REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civ. App. No. 194 of 2011
Claim No. CV 2009-00439

BETWEEN

FELIX JAMES

Appellant/ Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent/ Defendant

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Panel:

R. Narine J.A.

M. Mohammed J.A.

P. Rajkumar J.A.

Appearances:

Mr. M. Seepersad and Mr. T. Davis appeared on behalf of the Appellant

Mr. N. Byam appeared on behalf of the Respondent

DATE DELIVERED: 9th October, 2018

I have read the judgment of Narine J.A. and agree with it.

M. Mohammed,
Justice of Appeal.

I too, agree.

P. Rajkumar,
Justice of Appeal.

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JUDGMENT

Delivered by R. Narine J.A.

1. This is an appeal against the quantum of damages awarded by the High Court for breach of the appellant's constitutional rights to liberty under section 4(a), and his right to such procedural provisions as are necessary to protect his rights under section 5(2)(h) of the Constitution.

2. The basic facts are not in dispute. The appellant was charged with murder in 1971. On 25th April 1975 the jury returned a special verdict of guilty but insane pursuant to section 66 of the **Criminal Procedure Act Chapter 12:02**, and was ordered to be detained at her Majesty's pleasure pursuant to section 67 of the Act.

3. In October 2003, the appellant filed a constitutional motion challenging the constitutionality of section 67 seeking declarations that the failure to conduct reviews of the appellant's mental condition and fitness for release, was in breach of his constitutional rights under sections 4(a), 4(b), 5(2)(a), 5(2)(b), 5(2)(c), 5(2)(e), 5(2)(f)(ii), and 5(2)(h) of the Constitution, and claiming damages for such breaches.

4. While this motion was pending, Stollmeyer J gave a judgment on 1st October, 2004 in HCA Nos. 2474 of 2003 and 1816 of 2003 between **George Noreiga and Edmund Funrose v. The Attorney General of Trinidad and Tobago**, holding that the failure to assess the applicants' mental condition and to review their cases was in breach of their rights under sections 4(a), 5(2)(a) and 5(2)(h) of the Constitution. The judge ordered that an assessment of their mental condition be carried out forthwith in order to determine their fitness for release. The judge further ordered that assessments be carried out on a regular and timely basis. He suggested that such assessments be conducted at no more than six month intervals.

5. The appellant's motion filed in 2003 was determined by Ibrahim J on 2nd October, 2006. The judge ordered, inter alia, that the appellant's case be remitted to the Minister of National Security to determine whether the appellant was fit for release, such determination to be made within 10 days of the order, and that damages were to be assessed by a Master. The order was subsequently amended to replace the words "the Minister of National Security" by the words "the Minister of National Security and/or the Attorney General".

6. Psychiatric reports of examinations of the appellant in 1975, 1994, 2003 and 2004 were subsequently forwarded to the Attorney General (Mr. John Jeremie) who responded by letter dated 9th November, 2006. The Attorney General stated that he had examined the reports and concluded that they contained insufficient information with respect to the appellant's progress while in custody, and

insufficient general information about the appellant's afflictions to enable him to advise the President to release him.

7. Further documents were subsequently supplied to the Attorney General, who responded by letter dated 10th January, 2007 that they were "conspicuously lacking sufficient information as to the applicant's afflictions and as to the basis for the conclusions reached by the tribunal for his fitness to be released". Accordingly, the Attorney General expressed the view that the documents did not assist him in arriving at a determination as to the fitness of the appellant for release.

8. On 13th February, 2007, by CV 2007-00491 the appellant filed an application for judicial review of the Attorney General's decision. On 30th January, 2009, Dean-Armorer J granted an order of certiorari remitting the decision to the Attorney General for reconsideration.

9. While the application was pending, by letter dated 13th May 2008, the Attorney General (now Ms. Bridgid Annisette-George) wrote to the Chief Medical Officer (CMO) requesting that a medical examination be carried out on the appellant, and a detailed and conclusive report on his mental and physical condition be provided as soon as possible. Under cover of letter dated 28th May, 2008, the Attorney General provided the CMO with the Attorney General's letters dated 9th November, 2006 and 10th January, 2007, in order to allow him to deal with the concerns raised by the Attorney General. By further letters dated 16th October, 2008 and 3rd December, 2008 the Attorney General wrote to the CMO, inquiring whether the assessments requested had been carried out.

10. The appellant was assessed by Dr. Iqbal Ghany on 27th July, 2008, and by Dr. D.O. Nwokolo on 4th August, 2008. The appellant was assessed by the psychiatric tribunal on 12th January, 2009 and rendered its report on 9th March, 2009. In its report the tribunal found no evidence of acute psychosis and felt that he was fit for

release. However, it noted that the appellant had a history of repeated violence and a mental disorder, and that there was a risk of recidivism.

11. By letter dated 24th March, 2009, the Attorney General sought clarification of the report, asking the tribunal to explain why it concluded that the appellant was fit for release, while there was a risk that he might re-offend. By letter dated 30th April, 2009, the tribunal reiterated its position that the appellant was fit for release.

12. The Attorney General subsequently advised the President that the appellant was fit for release. On 30th June, 2009, the appellant received a presidential pardon and was released on 2nd July, 2009.

THE DECISION OF THE HIGH COURT

13. On 10th February, 2009, before the tribunal submitted its report to the Attorney General, the appellant filed another application against the Attorney General, seeking various declarations that the constitutional rights of the appellant were infringed by the failure of the State to conduct periodic reviews of the mental condition of the appellant. Curiously the application included a declaration that the detention of the appellant between 8th November, 2004 to January, 2009, was in breach of the appellant's constitutional rights.

14. However, before the High Court and before this court, the appellant conceded that all previous claims of the appellant were subsumed under the order of Ibrahim J which granted relief up to the end of 2006. The Attorney for the appellant clarified that the relief he was seeking was with respect to the period 10th January, 2007 (the date of the Attorney General's letter stating that he was unable to advise the President to release the appellant having regard to the insufficiency of the material provided to him) to the end of June, 2009, when the appellant was pardoned.

15. On 1st July, 2011, Dean-Armorer J gave judgment for the appellant. She granted a declaration that the appellant's detention without review between 15th January,

2007 and June, 2009 was in breach of the appellant's rights under sections 4(a) and 5(2)(h) of the Constitution, and awarded the appellant $50,000.00 as monetary compensation for the breaches.

16. This court notes that the declaration granted does not appear to take note of the fact that the appellant was in fact reviewed by the psychiatrists in July and August, 2008, and by the psychiatric tribunal in January, 2009. This court notes as well, that the correspondence reveals that both Mr. Jeremie and Ms. Annisette-George, considered the material placed before them, expressed their views on the adequacy of same, and sought clarification from the relevant authorities. In particular, Ms. Anisette-George actively pursued the matter as reflected in the correspondence. The finding of the court that Mr. Jeremie's decision conveyed by letter of 10th January, 2007 was irrational, was appealed by the Attorney General. However, this appeal was subsequently withdrawn by the State.

17. In giving her decision, the trial judge in fact based her decision on the period January, 2007 to July, 2008. She found that during this period of 18 months the appellant was entitled to three reviews – in June, 2007, December, 2007 and June, 2008. However, she reasoned that the appellant was not entitled to compensation on the basis of detention for a particular number of hours or days. In her view, he was entitled to be compensated for the loss of the chance to be reviewed and declared fit for release. He suffered no loss of income by virtue of the breach, and his distress and inconvenience was limited to his uncertainty as to when he would be reviewed. In her view, an award of $50,000.00 was adequate in the circumstances.

18. Accordingly, what is before this court is the award of damages. The appellant has appealed on four grounds:

    (a) The award was inordinately low and a wholly erroneous estimate of the loss suffered.

(b) The learned judge adopted a wrong approach to the assessment of damages.

(c) The judge erred in not making a separate award of vindicatory damages, in addition to the compensatory damages, to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and to deter further breaches.

(d) The finding of the court was against the evidence.

LAW & ANALYSIS

19. In support of his submission that the damages awarded were inordinately low, counsel for the appellant referred this court to a number of first instance decisions which appear to be clearly distinguishable on the facts.

20. Some of these cases involved additional detention of the applicants due to the late delivery of notices of appeal by the prison authorities. In **Perry Matthew v. Attorney General** (unrep) HCA No. 3342 of 2004, the applicant served 409 days in excess of his sentence of imprisonment, for which he was awarded the sum of $350,000.00 for distress and inconvenience, in addition to $6,000.00 for breach of his constitutional rights.

21. In **Bryan Lynch v. Attorney General** (unrep) CV2008-01595, the applicant served an additional 672 days in excess of his sentence, as a result of the late delivery of his notice of appeal. He was awarded the sum of $450,000.00 as compensation for distress and inconvenience suffered during the period of his unconstitutional detention in addition to the sum of $7,500.00 for breach of his constitutional rights.

22. In **Quincy George v. Attorney General** (unrep) CV2011-03875, the prison authorities failed to deliver the applicant's notice of appeal resulting in his imprisonment for an additional period of 593 days in excess of his sentence. He was awarded the sum of $480,000.00 as compensation for deprivation of liberty inclusive of an uplift for aggravating factors. He also received $20,000.00 for

breach of his constitutional rights and an additional award of $50,000.00 as vindicatory damages.

23. **Wendell Beckles v. Attorney General and Commissioner of Prisons** (unrep) CV2009-03303, was a case in which the failure to communicate a Magistrate's order to the prison authorities resulted in his incarceration for almost 8 years. He was awarded damages in the sum of $2,000,000.00 for the period of 4 years recoverable under the Statute of Limitations. While declining to make an award of vindicatory damages, the trial judge expressly justified increasing the award to take into account the blatant negligence of the State with respect to the rights of the applicant and the notoriously squalid conditions in the prisons.

24. These cases are clearly distinguishable on the facts. In all of these cases the court was able to calculate the precise period of time during which the applicant was detained in breach of his constitutional rights. Accordingly, the court in each case was able to assess damages for deprivation of liberty without due process, and distress and inconvenience suffered having regard to the length of the unlawful detention. In the appellant's case the breach of his rights was caused by the failure of the State to conduct periodic reviews of his mental condition to determine whether he was fit for release. This procedure involved three distinct stages, namely, examination by medical and psychiatric experts, a consideration of their reports by the psychiatric tribunal, which may or may not advise the Minister that the applicant is fit for release, and a decision by the Minister to advise, or decline to advise the President that the applicant is fit for release.

25. It follows that the process of review involves three levels of decision making as to whether or not an applicant is fit for release – a decision of the experts, a decision of the tribunal, and a decision of the Minister. Once the process is engaged, there is no guarantee that the applicant will be released. The applicant has no constitutional right to be released. What he has is a right to be reviewed periodically, which may or may not result in his release.

26. Counsel for the appellant has referred us to a number of High Court decisions on quantum of damages awarded in cases in which the applicants were not reviewed so as to determine their fitness for release.

27. In **Kedar Maharaj v. Attorney General** (unrep) CV2009-00479, the applicant was detained for some 10 years following a recommendation for his release. He was awarded general damages in the sum of $1,000,000.00, and vindicatory damages in the sum of $100,000.00. Judgment was delivered on 27th July, 2011.

28. Rampersad J gave a joint judgment in the matters of **Selwyn Dillon, Christopher Ventour and Miguel Francois v. The Attorney General** (unrep) HCA No. 3498 of 2003 and HCA Nos. 1094 and 1090 of 2004. In the case of Dillon, the applicant had spent some 20 years in prison from 1988 to 2008 without review. He was recommended for release (after proceedings were filed) in 2004. The judge awarded him compensatory damages in the sum of $2,500,000.00 and vindicatory damages in the sum of $500,000.00.

29. In **Ventour** (supra), a similar award was made in respect of a period of detention of 13 years after he was recommended for release. In **Francois**, the applicant received $750,000.00 in compensatory damages and $250,000.00 in vindicatory damages. He was detained for a period of 4½ years following a recommendation for his release. The judgment in these cases was delivered on 27th September, 2012.

30. In **George Noreiga v. The Attorney General** (unrep) HCA No. 1688A of 2005 the court awarded the sum of $545,000.00 compensatory damages for breach of the applicant's constitutional rights and distress and inconvenience suffered during the period of 737 days of unconstitutional detention.

31. These cases are all distinguishable on the facts, having regard to the length of the period of unconstitutional detention. In all of these cases the courts appear to

have focused on the length of the period of detention in assessing compensatory damages for breach of the constitutional right.

32. In this matter, the trial judge based her award not on the period of detention per se, but on the loss of the applicant's "chance" to be reviewed and declared fit for release.

33. The "loss of chance" analysis was in fact applied by Charles J in **Mario Narcis v. The Attorney General** (unrep) CV2008-2108. In **Narcis**, the claimant pleaded guilty to the offence of possession of cocaine for the purpose of trafficking and was sentenced by the Magistrate to a term of 5 years imprisonment. He spent 68 days in prison before he was released on bail pending appeal. His appeal was subsequently dismissed by the Court of Appeal on the ground that there was no legitimate appeal filed. His conviction and sentence were affirmed. In calculating his sentence the prison authorities did not take into account the 68 days he had served. The judge held that the 68 days he had spent in prison should have been taken into account. In assessing damages for deprivation of his liberty, the judge reasoned that he should be compensated for the loss of chance to prosecute his appeal. She found that had he been able to ventilate his appeal it was more likely than not, that he would have obtained a reduced sentence or a bond, since the Magistrate had not taken into account that he was a youthful offender who had no previous convictions and was entitled to a one-third reduction for his guilty plea. She awarded $6,000.00 for the breach of his constitutional right, and $300,000.00 general damages, which included an uplift for aggravated damages and his loss of chance to prosecute his appeal.

34. Similarly, in this case what the appellant has suffered is not a period of detention that can be calculated with precision. By virtue of the failure of the authorities to review him periodically, he has lost the chance of being released, assuming that the review was favourable. In our view, the "loss of chance" approach is more appropriate in this case.

35. In addition, the 6 months guideline for reviews must not be applied in an inflexible, mechanical fashion. Consideration must be given to the peculiar circumstances of the case. In this matter, both Mr. Jeremie and Ms. Annisette-George felt that the information presented to them by the tribunal required further explanation or amplification in order to assist them in coming to a decision. On the face of the correspondence, the request cannot be said to be unreasonable. The provision of further information or clarification by the tribunal, and the consideration of same by the Minister/Attorney General may extend the time beyond the 6 months guideline. Further, in this case, the decision of the Attorney General as conveyed by his letter dated 10th January, 2007, prompted an application for judicial review, which was not determined until 30th January, 2009. The authorities may well have considered that they should await the outcome of the application out of deference to the court, before embarking on a further review. Even so, the appellant was subsequently assessed in July and August, 2008, reviewed by the tribunal in January 2009, who submitted their report in March 2009. Upon receipt of the report, the Attorney General quite understandably in my view, required clarification of an apparent contradiction in the report. Having received a response from the tribunal by letter of 30th April, 2009, the Attorney General advised the President that the appellant was fit for release. The presidential pardon was granted on 30th June, 2009, and the appellant was released 2 days later. Having regard to the time line set out above, it is difficult to support a finding that the appellant ought to be compensated for unconstitutional detention over a period of some 18 months between January 2007 and July 2008.

36. For the reasons given above, we are unable to say that the trial judge was wrong in assessing damages on the basis of a loss of chance to be released. We are unable to find that the quantum awarded was a wholly erroneous estimate of the loss suffered by the appellant and we decline to tinker with the judge's award.

VINDICATORY DAMAGES

37. In **Siewchand Ramanoop v. Attorney General of Trinidad and Tobago** Privy Council App. No. 13 of 2004, the Board recognised that an award of compensatory damages may be sufficient to vindicate the constitutional right that has been breached. However, in some cases an additional award may be necessary to reflect the sense of public outrage, to emphasise the importance of the constitutional right and the gravity of the breach, and to deter further breaches.

38. This was a case of institutional lethargy in engaging the process of review of the appellant's mental condition. As noted before, damages for the State's neglect in engaging the process has already been covered by the order of Ibrahim J. up to the end of the year 2006. The subject matter of this appeal concerns the period January 2007 to July 2009. During this time the decision of Mr. Jeremie in January 2007, was actively engaging the attention of the High Court, and during the pendency of the proceedings the appellant was in fact reviewed in July and August 2008. While the State may be criticised for its failure to act with greater expedition, there is nothing so egregious, arbitrary, or reprehensible which in our view, should attract an additional award of vindicatory damages.

DISPOSITION

39. Accordingly, we find no merit in this appeal. The appeal is dismissed and the orders of the High Court are affirmed. We will hear the parties on costs.

Dated the 9th day of October, 2018.

R. Narine
Justice of Appeal.