder and Mr. Hinds. He further testified that from Mondays to Wednesdays the profits for the bar could range between \$1,800.00 to \$2,000.00 per day and from Thursdays to Sundays, he could make a profit of about \$6,000.00 to \$8,000.00 per day because the bar opens from morning to morning on those days. He testified that he does not do much book keeping and that he keeps most of his money in his house to use to purchase stock for the bar and for personal living.
56. He further testified that the boat work varied. That sometimes he would obtain a big catch and sometimes a small catch. On a normal basis, he would make a profit of about \$3,000.00 to \$4,000.00 per day.

The case for the defendant

57. The defendant called two witnesses, Police Constable Kevin Benjamin (“PC Benjamin”) and retired Inspector of Police Eric Farris (“Inspector Farris”).
58. **Inspector Farris** served as a police officer for twenty-eight and a half years prior to retiring. He last worked at the Financial Investigation Branch based in Riverside Plaza however he spent most of his years at the Bureau. He retired on the 3rd December, 2016.
59. His duties and responsibilities while working at the Bureau included detection of crime related to narcotics and firearms offences, surveillance of offenders and other general police duties. In 2011 he was a sergeant at the Bureau and was responsible for supervising between five to six officers.
60. He testified that as a police officer of the Bureau he was responsible for conducting surveillance on individuals suspected of committing narcotic and firearms offences. He further testified that because of intelligence gathered against the claimant, the claimant was an individual suspected of committing narcotic and firearms offences and that he continually attracted the attention of the Bureau. As such, he testified that the claimant was well known to him and several other officers from the Bureau as an individual involved in criminal activities.
61. According to Inspector Farris, on the 28th August, 2011 a large exercise was conducted by several officers from the Bureau. The exercise was sanctioned by the Senior Superintendent and was headed by Inspector Farris who as the senior officer decided the date and time that the exercise was conducted. The purpose of the exercise was to search for arms and ammunition and dangerous drugs. During cross-examination, Inspector Farris testified that the intention of the officers on the 28th August, 2011 was to arrest and charge the claimant.
62. Inspector Farris testified that upon arriving at the claimant’s residence, he and the officers met with the claimant Andy, Rampersad and Daniel Jarvis (“Daniel”) as well as other persons and that Corporal Mc Donald informed the claimant that they were there to search

the premises for firearms, ammunition and dangerous drugs. Corporal Mc Donald also cautioned the claimant and told him that he had cause to believe that he (the claimant) was the leader of a gang. Inspector Farris testified that the claimant replied by saying “*me boss ah gang leader, no ah eh no gang leader.*” Additionally, Corporal Mc Donald cautioned Andy and Rampersad and told them that he had reasonable cause to suspect that they were also members of a gang led by the claimant. Inspector Farris testified that both Andy and Rampersad remained silent.

63. The officers then searched the bar situated on the ground floor and the claimant’s three bedroom house situate on the upper floor. Inspector Farris testified that he asked the claimant to secure his valuables and that the claimant went to the eastern side of the house and took up a large plastic bag which contained a large quantity of various currency of various denomination. According to Inspector Farris, more money was found under a mattress and in other areas of the house. On the ground floor, the claimant opened slot machines and the cash register and removed the monies therefrom. Inspector Farris testified that all of the aforementioned monies were seized from the claimant as he believed the monies were proceeds from crime. At the time of the seizure, Inspector Farris informed the claimant that he was of the opinion that the money was directly or indirectly the proceeds of previous crimes. Inspector Farris cautioned the claimant and the claimant replied by saying “*Boss I have two business and two boats*”.

64. According to Inspector Farris, the property adjacent to the claimant’s residence and bar (which was also owned by the claimant) and motor vehicle registration number, TBP 3810 were also searched in the claimant’s presence. Nothing illegal was found.

65. Inspector Farris testified that when the search was completed, he observed that Corporal Mc Donald arrested and cautioned the claimant after informing him that he was suspected of being a person involved in gang related activities. It was the testimony of Inspector Farris that the claimant was arrested and charged under the Anti-Gang Legislation based on information which was collected on him over an extended period of time. Inspector Farris further testified that the claimant was informed of his rights and privileges. That after his arrest, the claimant had asked for a phone call to call his common-law wife, Kemba

and was given same. According to Inspector Farris, Corporal Mc Donald also arrested Andy and Rampersad and informed them of their legal rights and privileges. Andy and Rampersad did not make any requests.

66. It is to be noted that Corporal McDonald did not attend this court as a witness and the defendant stated that it was not relying on his filed witness summary. The court has therefore placed no weight to Inspector Farris' evidence that Corporal McDonald informed the claimant of his rights and privileges as Corporal Mc Donald has not presented himself for cross examination on the issue. The court therefore accepts the claimant's evidence that he was not informed of his rights and privileges.

67. After the claimant, Andy, and Rampersad were taken to the police station, records of the events which transpired relative to the search of the claimant's property and arrest were made in the station diary and same was read over to the claimant by Inspector Farris. The claimant was asked whether the entries were true and correct. Inspector Farris testified that although the claimant indicated that the entries were true and correct, he refused to sign same. The money which had been placed in the black plastic bag was also counted in the claimant's presence.

68. Inspector Farris testified that Kemba visited the station and brought a subway sandwich for the claimant and food for Andy and Rampersad. He further testified that on another occasion Kemba brought medication for the claimant, the claimant having indicated that he suffered from hypertension. According to Inspector Farris, the claimant asked for phone calls to call his attorney, Ms. Elder and Mr. Kemoy Leonsingh. That whilst in custody, the claimant also communicated with Mr. Hinds. Inspector Farris testified that after communicating with Mr. Hinds, the claimant declined to be interviewed. Inspector Farris further testified that whilst in custody the claimant, Andy and Rampersad were provided with meals by the officers.

69. Inspector Farris testified that he personally surveilled the claimant's bar and club as both businesses were known to the police. He recalled identifying certain individuals going to and from the claimant's businesses to boats in the Carli-bay fishing area. Surveillance on

those boats and individuals led to several exercises being executed on the property belonging to the claimant which included boats and vehicles.

70. He testified that on another occasion he was tasked to conduct surveillance on the claimant's known associates as information received indicated that they were collecting drugs on behalf of the claimant in the Orange Valley area in Couva and that they were transporting the claimant's drugs to an unknown location. From information received from fellow officers and from his personal knowledge, Inspector Farris was aware that several exercises were conducted on the claimant by the officers of the Bureau. He was personally involved in doing surveillance and gathering intelligence on the claimant on approximately three occasions.
71. **PC Benjamin** is attached to the Bureau and was so attached at the material time. He has been a police officer for approximately sixteen years. On the 29th August, 2011 he was contacted by a senior police officer (whose name he could not recall) to convey the claimant from the office of the Bureau to the Central Police Station in Port of Spain. He along with Acting Sergeant Mark, Corporal Baptiste, Corporal Mc Donald and Sergeant Farris transported the claimant to the Central Police Station for safe keeping. PC Benjamin however, was not part of the search exercise when the claimant was arrested.
72. He testified that having worked at the Bureau, he was aware that the claimant was a person suspected of being involved in gang related activities. He is also aware that the claimant was suspected of trafficking firearms and narcotics. During cross-examination, PC Benjamin testified that there is a difference between someone being a suspect and a police officer having evidence to prove that an individual committed an offence.
73. PC Benjamin testified that on one occasion, then ASP David instructed him and some other officers to do surveillance on the Claxton Bay beach front as it was suspected that the claimant was receiving illegal firearms and narcotics. They were instructed to observe whether there were any illegal items being brought into the country by the claimant.

74. He testified that on another occasion whilst conducting surveillance, another police officer (whose name he could not recall) stopped a motor vehicle that the claimant was a passenger in and a search on the motor vehicle was conducted. However, no illegal items were found. Beyond the aforesaid, PC Benjamin had no further interaction with the claimant.
75. During cross-examination, PC Benjamin agreed that as a police officer, his duty was to try and get all evidence necessary against a person before he charges that person and that he must have evidence to prosecute that person.

The offence

76. The Claimant was charged with two counts of being a member of a gang pursuant to section **5 (1) (a) of the Anti-Gang Act No. 10 of 2011** which provides as follows;

“5. (1) It is hereby declared that gangs are unlawful and any person—

(a) who is a member of a gang; or

(b) who, in order to gain an unlawful benefit, professes to be a gang member when in fact he is not, whether by telling anyone that he is a gang member or otherwise suggesting to anyone that he is a gang member, commits an offence and is liable on summary conviction to imprisonment for ten years and on any subsequent conviction on indictment to imprisonment for twenty years.”

77. **Section 4** of the Anti-Gang Act defines “gang”, “gang member” and “gang-related activity” as follows;

““gang” means a combination of two or more persons, whether formally or informally organized, that, through its membership or through an agent, engages in any gang related activity;

“gang member” means a person who belongs to a gang, or a person who knowingly acts in the capacity of an agent for or an accessory to, or voluntarily associates himself with any gang-related activity, whether in a preparatory, executory or concealment phase of any such activity, or a person who knowingly performs, aids, or abets any such activity;

“gang-related activity” means any criminal activity, enterprise, pursuit or undertaking in relation to any of the offences listed in the First Schedule acquiesced in, or consented or agreed to, or directed, ordered, authorized, requested or ratified by any gang member, including a gang leader”

78. **Section 12(1)** of the Anti-Gang Act provides as follows;

“12(1) A police officer may arrest without a warrant a person whom he has reasonable cause to believe to be a gang member or whom he has reasonable cause to believe has committed an offence under this Act.”

79. Further, **section 13(1)** of the Anti-Gang Act states as follows;

“13(1) Notwithstanding any law to the contrary, a police officer may, without a warrant, detain for a period not exceeding seventy-two hours a person whom he reasonably suspects of having committed an offence under this Act without charging him for the offence.”

80. **Sections 6 & 7 of the Bail Amendment Act No. 11 of 2011** provided as follows;

“(6) ... a Court shall not grant bail to a person who is—

(a) over the age of eighteen years; and

(b) charged with an offence under the Anti-Gang Act.

(7) Subject to subsection (8), where a person is charged with an offence mentioned in subsection (6) and brought before the Court but no evidence has been taken within one hundred and twenty days of the reading of the charge, that person is entitled to make an application to a Judge for bail.”

81. In the Court of Appeal case of **Kevin Stuart v The Attorney General of Trinidad and Tobago**⁶ (a case relied on by the claimant), Bereaux JA at paragraphs 17 to 21 had the following to say in relation to the type of evidence necessary to establish a case of being a member of a gang under the Anti-Gang Act;

⁶ C.A. No. P162 of 2015

“[17]...It is readily apparent from these provisions that proving gang membership in a court of law is no slam dunk. It requires a careful compilation of the evidence showing how the gang is organised, how the gang activity is perpetrated through gang members and their respective roles in such activity. Evidence at trial must be carefully led to show the nexus between the gang, the members and the activity. In a case where the gang-related activity relates to narcotics, evidence of actual sales of the narcotics is required to prove the gang-related activity. Mere surveillance without more may not suffice. It is not enough to simply observe the accused making “interactions” with other persons. The evidence must be that narcotics were sold by the accused to someone. This would include proof of exchange of money and the actual price paid. Undercover detection may be necessary. The best evidence would no doubt be that of a former member of the gang who has direct knowledge of its activities.

[18] Taking into account the definitions of gang, gang member and gangrelated activity, it was necessary for the appellant to show that PC Phillips had a reasonable basis for suspecting that:

(i) Stuart belonged to a gang consisting of his wife, Kerwin Rocke and himself; and that he, in combination with his wife, or Kerwin Rocke, or both, engaged in the sale of narcotic drugs (being a gang-related activity) either through all or any of them or through an agent;
(ii) or that Stuart acted as an agent for, or as an accessory of, the gang, or voluntarily associated himself with the gang-related activity (the sale of a narcotic drug) (i) or that Stuart acquiesced in, consented or agreed to, or directed, ordered, authorised, requested or ratified the sale of narcotics.

[19] To prove reasonable suspicion it is important to show a nexus between the gang members, in this case, Stuart, Stuart’s wife and Kerwin Rocke. It is necessary to provide evidence showing that there was a reasonable basis for suspecting the three alleged gang members were acting in concert to sell a narcotic drug. Evidence of their respective roles as gang members in the activity would also be required. Was he responsible simply for selling the narcotics? Was he responsible for making contact with purchasers? Was the

wife's role merely to provide the facade of legitimacy by selling in the shop? What role did Roche play? It is not enough simply to show Stuart acting alone (unless the evidence also pointed to agency). If that was the only evidence, then he should have been arrested for the sale of narcotics and not for being a gang member.

[20] The best evidence no doubt would be information emanating from a former member of the gang intimately acquainted with Stuart's role, by virtue of his own participation in the activity or, a confession from Stuart himself. If a former gang member is the source of that information he could be identified as a "former gang member" without necessarily naming him so as to allow the court to judge the basis of reasonable suspicion.

[21] But details of the gang activity and gang membership, the nexus between the activity and the gang member and his role in the gang and in the activity, are required..."

Issue 1 – Malice

Law

82. Both parties herein have agreed that the existence of malice may be inferred from the absence of reasonable and probable cause and the claimant is asking the court to so infer. However, the defendant submitted that in this case malice cannot be inferred from the absence of reasonable and probable cause because the claimant has failed to prove that the prosecution against him was actuated by malice. It is abundantly clear to this court that the mere lack of reasonable and probable will not equate to malice in every case.

83. **Mendonça JA in Sandra Juman v The Attorney General**⁷ at paragraph 25 in treating with the issue of malice stated as follows;

“Malice must be proved by showing that the police officer was motivated by spite, ill-will or indirect or improper motives. It is said that malice may be inferred from an absence of reasonable and probable cause but this is not so in every case. Even if there is want of

⁷ Civil Appeal No. 22 of 2009

reasonable and probable cause, a judge might nevertheless think that the police officer acted honestly and without ill-will, or without any other motive or desire than to do what he bona fide believed to be right in the interests of justice: Hicks v Faulkner [1987] 8 Q.B.D. 167 at page 175.”

84. In the Privy Council case of **Williamson v Attorney General of Trinidad and Tobago**⁸, Lord Kerr stated the following in relation to malice at paragraphs 11 to 13;

“[11] ...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) 18 JP 713, 23 LJ Ex 328, 10 Exch 352, 356 per Alderson B and Gibbs v Rea [1998] AC 786, 797D, [1998] 3 WLR 72, 1 OFLR(ITELR) 719. 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, [2013] 4 All ER 8; Gregory v Portsmouth City Council [2000] 1 AC 419; 426C, [2000] 1 All ER 560, [2000] LGR 203; 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, 60 LJQB 332. 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.”

⁸ [2014] UKPC 29

85. Further, in the Privy Council decision of *Sandra Juman v The Attorney General of Trinidad and Tobago*⁹, Lord Toulson at paragraph 18 had the following to say about malice;

“The essence of malice was described in the leading judgment in Willers v Joyce at para 55:

“As applied to malicious prosecution, it requires the claimant to prove that the defendant deliberately misused the process of the court. The most obvious case is where the claimant can prove that the defendant brought the proceedings in the knowledge that they were without foundation ... But the authorities show that there may be other instances of abuse. A person, for example, may be indifferent whether the allegation is supportable and may bring the proceedings, not for the bona fide purpose of trying that issue, but to secure some extraneous benefit to which he has no colour of a right. The critical feature which has to be proved is that the proceedings instituted by the defendant were not a bona fide use of the court’s process.”

86. Further, Mendonça JA in *Manzano* supra stated the following at paragraph 47;

“The proper motive for a prosecution is a desire to secure the ends of justice. So in the context of malicious prosecution a defendant would have acted maliciously if he initiated the prosecution through spite or ill-will or for any other motive other than to secure the ends of justice. It follows therefore that even if a claimant cannot affirmatively establish spite or ill-will or some other improper motive, he may still succeed in establishing malice if he can show an absence of proper motive.”

Discussion and findings

87. The claimant argues that the defendant had no evidence to charge him with being a member of a gang. That the absence of want of reasonable and probable cause for the bringing of

⁹ [2017] UKPC 3

the charges against him is sufficient for the court to infer a malicious motive on the part of Corporal McDonald. The proper motive for a prosecution is a desire to secure the ends of justice. Therefore, if the claimant is right that Corporal McDonald had no evidence to charge him then it cannot be said that Corporal McDonald had an honest belief that the claimant was guilty of the offence of being a member of a gang and so malice may be inferred since it can be said that the prosecution against the claimant was initiated for some other motive than to secure the ends of justice.

88. The claimant gave evidence for himself. He admitted that in 1991 he was convicted for possession of marijuana and that he had to pay a fine of \$5,000.00. He further admitted that in 1996 he was charged for trafficking cocaine, that Corporal McDonald was a witness in that matter and that charge was dismissed. The claimant however maintained that he was not a member of a gang. The court agrees with the submission of the claimant that during cross-examination, his arrest, the searches conducted at his businesses and the conditions of his detention were not challenged.

89. PC Benjamin and Inspector Farris gave evidence for the defendant. Although Corporal McDonald gave a witness summary in this matter, he failed to attend court for cross-examination and the defendant stated that it would not be relying on Corporal McDonald's evidence. The court finds that Corporal McDonald being the arresting and charging officer in this case would have had critical evidence as to the reasons which led to him to have an honest belief in the claimant's guilt. The court therefore drew adverse inferences against the defendant for failing to produce Corporal McDonald as a witness.

90. Upon an examination of the evidence of PC Benjamin and Inspector Farris, the court finds that there was no evidence to lead it to believe that Corporal McDonald had an honest belief in the guilt of the claimant to charge him with being a member of gang. Previous interaction with the claimant (save and except for the charges) were only in the nature or surveillance on unknown dates and nothing more.

91. Inspector Farris testified that he had conducted surveillance on the claimant's businesses on countless occasions prior to the 28th August, 2011. No dates and times and details of

what was seen has been given. That he saw certain individuals going to and from the claimant's businesses to boats at Carli-bay fishing area and that surveillance on those boats and individuals later led to several exercises being executed on the property belonging to the claimant which included his boats and vehicles. Inspector Farris further testified that on another occasion he was tasked with surveilling the claimant's known associates as information received indicated that the claimant's known associates were collecting drugs on his behalf and transporting same to an unknown location. Who are the individuals and when were they observed and under what circumstances and what were the specific transactions, the court is blissfully unaware of.

92. Moreover, he testified that due to intelligence gathering, the claimant had attracted the attention of officers at the Bureau and that the claimant was known as an individual involved or suspected to be involved in criminal activities. This statement is as general as statement as all the others in relation to observations purportedly made by the police. According to Inspector Farris the search conducted on the claimant's bar and house on the 28th August, 2011 was for the purpose of searching for arms and ammunition and dangerous drugs. He testified that nothing illegal was found but that a certain amount of monies were seized from the claimant's house and bar. After the search, Corporal McDonald informed the claimant that he was suspected of being a member of a gang, cautioned and arrested him.
93. PC Benjamin was not involved in the search exercise conducted on the claimant's property. He however testified that he was aware that the claimant was suspected of being involved of gang related activities and that he was instructed to conduct surveillance on the Claxton Bay beach front as it was suspected that the claimant was receiving illegal firearms and narcotics. But again no real information that points specifically to the claimant being involved in a known transaction or transactions is provided.
94. As mentioned in *Kevin Stuart* supra, mere surveillance without more may not suffice in proving gang membership. It was therefore incumbent upon Inspector Farris to provide evidence to show how those individuals going to and from the claimant's businesses were

acting in concert with the claimant to sell firearms and narcotic drugs to demonstrate that Corporal McDonald had an honest belief that the claimant was a member of a gang. Not only did the Inspector fail to lead any evidence of the aforementioned but he also failed to mention whether any illegal firearms and narcotics were actually either during or subsequent and as a result of those surveillance exercises during searches of the claimant's boats and vehicles. Moreover, he failed to lead any evidence of whether narcotic drugs were actually found when he was surveilling the claimant's known associates. PC Benjamin's evidence also failed in that regard. He spoke of surveillance on the Claxton Bay beach front, but has not given evidence that the claimant was seen receiving illegal firearms and narcotic drugs.

95. Further, in *Kevin Stuart* supra the fact that the officer kept on investigating the alleged gang involvement was persuasive as to the officer's genuine belief in the offence having been committed. However, in this case besides the fact that the club was searched there is was no evidence that Corporal McDonald continued investigations into the alleged gang involvement of the claimant prior to charging him.
96. As such, the court finds that the evidence of Inspector Farris and PC Benjamin fails to provide any explanation as to the motive for claimant's arrest, charge and prosecution. In that regard the evidence in this case demonstrates quite clearly in the court's view that that Corporal McDonald misused the process of the court by bringing criminal charges against the claimant since those charges were brought in the knowledge that same clearly were without foundation. The Anti-Gang Act 2011 had been barely days old when the officers searched and arrested the claimant and charged him for being a gang member, an offence which was not known to the laws of this land prior to that time. So that the very actions for which the claimant was arrested and charged could not have cumulatively amounted to an offence of being in a gang as there was no law making it an offence prior to the coming into force of the Act. It is the finding of the court that this much would have been obvious to the officers.
97. The defendant submitted that the claimant cannot rely on the failure of the officers to conduct sufficient enquires into whether he was a member of a gang to prove that his

prosecution was malicious. In so submitting the defendant relied on the cases of Sandra Juman supra and Hill v Chief Constables of West Yorkshire¹⁰. The court agrees with the submission of the claimant that he did not merely rely on the insufficient enquiries by the officers to infer malice. That he also pleaded that there was no evidence to prosecute him, the defendant knew there was no evidence to justify prosecution, the defendant did not have an honest belief in the prosecution and his guilt and that notwithstanding the defendant's knowledge of no evidence to prosecute, he instituted and continued the prosecution.

98. The court further agrees with the submission of the claimant that the defendant has misstated the relevant principle of law in relation to insufficient investigations. That the relevant principle is that insufficient investigations is not in itself enough to infer malice but it can be assessed by the court in light of all of the particular facts of a case to objectively determine the sufficiency of the material upon which the prosecution was launched. In Manzano supra, Mendonça, J.A. at paragraph 30 had this to say;

“In Abbott v Refuge Assurance Co. Ltd [1961] 3 All ER 1074 Upjohn L.J. outlined (at p. 1087) three propositions which he said were clearly settled in relation to steps that a reasonable man would take. The failure to take any of these steps will provide evidence from which the Judge may infer an absence of reasonable and probable cause. One of them I think is relevant to this appeal and it is that the defendant or his advisors would take reasonable steps to inform himself of the true state of the case. It is, however, relevant to bear in mind the following passages from the judgment of the Court in A v State New South Wales, supra:

“[86] It is, nonetheless, important to recognise what, standing alone, may not suffice to show a want of objective sufficiency. It is clear that absence of reasonable and probable cause is not demonstrated by showing only that there were further inquiries that could have been made before a charge was laid. When a prosecutor acts on information given by others it will very often be the case that some further inquiry could be made. Lister v Perryman (1870) LR 4 HL 521, where a charge was preferred on account of what had been

¹⁰ (1989) AC 53

reported to the prosecutor, is a good example of such a case. And as Lord Atkin rightly said in *Herniman v Smith* [1938] 1 All ER 1 at 10:

'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 a reasonable and probable cause for a prosecution.' [87] For like reasons it cannot be stated, as a general and inflexible rule, that a prosecutor acts without reasonable and probable cause in prosecuting a crime on the basis of only the uncorroborated statements of the person alleged to be the victim of the accused's conduct. Even if at trial of the offence it would be expected that some form of corroboration warning would be given to the jury, the question of absence of reasonable and probable cause is not to be decided according to such a rule (see *Bradshaw v Waterlow & Sons Ltd* [1915] 3 KB 527 at 534). The objective sufficiency of the material considered by the prosecutor must be assessed in light of all of the facts of the particular case.

It is therefore not sufficient to establish reasonable and probable cause to rely only on the fact that there were further enquiries that could have been conducted. The objective sufficiency of the material must be assessed in the light of all the facts of the particular case, which might include, in an appropriate case, the failure on the part of the prosecutor to conduct further enquiries to inform himself of the true state of the case."

99. Consequently, the court finds that the evidence of the defendant clearly shows that there was no reasonable and probable cause to charge the claimant (which is accepted by the parties). There was no foundation whatsoever to charge the claimant. Although inferring malice from lack of reasonable and probable cause is rare, the court finds that on the balance of probabilities the claimant has demonstrated that in the circumstances of this case malice, should be inferred from the lack of reasonable and probable cause. As such, the court finds that claimant was maliciously prosecuted and so he is entitled to damages.

Issue 2 – Damages

100. The claimant claimed damages for malicious prosecution, special damages as well as aggravated and exemplary damages.

General damages

101. Damages in cases of malicious prosecution are awarded under the three following heads;

- i. Injury to reputation- to character, standing and fame.
- ii. Injury to feelings- for indignity, disgrace and humiliation caused and suffered.
- iii. Deprivation of liberty- by reason of arrest, detention and/or imprisonment¹¹

102. Further, in *Thaddeus Bernard v Quashie*¹², de la Bastide C.J. stated the following in relation to aggravated damages;

“The normal practice is that one figure is awarded as general damages. These damages are intended to be compensatory and include what is referred to as aggravated damages, that is, damages which are meant to provide compensation for the mental suffering inflicted on the plaintiff as opposed to the physical injuries he may have received. Under this head of what I have called ‘mental suffering’ are included such matters as the affront to the person’s dignity, the humiliation he has suffered, the damage to his reputation and standing in the eyes of others and matters of that sort. If the practice has developed of making a separate award of aggravated damages I think that practice should be discontinued.”

103. The claimant was arrested and taken to the Bureau on the 28th August, 2011. He testified that when he was taken out of the back of the police vehicle his right leg was in immense pain. He arrived at the Bureau at about 7:00 pm and sat on a bench until about 2:00 am. He was then given a mattress upon which to sleep. As he suffers with hypertension, when he awoke on the 29th August, 2011 he felt dizzy and in his own words it was “as though he wanted to black out” because of the stressful situation. Shortly after 9:00 pm on the 29th August, 2011, the claimant was taken to the Police Headquarters in Port of Spain and placed in a cell with about five or six other persons. He testified that the

¹¹See *Thaddeus Clement v the Attorney General of Trinidad and Tobago* Civ. App. 95 of 2010 at paragraph 12, per Jamadar JA.

¹² CA No 159 of 1992.

cell was very dirty and smelled like faeces. He further testified that he had to sleep on the concrete floor.

104. On the 2nd September, 2011 the claimant was taken to the Arouca Remand Yard and placed in a cell with three other persons. He was kept incarcerated in the Remand Yard until the 12th October, 2011. He was therefore detained for forty-five days. The claimant went into great detail (as set out above in his evidence) about his experiences at the Remand Yard. The claimant testified that as a result of his arrest, he was humiliated, embarrassed, suffered considerable distress, inconvenience, loss and damage.

105. The claimant submitted that the sum of \$350,000.00 (plus interest) is an appropriate figure to be awarded for general and aggravated damages. In arriving at that figure, the claimant relied on the following cases;

- i. **Kevin Stuart** supra - The respondent spent a total of approximately thirty-three hours in custody before he was charged and taken before the magistrate. He was awakened and taken from his home at twelve midnight on the 27th August, 2011 by policemen who banged on his door and entered his home with guns pointed at him. He was placed in a cell with a clogged toilet which emitted a stench. He had to sleep on the hard cell floor. The High Court Judge awarded the respondent the sum of three hundred thousand dollars (\$300,000.00) general damages for wrongful arrest and malicious prosecution, fifty thousand dollars (\$50,000.00) exemplary damages and eighteen hundred dollars (\$1,800.00) special damages. The Court of Appeal upheld the High Court's decision in relation to the wrongful arrest but held that there was no malicious prosecution. The Court of Appeal therefore reduced the general damages from \$300,000.00 to \$50,000.00 since the malicious prosecution claim was disallowed.
- ii. **Kedar Maharaj v Attorney General**¹³, Boodoosingh J – This was a claim for false imprisonment arising out of the claimant's detention in a mental institution for

¹³ CV2009-01832

twenty-nine days. The claimant was awarded the sum of \$280,000.00 in general damages and \$50,000.00 in exemplary damages.

- iii. **Seemungal v Attorney General of Trinidad and Tobago and Another¹⁴**, Boodoosingh J - an award of \$100,000.00, inclusive of aggravated damages, was made for false imprisonment of 12 days. An award of \$60,000.00 was also made for exemplary damages.
- iv. **Brahim Rampersad v Attorney General of Trinidad and Tobago¹⁵**, Master Paray-Durity- The claimant was detained for two weeks. Master Paray-Durity awarded \$190,000.00 as general damages inclusive of aggravated damages and \$30,000.00 as exemplary damages for wrongful arrest, false imprisonment and malicious prosecution.
- v. **Jennelyn Guerra v The Attorney General of Trinidad and Tobago¹⁶**, Dean-Armorer J – the applicant was detained for a period of seven days. She was awarded \$110,000.00 for the infringement of her right to liberty.
- vi. **Adesh Maharaj v Attorney General¹⁷**, Pemberton J – the applicant was awarded \$20,000.00 for loss of his liberty for two hours and fifty minutes.
- vii. **Clement v The Attorney General of Trinidad and Tobago¹⁸**, Gobin J – the claimant was detained for seventeen hours and he was awarded the sum of \$50,000.00 for wrongful arrest and false imprisonment.
- viii. **Alphie Subiah v The Attorney General of Trinidad and Tobago¹⁹**- The Privy Council reinstated the Master’s award of \$80,000.00 in compensatory damages where the claimant had been unlawfully detained for a period of over seven hours. The Board at paragraph 13 stated as follows;

“The Court of Appeal unanimously concluded that on a purely compensatory basis the appellant was entitled to \$45,000.00. The Board is inclined to wonder, given the passage of time and changes in value of money since some of the earlier precedents relied on, whether the level of compensatory damages may call for

¹⁴ CV2009- 00894

¹⁵ HCA S-1578 of 2002

¹⁶ HCA No. 1717/01

¹⁷ S-788 of 1990

¹⁸ HC2218/2008

¹⁹ PC No. 39 of 2007

upwards revision by the Courts of Trinidad and Tobago. But the Board has always deferred to the superior knowledge and experience of the local courts in assessing the level of damages...”

106. The claimant submitted that the court should note that the offence with which he was charged was a serious and grave offence, that he was not entitled to any bail and that if he was found guilty he would have been liable for twenty-five years imprisonment. The claimant further submitted that the humiliating and degrading circumstances of his arrest included the following;

- i. He was handcuffed and taken into a police vehicle in the full presence of his neighbours and customers in his bar;
- ii. The excessive force used by the officers in arresting and searching his property (twenty officers in about five police vehicles all pointing guns);
- iii. The contemplation of the officers at the time of apprehending him and laying the charges in light of not finding anything illegal during the search;
- iv. The oppressive and unlawful behaviour of the officers in failing to 1) provide the claimant with full details and particulars of the charge against him, 2) inform him of his rights to seek advice from an attorney and 3) caution him on arrest.
- v. The heartache of his common law relationship of over six years ending during his detention;
- vi. The anxiety over the plight of the claimant’s businesses, family and unpaid bills occasioned by the prosecution;
- vii. The conditions of the prison;
- viii. The conduct of the proceedings by the defendant in defending the proceedings up to trial of this matter on all issues; and
- ix. The fact that he has been shunned by family and friends and his reputation has been irreparably harmed.

107. The defendant submitted that the court should consider the following two cases in determining a just figure for general damages;

- i. **Onnell Dyer v The Attorney General of Trinidad and Tobago**²⁰, **Kokaram J** - the claimant who was detained for a period of thirty-four days (after being charged with the offence of being a member of a gang) was awarded \$40,000.00 in general damages for malicious prosecution. In this case, His Lordship stated that the claimant's evidence in relation to damages was meagre.
- ii. **Glen Baptiste v The Attorney General of Trinidad and Tobago**²¹(cited in Onnell Dyer supra) wherein the claimant there was detained for 42 days and awarded the sum of \$45,000.00.

108. According to the defendant, the facts of this case can be distinguished from cases where higher awards were awarded for longer periods of incarceration and where malice was overt like in **Ted Alexis v The Attorney General HCA No. S 1555 of 2000** where cocaine was planted on a plaintiff and he was imprisoned for two and a half months and was awarded \$100,000.00 for unlawful arrest, false imprisonment and malicious prosecution, inclusive of aggravated damages and \$25,000.00 as exemplary damages to mark the court's disapproval of the officer's conduct.

109. In respect to the claimant's evidence of loss of damage to feelings or reputation, the defendant submitted that most of the said evidence such as the reduced patronage of his bar remained uncorroborated by documentary evidence or any independent witness. The defendant further submitted that since the claimant was previously charged with a drug offence and pled guilty to same, the injury to his reputation will be significantly less than a person with an unblemished record.

110. In determining a reasonable figure for general damages, the court also considered the followings cases;

- i. **Keon Ouow v The Attorney General of Trinidad and Tobago**²², Donaldson-Honeywell J - the claimant who was detained for a period of thirty-five days (after

²⁰ CV2015-03207

²¹ No. 1842 of 1997

²² CV2015-02893

being charged with the offence of being a member of a gang) was awarded \$200,000.00 in general damages for wrongful arrest, false imprisonment and malicious prosecution.

- ii. **Marvin Pascall and another v The Attorney General of Trinidad and Tobago**,²³ Kokaram J - the claimants who were detained for a period of twenty-five days (after being charged with the offence of being members of a gang) was awarded \$70,000.00 in general damages inclusive of aggravated damages.

111. Having regard to the evidence before the court, the awards in similar cases and the fact that there was no claim for damages for false imprisonment, the court finds that a just award for general damages which sum includes an uplift for aggravation is the sum of \$250,000.00.

Exemplary damages

112. Exemplary damages are awarded in cases of serious abuse of authority. The function of exemplary damages is not to compensate but to punish and deter. The case of **Rookes v Barnard (1964) AC 1129** established that exemplary damages can be awarded in three types of cases namely;

- i. Cases of oppressive, arbitrary or unconstitutional action by servants of the Government;
- ii. Cases where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff; and
- iii. Cases in which exemplary damages are expressly authorized.

113. The court agrees with the submissions of the claimant that this is a suitable case for an award of exemplary damages. The actions of Corporal McDonald in arresting the claimant without reasonable and probable cause, continuing the proceedings until the 12th October, 2011 even though he knew he did not have sufficient evidence to proceed and subjecting the claimant to unsanitary prison conditions and deprivation of his liberty were arbitrary, oppressive and unconstitutional. In fact it was odious. The arbitrary exercise of

²³ CV2015-03142

power by the state in this case was overwhelming and the court should send a strong message it should not and will not be tolerated in a free and democratic society with respect for the rule of law.

114. The claimant submitted that the sum of \$60,000.00 in exemplary damages ought to be awarded. In so submitting, the claimant relied on the following cases;

- i. **Ghanny v PC Ramadhi**²⁴ wherein Rajkumar J made an exemplary award of \$60,000.00 for assault, false imprisonment and malicious prosecution.
- ii. **Morris Kenny v The Attorney General of Trinidad and Tobago**²⁵ wherein Tam J awarded the sum of \$60,000.00 in exemplary damages.
- iii. **Stephen Seemungal** supra wherein Boodoosingh J awarded exemplary damages for unlawful detention on an invalid warrant of twelve days,

115. The court also considered the cases of **Keon Ouow** supra and **Marvin Pascall** supra wherein exemplary damages in the sum of \$30,000.00 and \$20,000.00 respectively were awarded. The court finds that in the circumstances of this case an award of \$50,000.00 in exemplary damages is reasonable.

Special Damages

116. Special damages must be specifically pleaded and proven: **Grant v Motilal Moonan Ltd**²⁶ per Bernard CJ and reaffirmed in **Rampersad v Willies Ice Cream Ltd.**²⁷

117. The claimant testified that he paid the sum of \$15,000.00 in legal fees during the period of the 1st September, 2011 to the 12th October, 2011. The claimant was however unable to find the receipts for those legal fees. The claimant also testified that as he was unable to open his businesses during the time he was detained, he suffered loss of profits in the sum \$350,000.00.

²⁴ CV 2015-01921

²⁵ HCA T-62 of 1997

²⁶ (1988) 43 WIR 372

²⁷ Civ App 20 of 2002

118. In *The Great Northern Insurance Company Limited v Johnson Ansola*²⁸, Mendonca JA stated as follows at paragraph 97;

“...it seems clear that the absence of evidence to support a plaintiff’s viva voce evidence of special damage is not necessarily conclusive against him. While the absence of supporting evidence is a factor to be considered by the trial Judge, he can support the plaintiff’s claim on the basis of viva voce evidence only. This is particularly so where the evidence is unchallenged and which, but for supporting evidence, the Judge was prepared to accept. Indeed in such cases, the Court should be slow to reject the unchallenged evidence simply and only on the basis of the absence of supporting evidence. There should be some other cogent reason.”

119. The court agrees with the submission of the claimant that there would be no doubt that he would have incurred legal fees to retain Attorneys at law to represent him at the criminal proceedings. However, the claimant knowing that he had misplaced the receipts could have obtained a letter from his Attorneys at law who represented him in order to prove that the sums were paid and the court so finds. In those circumstances the court will allow a reasonable sum for fees in the sum of \$10,000.00.

120. Further, the claimant has not provided any documentary evidence to prove the expenses, sales and therefore the profits of his businesses. The court would therefore be engaging in speculation if it granted the claimant’s claim for loss of profits. As such, the court finds that the claimant’s claim for special damages in that regard was not made out.

Interest

121. The Court of Appeal in the case of the *Attorney General v Fitzroy Brown and others*²⁹ set out that the pre-judgment interest rate on general damages should be aligned with the short term rate or the rate of return on short term investments of which there is

²⁸ Civil Appeal No: 121 of 2008

²⁹ CA 251/2012

some evidence before the court. Further, the Court of Appeal in that case reduced the rate of pre-judgment interest rate on general damages from 9% to 2.5%. There being no evidence of the rate of return on short term investments before the court, the court will award 2.5% interest on general damages.

Dated the 15th May, 2018

Ricky Rahim

Judge