REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 146 of 2009

BETWEEN

URIC MERRICK

APPELLANT

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO
AND
JOHN ROUGIER
THE COMMISSIONER OF PRISONS

RESPONDENTS

PANEL: **I. Archie C.J.**
A. Mendonça J.A.
G. Smith J.A.

APPEARANCES:

Gerald Ramdeen and V. Debideen
on behalf of the Appellant

Fyard Hosein S.C., A. Panchu and M. Lutchman
on behalf of the Respondents

DATE OF DELIVERY: 5th February, 2013.

I have read the judgment written by Smith J.A.
I agree with it and have nothing to add.

I. Archie
Chief Justice

I, too, have read the judgment written by Smith J.A.
I also agree with it and have nothing to add.

A. Mendonça
Justice of Appeal

Delivered by G. Smith J.A.

JUDGMENT

1. The Appellant pleaded guilty at the Magistrates' Court to a charge of being in possession of marijuana and was sentenced to a term of imprisonment for six months on the 8th September 2006. The Appellant appealed this sentence on the very 8th September 2006 and was placed in the remand yard of the Golden Grove prison pending the determination of his appeal.

2. Ten months later and upon the advice of his attorneys, the Appellant signed a Notice of Withdrawal of his appeal (the "Notice of Withdrawal") on the 30th July 2007. According to the Appellant's own evidence, the Notice of Withdrawal "was only delivered to the Court on the 6th August 2007".[1] Based on the advice of his attorney, he expected to be released forthwith from the Golden Grove prison.

Alas, this did not happen. The Appellant was informed by the prison authorities that he would now have to start serving the six month term of imprisonment afresh. In pursuance of this he was transferred to the Port-of-Spain prison. At the Port-of-Spain prison he had to endure degrading conditions.

3. On the 23rd August 2007 the Appellant commenced habeas corpus proceedings to secure his release from the Port-of-Spain prison. On the 10th September 2007 the habeas corpus proceedings were determined in his favour and he was released from the prison on the same day.

4. On the 5th November 2007, the Appellant commenced these proceedings for false imprisonment for his detention at the Port-of-Spain prison. These proceedings were not defended and on the 30th September 2008 the Appellant entered a default judgment for his unlawful imprisonment against the State with damages to be assessed.

5. The trial judge who assessed the damages invited written submissions from the Appellant and the Respondents and assessed the damages payable to the Appellant for his false imprisonment as follows:

(1) General damages for 35 days imprisonment at $1,000.00 per day - $35,000.00;
(2) No award for aggravated or exemplary damages;
(3) Special damages of $4,000.00; and
(4) Prescribed costs of $11,250.00.

6. The Appellant now appeals the award of damages, the complaint being that the award is too low.

[1] See paragraph 6 of the Appellant's affidavit filed on the 26th March 2009.

7. In my opinion:

(1) The Appellant has made out his case that the award of general damages is too low. I award him the sum of $200,000.00 as general damages for false imprisonment. This award includes a sum for aggravated damages;

(2) This is not a fit case for an award for exemplary damages; and

(3) The Appellant made no submissions with respect to the award of special damages, and the Respondents did not appeal against the award of special damages. I therefore leave the award of special damages at $4,000.00.

The Court will invite submissions on costs upon the delivery of this judgment.

PRELIMINARY

8. Before I begin the analysis of this appeal I need to mention a peculiar feature of this case.

This appeal produced extensive argument and research. The Appellant's submissions were about ninety five pages long with over seventy five citations. The Respondents' submissions were about thirty seven pages long with over sixty citations. In addition, each party gave an index/summary of local decisions on the quantum of damages which contained a plethora of cases.

9. Both parties submitted that this was a fit case for the Court of Appeal to give guidelines on a host of issues.

10. However, in oral submissions, the parties accepted that many of the issues upon which guidance was sought were extraneous to the present appeal. Additionally, both counsel conceded that certain issues and principles of law were either well settled or required no real input from the Court of Appeal.

11. I will analyse this appeal in two sections, namely:

Section A: Issues that directly impact upon the decision of this appeal; and

Section B: Other issues for guidance of the parties.

SECTION A:

Issues that directly impact upon the decision of this appeal

12. I have identified five issues that directly impact upon the decision in this appeal, they are:

(i) General principles upon which a court of appeal will interfere with an award of damages;

(ii) The number of days of false imprisonment of the Appellant;

(iii) The adequacy of the award of damages;

(iv) Aggravated damages; and

(v) Exemplary damages.

(i) *General principles upon which a court of appeal will interfere with an award of damages*

13. Both parties agree that there are two circumstances where a court of appeal will interfere with an award of damages. Firstly, where a trial judge has misdirected himself on the law or the facts. Secondly, where the award is a wholly erroneous estimate of the damage suffered.[2]

14. In this matter, both parties agree that the Order of the trial judge itself indicates that he misdirected himself on the law. The trial judge used a daily rate of loss and multiplied it by the number of days of incarceration (a pro rata basis).

Specifically, the trial judge used a figure of $1000 per day of loss, multiplied by 35 days of incarceration to award $35,000.00 as general damages for the Appellant's false imprisonment.

This pro rata basis for assessing damages for false imprisonment has repeatedly been held to be erroneous.[3] On that basis it would be appropriate to vacate the award of the trial judge as being based upon an error of law.

15. In any event, as I will demonstrate later in this judgment,[4] it is my opinion that the award of $35,000 as damages is a wholly erroneous estimate of the damage suffered. This is the second basis that justifies this court's reconsideration of the award of the trial judge.

16. A peripheral issue concerning the principle of interference with the award of damages in this appeal is the fact that the trial judge gave no written or oral reasons for his decision.

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[2] See **Thaddeus Bernard and Another v Nixie Quashie** Civil Appeal 159 of 1992 per de la Bastide C.J. at page 4.
[3] See **Josephine Millette v Sherman McNicholls** Civil Appeal 14 of 2000 per de la Bastide C.J. at pages 4 and 5.
[4] See paragraph 40 below.

On the facts of this appeal the lack of reasons from the trial judge poses no real problem since the simple issue on this appeal is whether the award of damages falls so far short of what a proper award should be so as to constitute a wholly erroneous estimate of the damages payable. This has been the approach adopted in similar cases on appeal (see generally **Josephine Millette v Sherman McNicholls** Civil Appeal 14 of 2000 at page 3).

17. Further in cases where there are no, or no sufficient reasons for an award of damages:

> "... **the Court of Appeal is entitled to look at the matter afresh and come to its own conclusion as to how the discretion** (to award damages) **ought to have been exercised.**" (See **Romauld James v The Attorney General** Civil Appeal 154 of 2006 at paragraphs 5 and 6; and see also **Angela Inniss v The Attorney General of Saint Christopher and Nevis** P.C. Appeal No. 29 of 2007 at paragraph 16.)

In the judgment that follows I will undertake that analysis.

(ii) *The number of days of false imprisonment of the Appellant*

18. In his Statement of Case, the Appellant alleges that he was unlawfully detained/falsely imprisoned for forty three days. These forty three days are calculated from the day he signed his Notice of Withdrawal (30th July 2007), to the date of his release (10th September 2007). However, in the written submissions, the Appellant accepted that the period of unlawful detention/false imprisonment should only run from the date the Notice of Withdrawal reached the Court of Appeal (6th August 2007) up to the date of the Appellant's release (10th September 2007). This amounts to thirty six days if the date of the filing of the Notice of Withdrawal and the date of the Appellant's release are included in the period of detention.

19. The Respondents have submitted that the period of detention between the time when the Notice of Withdrawal reached the Court (6th August 2007) up to the date of the Appellant's release (10th September 2007) is thirty five days. However, no explanation is given as to which days are excluded or included. The trial judge seems to have accepted thirty five days as the period of false imprisonment for he used the period of thirty five days as the period of detention.[5]

[5] See paragraph 14 above.

20. In my opinion the proper period of detention is thirty six days as the Appellant submitted. The evidence does not state the times of either the submission of the Notice of Withdrawal or of the Appellant's release from the Port-of-Spain prison and in these circumstances I would give the Appellant the benefit of the doubt and include both days in the computation of the period of detention.

(iii) *The adequacy of the award of damages*

21. In considering the adequacy of the trial judge's award of damages one must always bear in mind that this is a claim for the tort of false imprisonment. The principal heads of general damage for this tort are firstly, compensation for the injury to liberty and secondly, compensation for the injury to feelings.[6] Under the head of compensation for injury to feelings, matters that can be considered include the indignity, mental suffering, disgrace, humiliation and loss of reputation suffered.[7]

22. The award of damages under the two heads of compensation for the injury to liberty and the injury to feelings involves many subjective factors. So much so that one can safely say that no injury to liberty or feelings will be the same as between different persons. Hence in assessing general damages for false imprisonment:

> "**Any one person trying to fix a sum as compensation will probably find in his mind a wide bracket within which any sum could be regarded by him as not unreasonable— and different people will come to different conclusions. So in the end there will probably be a wide gap between the sum which on an objective view could be regarded as the least and the sum which could be regarded as the most to which the plaintiff is entitled as compensation.**" (per Lord Reid in **Cassell & Co Ltd v Broome and Another** [1972] 1 All ER 801 H.L. at page 836.)

Therefore in the exercise of assessing general damages for the tort of false imprisonment there will probably be a wide range within which an award could reasonably be made without interference from a court of appeal.

[6] See **McGregor on Damages** 15th Edition page 619.
[7] See note 6 above.

Further, in considering a range within which damages should fall, comparable cases are a useful guide to both trial and appellate judges.

23. In the present appeal, much of the written submissions of the Appellant were taken up with referring to a plethora of decided cases on false imprisonment and on unlawful detention in constitutional law cases. Many of these cases bore very little similarity to the Appellant's case and were of extremely limited relevance as comparable awards. However, in oral submissions counsel for the Appellant accepted that there were three cases that were reasonably comparable to the Appellant's case.[8] I will now refer to these cases and use them as comparators for the reasonable range of an award of damages for this Appellant.

24. The first case is **Frankie Lopez v The Attorney General** CV 2007-03032. There is no written decision in this case. The Appellant exhibited the pleadings and the order of the trial judge. From the documents cited, the relevant facts are that the claimant withdrew an appeal against sentence after having served a period in excess of his original sentence. He was kept in prison after the withdrawal of his appeal and had to bring habeas corpus proceedings to secure his release. In the Claim Form the claimant alleged false imprisonment for twenty four days. The Appellant's submissions said that he was "falsely incarcerated" for thirteen days and also that the trial judge awarded damages for thirteen days of false imprisonment in the sum of $150,000.00.[9] The order (dated 14th November 2008) recited that the sum of $150,000.00 included an unspecified sum for aggravated damages.

25. The second case is **Victor Romeo v The Attorney General** CV 2007-04388. There is no written decision in this case. The Appellant exhibited the pleadings, the affidavit of the claimant and the order of the master. From the documents cited the relevant facts are that the claimant was incarcerated pending a preliminary inquiry into a charge of incest. The charges were dismissed but the claimant remained unlawfully incarcerated for a further period of twenty nine days. The master awarded the claimant the sum of $210,000.00 as general damages for false imprisonment (in March 2010).

26. The third case is **Kedar Maharaj v The Attorney General** CV 2009-01832. There is a brief written decision in this case. The claimant was incarcerated at a psychiatric hospital for many years. Eventually, a psychiatric hospital tribunal ordered his release. The claimant was not

[8] See the Transcript of Proceedings in the Court of Appeal at page 22.
[9] See the Appellant's full written submissions filed on the 13th April 2012 at page 49.

released and he commenced constitutional law proceedings. Pursuant to these proceedings a judge ordered his release. Even then, the claimant was not released until he brought successful habeas corpus proceedings. The claimant was unlawfully detained for twenty nine days after the first order for his release. The claimant brought proceedings in tort for his unlawful detention and was awarded the sum of $280,000.00 as general damages (in February 2010). This sum of $280,000.00 included an unspecified award for aggravated damages.

27. These cases show that in cases of shorter but comparable false imprisonment a range of $150,000.00 to $280,000.00 would be considered appropriate.

Before stating an appropriate award I must first consider the issue of aggravated damages.

(iv) Aggravated damages

28. Aggravated damages are an element of the compensatory damages awarded to a claimant to cater for an element of aggravation of the injury to the claimant.[10]

These damages are separate and distinct from exemplary damages which are in the nature of a punitive award of damages against a wrongdoer.[11]

An appropriate citation for the place of aggravated damages in unlawful detention/false imprisonment is from the case of **Takitota v Attorney General and Others** [2009] UKPC 11 where at paragraph 11 Lord Carswell stated:

> "**In awarding compensatory damages the court may take account of an element of aggravation. For example, in a case of unlawful detention it may increase the award to a higher figure than it would have given simply for the deprivation of liberty, to reflect such matters as indignity and humiliation arising from the circumstances of arrest or the conditions in which the Claimant was held. The rationale for the inclusion of such an element is that the Claimant would not receive sufficient compensation for the wrong sustained if the damages were restricted to a basic award.**"

[10] See the **Takitota** case referred to hereunder.
[11] See **Thaddeus Bernard and Another v Nixie Quashie** (op cit) at page 9.

29. In Trinidad and Tobago, the accepted practice in cases of unlawful detention/false imprisonment is to include the award for aggravated damages in the award of general damages. (See de la Bastide C.J. in **Thaddeus Bernard and Another v Nixie Quashie** Civil Appeal 159 of 1992 at page 5 and the most recent endorsement of this practice by the Privy Council in **Subiah v Attorney General of Trinidad and Tobago** [2008] UKPC 47 at paragraph 11).

Even though a court must indicate the basis upon which it proposes to make an award for aggravated damages, there is no need to state such aggravated damages as a separate award.

30. In the present appeal the Appellant submits three grounds upon which an award of aggravated damages ought to be made, namely:

(a) The cutting of the Appellant's dreadlocks;

(b) The conditions of the Appellant's imprisonment; and

(c) The mental suffering of the Appellant.

(a) The cutting of the Appellant's dreadlocks

31. In his affidavit in support of his claim for damages, the Appellant complained that his dreadlock hairstyle had been cut by the prison authorities. This, he alleged, caused him to be upset and dejected.

However, in his Statement of Case, while the Appellant gave several Particulars in support of his claim for aggravated damages, these Particulars did not include the cutting of his dreadlocks.

In oral submissions in the Court of Appeal, the Appellant's counsel accepted that the cutting of the Appellant's dreadlocks ought to have been pleaded/ particularised as an item of the aggravated damages. Counsel also rightly conceded that his failure to do so meant that he could not pursue this item in his claim for aggravated damages.

(b) The conditions of the Appellant's imprisonment

32. The conditions under which a person is unlawfully detained can be a factor that aggravates the injury to that person. In the recent **Takitota** case (see paragraph 28 op cit) the

prison conditions that Mr. Takitota had to endure for eight years were taken into consideration as a factor justifying an award of aggravated damages.[12]

33. The Respondents suggest that prison conditions per se should not be a factor in aggravation of the damages in this appeal. The Appellant was already lawfully in prison and spent a period of time in excess of his sentence. On these facts there was no loss of reputation, humiliation, shock or injury to feelings that would form the basis of an award of aggravated damages. The Respondents refer to the U.K. Court of Appeal decision in **Ex Parte Evans**[13] in support of this proposition. In **Evans'** case, Ms. Evans had been convicted of several offences and was lawfully imprisoned but served an extra fifty nine days on her sentence because of a miscalculation by the prison governor. That miscalculation only became apparent after a series of court decisions revealed that the method of calculation of Ms. Evans' sentence was erroneous. Ms. Evans was awarded general damages for this unlawful imprisonment of fifty nine days but all parties accepted that this was not a case for an award of aggravated (or exemplary) damages. Ms. Evans' situation was contrasted with that where a person was a "free" citizen and then wrongly imprisoned. Ms. Evans had been properly incarcerated and was merely detained beyond her time.[14] In Ms. Evans' case there was no damage to reputation, humiliation, shock or injury to feelings.

34. Similarly, in the present matter the Respondents argue that like in **Evans'** case there can be no question of aggravated damages since the Appellant had been lawfully incarcerated and was merely detained beyond his sentence. They state that an award of general damages for this unlawful detention was adequate compensation without an increased award for aggravated damages.

35. The Respondents also argue that the Appellant was not held in different conditions to any other prisoner at the Port-of-Spain prison. To award aggravated damages at common law for such a detention could inadvertently and wrongly open the flood gates for prisoners to have a claim for aggravated damages for their detention at the Port-of-Spain prison.

36. The Respondents' arguments are indeed weighty. However, they ignore one material factor, namely the material change in circumstances upon the Appellant's unlawful incarceration

[12] Per Lord Carswell at paragraph 11 of the judgment.
[13] **R v Governor of Brockhill Prison, Ex Parte Evans** (No.2) [1999] Q.B. 1043 (C.A.).
[14] See **Evans'** case at page 1060.

at the Port-of-Spain prison. The Appellant had been transferred from the Golden Grove prison where he had been lawfully detained on remand, to the Port-of-Spain prison where he was now wrongfully detained as "a convicted prisoner"[15] and in conditions which can only be described as deplorable.

The Appellant's uncontradicted evidence is that the conditions at the Port-of-Spain prison were much worse than he experienced at the Golden Grove prison. In summary, the Appellant was placed in a small, bare cell with seven other prisoners. There were no toilet facilities; a bucket was provided for such purposes and had to be used in full view of all the other cell mates and kept in the same cell. The cell mates had to sleep on a bare concrete floor like sardines in a position described as head and tail. Showering was a brief affair, in the nude, in the prison yard in full view of all and without anything for drying off after the "shower". Meals were served in unsanitary utensils and the Appellant could not each such meals.

In fact, even the Respondents accept that the conditions under which the Appellant was detained at the Port-of-Spain prison "**were unsanitary, crowded and caused him** (the Appellant) **considerable distress**".[16]

Further, prison conditions, far less for deplorable prison conditions, were never an issue in **Evans'** case. **Evans'** case can be distinguished on this ground.

37. The deplorable prison conditions that the Appellant had to endure when he was unlawfully detained at the Port-of-Spain prison as a convicted prisoner is, on the particular facts of this case, a matter which justifies an award of aggravated damages.

(c) The mental suffering of the Appellant

38. The mental suffering that a person endures as a result of an unlawful imprisonment can be a factor to consider in an award of general damages. This mental suffering may fall under the head of injury to feelings.

However, the Appellant cited no authority in which the mental suffering of a claimant was such as to justify an award of aggravated damages. In any event, to justify a possible award

[15] See paragraph 7 of the Appellant's affidavit (op cit).
[16] See the Respondents' skeletal submissions filed on the 2nd April 2012 at page 4 paragraph 2.5.

of aggravated damages for the mental suffering of a claimant in a case of false imprisonment, such mental suffering would have to be specifically pleaded and proved.

In the present matter, the Appellant did not plead any mental suffering in his Particulars of aggravated and exemplary damages. This would negate any claim for such aggravated damages in this case.

In any event, I am not satisfied that the facts that the Appellant raises in support of this claim are sufficient to found an award for aggravated damages for mental suffering.

The Appellant alleges that when he was told that he had to serve his term of six months imprisonment afresh, even after the withdrawal of his appeal, he was shocked and surprised and felt frustrated and dejected until his eventual release thirty six days later. This injury to his feelings is properly considered under the award of general damages. This injury to his feelings does not strike me as over and beyond the injury that any person unlawfully detained would experience such as to aggravate the injury or damage.

39. In all the circumstances, it is my opinion that this is not a fit case to award aggravated damages for the alleged mental suffering of the Appellant.

The award of general damages

40. I have considered the injury to the liberty and the injury to the feelings of the Appellant and the matters in aggravation of the compensatory damages to be awarded.

I have also considered the range of $150,000.00 to $280,000.00 as suggested by comparable cases.

I find that the award of $150,000.00 is too low on the facts of this appeal, especially since this Appellant was unlawfully detained for a much longer period than in the **Frankie Lopez** case.[17]

On the other hand an award of $280,000.00 as in the **Kedar Maharaj** case is above what I consider appropriate here. I say so because the **Kedar Maharaj** case is a very short decision in which an award of aggravated damages was made and where the specific factors which justify that award were not detailed. Further, in **Kedar Maharaj's** case the Claimant had to pursue two different sets of legal proceedings to secure his release unlike in the present appeal where only one set of legal proceedings was needed to secure the Appellant's release. Even though the

[17] See paragraph 24 above.

detention in the **Kedar Maharaj** case was seven days less than in the present appeal, this in itself is not so significant to increase the award in this case to the level of the award in **Kedar Maharaj's** case.

In these circumstances, an award of $200,000.00 (which sum is inclusive of aggravated damages) is, in my view, appropriate as compensatory damages for this Appellant.

The trial judge's award of $38,000.00 as compensatory damages is a wholly erroneous estimate of the damage that the Appellant suffered.

(v) Exemplary damages

41. Much of the written submissions of the Appellant were taken up with a discussion of exemplary damages. The Appellant traced the historical development of the concept from the Babylonian laws (B.C.). The Appellant suggested a novel approach to the award of exemplary damages based upon principles that applied new tests.

As interesting as this exposition was, it did not persuade me that the settled principles have been or ought to be changed.

42. As stated before, exemplary damages are punitive in nature.[18] Its purpose is to punish and/or deter a tortfeasor.

Since the decision in **Rookes v Barnard** [1964] A.C. 1129 it is accepted that exemplary damages can be awarded in three types of cases,[19] namely:

(a) Where this is authorised by statute;

(b) Where the tortfeasor's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the innocent party; or

(c) Where there has been arbitrary, oppressive or unconstitutional action by servants of the State.

This position has been repeatedly accepted in the courts of Trinidad and Tobago and I see no reason to change it.

43. The only relevant category in this appeal is (c), the alleged arbitrary, oppressive or unconstitutional action by servants of the State.

[18] See paragraph 28 above.
[19] This is referred to by the Appellant as the "categories test".

44. This present appeal does not merit an award of exemplary damages for any alleged arbitrary, oppressive or unconstitutional action by servants of the State. This is not a case where it is fit to punish or deter a tortfeasor. The compensatory award of $200,000.00 is adequate in these circumstances.

There is no evidence that the unlawful detention of the Appellant was as a result of any intentional or malicious action of the prison authorities. The Appellant was not singled out for arbitrary or oppressive action. In fact, the evidence suggests that the prison authorities (like those in the **Evans** case mentioned above)[20] formed a wrong view of the law when they opined that the Appellant had to start serving the six month term of imprisonment afresh. They may also have been overcautious in the process.

In the circumstances, there is no need to punish or deter the Respondents and I would make no award for exemplary damages.

SECTION B:

Other issues for guidance of the parties

45. I have identified two issues that the parties raised on this appeal, which, while they are not essential to the determination of this appeal, are matters upon which this court should provide guidance.

They are:

(i) The power of a court to receive submissions from a defendant against whom there has been a default judgment; and

(ii) Whether the general measure of damages for loss of liberty either by way of a common law claim or for a violation of the Constitution should equated.

46. There is another issue which was not raised by the parties on this appeal which I consider to be of importance in respect of damages in these types of appeals: namely, in the case where magisterial appeals are withdrawn and a person is also wrongfully imprisoned beyond this withdrawal; should the award of damages run from the time the withdrawal is filed or within a reasonable time thereafter?

[20] See paragraph 33 above.

(i) *The power of the court to receive submissions from a defendant against whom there has been a default judgment*

47. The Appellant had taken up judgment in default of appearance against the Respondents on the 30th September, 2008.

In spite of this default judgment, the trial judge invited both the Appellant and the Respondents to make written (and apparently)[21] oral submissions on the issue of damages.

The Appellant contends that the judge was wrong to allow the Respondents to do so since this was a breach of Rule 12.11 of the Civil Proceedings Rules 1998 (the "C.P.R.").

48. Rule 12.11 of the C.P.R. (as it was at that time) provided that unless a defendant sets aside a default judgment, the only matters on which he "**may be heard are**": (a) costs; (b) the time of payment of a judgment debt; and (c) enforcement. The Appellant therefore submits that the Respondents should not have been allowed to make any submissions on damages to the trial judge.

49. The Appellant recognizes that the point is moot in this appeal because Rule 12.11 would have no application to the right of a respondent to be heard on appeal.

In any event, this specific point may no longer be as relevant because the C.P.R., and more particularly, Rule 12.11 has been amended to allow a defendant against whom there is a default judgment to have full participation in an assessment of damages provided that the defendant follows certain procedures.[22]

I strongly recommend that any defendant against whom there is a default judgment and who wishes to have full participation in an assessment of damages utilise the new procedures in the amended C.P.R. to do so.

Nevertheless, I would consider the issue of the trial judge inviting written and oral submissions in this case, when the Respondents had no right so to do under the former Rule 12.11 of the C.P.R.. My findings on this issue may have bearing on some exceptional cases under the amended rules where the procedures to allow for participation in an assessment of damages are not strictly followed by a defendant.

[21] See the Appellant's full written submissions (op cit) at page 7.
[22] Namely that the defendant indicates this in his appearance; or he files a Notice under Rule 16.2(4). See also Rule 10.2(2) re the right of a defendant who admits liability but wishes to be heard on quantum.

50. The "Judicial Sector Reform Project: Review of Civil Procedure" by Dick Greenslade 1998 (the "Greenslade Report") informed the drafting of the C.P.R.. In particular the Greenslade Report recommended that in the case of a default judgment for unliquidated damages a defendant "**should have no right to be heard on an assessment**"[23] (my emphasis) on any matters except the method of payment of damages, costs or an application to set aside judgment. This formed the rationale behind Rule 12.11. It was clearly aimed at the right of a defendant to be heard on an assessment of damages.

51. Distinct from the right of a defendant to be heard, is a discretion in a trial judge to invite submissions from the parties or their attorneys. A trial judge remains in command and control of the proceedings before him. "**His overriding duty is to ensure the fair and orderly unfolding of the respective cases**... **according to the practice and procedure of the court.**"[24] More specifically, a "**trial judge relies a great deal on the assistance of counsel in arriving at his final determination**".[25]

Indeed, in a complicated case or in a case where the trial judge is dissatisfied with the submissions from one party, it would be counterproductive to the administration of justice to deny audience to the other party or his counsel.

52. The former Rule 12.11 provided generally that a defendant against whom a default judgment has been entered "**may be heard**" only on certain limited matters. However, as I stated before, in view of the underlying philosophy behind this rule and in order to avoid the counterproductive and impractical result that may arise in difficult or complicated cases, I apply a purposive construction to Rule 12.11. I interpret the rule to the effect that it affects the right of a defendant to be heard as opposed to the discretion of a trial judge to invite submissions.

53. For the avoidance of doubt, this is not a charter to avoid or evade the requirements of the old or the amended Rule 12.11 and related rules.[26] Those who do not follow these rules do so at their peril. They will have no right to participate in the proceedings and a judge may, in the exercise of his discretion, properly refuse to allow them to do so.

[23] See page 68 of the Greenslade Report.
[24] See Halsbury's Laws of England 4th Edition Volume 37 at paragraph 510.
[25] See note 24 above.
[26] See note 22 above.

Where however, a judge requires the assistance of a defendant he may invite that defendant to make submissions to him notwithstanding that the defendant has been in breach of the provisions of Rule 12.11 and the related rules.

54. In this case, bearing in mind the difficult and novel arguments being advanced, it was not wrong for the trial judge to have invited written and oral submissions from the Respondents even though there was a default judgment against the Respondents.

(ii) *Whether the general measure of damages for loss of liberty either by way of a common law claim or for a violation of the Constitution should be equated.*

55. The starting point for this discussion is the recognition that this issue is academic or moot to this appeal. This appeal is concerned solely with common law damages for false imprisonment in a situation where there are comparable cases that can be used as guides to a likely award of damages. There is no need to refer to constitutional law awards for guidance.

Additionally, the point in issue is moot because the law as expressed by the Privy Council in appeals from Trinidad and Tobago (*inter alia*) and by the local Court of Appeal is that there is a clear distinction between an award of damages at common law and an award of damages under the Constitution.[27] The two awards cannot be equated.

A fortiori, even the Appellant has accepted that there is such a distinction.[28] Nevertheless, the Appellant argues that this distinction between common law damages and damages awarded for constitutional infringements is cosmetic in the case of loss of liberty. The Appellant also argues that this distinction ought to be done away with and that the two awards should be equated. This, the Appellant submits, will bring certainty and clarity to the law.

56. The Appellant's arguments cannot be supported. The distinction between constitutional law damages and common law damages is not 'merely cosmetic'. There is a fundamental difference between the two.

As Lord Nicholls said in the **Ramanoop**[29] case:

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[27] See e.g. (a) **Ramesh Lawrence Maharaj v Attorney General of Trinidad and Tobago (No. 2) (P.C.)** (1978) 30 WIR 310 at page 321 paragraph j per Lord Diplock; (b) **Attorney General of Trinidad and Tobago v Ramanoop** [2006] 1 A.C. 328 paragraph 18; and (c) **Crane v Rees and Others (Court of Appeal of Trinidad and Tobago)** (2000) 60 W.I.R. 409 at page 416 paragraphs a-c per Hamel-Smith J.A.

[28] See the Appellant's full written submissions filed on the 13th April 2012 at pages 38-40.

[29] **Attorney General of Trinidad and Tobago v Ramanoop** [2006] 1 A.C. 328 paragraph 18.

> "**When exercising** its **constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened**."

On the other hand, when a court is exercising its common law power to award damages for the injury to the liberty of a claimant (e.g. for the tort of false imprisonment) the court is concerned with compensating the victim of a tort.

57. The important element of the distinction between vindicating or upholding a right as opposed to merely compensating a victim of a tort is that what is required to vindicate or uphold a right can go far beyond compensation. Compensation is merely an element of vindicating or upholding a right. Further, relief in a constitutional law claim to vindicate or uphold a right is discretionary unlike at common law where compensatory damages are awarded as of right once loss is proved.

As Lord Hope stated in **Seepersad and Another v Attorney General of Trinidad and Tobago**[30]:

> "**It is well established that the power to give redress under s 14 of the Constitution for a contravention of the Applicant's constitutional rights is discretionary**... **There is no constitutional right to damages. In some cases a declaration that there has been a violation of the constitutional right may be sufficient satisfaction for what has happened**... **In others it will be enough for the court to make a mandatory order**... **to treat entitlement to monetary compensation as automatic where violation of a constitutional right has occurred would undermine the discretion that is invested in the court by s 14. It will all depend on the circumstances.**" (my emphasis)

58. This is not to say that monetary compensation should not usually be awarded in cases of the violation of a constitutional right. In fact compensation should normally be considered, but such compensation is not the object of the award in a constitutional law claim for loss of liberty (*inter alia*) unlike in the case of a common law claim for loss of liberty.

The scope of an award in a constitutional law claim ought not to be pigeonholed by the old, established considerations of a common law claim, or else we run the risk that "**the broad**

[30] [2012] UKPC 4 at paragraph 38.

dimension of the constitutional remedy would be lost if constitutional torts were only compensable by reference to the common law measure of damages."[31]

59. An apt quote to highlight the continuing distinction between the two types of awards and the rationale for the distinction is to be garnered from the statement of Hamel-Smith J.A. in **Crane v Rees and Others**[32] that there is:

> "... **a clear distinction between common-law damages that are available to a plaintiff in tort and monetary compensation for which the State is liable where the fundamental rights of an applicant are infringed. The former is in private law where the factors that have to be considered in assessing those damages have been firmly established over the years. The latter is derived in public law where the court is given the discretion, in addition to making a declaration that the right has been infringed and/or an order prohibiting further infringement, to make an award of monetary compensation for the breach. The awards are different and it would be wrong to apply strictly common-law principles, which are reserved for assessing damages in tort, to determine compensation under the Constitution.**"

60. Having recognized the distinction between the two types of damages and the fact that the two ought not to be equated, this does not mean that comparisons are useless. The Privy Council has stated that "**a comparable common law measure of damages will often be a useful guide in assessing the amount of**... **compensation**"[33] that is required to vindicate or uphold a constitutional right.

That is to say while comparable common law awards of damages may be useful as a guide to an award of compensation for the violation of a constitutional right, a court ought not to feel obligated or pigeonholed into following common law awards when assessing damages in respect of constitutional law claims.

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[31] **The Attorney General of Trinidad and Tobago v David Lakhan and Another** Civil Appeal 154A of 1997 per Hamel-Smith J.A at page 12.
[32] (2000) 60 W.I.R. 409 at page 416 paragraphs a-c.
[33] **Attorney General of Trinidad and Tobago v Ramanoop** [2006] 1 A.C. 328 paragraph 18.

(iii) *In cases of the withdrawal of a magisterial appeal, where damages are awarded for wrongful imprisonment beyond sentence, should the award of damages run from the time the withdrawal is filed or within a reasonable time thereafter.*

61. I am of the view that in these cases damages should run from a reasonable time after the withdrawal of the appeal comes to the notice of the prison authorities.

62. Let me state from the outset that this point did not arise on the facts of this case, neither did either party address the issue. Nevertheless, it could be of some importance in some cases as I will show below.

63. The problem arises because by virtue of the provisions of section 138 of the Summary Courts Act Chapter 4:20, a magisterial appeal is deemed as abandoned upon the filing of a notice. There will usually be a time lag between the filing of such an abandonment (or withdrawal of appeal) and a prisoner's eventual release from custody.

In cases of wrongful imprisonment beyond the withdrawal of an appeal this time lag can give rise to certain anomalous situations.

64. What if, for instance, the notice of abandonment is filed late on Friday afternoon and only served on the prison authorities on Monday. Is the weekend to count in assessing damages?

Similarly, what if the notice is filed early in the morning but only served on the prison authorities late in the same afternoon, are the extra hours to count in assessing damages?

In both cases I would think that such extra time would not count.

I would suggest that in computing the time for the assessment of damages for wrongful imprisonment in such cases, a reasonable time should be allowed for the processing of the notice of withdrawal.

What period of time is considered reasonable would vary with the specific facts and would best be determined on a case by case basis.

CONCLUSIONS

65. This appeal is allowed to the extent that the award of damages is increased from $35,000.00 to $200,000.00 which sum is inclusive of aggravated damages.

The Orders of the trial judge:

(i) Not to award exemplary damages; and

(ii) To award $4,000.00 as special damages

are upheld.

The Order for costs will be considered after hearing submissions from the attorneys.

G. Smith
Justice of Appeal