REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P 245 of 2012

BETWEEN

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Appellant

AND

SELWYN DILLON

Respondent

PANEL: **P. Jamadar, J.A.**
C. Pemberton, J.A.
A. des Vignes, J.A.

APPEARANCES:

Mr. N. Byam and Ms. Benjamin for the Appellant.

Mr. G. Ramdeen and Mr. D. Heeralal for the Respondent.

DATE DELIVERED: 9th March, 2018.

DELIVERED BY JAMADAR, J. A.

JUDGMENT

INTRODUCTION

1. In November 1981 Selwyn Dillon was arrested and charged with the murder of his mother Grace Dillon. He was not entitled to bail and so remained incarcerated at the Remand Yard in Trinidad for about seven (7) years until his trial at the San Fernando Assizes, in May 1988. At that trial evidence was led that Mr. Dillon was suffering from a mental illness at the time of the act so as to make him not responsible in law for his actions.[1] As a consequence, the trial judge, Justice Crane, directed the jury to enter a special verdict of guilty but insane, pursuant to section 66 of the Criminal Procedure Act, Chap. 12:02 (CPA).[2]

2. The effect of this verdict was threefold. First, Mr. Dillon was found to be guilty of killing his mother, but was insane when he did the act. Second, there was no right of appeal against the verdict, either in relation to the commission of the act or the state of insanity, since a person found guilty but insane was acquitted of the offence due to a lack of *mens rea*.[3] Third, Mr. Dillon was ordered by the trial judge to be detained at 'the President's Pleasure' (pursuant to section 67, CPA).

[1] Between 1984 - 85, while at Remand Yard and prior to his trial, Mr. Dillon was taken to the St. Ann's Mental Hospital for evaluation pursuant to a court order. He spent two weeks there. While there he was examined by Dr. I. Ghany.

[2] Section 66 of the Criminal Procedure Act, Chap. 12:02 provides: "Where, in an indictment, any act is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible according to law for his actions at the time when the act was done, then, if it appears to the jury before whom such person is tried and he did the act charged, but was insane as mentioned above at the time when he did the same, the jury shall return a special verdict to the effect that the accused person was guilty of the act charged against him, but was insane as mentioned above at the time when he did the act."

[3] Halsbury's Annotations/Criminal Law/Criminal Cases Review (Insanity) Act 1999/1 Reference of former verdict of guilty but insane states, under the rubric "General Note": "The Trial of Lunatics Act 1883, s 2(1), as originally enacted, made provision for the return of a special verdict of "guilty but insane", i.e., that the accused was guilty of the act or omission charged against him, but was insane (so as not to be responsible, according to law, for his actions at the time when the act was done or the omission made) at the time when he did the act or made the omission. There was no right of appeal against such a verdict, since a person found guilty but insane was acquitted of the offence (because he lacked mens rea), and there was therefore no appeal either against a finding that the accused did the act or that he was insane at the time was possible (see Felstead v R [1914] All ER Rep 41, HL)."

3. Mr. Dillon was sent to the Carrera Island prison following the order of detention in 1988, where he remained until his release in 2008 (i.e. for 20 years). During this period of detention he received absolutely no examinations, care, treatment or evaluations with respect to any mental or psychiatric conditions, or as a mentally ill person (except once in 2004, following the commencement of these proceedings). In addition, he was never the beneficiary of any case reviews throughout this period, in spite of having petitioned the President for one in 1988 and made several inquiries of the prison authorities about that possibility (subsequent to his trial and detention).

4. On the 12th December, 2003 Mr. Dillon commenced these proceedings by way of constitutional motion, essentially challenging the constitutionality of his detention at the President's Pleasure pursuant to section 67 CPA. He sought an order for his release and damages for 'unconstitutional action and all damages and loss suffered'. On the 16th and 25th February 2004, pursuant to a request by the then Attorney General, Mr. John Jeremie, Mr. Dillon was examined by Dr. I. Ghany, Consultant Psychiatrist at the Forensic Unit, St. Ann's Hospital. Dr. Ghany's report, dated 26th February, 2004 and addressed to the Attorney General, concluded that: "This man has not shown any formal mental illness for several years and in my opinion is fit to be released".

5. In November 2007 Ibrahim J. granted Mr. Dillon relief, declaring that section 67 CPA was unconstitutional, as was the order of detention imposed on him, and that it was necessary to construe section 67 with the necessary modifications to bring it into conformity with the Constitution. In practical terms, section 67 was modified to remove detention at the President's Pleasure and to vest that responsibility and duty in the courts. Ibrahim J. consequentially also ordered that the initial detention order of Crane J. be replaced with the modified order. And, He also declared that the lack of any effective review of Mr. Dillon's case rendered the detention unconstitutional as it was in breach of section 4(a) of the Constitution - the right not to be deprived of liberty except by due process of law. Then, in January 2008 Ibrahim J., on a separate occasion, further ordered that: (i) Mr. Dillon be released forthwith from prison, and (ii) that there be an assessment of any damages due to him. That assessment was scheduled for the 30th January, 2008.

6. On the 27th September, 2012 Rampersad J. delivered his judgment on the assessment of damages. He ordered the State to pay Mr. Dillon: (i) TT$2,500,000.00 compensatory damages; (ii) TT$500,000.00 vindicatory damages; and (iii) interest on these sums at 6% per annum from the 12th December, 2003 (the date of commencement of these proceedings). This appeal concerns the assessment of damages only.

REVIEWING DAMAGES

7. There are generally two bases upon which the Court of Appeal will interfere with an award of damages: (i) error of law, where a judge has acted upon a wrong principle of law, or (ii) where the amount awarded is an entirely erroneous estimate of the damages. The first basis includes giving undue or insufficient weight to the evidence, or having regard to irrelevant or disregarding relevant and material evidence. Otherwise, the court of Appeal is generally disinclined to interfere with a trial Judge's assessment of damages.[4]

COMPENSATORY DAMAGES

8. It is clear that in November 2007 Ibrahim J. granted a declaration, that the detention of Mr. Dillon without any effective case reviews rendered the entire period of detention unconstitutional - and in breach of his section 4(a) rights. Indeed, it follows that there would also have been a breach of Mr. Dillon's section 5(2)(h) rights under the Constitution.[5] Lord Hope in **Seepersad and Panchoo v. The Attorney General**[6], particularly at paragraphs 10, 32, 37 and 42, has explained that in cases of indeterminate sentences of detention, sections 4(a) and 5(2)(h) of the Constitution demand that such sentences require that the court carry out periodic reviews of the question of the detainee's

[4] See Nelson JA in **Sookdeo Ramsaran v Lorris Sandy and Theresa Rampersad**, Civ. App. No 55 of 2003; **Theophilus Persad and Capital Insurance Company Limited v Peter Seepersad,** Civ. App. Nos. 136 and 137 of 2000; and **Nance v British Columbia Electric Ry**. [1951] AC 601 PC.

[5] Section 4(a) of the constitution provides: "It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely (a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law." And Section 5(2)(h) provides: "Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms."

[6] (2012) UKPC 4.

release, and do so at appropriate intervals during the period of detention.[7] In this matter the uncontroverted evidence is that this was never done for the entire period of 20 years that Mr. Dillon was detained. Indeed, even after this action was filed in 2003 and the opinion of the Consultant Psychiatrist received in 2004 advising fitness for release, the State did not take any steps to initiate a case and detention review. It is therefore clear that Mr. Dillon's sections 4(a) and 5(2)(h) rights were violated.

9. In addition to the failure by the State to conduct any case and detention reviews, there is also the matter of failure to comply with the placement and treatment requirements of section 67 CPA. Sections 67 states:

> "67. Where a person is found to be insane under section 64 or section 65, or has a special verdict found against him under section 66, the Court shall direct the finding of the jury to be recorded, and thereupon the court may order such person to be detained in safe custody, in such place and manner as the Court thinks fit until the President's pleasure is known."

And Section 68 states:

> "68 The Court shall as soon as practicable, report the finding of the jury and the detention of the person to the President who shall order the person to be dealt with as a mentally ill person in accordance with the laws governing the care and treatment of such persons or in any other manner he may think necessary"

10. What are the obligations of the Court and the State in relation to a person who is found to be 'guilty but insane' pursuant to section 66 CPA? First, if detention is ordered, the person must be "detained in safe custody" and in "such place and in such manner as ... (is) fit". These requirements are objective and demand some form of assessment and justification - as to what constitutes 'safe custody' and a 'place and manner' that is 'fitting'. It also raises the question: safe and fitting for whom? Second, once a detention order is made, the person detained must "be dealt with as a mentally ill person" in accordance with

[7] See also, Rule 282 of the 1943 Prison Rules, Trinidad and Tobago: "The case of every prisoner serving a term of imprisonment exceeding four (4) years shall be reviewed by the Governor at intervals of four years or at shorter periods if deemed advisable".

the relevant laws "governing the care and treatment of such persons".[8] Clearly what is intended is a therapeutic and rehabilitative intervention - aimed at the care and treatment of the particular person and therefore of his/her particular needs. These are the statutory requirements under the relevant law for due detention.

11. Thus, while detention is no doubt to have the twin goals of protection of both the public and the detainee, it is also to be exercised in terms of place and manner primarily for the welfare (care and treatment) of the detainee (and so consequentially for the benefit of society with detainee reintegration if/when possible).

12. Detention under sections 67 and 68 CPA, to be due process compliant (section 4(a) of the Constitution) and in accordance with the law (section 4(b) of the Constitution - protection of the law compliant), must not only provide for continuing and appropriate reviews throughout the duration of the detention, but must also meet the specific placement and care and treatment imperatives of the law. If the placement and care and treatment requirements of detention are not met, then the deprivation of the liberty of the detainee is in breach of both sections 4(a) and (b) of the Constitution.[9] Put another way, if there is a failure to provide the required placement and care and treatment mandated by sections 67 and 68 CPA, then that failure taints the entire detention and renders it unconstitutional.

13. Mr. Dillon was never the beneficiary of either the placement or care and treatment requirements of sections 67 and 68 CPA. In terms of placement, he was continuously detained at the Carrera Island prison, an isolated austere site in the Gulf of Paria, reputedly surrounded by choppy shark infested waters, and a prison generally reserved for the most hardened convicted felons in Trinidad and Tobago. First used as a prison depot around 1854 and constructed into a formal stone-walled prison complex between 1877 and 1880,

[8] See, Mental Health Act, Chapter 28:02.

[9] Lord Hope, in **Seepersad and Panchoo v The Attorney General** [2012] UKPC 4, also alludes to this as a general requirement of reviews in all cases of indeterminate detentions: "The wording of a sentence of detention during the state's pleasure indicates that the progress and development of the detainee, as well as the requirements of punishment, must be kept under continuous review throughout the sentence. The continuing review must extend to the duration of the detention as well as to the place where and the conditions under which the detainee is being kept, even if a minimum term for the detention has been set by the judiciary."

it has hardly been modified since then - except for a 1930s expansion. Even though the prison at Carrera evolved into a more ideologically modern correctional institute, geared towards the development of socially acceptable behaviour in its inmates with a goal of societal re-integration, it is presumptively the furthest thing from a place of 'safe custody' or a place 'fitting' for the 'care and treatment' of a mentally ill person.[10] Indeed, no evidence has been produced to rebut this presumption, or to demonstrate otherwise than what this court can take judicial notice of in relation to Carrera Island prison.

14. Furthermore, there is no evidence that Mr. Dillon was ever actually "dealt with as a mentally ill person" or benefited from any appropriate "care and treatment" for any such persons. In fact the evidence is that he simply was never cared for or treated as required by the law in relation to the imposition of special verdicts.

15. The Mental Health Act, Chapter 28:02 provides expressly for admission to and the care and treatment of mental ill persons at a psychiatric hospital pursuant to court and/or ministerial orders (see, sections 6, 13 and 14 of the Mental Health Act). It is: An Act to provide for the admission, care and treatment of persons who are mentally ill ...". A mentally ill person is defined as "a person who is suffering from such a disorder of mind that he requires care, supervision, treatment and control, or any of them, for his own protection or welfare or for the protection or welfare of others" (see, section 2 of the Mental Health Act). Thus, when sections 67 and 68 of the CPA mandates that with a return of a section 66 special verdict and an accompanying order for detention, the detainee "shall ... be dealt with as a mentally ill person in accordance with the laws governing the care and treatment of such persons", what is contemplated is something completely different from the manner in which Mr. Dillon was detained and treated. Indeed, section 52 of the Mental Health Act makes it a specific offence for any person to "ill-treat or wilfully neglect a person suffering from a mental disorder who is in his custody or under his care and protection". In light of the requirements of sections 67 and 68 CPA, was the treatment of Mr. Dillon by the State an offence under section 52 of the Mental Health Act? Whether his placement at Carrera Island prison and the failure to provide any appropriate care and

[10] See, Carrera Island Prison, ttprisons.com.

treatment was intentional or wilfully neglectful, one thing is clear - they were unconstitutional.

16. Trinidad and Tobago acceded to the International Covenant on Civil and Political Rights, 1966 (ICCPR) on the 21st December, 1978. Article 9, paragraph 1 states: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." Clearly sections 4(a) and 5(2) (h) of the 1976 Constitution mirror this international standard, which by virtue of accession the State is obliged to observe. Mr. Dillon's detention without any case reviews constituted an arbitrary and therefore unconstitutional detention.

17. Article 10, paragraph 1 of the ICCPR also states that: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Clause (a) of the Preamble of the 1976 Constitution also mirrors this provision. The United Nations in its Standard Minimum Rules for the Treatment of Prisoners (1955/57), provides specific guidance in relation to these internationally covenanted values of humane treatment and respect for the inherent dignity of the person in the context of detained persons. These rules provide, inter alia, that: "Persons who are found to be insane shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible" (Rule 82 (1)). And further, that: "Prisoners who suffer from other mental diseases or abnormalities shall be observed and treated in specialised institutions under medical management" (Rule 82 (2)). Clearly and inferentially this is what sections 67 and 68 of the CPA contemplate, or rather, what sections 67 and 68 contemplate is aligned with this international norm for treatment of insane and/or mentally ill persons. Mr. Dillon's detention at Carrera Island prison was therefore also in breach of these internationally covenanted values and the constitutional value of respect for the inherent dignity of the person.

18. In the absence of any case reviews, or appropriate care and treatment for 20 years, and in the circumstances of this case, there can be no question that Mr. Dillon is entitled to at least compensatory damages. Mr. Dillon was totally neglected in relation to the care and treatment that he was entitled to receive in law as a condition of his detention. He was detained in an inappropriate place. Thus, declarations of unconstitutionality alone cannot adequately remedy or redress (section 14 of the Constitution) the self-evident pain, mental anguish, and suffering experienced by Mr. Dillon by reason of the State's unconstitutional actions; or the undisputed physical, mental, emotional, and psychological effects and distress of his unconstitutional detention (see **Maharaj v The Attorney General (No.2)** (1978) 2 All ER 670).

19. What the evidence therefore reveals, is that Mr. Dillon was treated contrary to core constitutional values, specific statutory conditions relevant to his detention pursuant to a special verdict made under section 66 CPA and international treaty obligations. And further, that he suffered deleterious effects as a result.

20. Rampersad J., at paragraph 53 of his judgment, carefully, correctly and comprehensively set out the evolution of the law and principles governing the consideration and assessment of damages for constitutional breaches. There is therefore no need to rehearse this history or the relevant authorities in this judgment. The main points in summary are as follows: (1) the award of damages is discretionary; (2) the nature of any award of damages is always with the intention and purpose of upholding and/or vindicating the constitutional right(s) infringed and in furtherance of effective redress and relief for the breaches; (3) whether an award of damages is to be made depends on the circumstances of the case, including consideration whether a declaration alone is sufficient to vindicate the right(s) infringed and whether the person wronged has suffered damage; (4) in determining the sufficiency of a declaration and/or the need for damages, the effect(s) of the breach on the party seeking relief is a relevant and material consideration; (5) compensation can thus perform two functions - redress for the *in personam* damage suffered and vindication of the constitutional right(s) infringed; (6) compensation *per se* is to be assessed according to the ordinary settled legal principles, taking into account all

relevant facts and circumstances, including any aggravating factors; (7) in addition to compensation *per se*, an additional monetary award may also need to be made in order to fully vindicate the infringed right(s) and to grant effective redress and relief; (8) such an additional award is justified based on the fact that what has been infringed is a constitutional right, which adds an extra dimension to the wrong, and the additional award represents what may be needed to reflect the sense of public outrage at the wrongdoing, emphasise the importance of the constitutional right and the gravity of the breach, and/or to deter further similar breaches; (9) the purpose of this additional award remains, as with compensation, the vindication of the right(s) infringed and the granting of effective relief and redress as required by section 14 of the Constitution, and not punish the offending party; and (10) care must be taken to avoid double compensation, as compensation *per se* can also take into account similar considerations, including relevant aggravating factors and is also intended to uphold and/or vindicate the right(s) infringed.

21. Clearly there has been an unconstitutional detention of Mr. Dillon for the entire period of 20 years, from the time of the initial order of detention at the President's Pleasure until his release. This is both because of the absence of any release assessments and reviews, as well as because of the absence of any fitting care and treatment and/or placement; all in the context of the unconstitutionality of the detention order *per se* (at the 'President's Pleasure'). It is also not irrelevant that the period of 20 years detention at Carrera Island prison amounts to what is statutorily considered a 'long Sentence' - see the 1943 Prison Rules, rule 281, which only provides for mandatory reviews every 4th, 8th, 16th and 20th year of the sentence (and so appears not to contemplate incarceration beyond that duration); and based on judicial precedent, 15 years incarceration amounts to a term of imprisonment for life - see **Farfan v. The State.**[11] Thus, Mr. Dillon was unconstitutionally detained for the longest possible time, amounting to what in law is considered to be in excess of a life sentence! This then is the starting point for any assessment of compensatory damages.

[11] Cr. App. No. 34 of 1980, per Bernard JA, at page 6; and see also Commonwealth Caribbean Criminal Practice and Procedure, by Dana Seetahal, at page 443.

22. In March 2015 the Court of Appeal decided the case of **Mukesh Maharaj v. Attorney General.**[12] The lead judgment was delivered by Bereaux JA. It was a unanimous decision. The circumstances are based on similar (and analogous) underpinning legal circumstances to those in the instant appeal, though there are several significant differences in the factual circumstances of the nature and periods of detention.

23. In 1999 **Mukesh Maharaj** pleaded guilty to manslaughter on the basis of diminished responsibility pursuant to section 4A of the Offences Against the Persons Act, Chapter 11:08 (OAPA). He had been diagnosed with schizophrenia. He was a homeless person living on the streets of San Fernando and had bludgeoned to death another homeless person who had taken his sleeping spot. The trial judge ordered Mr. Maharaj 'detained in safe custody' at the forensic unit of the St. Ann's Mental Hospital or such other appropriate place 'until the President's Pleasure be known'. This was all done pursuant to section 4A (6) and (7) of the OAPA.[13]

24. At the forensic unit of St. Ann's, Mr. Maharaj was the beneficiary of periodic reviews by an established Psychiatric Hospital Tribunal, and on the 14th March, 2004 the Tribunal recommended his release from the hospital. However no action was taken on that recommendation until January 2006, when the Cabinet agreed to it and directed the Attorney General to take the necessary steps to effect it. Despite this, Mr. Maharaj remained detained at St. Ann's until he brought court proceedings for constitutional relief

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[12] Civ. App. 118 of 2010 - Archie CJ; Bereaux & Rajnauth-Lee JJA.

[13] Section 4A (6) and (7) provides:

> "(6) Where on a trial for murder –
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> (a) Evidence is given that the accused was at the time of the alleged offence suffering from such abnormality of mind as is specified in subsection (1); and
>
> (b) The accused is convicted of manslaughter,
>
> the Court shall require the jury to declare whether the accused was so convicted by them on the ground of such abnormality of mind and, if the jury declare that the conviction was on that ground, the Court may, instead of passing such sentence as is provided by the law for that offence, direct the finding of the jury to be detained in safe custody, in such place and manner as the Court thinks fit until the President's pleasure is known.
>
> (7) The Court shall as soon as practicable, report the finding of the jury and the detention of the person to the President who shall order the person to be dealt with as a mentally ill person in accordance with the laws governing the care and treatment of such persons or in any other manner he thinks necessary."

to secure his release and a court order was obtained in April 2009 (about 5 years after the Tribunal's recommendation).

25. At first instance, the trial judge found that there had been a breach of Mr. Maharaj's constitutional rights not to be deprived of liberty without due process (sections 4(a) and 5(2)(h) of the Constitution), and this was in relation to his detention for the period of 5 years after the Tribunal's release recommendation. He awarded damages in the sum of TT$200,000.00, which included the sum of TT$25,000.00 as 'vindicatory damages'. On appeal the Court of Appeal unanimously increased the damages awarded to TT$450,000.00, representing a "sum sufficient to compensate the appellant for the breaches of his rights and also to vindicate them" (Bereaux JA, at paragraph 28). The Court of Appeal's decision was based on a period of detention of 4½ years (not 5 as used by the trial judge) and on the nature and gravity of the breaches. The court also opined and expressly found that there was "no necessity for an additional sum" to vindicate the rights infringed (Bereaux JA, at paragraphs 28 and 51).

26. In **Mukesh Maharaj**, the relevant circumstances that informed the Court of Appeal's award of damages - the period of unconstitutional detention, the nature and gravity of the breaches, and aggravating factors, were as follows (see Bereaux JA, at paragraphs 29, 30 and 51). The period of unconstitutional detention was 4½ years and the breaches of the Constitution were to sections 4(a), (b), and 5(2)(h) - due process, protection of the law, and benefit of procedural provisions for the protection of fundamental rights. In the opinion of the court, it was the "absence of a process within the criminal justice system or the executive by which the 'President's Pleasure' could be carried into effect" that constituted the breach of Mr. Maharaj's rights under sections 4(a), (b) and 5(2)(h) of the Constitution. In addition, the court opined that: "The appellant's continued detention thus had all the elements of arbitrariness which Phillips J.A. in **Lassalle v. The Attorney General** described as 'the antithesis of due process'" (see Bereaux JA, at paragraph 50). In relation to aggravating factors, the Court of Appeal agreed with the trial judge's assessment of those, to wit: the appellant's unlawful detention and his uncertainty as to status ("fear that the authorities had forgotten him"). However, the court found that there

was no evidence of any grief, inhumane prison conditions, loss of reputation, physical assault, or misery and distress - Bereaux JA at paragraphs 29 and 51. Mr. Maharaj was also the beneficiary of appropriate placement, care and treatment (for a mentally ill person), and appropriate periodic case reviews (for a person detained for an indefinite period).

27. Mr. Dillon's circumstances are significantly different in all areas of relevant consideration from those of Mukesh Maharaj. First, Mr. Dillon's period of unconstitutional detention was for 20 years. Second, while the actual rights breached are the same - 4(a), (b), and 5(2) (h), the nature and gravity of the breaches are very different. Mr. Dillon's due process and protection of the law rights were breached because he was placed in an absolutely inappropriate place during his entire detention (Carrera Island Prison), he never received any treatment or care as a mentally ill person and there is no evidence that he received any treatment fit for a person in his condition (both as required by law), and he never benefited from any case and detention review assessments/evaluations and no such processes were available to him or at all. In this context his detention at the President's Pleasure was arbitrarily indeterminate. In addition, by reason of the verdict passed and imposed on him, Mr. Dillon had no right of appeal. His review and eventual release only happened because he initiated these court proceedings. Further, even in the face of a 2004 recommendation to the Attorney General of his fitness to be re-integrated into society and an impeccable detention record,[14] it took four years before he could enjoy the freedom of that benefit - and only by reason of a court order.

28. There are further differences. Rampersad J. found that as a result of his detention Mr. Dillon "had been living in fear" and that this fear was exacerbated because of the indeterminate nature of the detention and his lack of any opportunity for reviews. He feared that "he would be left to die in prison". Mr. Dillon also explained that because he witnessed other inmates being released this, in the judge's words, "furthered his anguish"; and in his own words, led him to believe that the authorities had "simply forgotten about my existence".[15] In the trial judge's opinion, Mr. Dillon "suffered immense fear as a result of

[14] See paragraphs 16 and 17 of the Mr. Dillon's affidavit filed on the 12th December, 2003 in support of his action.
[15] See paragraph 59 of the trial judge's judgment and paragraphs 11 and 21 of the affidavit of the appellant.

his incarceration" (see, paragraph 59 of the trial judge's judgment). Clearly Mr. Dillon suffered fear, misery and distress for an extraordinarily extended period of time, and did so in a wholly unsuitable place.

29. What then is an appropriate award of damages to compensate Mr. Dillon for the breach of his constitutional rights, for the inconvenience, distress and suffering he has had to endure as a result - the effects of the breaches, and to fully and effectively uphold and vindicate the rights infringed? Rampersad J. thought TT$2,500,000.00 was an appropriate sum. We agree.

30. This case is significantly more egregious than that of **Mukesh Maharaj**. Exponentially so. The period is four times more, and even taking into account what de la Bastide CJ (in **Millette v. Mc Nichols**[16]**)** called the 'absurdity' of a simple 'mathematical computation of damages' in unlawful detention cases, it is clear that the "subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on" (per Lord Kerr in **James v. The Attorney General** (2010) UKPC 23, at paragraph 28), that Mr. Dillion undoubtedly suffered because of his unconstitutional detention for 20 years, warrant a most substantial award of compensatory damages. In James, Lord Kerr (at paragraph 50 and 51) also explained that in assessments such as this one: "Translating hurt feelings into hard currency is bound to be an artificial exercise." And (citing with approval Dickson J in **Andrews v. Grand & Toy Alberta Ltd** (1978) 83 DLR (3D) 452), that the exercise "is a philosophical and policy exercise more than a legal or logical one." He however also advised that: "The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary... (As) No money can provide true restitution."

31. It must be noted that despite all that went wrong with Mr. Dillon's detention, some good came out of it. At paragraphs 16 and 17 of his affidavit in support of these proceedings, he deposed as follows:

[16] (2000) 60 WIR 362.

"16. While at Carrera I have attempted to make the best of my time here. Following my trial I attended a mat, hammock and bag making course. I pursued this trade until 1993 – 1994 when I began working in the tailoring workshop, I attended classes and have been awarded Level 1 and Level 2 Craft Diplomas in tailoring. I keep these certificates with me at Carrera. In 1998 I decided that I had pursued enough craft related work and that I wanted to try my hand at academics. I began to study and in 2003 I wrote CXC exams. I sat 5 subjects: English, Maths, principles of Accounts, Information Technology and Technical Drawing. I passed all these subjects, with a 1st class in English Language. At present I am studying for 2 A "Levels", Computer Science and Mathematics, which I hope to sit Next year. I find this very challenging but I am determined to succeed as I eventually wish to pursue further studies in the field of computers.

17. At present I am a staff teacher at the school in Carrera where I teach classes: Technical Drawing and Information technology. The Information Technology class is quite popular with 15 students and the Technical Drawing class has 4 students. As with most of my other activities at the Carrera prison I am largely unsupervised when teaching."

32 These accomplishments are however due more to the indomitable spirit of Mr. Dillon than to any special care or treatment that the State afforded him. He made the most of his unfortunate circumstances and must be congratulated for doing so.

33. Section 14 of the Constitution requires that the court provide 'redress' and 'relief' as 'it may consider appropriate' for the purposes of upholding and vindicating the fundamental rights infringed. In our carefully considered opinion, and we are unanimous about this, the trial judge's award of TT$2,500,000.00 is an appropriate sum as compensatory damages in all the circumstances of this case. Once one focuses on the rights infringed and on the effects of those breaches on Mr. Dillon (and not on the act that triggered his detention in the first place), this award is, we believe, in keeping with the new

standard established unanimously by the Court of Appeal in 2015 in **Mukesh Maharaj's** case and with the special circumstances of this case. It is also justified on the basis of the indication given by the Privy Council in 2008 in **Subiah v. The Attorney General**,[17] that "the level of compensatory damages may call for upwards revision by the courts of Trinidad and Tobago" (at paragraph 11). Can TT$2.5M ever truly compensate Mr. Dillon for what he had to endure? Probably not. However, TT$2.5M for 20 years of egregiously unconstitutional, neglectful and seemingly unconcerned detention will have to suffice. It is the best estimate that we consider is fair and reasonable, gauged by analogous, recent and persuasive local precedent. The trial judge's award is therefore upheld; no error of law or wholly erroneous estimate of damages has been demonstrated.

'VINDICATORY' DAMAGES

34. In **Subiah v. The Attorney General**,[18] Lord Bingham having explained that "ordinarily ... constitutional redress will include an award of damages to compensate the victim" and that this sum was to be assessed on "ordinary principles as settled in the local jurisdiction", including "whatever aggravating features there may be in the case" (at paragraph 11), then went on to explain what was the proper approach to be taken in relation to 'vindicatory' damages. He stated: "Having identified an appropriate sum (if any) to be awarded as compensation, the court must then ask itself whether that sum affords the victim adequate redress or whether an additional sum should be made to vindicate the victim's constitutional right. The answer is likely to be influenced by the quantum of the compensatory award, as also by the gravity of the constitutional violation in question to the extent that this has not already been reflected in the compensatory award" (at paragraph 11). In **The Attorney General v. Ramanoop**,[19] Lord Nicholls had earlier explained the core considerations that will inform whether or not an additional sum will be awarded as 'vindicatory' damages, as follows: "An additional award ... may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches" (at paragraph 19). This additional sum remains vindicatory in purpose and has its jurisprudential basis in "the fact that the right violated

[17] [2008] UKPC 47.
[18] [2008] UKPC 47.
[19] [2006] 1 AC 328.

was a constitutional right" which therefore "adds an extra dimension to the wrong" (at paragraph 19).

35. Thus as the Court of Appeal acknowledged in 2015, in **Maharaj's** case: "The Ramanoop approach of awarding an additional sum to vindicate the constitutional right is therefore well settled."[20] We all agree. Also, this additional sum has a salutary jurisprudential value and purpose - the recognition of the special status and vindication of constitutional rights. As to what it should be named, Lord Nicholls was clear as to what it was not to be called: " 'Redress' in s 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances ... punishment (in the strict sense of retribution) is not its object. Accordingly, the expressions 'punitive damages' or 'exemplary damages' are better avoided as descriptions of this type of additional award" (at paragraph 19) - hence 'vindicatory' damages as the apt descriptor for this additional award.[21]

36. Rampersad J. awarded an additional sum of TT$500,000.00 as 'vindicatory' damages. However he did not demonstrate in his judgment any reasons or justification as prescribed by both Lords Bingham and Nicholls for this additional 'vindicatory' sum awarded (see above).[22] In relation to compensatory damages Rampersad J. had this to say: "The fact of compensation, however, must include the period from which the recommendations for release were made, ... but must necessarily also include compensation for the failure to review the applicants in a timely basis from their initial dates of incarceration."[23] He then awarded the sum of TT$2,500,000.00 for compensatory damages. He continued as follows: "As mentioned above, in **Ramanoop**, the Privy Council affirmed the power of the court to make an additional award over and above the compensatory award for infringements of constitutional rights. In the current circumstances I believe that the applicants should be awarded under this head." And, he

[20] Per Bereaux JA, at paragraph 48.
[21] See and compare Archie CJ in **Mukesh Maharaj** (supra) on the "tenuous lineage" of "the expression 'vindicatory damages'".
[22] See paragraphs 72-75 of the judgment.
[23] See paragraph 73 of the judgment.

proceeded to award the sum of TT$500,000.00 without explaining why he believed it was necessary to vindicate the breaches of Mr. Dillon's rights. In the absence of any or any proper reasons, this court is entitled to review this aspect of the judge's decision.

37. In our opinion an additional sum as 'vindicatory' damages is justified for the following reasons. First, and as Bereaux J.A. also correctly observed in relation to **Mukesh Maharaj**: "His plight was not unlike many mentally ill patients in Trinidad and Tobago and his abandonment very much consistent with the approach adopted in respect of the mentally ill in Trinidad and Tobago."[24] The unconstitutional detention of Mr. Dillon, deemed a mentally ill person by virtue of the special verdict imposed, is absolutely unacceptable and especially so in Trinidad and Tobago. It amounted to an uncaring and careless, if not wilfully negligent or reckless, abandonment in disregard of his inherent (and constitutionally recognised and valued) dignity and personhood, and to his needs for care and treatment as a mentally ill person. This renders the gravity of the constitutional violation extremely egregious.

38. Second, there must be an instinctive recoil and sense of public outrage at the thought that Mr. Dillon as a mentally ill person could have been so disregarded and for so long. By comparison, **Mukesh Maharaj** enjoyed appropriate care and treatment at an institution for the mentally ill - and the benefit of periodic case reviews. The courts as guardians of the Constitution are also in this sense the conscience of the citizenry. It is simply outrageous that Mr. Dillion could have been treated in this way; and even after an examination and recommendation for release in 2004, left in the same unacceptable circumstances for a further four years (virtually the entire period of the unconstitutional detention for which damages were awarded in the case of **Mukesh Maharaj**), until he secured his own release by way of court intervention and order.

39. Third, the rights infringed - the constitutional values violated, are the entitlements to freedom (only to be curtailed by due process and according to law) and respect for the inherent dignity of the person (personhood itself). These are two of the most fundamental

[24] See paragraph 51, **Mukesh Maharaj v The Attorney General** (supra).

rights in a Westminster fashioned democracy. The Preamble to the Constitution identifies them both as among "the equal and inalienable rights with which all members of the human family are endowed by their Creator" (in a society which "is founded upon principles that acknowledge the supremacy of God"). These are also two internationally recognised rights that the State of Trinidad and Tobago has covenanted to uphold. An additional award is therefore also justified in order to both uphold and vindicate these important rights in the context of their violation. In addition, Mr. Dillon was deprived of his entitlement to the procedures that are necessary for the enjoyment and protection of these rights (section 5 (2) (h)). His detention was altogether arbitrarily, 'the antithesis of due process'.

40. Fourth and finally, this situation must never recur in the history of Trinidad and Tobago. The fundamental right to respect for the inherent dignity of the person and the constitutional mandate for equality of treatment for all, demand that all persons be treated equally and with respect. This is especially so for the vulnerable groups in society and the historically alienated and disregarded, such as the mentally ill. An additional sum to deter this ever happening again is therefore well-justified.

41. The trial judge was right that an additional sum ought to be awarded, but wrong in his estimate of what it should be. The sum of TT$500,000.00 is in our opinion altogether too high in light of the actual compensatory award and bearing in mind the factors already considered in making that compensatory award. In our opinion an additional sum of TT$200,000.00 is an appropriate award as 'vindicatory' damages to achieve the aims identified above and at the same time avoid double compensation.

INTEREST

42. There was also an appeal in relation to the order for interest. However the judge's order of 6% per annum from the 12th December, 2003, the date of commencement of these proceedings, is in keeping with the order for interest made by the Court of Appeal in **Mukesh Maharaj's** case, and there is no basis to interfere with it.

CONCLUSION

43. The appeal is therefore dismissed in relation to the compensatory award and the judge's order for compensatory damages in the sum of TT$2,500,000.00 is upheld. In relation to the award of vindicatory damages, the appeal is allowed and the Judge's order for vindicatory damages is set aside and in its place an award of TT$200,000.00 is substituted. Interest will run on these sums from the 12th December 2003, as also ordered by the judge. The parties will be heard on the issues of costs.

Peter Jamadar
Justice of Appeal

I have read the judgment of Jamadar, JA and I agree.

C. Pemberton
Justice of Appeal

I have read the judgment of Jamadar, JA and I also agree.

A. des Vignes
Justice of Appeal