REPUBLIC OF TRINIDAD AND TOBAGO

Claim No. CV 2010 – 04508

CA P192/2012

BETWEEN

GABRIEL JOSEPH

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Claim No. CV 2010 – 4093

CA P191/2012

BETWEEN

ANTONIO SOBERS

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Claim No. CV 2010 – 04649

CA P196/2012

BETWEEN

CLINT WILSON

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

APPEARANCES:

Mr. G. Ramdeen, Mr. U. Maharaj instructed by Ms. D. Harripaul for the Appellants

Ms. K. Seenath, Ms. V. Ramadhar instructed by Ms. K. Mark for the Respondent

DATE OF DELIVERY: **October 22 2021**

PANEL:

N. Bereaux JA

P.A Rajkumar JA

V. Kokaram JA

I have read the judgment of Rajkumar JA and I agree with it.

…….

Justice of Appeal

Nolan Bereaux

I have read the judgment of Rajkumar JA and I also agree with it.

……

Justice of Appeal

Vasheist Kokaram

Delivered by Peter A. Rajkumar JA

Background

1. The instant appeals concern three prisoners, each allegedly representative of a class of prisoners who collectively instituted action against the State in respect of alleged assaults committed against them on November 11, 2006. The prisoners allegedly represent three different categories. Mr. Sobers represents prisoners who sustained injuries and were treated at hospital. Mr. Joseph represents a category of prisoners who sustained injuries which were treated at the prison infirmary. Mr. Wilson represents a category of prisoners who allegedly sustained injuries but who have no medical records documenting them.

2. The alleged injuries occurred in the course of an exercise conducted by police, soldiers and prison officers for the purpose of restoring order at the Golden Grove prison. The State contended that there was a period of increasing insecurity and insubordination at the prison extending over a period of months. It became necessary to reassert control over portions of the prisons, which had come under the control of prisoners. To this end, an exercise was planned involving prison officers, police and soldiers. That exercise involved the entry into the northern wing of the prison with riot suppression gear. That gear included pepper spray, and devices which fired rubber bullets. The State contended that such force as had to be used was a proportional response to that quite serious situation.

3. In respect of the appellant Mr. Clint Wilson, the trial judge considered that he had produced no medical report documenting his injuries. She therefore found that his claim that he had suffered injuries in the course of the exercise was unsubstantiated, and his claim for compensation for such injuries allegedly sustained was rejected.

4. In respect of the respondents Mr. Sobers and Mr. Joseph, the State has appealed the trial judge's findings (i) that their claims to have sustained injuries in the course of that exercise had been established by the evidence, and (ii) that the evidence disclosed that disproportionate force was used against them such that it constituted an assault.

5. Counsel for Mr. Wilson contends that the authorities have clearly established that, especially where cross-examination has occurred, that findings of fact of a trial judge should rarely be interfered with by an appellate court, except where the trial judge has been demonstrated to have been plainly wrong, which is not the case here. Commendably he contends therefore that if the judge's findings of fact supporting the claims of Mr. Joseph and Mr. Sobers should not be interfered with, in principle this will equally apply to findings of fact made by the trial judge with respect to Mr. Wilson. Therefore, if the claims of Mr. Sobers and Mr. Joseph were to be upheld on appeal then the claim by Mr. Wilson should fail, because all were based on findings of fact by the trial judge.

Issues

6. Were the findings of fact by the trial judge plainly wrong as to:

   i. Whether injuries, if any, were sustained;

   in relation to:-

   a. Sobers,

   b. Joseph, and

   c. Wilson;

   ii. If so were they caused by the actions of the servants or agents of the State.

   iii. If so whether the degree of force used was reasonable or in proportion to the circumstances;

Conclusion and Disposition

7.

   i. a. The trial judge had sufficient evidence to conclude that injuries were sustained by Mr. Sobers.

   b. The trial judge had sufficient evidence to conclude that injuries were sustained by Mr. Joseph.

   c. The trial judge was entitled to find that, in the absence of any medical reports which corroborated Mr. Wilson's alleged injuries, and in circumstances where there was such corroboration in respect of around 50 other prisoners, that Mr. Wilson had not established that he had suffered any injury.

ii. The trial judge was entitled on the evidence, which included corroboration by the witnesses of the State, to find that it was more likely than not that Mr. Sobers was shot in the face with a rubber bullet, by servants or agents of the State while he was in a cell. Equally the trial judge was entitled to find on the evidence that Mr. Joseph was assaulted and battered after the riot had been brought under control, after he had returned to a cell, and after he was then removed therefrom, in circumstances where the use of force was not then required to subdue him.

iii. The trial judge was entitled to find on that evidence that the use of force on both Mr. Sobers and Mr. Joseph was not reasonable or proportionate to any threat they posed at the time they received their respective injuries.

In those circumstances, the findings of fact and orders of the trial judge in respect of Mr. Sobers, Mr. Joseph and Mr. Wilson have not been demonstrated to be plainly wrong such that an appellate court can reverse them.

Orders

8.

i. The appeals of the State in respect of Mr. Sobers and Mr. Joseph are dismissed.

ii. The appeal of Mr. Wilson is dismissed.

Analysis

9. The trial judge was required to assess the evidence in relation to i) whether or not either Mr. Sobers, Mr. Joseph or Mr. Wilson sustained injury. ii) If they, or any of them did, were such injuries caused or occasioned by servants or agents of the State. iii) If so caused, were they caused by the unreasonable use of force by the servants or agents of the State disproportionate to the occasion. The issue in this case is whether the trial's judge's process of assessing and analysing the evidence in relation to those matters can be demonstrated to be so flawed as to be described as plainly wrong.

Law

10. In the instant case, the court of appeal is asked to set aside findings of fact by a trial judge. The State in its appeal in relation to Mr. Sobers and Mr. Joseph contends that

the instant situation falls within the exceptional case where a trial judge should be found to be plainly wrong. If so this will justify this court reviewing and interfering with the findings of fact by the trial judge.

Reviewing Findings of Fact by the Trial judge

11. The circumstances in which an appellate court would review findings of fact by a trial court are by now too well known to require rehearsal. See **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21[1], **Petroleum Company of Trinidad and Tobago v Stanley Ryan and Anor** [2017] UKPC 30 at

[1] **Beacon Insurance Company Limited v Maharaj Bookstore Limited [2014] UKPC 21**
The role of an appeal court
12. In Thomas v Thomas [1947] AC 484, to which the Court of Appeal referred in its judgment, Lord Thankerton Stated, at pp 487-488:
"I Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence ***should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;*** *II The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."*

In that case, Viscount Simon and Lord Du Parcq (at pp 486 and 493 respectively) both cited with approval a dictum of Lord Greene MR in Yuill v Yuill [1945] P 15, 19:
"It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion." ***It has often been said that the appeal court must be satisfied that the judge at first instance has gone "plainly wrong".*** *See, for example, Lord Macmillan in Thomas v Thomas at p 491 and Lord Hope of Craighead in Thomson v Kvaerner Govan Ltd 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: Piggott Brothers & Co Ltd v Jackson [1992] ICR 85, Lord Donaldson at p 92.* ***Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole.*** *That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required* ***to identify a mistake*** *in* ***the judge's evaluation of the evidence*** *that is* ***sufficiently material to undermine his conclusions****. Occasions meriting appellate intervention would include when a trial judge* ***failed to analyse properly the entirety of the evidence****: Choo Kok Beng v Choo Kok Hoe [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169.*

14. The Board has adopted a similar approach in this jurisdiction. See Harracksingh v Attorney General of Trinidad and Tobago [2004] UKPC 3 in which it referred (at para 10) to the formulation of Lord Sumner in SS Hontestroom (Owners) v SS Sagaporack (Owners) [1927] AC 37, 47:
"… not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, ***unless it can be shown that he has failed to use or has palpably misused his advantage,*** *the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.*

… If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should … be let alone."

paragraph 15[2], **Harracksingh v Attorney General of Trinidad and Tobago** [2004] UKPC 3, **Bahamasair Holdings Limited v Messier Dowty Inc** [2018] UKPC 25[3]. Those circumstances have been repeated as recently as this year in the case of **Pleshakov v Sky Stream Corporation and Ors [2021] UKPC 15.** Reference will therefore be made only to two of the more recent reiterations of those principles as summarized in recent decisions of the Privy Council.

12. The Judicial Committee in **Bahamasair Holding Limited v Messier Dowty Inc** adopted the approach propounded by Lord Reed in Mc Graddie. Lord Kerr under the heading

[2] *15. ….It is sufficient to refer to Lord Reed's summary in Henderson v Foxworth Investments Ltd [2014] 1 WLR 2600, para 67:*
"67. It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has ***no basis in the evidence****, or a demonstrable misunderstanding of relevant evidence, or a demonstrable* ***failure to consider relevant evidence****, an appellate court will interfere with the findings of fact made by a trial judge* ***only*** *if it is satisfied that his decision* ***cannot reasonably be explained or justified****."*

[3] *The proper approach to the review by an appellate court to the findings of a trial judge*
32. As was observed in DB v Chief Constable of the Police Service of Northern Ireland [2017] UKSC 7, para 78 the United Kingdom Supreme Court on a number of occasions recently has had to address the issue of the proper approach to be taken by an appellate court to its review of findings made by a judge at first instance. And, as was said in that case, perhaps the most useful distillation of the applicable principles is to be found in the judgment of Lord Reed in the case of McGraddie v McGraddie [2013] UKSC 58; [2013] 1 WLR 2477.

33. In para 1 of his judgment Lord Reed referred to what he described as "what may be the most frequently cited of all judicial dicta in the Scottish courts" - the speech of Lord Thankerton in Thomas v Thomas [1947] AC 484 which sets out the circumstances in which an appeal court should refrain from or consider itself enabled to depart from the trial judge's conclusions. Lord Reed's comprehensive and authoritative discussion ranged over the speech of Lord Shaw of Dunfermline in Clarke v Edinburgh & District Tramways Co Ltd (1919) SC (HL) 35, 36-37, where he said that an appellate court should intervene only if it is satisfied that the judge was ***"plainly wrong"****; the judgment of Lord Greene MR in Yuill v Yuill [1945] P 15, 19, and the speech of Lord Hope of Craighead in Thomson v Kvaerner Govan Ltd [2003] UKHL 45; 2004 SC (HL) 1, para 17 where he Stated that:*
"It can, of course, only be on the rarest of occasions, and in circumstances where the appellate court is convinced by ***the plainest of considerations****, that it would be justified in finding that the trial judge had formed a wrong opinion."*

36. The basic principles on which the Board will act in this area can be summarised thus:
1. "… ***[A]ny appeal court must be extremely cautious about upsetting a conclusion of primary fact.*** *Very careful consideration must be given to the weight to be attached to the judge's findings and position, and in particular the extent to which, he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere …" - Central Bank of Ecuador v Conticorp SA [2015] UKPC 11; [2016] 1 BCLC 26, para 5. 2. Duplication of the efforts of the trial judge in the appellate court is likely to contribute only negligibly to the accuracy of fact determination - Anderson v City of Bessemer, cited by Lord Reed in para 3 of McGraddie.*
3. ***The principles of restraint "do not mean that the appellate court is never justified, indeed required, to intervene."*** *The principles rest on the assumption that "the judge has taken proper advantage of having heard and seen the witnesses, and has in that connection* ***tested their evidence by reference to a correct understanding of the issues against the background of the material available and the inherent probabilities.****" Where one or more of these features is not present, then the argument in favour of restraint is reduced - para 8 of Central Bank of Ecuador.* (All emphasis added)

"*The proper approach to the review by an appellate court to (sic) the findings of a trial judge*" stated (all emphasis added):-

32. As was observed in DB v Chief Constable of the Police Service of Northern Ireland [2017] UKSC 7, para 78 the United Kingdom Supreme Court on a number of occasions recently has had to address the issue of the proper approach to be taken by an appellate court to its review of findings made by a judge at first instance. And, as was said in that case, perhaps the most useful distillation of the applicable principles is to be found in the judgment of Lord Reed in the case of McGraddie v McGraddie [2013] UKSC 58; [2013] 1 WLR 2477.

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34. Lord Reed then considered foreign jurisprudence on the subject in paras 3 and 4 of his judgment as follows: "3. The reasons justifying that approach are not limited to the fact, emphasised in Clarke's case and Thomas v Thomas, that the trial judge is in a privileged position to assess the credibility of witnesses' evidence.

Other relevant considerations were explained by the United States Supreme Court in Anderson v City of Bessemer (1985) 470 US 564, 574-575: 'The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the court has Stated in a different context, the trial on the merits should be 'the 'main event' ... rather than a 'tryout on the road.'' ... For these reasons, review of factual findings under the clearly erroneous standard - with its deference to the trier of fact - is the rule, not the exception.'
Similar observations were made by Lord Wilson JSC in In re B (A Child) [2013] 1 WLR 1911, para 53. 4. Furthermore, as was Stated in observations adopted by the majority of the Canadian Supreme Court in Housen v Nikolaisen [2002] 2 SCR 235, para 14:

'The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.'"

35. The Board adopts a similar approach. In their work, Privy Council Practice, Lord Mance and Jacob Turner at paras 5.46-5.53, State that the Judicial Committee of the Privy Council has the power to review factual findings. It will, however, review findings of fact based on oral evidence with great caution, and will not normally depart from concurrent findings of fact reached by the courts below.

*36. The basic principles on which the Board will act in this area can be summarised thus: 1. "... **[A]ny appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the judge's findings** and position, and in particular the extent to which, he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere ..." - Central Bank of Ecuador v Conticorp SA [2015] UKPC 11; [2016] 1 BCLC 26, para 5. 2. Duplication of the efforts of the trial judge in the appellate court is likely to contribute only negligibly to the accuracy of fact determination - Anderson v City of Bessemer, cited by Lord Reed in para 3 of McGraddie. 3. **The principles of restraint** "do not mean that the appellate court is never justified, indeed required, to intervene." The principles **rest on the assumption** that "**the judge has taken proper advantage of having heard and seen the witnesses**, and **has in that connection tested their evidence by reference to a correct understanding of the issues against the background of the material available** and **the inherent probabilities**." Where one or more of these features is not present, then the argument in favour of restraint is reduced - para 8 of Central Bank of Ecuador.*

*37. The Board considers that the Court of Appeal in the present case should have operated on these principles in reviewing the Chief Justice's findings made at first instance. It further finds that it failed to do so. Rather, because it disagreed with some of those findings, it considered that it was legitimate to set them aside and to examine the evidence de novo. Given that **there was material** before the Chief Justice **on which he could make the factual findings** which he did and that **the inferences which he drew from them could properly be drawn**, and that **none of his conclusions was "plainly wrong"**, the Court of Appeal should not have conducted its own analysis.*

13. A recent authority also to this effect is **Pleshakov v Sky Stream Corporation and Ors [2021] UKPC 15** delivered June 14, 2021 at paragraphs 32-39 and 52-59 (all emphasis added).

*32. The Court of Appeal reminded themselves of well-known authority to the effect that an appellate court should not interfere with the evaluation of facts and inferences to be drawn from findings of fact unless the trial judge was **plainly wrong**. At para 33 Baptiste JA referred to the judgment of Lord Neuberger of*

Abbotsbury in In re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33; [2013] 1 WLR 1911, para 53, where he said that ***an appellate court could only interfere with a finding of fact made by a judge after hearing live evidence where there was no evidence to support the finding, where the finding was based on a misunderstanding of the evidence*** *or* ***where the finding was one which no reasonable judge could have reached.*** *Baptiste JA also referred to Assicurazioni Generali SpA v Arab Insurance Group [2002] EWCA Civ 1642; [2003] 1 WLR 577, paras 15 and 16 (Clarke LJ) and Langsam v Beachcroft LLP [2012] EWCA Civ 1230, para 72 (Arden LJ). At para 36 he noted that an appellate court is rarely justified in overturning a finding of fact by a trial judge which turns on the credibility of a witness and referred to Beacon Insurance Co Ltd v Maharaj Bookstore Ltd [2014] UKPC 21, para 17, where Lord Hodge said:*

"Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses, who have given oral evidence… an appellate court may have to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole."

Baptiste JA also referred to Central Bank of Ecuador v Conticorp SA [2015] UKPC 11 and guidance given by Lord Thankerton in Watt (or Thomas) v Thomas [1947] AC 484, 487-488:

"I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;

II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;

III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

The Board also finds it helpful to refer to the speech of Viscount Simon in that case, at p 486: "… an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide. But ***if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses,*** *the appellate court will bear in mind that it has not enjoyed this opportunity and that* ***the view of the trial judge as to where credibility lies is entitled to great weight.*** *This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it*

is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

14. Despite so reminding itself that court of appeal then proceeded to evaluate the evidence itself having purportedly identified an error in the trial judge's reasoning in relation to a finding that there had been an oral agreement. The Board had cause to emphasise the limited circumstances in which an appellate court should do so.

52. The Court of Appeal directed themselves correctly concerning the general principles regarding the caution to be exercised by an appellate court before it can properly overturn findings of fact or inferences drawn from facts by a first instance judge who has heard oral evidence and in doing so has had a full opportunity to weigh all the competing elements in the evidence against each other. The Board does not find it necessary to add to the case-law on that topic in this judgment.

53. In the Board's view, this was a classic case in which there was a good deal to be said on each side regarding the primary facts and what inferences should be drawn from the primary facts and the circumstances in which the parties were acting. ***It is the function of the trial judge in such a case to weigh carefully the points made by each side and come to definite conclusions****. That is what the judge did.* ***He rejected parts of Mr Pleshakov's evidence and aspects of his case, but still found that the inference was to be drawn that the respondents acquired the SSC shares intending to hold them on trust for Mr Pleshakov absolutely. In the Board's opinion, the judge was fully entitled to weigh the evidence as he did and come to that conclusion.***

58. The other matters referred to by Baptiste JA were points on which the Court of Appeal would have been disposed to draw different inferences had they been hearing the case at trial, but they were not conducting the trial and had not heard the evidence given by the relevant witnesses. It is well-established that this is not a proper basis on which an appellate court can interfere with the findings and conclusions reached by a judge after hearing evidence at trial.

Whether the trial judge's findings of fact were plainly wrong

15. The trial judge stated that the credibility of the claimants was of utmost importance[4]. The State was unable to call specific evidence in relation to disputing the specific assaults and injuries sustained by each claimant. However the State did lead evidence

[4] Paragraph 16 of the judgment.

generally that i. a state of unrest and lawlessness occurred at the prison, ii. that an exercise had to be carried out to regain control of it, iii. that the exercise involved coordination between the police, soldiers, and prison officers, and iv. that the force used in suppressing that situation was not disproportionate. Therefore, it contended that, to the extent that the force used caused injury to any of the prisoners, it was force that was reasonable and proportionate to that which the occasion required.

Mr. Sobers

16. The State's contention is that Mr. Sobers' evidence should have been rejected in its entirety because Mr. Sobers had clearly been untruthful. This was because he should not have been believed in relation to how the injuries that he sustained occurred, having clearly embellished and exaggerated his version of events. Accordingly, his entire case should have been rejected.

17. Mr. Sobers claims that he was shot in the face while in his cell. He also contends that he was then dragged from his cell, that he was beaten and kicked, that he ran a short distance, that he was shot again in the waist, that he fell from a height of 8 feet from one level to another, and that he sprained his arm. On his account he was seriously assaulted by officers of the State, and the use of force was entirely disproportionate to any situation that was then existing, or any threat he could have then posed.

18. It is correct that Mr. Sobers clearly was untruthful with respect to some aspects of his evidence. The medical reports do not disclose any second bullet wound, any sprained left arm or any injuries consistent with the savage and brutal assault that he contends occurred. The medical reports do however reveal an injury to the face[5], consistent with having been struck with a rubber bullet at close range. Apart from that in his own statement to prison authorities on November 24, 2006 he made no allegation of those further injuries. This was not lost upon the trial judge, who recognized this at

[5] See discharge summary from Eric Williams Medical Science Complex admitting diagnosis - gunshot wound to L face, rubber pellets at page 318, 319 record of appeal. See also report of Dr. Narayansingh dated November 20, 2006, page 342 record of appeal.

paragraphs 88-89 of the judgement and accepted that Mr. Sobers had clearly exaggerated the circumstances in which he sustained his injuries.

> *"88. I accept Sobers evidence …that he was in his cell at the time and that he was shot at close range in the face by an officer. That such actions were occurring on that date is confirmed by Williams' evidence. This is also consistent with the medical evidence led on behalf of Sobers. I have no doubt however that there is an element of exaggeration by Sobers with respect to the beating he suffered at the hands of the officers. For example there is no medical evidence confirming the sprain to his left hand as he alleges. This, coupled with the contents of his Statement made on 24th November, suggests to me that he has greatly exaggerated the assault received at the hands of the servants of the Defendant.*
>
> *89. With respect to Sobers therefore I accept that he was **shot** with nonlethal ammunition at relatively close range **by one of the officers** and that as a result of the gunshot wound he suffered **serious injury to his face** and **injury to his eye** as **confirmed by his medical records**. I accept his evidence that after he regained consciousness he was **dragged out of his cell** and that, while trying to defend himself, he was beaten by officers. This, in my view, is **consistent with William's evidence** that inmates who resisted being removed from their cells were hit. **I do not** however **accept his evidence** of **being shot a second time** or **falling over the railing** onto the lower level and **spraining his hand**. If this were the position in my opinion there would have been some medical evidence in support of this claim".*

19. However, that was not the end of the matter. The trial judge at that point was not faced only with a witness who had been untruthful with regards to some of his evidence. She also had available to her evidence from witnesses called by the State. The State's witnesses in fact confirmed key aspects of Mr. Sobers' account as to how he sustained the undisputed injury to his face which was corroborated by medical records. Officer Williams, (the officer in charge of the soldiers), observed a riot control weapon being fired into a cell and a prisoner emerging therefrom shortly after with an apparent injury to the eye[6]. There is therefore evidence from the State's own witness that a riot control weapon was fired into a cell and that there was apparent injury to a prisoner's eye. There was also evidence by medical reports, which disclosed that though fortunately the eye itself was not injured, the cheekbone had been,

[6] Paragraph 41 of the judgment.

consistent with contact from a rubber bullet. See also paragraphs 41, 42, 45 of the trial judge's judgment.

20. There is no dispute therefore that:

    i) a riot control weapon was utilized which discharged rubber bullets,

    ii) a riot control weapon was deployed by discharging it **into** a cell,

    iii) that a prisoner suffered injury to the face in the vicinity of the eye, and

    iv) that Mr. Sobers produced a medical report disclosing an injury to his cheekbone in the vicinity of the eye.

    It was therefore quite open to the trial judge to find that the manner in which Mr. Sobers claimed to have received his injuries, though clearly exaggerated, was supported not just by his own witness statement, but that it was corroborated by the evidence of the State's witness Officer Williams.

21. There is absolutely no explanation as to why a riot control weapon firing rubber bullets at reasonably close range into a cell was required to subdue this particular prisoner. He was already in a cell. He was not therefore in a position to pose a danger to officers by being out of his cell. The use of force to suppress the situation, which, according to the evidence of Williams and Mohammed, had already been largely contained, was unnecessary.

22. The trial judge was therefore entirely justified in finding that if the evidence from all parties was that Mr. Sobers was already in his cell, that the use of force that was deployed in those circumstances was not justified and was disproportionate.

23. The trial judge was also therefore entitled to find: i. that Mr. Sobers' evidence as to how he received the injury to his face was, at least as to that portion of his injury, to be believed, ii. to find that, the use of such force being disproportionate, constituted an assault, and iii. to reject the evidence of further injuries that Mr. Sobers attempted to describe, portray and exaggerate, (in particular being shot a second time when there was no medical evidence to this effect).

24. The reasoning of the trial judge, her findings after her analysis of the evidence, and the weighting and evaluation thereof, have not been demonstrated to be plainly wrong. That is because it cannot be demonstrated that she failed to take advantage of seeing and hearing the witnesses, or that she took into account any irrelevant evidence, or that she failed to take into account any relevant evidence.

25. The State contends however that she did fail to take into account relevant evidence and itemizes them in its submissions, inter alia, as follows:

    i) that his evidence with respect to injuries, apart from those to his face, was not borne out by any medical reports or records. Therefore his entire story as to what occurred after he came out of the cell[7] was a complete fabrication tainting the entirety of his evidence as to how he received his injuries;

    ii) his testimony was not corroborated by any of the other persons that he claims were in the cell with him, and an adverse inference should be drawn that such persons, if they had been produced, would not have supported his version of events;

    iii) that he did not identify whether the persons who attacked him were Prison Officers or Police Officers or Soldiers;

    iv) words in Mr. Sobers' witness statement were identical to words in Mr. Joseph's and Mr. Wilson's witness statements, although Mr. Sobers swears that they were his own words and no one else's;

    v) That when Mr. Sobers swore that he repeatedly asked the officers why he was being attacked, he pleaded with them to stop, and requested that he be taken to see the doctor, he could not be believed, because the nature of the injury to the jaw would have made it impossible for him to speak.

    As to these, the trial judge was quite aware that Mr. Sobers was embellishing his version of events and his account could not be accepted in its entirety. However, she quite correctly focussed on the core aspects of his account, ignoring the embellishments. The core aspects were being shot in the face and being in the cell

[7] (as to a vicious attack upon him by the Prison Officers, as to his running away and falling from one level to the other, as to his being shot a second time and as to his spraining his left arm)

when it occurred, both corroborated by documented medical records and the State's own witnesses. In those circumstances, corroboration by cellmates, or identification of the specific officers responsible, would neither add to nor diminish the credibility or weight of Mr. Sobers' evidence. Neither could it carry the State's defence any further. This is reflected in the judgment, for example at paragraph 89 above and in particular the highlighted portions.

26. This submission therefore ignores the fact that:
    i. the trial judge had the advantage of seeing and hearing the witnesses;
    ii. the trial judge did not accept the entirety of Mr. Sobers' evidence but quite rightly rejected such of his evidence that was not supported by the medical records;
    iii. the trial judge did have regard to documentary evidence which at least corroborated his claim to have been shot in the face; and
    iv. there was corroborating evidence from witnesses called on behalf of the State itself .

27. In those circumstances, it is simply not possible to interfere with the trial judge's findings of fact. This is so regardless of whether or not the appellate court would have come to the same conclusion or assess the evidence itself in the same way. An appellate court is not entitled to review evidence as though it were itself a trial court making findings of fact for the first time unless the trial judge can be demonstrated to have been plainly wrong. Once a trial judge has made findings of fact and has properly done so by analyzing the evidence and by taking into account the relevant aspects, and has not ignored or overlooked any relevant evidence, then an appellate court's ability to review the findings of fact so arrived at is circumscribed.

28. In this case, for the reasons above, the trial judge could not be said to be plainly wrong:
    i. in relation to accepting that Mr. Sobers did receive some of the injuries he claimed,

    ii. that this occurred at the hands of the servants or agents of the State, and

iii. that the use of force which produced those injuries was not proportionate to the circumstances then existing.

Mr. Joseph

29. With respect to Mr. Joseph, the State points again to the discrepancies in Mr. Joseph's evidence of a similar nature to the discrepancies in Mr. Sobers' evidence. For example: i) words in Mr. Joseph witness statement were identical to words in Mr. Sobers' witness statement although Mr. Joseph swears that they were his own words and no one else's; ii) because Mr. Joseph accepted that his hands were handcuffed behind his back, his credibility was in issue because he made no mention in his witness statement of the fact that officers had removed his handcuffs at his request in the course of battering him, and only stated this in cross-examination. Further, he had testified that he had put his hand to his head after receiving a blow there, something which he could not have done if his hands were in fact handcuffed behind his back; iii) that Mr. Joseph's injuries were not consistent with the savage assault and battery that he described; iv) that Mr. Joseph called no witnesses to corroborate his testimony, even though other persons were present and observed the alleged savage attack that he was describing; and v) Mr. Joseph admitted under cross examination, contrary to his statement of case, that not all of the officers attacking him wore masks.

30. Items i), iv) and v) cannot justify ignoring the medical evidence of injuries and the trial judge frontally addressed this. Item ii) was addressed by the trial judge at paragraphs 93 and 94 of the judgment as set out hereunder.

31. These are discrepancies which the trial judge clearly took into account. She recognized that the injuries that Mr. Joseph attested to were not consistent with those in the medical reports. She was aware, because submissions had been made to her, that the use of language in the witness statements in some respects appeared similar, suggesting collusion between witnesses. She was aware that the action described by him of putting his hands to his head to feel whether there was blood there, was not possible if his hands were handcuffed behind his back.

32. The trial judge balanced those considerations in assessing the evidence as reflected in the extracts from the judgment set out below: -

*"90. With respect to Joseph **it is not in dispute that he was injured**. It is clear however that information recorded in Joseph's medical history record is different from what is recorded against his name in the outpatients' log book. Both these documents emanate from the prison. No attempt is made to give a reason for these differences. With respect to the differences while it is possible to credit the failure of the prison doctor on the 13th November to record as extensive soft tissue injuries as was noted on the night of the 11th there seems to be no excuse, and indeed none has been proffered, for the failure by the doctor to note the laceration to his left temple in the vicinity of his eye".*

33. The trial judge accepted that there may have been exaggeration by him and accepted that he could not have put his hand to his head while handcuffed as he described. See paragraphs 93 and 94 of the judgment. (All emphasis added)

*"93. ...While it is **reasonable to accept that there may have been some exaggeration by Joseph** as to the **manner by which his injuries were inflicted** I accept his evidence in this regard. The contents of the **outpatient's log**, to my mind, **confirms that Joseph received injuries** to his upper back and head, while the **observations of the prison doctor confirms injury** to his right deltoid.*

*94. The Defendant suggests that Joseph is not to be believed because he gives evidence of putting his hand to the left side of his head in circumstances where it is clear that he could not have done so because he was in fact handcuffed. **I accept that Joseph could not have put his hand to his head** in the circumstances, however, **it cannot be disputed that he had a laceration to his left temple**. I accept therefore that he was bleeding from a wound to the left side of his head. **The fact that he may not have been speaking the truth** when he says **he put his hand to his head** to my mind, while it suggests some embellishment on his part **does not**, in my opinion, **totally discredit his evidence**. It would seem to me that at the end of the day **Joseph's evidence as to the circumstances of his assault is credible** and I accept it".*

34. There was no evidence that he received those injuries from another inmate and the trial judge so found as follows:

"92. The Defendant suggests that it is possible that Joseph's injury could have been inflicted by another inmate. There is no evidence which would lead me to this conclusion. Indeed from the evidence in this case, including that led by the Defendant, it is more likely than not that the injuries were inflicted by the officers. I accept Joseph's evidence in this regard".

35. The core matters in relation to Joseph were the fact that he suffered injuries, (as to which there was no dispute), and the circumstances in which he received those injuries. Mr. Joseph said he was inside his cell and was removed and attacked. It was not put to him that he was **not in a cell** when he was removed. This was impliedly accepted in cross-examination[8], where it was put to him that he received injuries in the course of resisting attempts to search him.

36. A trial judge is required to assess inconsistencies in evidence and recognize that not all the evidence that a witness provides may be consistent. The trial judge correctly recognized i. that there was as in the case of Mr. Sobers, documentary evidence in the form of the records which described the fact that injuries were sustained by Mr. Joseph ii. the fact that there was no evidence to displace his assertion that they occurred as a result of the actions of the State's agents. The trial judge drew adverse inferences from the failure of the State to call any prison officer as a witness to contest Mr. Joseph's allegation that excessive force was used on him[9]. iii. the fact that his assertion that they occurred when he was removed from his cell was corroborated by the State's own evidence that prisoners were removed from their cells and that manhandling of such prisoners was observed. (See also paragraph 50-51, 65-66 of the trial judge's judgment)

37. The trial judge accepted that Mr. Joseph was in his cell immediately prior to the assault[10]. From the evidence of the State's own witnesses once the prisoners were back in cells the situation had been brought under control. If it were accepted that they were then removed from their cells, handcuffed, and searched, and that manhandling occurred at that point, then the trial judge's conclusion that disproportionate use of force was applied to Mr. Joseph could not be faulted.

[8] See page 80, R.o.A line 22/23.
[9] Para 106
[10] Para 104

38. That is because:

    i) if Mr. Joseph received injuries,
    ii) if he had already returned to a cell,
    iii) if he had been removed therefrom and handcuffed,
    iv) if he were then searched,
    v) if there was no evidence whatsoever that those injuries were inflicted by another inmate, and
    vi) if the State brought no prison officer to testify as a witness to matters which they must have observed,

    then it was open to the trial judge to find that Mr. Joseph's injuries, in the absence of evidence to the contrary by the State's witnesses, were caused by the officers of the State in the manner that he described. Given that he was handcuffed and not likely to have been posing a threat by that time, the force used upon him, which produced his documented injuries, would necessarily have been out of proportion to any threat he then posed. (See paragraph 69 of trial judge's judgment)

39. In those circumstances, the trial judge could not have said to be plainly wrong in any sense as explained in the various cases that have been repeatedly cited by the Privy Counsel and that have been repeatedly applied by this court.

40. Accordingly, in respect of both Mr. Sobers and Mr. Joseph the appeals of the State must be dismissed.

Mr. Wilson

41. The trial judge dealt with Mr. Wilson as follows:-

"95. With respect to Wilson, unlike Sobers and Joseph, there is no medical evidence to support the case presented by him. Wilson admits however that he was outside of his cell. From this I can infer that he was one of the approximately 75 inmates who were refusing to follow the instructions to return to their cells. While there an admission by the witnesses for the Defendant of the use of force with respect to the employment of rubber bullets in removing inmates from their cells and searching inmates Wilson does not claim to be injured as a result of any of these activities. According to him he was outside of his cell and it was while there that he was beaten with batons and a bolt cutter. He gives no evidence of

being searched or dragged from his cell. No one else gives evidence of the use of the bolt cutter. I do not accept his evidence with respect to the bolt cutter.

96. He says that he had an open wound to his head and he was black and blue all over his body. If Wilson is to be believed his injuries were serious. It would seem to me that if that was the position, given the fact that there is a record of some 50 persons who suffered injury of one sort or the other that night, there would be some record of Wilson's injuries. It cannot be doubted that injuries, even minor injuries, of other inmates were recorded. If he did suffer the injuries he claims why were his injuries not recorded as were those of the other inmates. It seems to me that it is more likely than not that Wilson did not suffer the injuries as he claims. In the circumstances I do not accept Wilson's evidence with respect to his injuries.

97. At the end of the day therefore I find that there is evidence that both Sobers and Joseph were assaulted by the officers and I accept that evidence. I do not however accept the evidence of Wilson as to his assault by the officers. In my opinion, on the evidence, even if Wilson suffered injury on that night, and I do not accept that he did, it could only have been as a result of the use of the rubber bullets and pepper spray by the officers in their attempts to get the inmates back into their cell but Wilson does not complain of injury as a result of those actions".

42. In respect of the appeal by Mr. Wilson counsel for Mr. Wilson accepted that if those principles as to review findings of fact by a trial judge were to be applied so as to dismiss the appeals of Mr. Joseph and Mr. Sobers, that similarly the appeal by Mr. Wilson himself would have to be dismissed. That position clearly recognized the effect of the authorities, and the inconsistency inherent in propounding two diametrically opposed positions in respect of the three prisoners involved in this appeal.

43. For completeness it should be indicated that the trial judge found that in respect of Mr. Wilson: i) there was no documentary evidence that he had sustained any injury, ii) that no adverse inference could be drawn against the State such as to supplant the need for Mr. Wilson to have produced at least prima facie evidence that he had sustained such injuries, iii) that his own evidence as to the type of injuries he sustained and how he sustained them is not supported by any medical records. In the context where there were medical records or medical reports for over fifty prisoners who sustained injuries the court considered it curious as to why he peculiarly would not have medical records, whether treated at the infirmary, or treated at the hospital.

Use of Force – Whether proportional

44. There has been no contention that the trial judge misdirected herself in the law that was applicable. The trial judge dealt with this comprehensively and adequately. In this regard for the sake of completeness, only the relevant paragraphs of the trial judge's judgment are set out hereunder.

"98. In these circumstances, the final question to be answered therefore is whether the use of force by the officers on Sobers and Joseph was reasonable. In its submissions the Defendant accepts that force was used by the police officers and the prison officers but says that the use of force was reasonable and commensurate with the situation. According to the Defendant force was employed during the operation for the prevention of crime and preventing and stopping a breach of the peace. Further, the Defendant submits that the officers acted lawfully in self defence and the defence of third parties.

99. It cannot be disputed that these reasons all present a justification for assault and battery. To succeed in this defence however the Defendant will not only have to show that at least one of these factors was present but will also have to satisfy me that the degree of force used was commensurate with the situation. The force used must be reasonable and proportionate to both the particular circumstances and for the purpose used: Halsbury's Laws of England Volume 36(2) 4th Edition (Reissue) page 330 paragraph 589 page 330. The Defendant must satisfy me therefore that the use of force was strictly necessary for the purpose for which it was engaged, that is the prevention of a crime; to prevent a breach of the peace and or in self defence or defence of others; and that it was not employed for other reasons as, for example, punitive purposes.

100. The following statement made by Circuit Judge Friendly in the American case of ***Australia Johnson v A. Glick, warden of Manhattan house of detention for men and others. Number 845, docket 72 – 2428 reported in 481 Federal Reporter 2nd Series at paragraphs 5-8*** *is in my opinion is particularly apt:*
"The management by a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women, may require or justify the occasional use of a degree of intentional force. Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights. In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."

101. On the evidence of the Defendant it is admitted that force was applied for two different purposes: (i) in an attempt to get the inmates back into the cells and (ii) in order to retrieve contraband items from the prisoners. Once I accept the evidence of the Defendant with respect to the circumstances that obtained in the prison that night prior to the entry of the officers and the futile attempts made earlier to resolve the situation, as I do, it is clear that the decision to use an element of force to ensure that the prisoners returned to their cells was a sound one and cannot be faulted".

Conclusion and Disposition

45. i. The appeals of the State in respect of Mr. Sobers and Mr. Joseph are dismissed.

    ii. The appeal of Mr. Wilson is dismissed.

    They are dismissed because the findings of fact by the trial judge have not been demonstrated to be plainly wrong. The trial judge took into account the evidence of the prisoners themselves, and also corroborating evidence by the State's own eyewitnesses, in addition to contemporaneous documentary evidence in the form of medical records. In so doing, the trial judge considered the entirety of the evidence. She was entitled, after recognizing and making allowances for exaggeration by Mr. Sobers and Mr. Joseph, to accept such part of their evidence which had been so corroborated, and accordingly make the findings of fact, inferences therefrom, and conclusions that she did. None of those inferences or conclusions has been demonstrated to be plainly wrong. The evidence as a whole can reasonably be regarded as justifying that court's conclusion.

Order

46. Accordingly, the appeals by the State in respect of Mr. Sobers and Mr. Joseph are dismissed. The appeal by Mr. Wilson is also dismissed. We will hear the parties on costs.

Additional Matter

47. Several claims were brought by prisoners arising from the suppression of the situation at the prison all those years ago. The trial judge recorded an agreement between the parties as to the conduct of those claims as follows:

"*For the purpose of determining liability it was ordered by consent that all 57 cases would be heard together. To that end the cases were divided into three categories with each category represented by one of three cases: those in which the claimants have no record of injuries by CV 2010- 04649 Clint Wilson v The AG; those in which the claimants received treatment at the prison by CV 2010-04508 Gabriel Joseph v The A,G and those in which the claimants received treatment at the hospital by CV 2010-04093 Antonio Sobers v The AG.*

It was further agreed that the cases in each category would be bound by my findings in the action representing their category".

48. There would be logic in an agreement that the finding of liability in respect of the claimant Mr. Wilson could bind others in his position - all being persons in respect of whom no medical record could be produced which corroborated their claims to have each sustained injury from assault and battery.

49. The logic of doing so in respect of Mr. Sobers and Mr. Joseph is less clear. The selection of the categories they allegedly represented was based on whether they were treated for injuries at the hospital or the prison. The finding of liability in respect of each however was dependent on the evidence as to whether force was used upon them in a manner which was disproportionate to the need to subdue them in the specific circumstances that then applied. This was a matter of fact and evidence specific to each claimant.

50. Despite the number of claimants involved, it is difficult to understand the basis of the categorization, and the agreement that was presented to the trial judge, that the outcome of the cases of Mr. Sobers and Mr. Joseph would be binding upon others, when it had not been demonstrated that they were similarly circumstanced in the necessary manner at the time they received those injuries. The rationale for a case being selected as a binding test case should be based on an established common logical, factual and material connection with respect to the circumstances of the persons in the class.

51. From the above analysis and review, it has been demonstrated that the outcome of each matter was very much dependent on the facts and specific findings made by the trial judge on each issue identified previously at paragraph 5 above.

52. That was an exercise that, tedious as it might have been, had to be carried out in respect of each such claimant, so as to ascertain i. whether the force if any, that they alleged had been applied to them, had been applied to them by servants or agents of the State, ii. whether the injuries they claimed had in fact been inflicted, or whether, like Mr. Sobers, they had exaggerated them, and iii. whether at the time of their infliction they were resisting apprehension, or had already been subdued, such that any such force would have been disproportionate at that time.

53. Because this is a concern that has arisen in the course of consideration of this issue after the hearing, it is proposed to provide the parties, who actually entered into this test case agreement, with the opportunity to address these concerns in writing.

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Peter A. Rajkumar

Justice of Appeal