REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cv.A.No.52/2001

IN THE MATTER OF THE CONSTITUTION OF TRINIDAD AND TOBAGO

AND

IN THE MATTER OF THE GUARANTEES OF FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS PART 1 OF THE SAID CONSTITUTION

AND

IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS PURSUANT TO SECTION 14 OF THE CONSTITUTION AND ORDER 55 OF THE RULES OF THE SUPREME COURT

BETWEEN

SIEWCHAND RAMANOOP **APPELLANT**

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO
RESPONDENT

CORAM:

Sharma, C.J.
Warner, J.A.
Kangaloo, J.A.

APPEARANCES:

Dr. F. Ramsahoye, S.C., Mr. A. Ramlogan, Mr. K. Neebar
appeared on behalf of the Appellant

Mr. B. Busby, Ms. J. Baptiste
appeared on behalf of the Respondent

DATE DELIVERED: 21st March, 2003

JUDGMENT

Delivered by S. Sharma, C.J.

There are two questions raised on this appeal. The first is one of great constitutional importance and it is whether the court in an appropriate case can grant an aggrieved applicant exemplary damages under the Constitution of Trinidad and Tobago (the Constitution). The answer to this has not been authoritatively settled in this jurisdiction and indeed some doubt is now cast upon its relevance and usefulness in the common law jurisdictions. There are seriously conflicting views, as this appeal has demonstrated.

The second question, no less important is one which impacts on the cost of litigation and which in recent times has reached a stage where it is now perceived as being positively prohibitive. The question is in what circumstances should a court make an award for costs fit for Senior and Junior Counsel at the conclusion of a trial.

THE UNDISPUTED FACTS

> Siewchand Ramanoop (the appellant) swore that "on the night of 10th November, 2000 he had an altercation with "a thin, tall, dark man of East Indian descent" outside a pub which he had patronized.
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> Later that night around 10.45 p.m. a car stopped at his home and he heard someone calling out his name. Upon opening his door he was confronted by two men, one of them a uniformed police officer whom he identified as P.C. Rahim, the other was the same man with whom he had the altercation.
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> The Appellant stated that "before he could say anything" P.C. Rahim slapped him across his face and neck. P.C. Rahim then handcuffed him and slapped and cuffed him for "about 5-10 minutes" shouting that:
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> > "You want tuh (expletive deleted) interfere with police. Take dat. I will manners yuh. Doh ever interfere with police."

At this time he was standing outside his home clothed only in his underwear. He was shoved back inside his house where P.C. Rahim continued to beat him for a further 2-3 minutes. P.C. Rahim instructed him to "take a shirt and pants" because "he was going to lock me up". He was put into the back seat of a motor vehicle, still handcuffed and wearing only underwear, P.C. Rahim having refused to allow him to get properly dressed. Rahim sat next to him while the "Indian man" drove to the Gasparillo Police Station. During the journey he was constantly slapped and cuffed by Rahim who stated that he would teach him a "lesson for interfering with police."

On arrival at the station, his head was rammed against a wall of the police station by P.C. Rahim resulting in a gushing wound. Rahim then poured rum over his head causing his wound to burn.

The appellant was later allowed to put his clothes on and was handcuffed by Rahim to an iron bar attached to a wall of the police station. He was interviewed by Rahim who asked him to initial a written document. The appellant refused and was slapped about the head by Rahim who told him:

> "If you doh sign dis yuh cyah (expletive deleted) leave this station here tonight."

The appellant said he signed the document because he was losing blood, felt weak and dizzy and was frightened of what Rahim might do to him if he did not . P.C. Rahim later apologized, saying that his wife was pregnant and he was "under some pressure". The appellant was then taken home by the "Indian man". The appellant deposed that at no time during his detention was he informed of his right to retain or instruct an attorney or to hold communication with him.

He filed a constitutional motion seeking certain relief against the State. The facts were not contested by the State. On the day of hearing, the State conceded that the appellant's rights had been breached and the following declarations were granted:

(1) A declaration that the appellant's arrest and imprisonment from midnight on 10th November 2002 to 2.00 a.m. on 11th November 2000 were unconstitutional and a breach of the Appellant's rights under section 4(a).

(2) A declaration that the assault of the appellant by police during his arrest and period of imprisonment was a

> breach of the appellant's right to security of the person under section 4(a).
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> Two further declarations relative to the failure of the police to inform the appellant of his right to retain and instruct a legal advisor of his choice and to hold communication with him and to the failure of the police to permit him to communicate with a friend or relative by way of a telephone call while under arrest; as being breaches of section 4(b) of the Constitution were granted.

The judge in a very insightful judgment refused to make an award for exemplary damages for several reasons.

First, he declared himself to be bound by ***Attorney General of St. Christopher, Nevis and Anguilla v Reynolds*** 1980 AC 637, a decision of the Privy Council, which appeared to him to have decided that exemplary damages could not be awarded for constitutional breaches.

Secondly, that exemplary damages were inappropriate to actions brought under section 14 of the Constitution.

And finally, the decision in ***Rookes v Barnard*** 1964 AC 1129 was "founded on precedent, some decided more than two hundred years ago, at a time when there existed no clear remedy against high handed State action. (See the speech of Lord Devlin at pp. 1222-1223)"

Turning to the judge's first reason for not awarding exemplary damages in this case, he felt himself bound by ***Reynolds*** (supra). In my respectful opinion the learned judge fell into error when he so decided.

Section 3(6) of the Constitution of St. Christopher had expressly provided for "compensation" to be payable in respect of "unlawful" detention in the chapter dealing with fundamental rights and freedoms. It reads as follows:

> "3. (6) Any person who is unlawfully arrested or detained by any other person shall be entitled to <u>compensation</u> therefor from that other person or from any other person or authority on whose behalf that other person was acting."

However, section 14 of the Constitution states:

> "(1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.
>
> (2) The High Court shall have original jurisdiction (a) to hear and determine any application made by any person in pursuance of subsection (I); and (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (4), and may, subject to subsection (3), make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this chapter to the protection of which the person concerned is entitled…" (my emphasis).

The judge quite rightly, in my view, used ***Maharaj v Attorney General of Trinidad and Tobago*** No.2 1979 AC 385, as his starting point in his effort to resolve the issue. In that case the Privy Council held that damages for deprivation of liberty should include compensation for loss of earnings consequent upon the imprisonment as well as the inconvenience and distress suffered by the individual.

The Board found it unnecessary to express a view on the applicability of the award of exemplary damages because no such claim was made. The question is therefore still open for determination.

The judge however, relied very heavily on the dicta of Lord Diplock, though not extensively quoted, clearly had the following passages in mind:

> "What then was the nature of the "redress" to which the appellant was entitled? Not being a term of legal art it must be understood as bearing its ordinary meaning, which in the Shorter Oxford English Dictionary, 3rd ed. 1944 is given as: "Reparation of, satisfaction or compensation for, a wrong sustained or the loss resulting from this." [398F].

Lord Diplock found that monetary compensation could be awarded for the breach of a constitutional right [page 399A-B]. As to the measure of monetary compensation that could be awarded Lord Diplock stated as follows:

> "Finally, their Lordships would say something about the measure of monetary compensation recoverable under section 6 where the contravention of the claimant's constitutional rights consists of deprivation of liberty otherwise than by due process of law. The claim is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration. Counsel for the appellant has stated that he does not intend to claim what in a case of tort would be called exemplary or punitive damages. This makes it unnecessary to express any view as to whether money compensation by way of redress under section 6(1) can ever include an exemplary or punitive award."

The judge also relied on ***Reynolds*** to fortify his decision not to award exemplary damages. In that case the appellant had brought both a common law action for false imprisonment and a constitutional action under section 3(6) of the Constitution in respect of his unlawful detention. The Court of Appeal of West Indies Associated States Supreme Court granted increased damages from the original decision of the High Court, including a small sum as exemplary damages on the claim for false imprisonment. Before the Judicial Committee it was argued on behalf of the Attorney General that the damages recoverable under the then Constitution of St. Christopher Nevis and Anguilla were compensatory and not punitive and could not include any award for exemplary damages. Lord Salmon who delivered the judgment of the Judicial Committee said at pg. 662E:

> "The Attorney General relied on the last few words of the judgment which revealed that the sum awarded included 'a small sum as exemplary damages'. His argument was that no

> exemplary damages should have been awarded because compensation alone could be claimed under section 3(6) of the Constitution. This, no doubt, would be true but for section 16(1) of the Constitution, which makes it plain that anyone seeking redress under the Constitution may do so 'without prejudice to any other action with respect to the same matter which is lawfully available'; and in the present case, the plaintiff claimed (1) damages for false imprisonment, and (2) compensation pursuant to the provisions of section 3(6) of the Constitution."

The Board upheld the decision of the Court of Appeal to award exemplary damages in the claim for false imprisonment. It is to be noted however, that section 3(6) of the Constitution of St. Christopher, Nevis and Anguilla gave a right of compensation to any person unlawfully deprived of his liberty.

It appears to me that, what may have persuaded the judge was that "compensation" under section 3(6) to be awarded for unlawful deprivation of liberty bore the same meaning as "redress" as ascribed to it by Lord Diplock in ***Maharaj*** (supra) and consequently excluded any claim for exemplary damages.

The obiter dicta of de la Bastide, C.J. in ***Jorsingh v The Attorney General*** 1997 52 WIR 501 at pp.505-506 noted the difference in terminology and merits quotation:

> "If that is to be regarded as part of the ratio decidendi, then I would respectfully express the hope that the Privy Council may be persuaded to re-examine this issue when it is raised again before them as inevitably it will be. The power to award damages in constitutional cases is part of the jurisdiction conferred on the High Court by section 14(2) of the Constitution…The discretion given to the court by this provision is a very wide one indeed. It empowers the court to make any order, without limitation, which the court considers appropriate for the purpose of enforcing the rights enshrined in the Constitution. Given the breadth of this power, it is not readily apparent to me why, in making an order for payment of damages as a consequence of a breach of a constitutional right, the court should be either (a) limited to providing compensation for the injured party, or (b) bound necessarily by the rules

> which govern the assessment of damages (including exemplary damages) at common low."

At pg. 506 he continued that section 14(2):

> "…has the effect of releasing the court from the constraints of common law rules governing the award of damages, more so as our section 14(2)… makes no express mention of the 'payment of compensation'."

In my respectful opinion, here the judge fell into error. Section 3(6) of the St. Christopher Constitution, was limited to an award for compensation. It certainly does not have the breadth of section 14(2) of the Constitution.

Turning to the judge's second reason for not awarding exemplary damages in this case, he said:

> "Retribution, deterrence or punishment is foreign to constitutional relief and is at best a matter to be addressed by the criminal process or by any disciplinary process initiated against the offending state functionary, which may flow from the findings of the court. Lord Scott's dictum in ***Kuddus*** at pg. 218 is especially apt. He said:
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> > "…the function of an award of damages in our civil justice system is to compensate the claimant for a wrong done to him. The wrong may consist of a breach of contract, or a tort, or an interference with some right of the claimant under public law. But whatever the wrong may consist of the award of damages should be compensatory in its intent."
>
> In my judgment the provisions of section 14 do not accommodate the awarding of exemplary damages because it is a doctrine entirely inconsistent with their purport."

A similar approach appears to have been taken in the Indian case of ***Basu v The State of West Bengal*** 1977 2LRC1 at p.25 letter I where Anand J stated:

> "In the assessment of compensation the emphasis has to be on the compensatory and not on the punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate

> punishment for the offence (irrespective of compensation) must be left to the criminal courts in which the offender is prosecuted, which the state, in law, is duty bound to do."

In the South African case of ***Fose v Minister of Safety and Security*** 1998 1 LRC 198 the judges advanced a different reason for its reluctance in making an award for exemplary damages.

Section 7(4)(a) of the South African Constitution provides:

> "When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights."

The breach involved in the ***Fose*** matter was a breach of the right not to be tortured and not to be subject to cruel, inhumane or degrading treatment. Ackermann J held at page 236c that there is no place for punitive constitutional damages. At page 240f Didcott J expressed the view that in no matter at all did section 7(4)(a) authorise awards of punitive or exemplary damages. Kriegler J however at page 242c-d thought that exemplary damages should be rejected as a remedy in that case but was not prepared to go as far as Didcott J in rejecting for all time the possibility that a case may arise where punitive or exemplary damages are 'appropriate' redress for infringement of constitutionally protected rights. At page 236g to 237e Ackermann J expressed his concerns against the award of examplary damages as follows:

> "Nothing has produced or referred to which leads me to conclude that the idea that punitive damages against the government will serve as a significant deterrent against individual or systemic repetition of the infringement in question is anything but illusion. ..To make nominal punitive awards will, if anything, trivialise the right involved.
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> In a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial economic implications and where there are 'multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform' it seems to me to be

> inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are already fully compensated for the injuries done to them with no real assurance that such payment will have any deterrent or preventative effect. It would seem that funds of this nature could be better employed in structural and systemic ways to eliminate or substantially reduce the causes of infringement."

The third reason of the judge for rejecting an award for exemplary damages was "it was founded on precedent, some decided more than two hundred years ago at a time when there existed no clear remedy against high-handed State action" (my emphasis). Since the second and third reasons relied on by the judge are connected I shall deal with them together.

The reasoning of the judge in my respectful view is hard to follow. The judgments of all the Law Lords in ***Kuddus*** (supra) with the exception of Lord Scott have recognised and acknowledged that an award for exemplary damages is now firmly entrenched as part of the Common Law.

In this case it was held on an interlocutory appeal the court's power to award exemplary damages was not to be limited to cases where it could be shown that the cause of action had been recognised before 1964 as justifying such an award.

The majority of the Law Lords in this case either accepted the legitimacy of exemplary damages (Lord Slynn of Hadley, Lord Nicholls of Birkenhead) or were prepared to assume it, referring to significant arguments in support of exemplary damages (Lord Mackay of Clashfern, Lord Hutton). It was only Lord Scott of Foscote who would have been "receptive to a submission that exemplary damages awards should no longer be available in civil proceedings". Although the point was not raised in ***Kuddus***, for Lord Scott an objection might have been that exemplary damages, with punitive effect, operate to punish a defendant.

Kuddus has therefore both secured the place of exemplary damages in English law and, in abolishing the cause of action limitation, brought English

law in line with that in Canada (***Vorvis v. Insurance Corporation of British Columbia*** [1989] 1 S.C.R. 1085), New Zealand (***Green v. Matheson*** [1989] 3 N.Z.L.R. 564; ***Willis v. AG*** [1989] 3 N.Z.L.R. 574) and Australia (***Gray v. Motor Accident Commission*** (1998) 196 C.L.R.1).

It is not necessary for the purposes of this judgment to go into the facts and circumstances of the various Commonwealth cases cited above. It is sufficient to say that they all made it clear in one way or another, that exemplary damages, as a head of general damages were alive, and that they were prepared to make awards in cases other than tort, for instance breach of contract (see ***Royal Bank of Canada v. W. Got & Associates Electric Ltd*** (2000) 178 D.L.R. (4th) 385 ("***Got"***). It is equally true to say however, that exemplary damages are not without their critics who have asserted that they are anachronistic and anomalous. See Generally Street Principles of the Law of Damages 1962 pp.3334.

The notion that somehow exemplary damages is on its way to obsolescence, is not one with which I am prepared to accept in view of the Commonwealth authorities and the judgments of the several law lords in ***Kuddus***.

In point of fact, it is perhaps, more imperative and relevant now than ever, where the Executive seeks to acquire and to exercise wide powers, which are sometimes carried out by high handed officials who act in its name.

These powers must be realistically checked. It is the judiciary's function to do so, it must take the necessary measures to use effective and appropriate remedies at its disposal.

Judicial review is a good example of this; another may be the kind of relief, which the court will fashion, if there is no known existing remedy, for example in Constitutional Law.

JURISDICTION TO AWARD EXEMPLARY DAMAGES

Before dealing with the issue of whether exemplary damages can be awarded under the Constitution, I wish to repeat by way of introduction what I said obiter in ***Ramnarine Jorsingh v Attorney General*** 1997 52 WIR 501 at pg.512 letter f.

> "The breadth of the language of subsection (2) is clear. The court is mandated to do whatever it thinks appropriate for the purpose of enforcing or securing the enforcement of any of the provisions dealing with the fundamental rights. There is no limitation on what the court can do. Any limitation of its powers can only derive from the Constitution itself. Not only can the court enlarge old remedies; it can invent new ones as well, if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the court itself, instead of being the protector, defender and guarantor of the constitutional rights would be guilty of the most serious betrayal."

By way of amplification, I should like to add that there is nothing in section 14 of the Constitution which limits remedies only to those known to law or equity, and nothing which limits the availability of existing remedies only to those circumstances in which they would currently be available.

There is a need for a remedy under section 14 of the Constitution, in addition to or instead of Common Law remedies to vindicate Constitutional rights. It cannot be that the Constitutional Courts' role is limited to an award for compensation and declarations. This approach would merely reflect the Common Law position.

The role of the court in a Constitutional motion is fundamentally different from its role in conventional (civil) litigation. This has been reflected in the development of the Constitutional jurisprudence, thus far on the generous approach to be taken in interpreting the fundamental rights and freedoms and it would be something of a jurisprudential anomaly, if the orders of the court should simply follow the Common Law. The greatest irony in all of this is that the Common Law itself is undergoing drastic changes and the

willingness of the courts in the old Commonwealth not to follow strictly the boundaries laid down in ***Rookes v. Barnard***, see for instance ***Got*** (supra).

When therefore the question of exemplary damages was tangentially raised in ***Ramnarine Jorsingh v Attorney General*** 52 WIR 501 I said:

> "Before dealing with the present appeal, I think that it would be useful to mention two cases which can undisputedly be regarded as landmark decisions on the law of damages, particularly exemplary damages: ***Rookes v Barnard*** [1964] 1 All ER 367 and ***Cassell & Co. Ltd. v Broome*** [1972] 1 All ER 801. In both these cases, the question of the common-law remedy of exemplary damages (used synonymously with the term "punitive damages" by many) was discussed at length by some of the most eminent jurists of this century.
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> In ***Rookes'*** case it was held that English law recognised the awarding of exemplary damages, that is damages the object of which was to punish or deter and which were distinct from aggravated damages; that there were two categories of cases where an award of exemplary damages could serve a useful purpose, one of which was in the case of oppressive, arbitrary or unconstitutional action by the servants of the government.
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> In Cassell's case, Lord Hailsham of St. Marylebone LC, Lord Reid, Lord Diplock and Lord Kilbrandon, endorsed the "unconstitutional" category in ***Rookes***, and added that servants of the Government should not be limited to servants of the Government in the strict sense of the word, but extended to others such as local government officials or the police, who may be described as exercising governmental functions.
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> It is interesting to note here that, only a few years later the House of Lords, rather than being restrictive, was clearly in a more expansive mood. From the common-law jurisdiction, I now wish to turn to the Constitution."

The undisputed facts in this case show that the police officer's behaviour was reprehensible and despicable. He showed a callous and shameful disregard for the fundamental rights of the appellant and stripped him of his human dignity. His duty was to protect and serve. Yet he did the exact opposite.

Had the appellant brought an action in tort, there is little doubt that he would have succeeded in a claim for exemplary damages.

The Constitution is an amalgam of the common law, equity, statutes and convention. When the Constitution came into existence it was already part of the law of the land that in circumstances, such as these, the appellant could have successfully brought an action in tort for exemplary damages.

By section 4 of the Constitutions these rights were converted into Constitutional rights, which were entrenched in the Constitution and became fundamental rights and freedoms. These rights were to be safeguarded and their importance was clearly recognised by section 5((1) which says:

> "Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared.

By what legal magic therefore is he to be deprived of this remedy? His action was not one, which he could legitimately have pursued at Common Law, since he sought and obtained declarations to vindicate his Constitutional rights, to which he was clearly entitled. Should he have brought separately a Constitutional motion and a claim in private law for damages and then have them consolidated? This in my view would be regarded as procedural abuse. It will increase costs and certainly does nothing to enhance the administration of justice.

In view of all that I have said, I am of the respectful view, the Constitutional court does have a jurisdiction to award exemplary damages. If it is to be awarded it will fall within the first situation described by Lord Devlin as oppressive, arbitrary or unconstitutional acts by servants of the government.

EXEMPLARY DAMAGES – SHOULD IT BE AWARDED IN THIS CASE?

It is true that exemplary damages as an award is anomalous, for it goes beyond compensation of injury and vindication of rights. The arguments against any award of this nature is based on several grounds, firstly they exact punishment without the protection which the Criminal Law affords. Secondly, they can lead to multiple sanctions, then there is the argument the aggrieved litigant will receive a windfall. Thirdly that they should not be awarded when the actual wrongdoer is not before the court and finally the damages are difficult to assess.

On the other hand, they may provide incentive for persons wronged by action of officials to take private action to enforce the Constitution then and in this way may be effective in deterring as well as punishing official misconduct.

The question of double punishment, which is one of the main objections against an award of exemplary damages, simply does not arise in this case.

The Executive (police officer) will bear the burden of having to pay the sum awarded. The policeman will not. He may be subjected to an internal enquiry and/or face criminal charges. There is strictly speaking no double punishment here. In fact at the conclusion of the hearing of this appeal, we were told by Counsel that the policeman was not on any disciplinary charges, nor was he criminally charged although this incident took place in November 2000. The doctrine of Sovereign Immunity does not apply in this jurisdiction.

The State itself will be deterred in two ways. First in my view, it will be more astute and alive to a more meticulous and rigorous selection procedure for police officers. Secondly, the payment out of such exemplary damages from the public purse, if persistent, will inevitably attract the attention of opposing politician, the press, pressure groups and the taxpayer himself. This should lead in the long run to a system which is more efficient and accountable for ultimately what could be at stake is the loss of office. The argument that such exemplary damages come out of the public purse and therefore is a

means of allocating scarce public funds by the judiciary without the sanction of the legislature with respect, misses the mark as it does not foresee the longer term benefit set out herein which will accrue to the society as a whole.

But, the question of deterrence and punishment can be more direct and effective and I can see nothing morally reprehensible nor jurisprudentially objectionable, if the State were to pursue a claim for recovery against the offending Police Officer for the sum it has to pay by way of exemplary damages.

The argument that the wrongdoer is not before the Court is not one which is available in the instant case. Here there is no question of vicarious liability on the part of the State. The wrongdoer on this occasion is the Executive arm of the State in the person of the police officer. It must be remembered that the wrongs which have been done by the State, in the person of P.C. Rahim, are infringements of the appellant's constitutional rights. It is very doubtful whether P.C. Rahim is an individual against whom constitutional redress is available under the constitution. Consequently I am firmly of the view that no question of vicarious liability arises under the constitution in the circumstances of this case, so that the wrongdoer is indeed the party before the Court.

Then there is the question that such a sum would be regarded as a windfall. I do not think there is much substance in this point. I view these damages as the price which has to be paid by the State for its failure in the first place to ensure, that men and women who are recruited into the police service are of the highest moral and ethical values. This is not to deny that there still will not be cases of the kind exemplified by the policeman in this case, but at least the incidents would be reduced.

CONSTITUTIONAL BREACHES – VINDICATORY DAMAGES

If the Court is powerless to award exemplary damages in the instant case, is the appellant to be confined only to compensatory damages? Should the court not be able to make an award, which would reflect the manner and circumstances of the particular breach? All breaches clearly will not be the same.

The importation of exemplary damages as a head of damages may have obfuscated the correct jurisprudential approach to the question of damages in Constitutional Law. I say this because on the assumption that exemplary damages were unknown to the common law, would a Constitutional Court, be unable to invent a remedy by making an award for damages, if as in the present case, it wished to denounce and mark its disapproval for the executive's contumelious and shameful breach of a citizen's constitutional rights. To put in another way, is the Constitutional Court merely to duplicate the remedies known to the Common Law? If that were the case then there would be no justification for the exclusion of exemplary damages. I do not find these excogitative arguments convincing and I think in the mindset of the Constitutional judge, he should try and distance himself as far as possible from the Common Law remedies and think in Constitutional terms as to what remedies are the courts going to fashion for breach of a Constitutional right.

The principles on which damages are assessed at Common Law are fully developed. There is however, a great danger in my respectful opinion, of destroying, if not diminishing the true value of the Constitution if the court cannot expand and or develop appropriate remedies.

It may be helpful to use the Common Law as a starting point but it should in my view be just that. A new jurisprudence has to be developed. In the Common Law, the objective is always compensation. In Constitutional Law, the question of compensation undoubtedly arises but it must not only be so narrowly confined. There ought to be some award for the violation of the right itself. Clearly, the court will not award the same sum for every violation. It will be done on a case by case basis. A lot will depend on the

circumstances in each case. However, it may be that in all cases, at the very minimum the court will grant a declaration together with a nominal conventional sum for the breach. If the aggrieved applicant has suffered loss or damage compensatory damages should be added and an award for "vindicatory" damages, if the facts or circumstances of the case warrants it. The court will therefore be relieved from the application of all common law principles. The assessment of damages would be at large so to speak although there is no doubt that consideration will be given to the importance and need for the punitive and deterrent elements in making the award

This approach is not likely to be conducive to the "flood-gate" argument, as the remedy of the court (unless there was loss or damage suffered) to which an aggrieved party would be entitled is a declaration and a nominal conventional sum for the breach simpliciter. This would certainly act as a disincentive to any person who may be tempted to approach the court.

There is something solemn and sacred about the Constitution. It represents the hope and aspirations of the nation. There are strong spiritual and moral underpinnings on which it is founded. In it the nation affirms its belief in the Supremacy of God, acknowledges the dignity of the human being, and the State faithfully pledges to secure and protect the fundamental rights and freedoms of its citizens. These are some of the noble ideals, which illustrate the great divide between private law on the one hand and the Constitution on the other.

A police officer representing the State has a far greater capacity for harm and abuse than an individual trespasser exercising no authority other than his own.

> "A private citizen, asserting no authority other than his own, will not normally be liable in trespass if he demands, and is granted, admission to another's house. See W. Prosser, The Law of Torts 18, pp.109-110 (3d ed.1964); 1 F. Harper & F. James, The Law of Torts 1.11 (1956). But one who demands admission under a claim of federal authority stands in a far different position. Cf.

> ***Amos v. United States***, 255 U.S. 313, 317 (1921). The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well. See ***Weeks v. United States***, 232 U.S. 383, 386 (1914); ***Amos v. United States,*** supra. "In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime"

See ***Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*** 403 US 388 1971 p.394-395.

I have extracted this passage from ***Bivens*** (supra) only because it strikingly shows why it is so necessary to treat entry by a policeman on to private property in the name of the law differently from entry by another citizen on to his neighbour's property.

When therefore, instead of fulfilling its promise, the State (Executive) in the most disgraceful and shameful way humiliates its citizen and strips him of his dignity then it is to the Constitution we must turn for redress.

EXEMPLARY DAMAGES IN CONSTITUTIONAL LAW
VINDICATORY DAMAGES

Whether it be an award for exemplary or vindicatory damages by the Constitutional Court one thing is quite clear, it certainly will not be an award which a person would receive in tort, although this could be a realistic starting point.

While I hesitate to do so, having done so twice before, I find it necessary once again to refer to certain obiter dicta expressed in ***Jorsingh*** if only because the circumstances in the instant appeal are precisely what I had in mind at the time. At page 514 in ***Jorsingh*** I said:

> "This tentatively austere approach to damages adumbrated by Lord Diplock and the misgivings and apprehensions of Lord Hailsham were to sit if not uneasily, certainly incompatibly, with the broad and generous approach the Privy Council has consistently taken when it came to the interpretation of fundamental rights under the Constitution. …There was no doubt (and this was universally accepted) that a Constitution was no ordinary Act of Parliament, or document. It was the supreme law of the land and had to be so interpreted.
>
> Yet Lord Diplock and Lord Hailsham to a lesser extent were providing a preview to the important element of remedies in a way which was the antithesis of all that had briefly gone on before and so profusely after. Remedies (of which damages is only one) seemed to be regarded in splendid isolation and ornamentally *sui generis* as if there was no connection between the fundamental rights and the appropriate remedy to be given in any particular case."

In view of the issue raised in this appeal, that is, whether exemplary damages can be awarded in an appropriate case for breach of a Constitutional Right, it is not necessary for this Court to assess those damages. This is really a matter for the Court below.

However, in conducting such an exercise, I am of the view that the Court may wish to start with a basic figure as if the action were brought in private law. This would provide a minimum figure from which to proceed.

Several factors may be considered in assessing the basic figure for example:

(a) The nature of the Constitutional Right breached.

(b) The circumstances surrounding the breach including the gravity and duration.

(c) The frequency with which the particular breach occurs in the society.

(d) A realistic approach between the frequency of the breach and the need to deter others from committing similar breaches.

(e) Any real prospect that the offender will be disciplined or face criminal charges and the consequences.

These factors are not to be regarded as exhaustive. There may be other matters the judge may wish to consider in the assessment of damages whether exemplary or vindicatory for Constitutional breaches.

COSTS

I now turn to the other issue raised on this appeal that is, whether the judge fell into error when he made an award for costs fit for Senior Counsel.

The proceedings in the Court below show that Counsel for the respondent was objecting to an application made by the appellant (though not reflected in the proceedings) for costs fit for both Senior and Junior Counsel.

The arguments put forward by the respondent were that the matter was not one which required Senior Counsel. She pointed out, the facts were not disputed and the law settled.

The judge it would appear was persuaded by the argument and though he did not give any reasons in his judgment for making an order for costs fit for Senior Counsel only, it would be reasonable to infer, he was in partial agreement with Counsel for the State.

The judge not having given any reasons, I must presume that he exercised his discretion properly and it was for the appellant to show that the trial judge had acted on some wrong principle of law, or had either taken into account some fact, which he ought to have considered or omitted to take into account some factor which ought to have been taken.

The fact that this Court, might have exercised its discretion differently is not a good enough reason. I cannot agree with the submissions made in the Court below and repeated in this Court.

The facts were undisputed but it was only after the motion and the affidavit in support were filed. There does not seem to have been any indication that the respondent had indicated it was not contesting the facts.

The appellant, in my view would have been justified in retaining Senior and Junior Counsel, on the basis that the State was going to vigorously resist the facts (it very seldom concedes) since the allegations made were so serious and damaging to the police if established.

Neither is it true to say that the law on the issue of exemplary damages is authoritatively settled . In point of fact, this case itself demonstrates that is not the position, and the matter is still one of great importance in Constitutional Law, and to settle it authoritatively, the Court relies on the industry and forensic skills of advocates who are highly skilled in this area of the law. It is in this way the law develops.

It would appear that the judge did not consider these important matters and was persuaded by Counsel for the State wrongly in my view that the facts were settled and the law settled. See ***The Attorney General of Trinidad and Tobago v Curtis Thomas*** Civil Appeal No.73 of 2000 (unreported).

THE RESULT

I would accordingly allow this appeal and remit the matter to have the exemplary/vindicatory damages assessed by a Judge in Chambers. On the question of costs, I would set aside the order of the Court below and order that the costs be fit for Junior and Senior Counsel. The order in respect of costs is the same in this Court.

S. Sharma
Chief Justice

I have read in draft the judgment of Sharma, C.J. and I agree with it.

W. Kangaloo
Justice of Appeal