



[2014] JMSC Civ 23

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV O666/2012

|                |  |                                 |
|----------------|--|---------------------------------|
| <b>BETWEEN</b> | <b>DENESE KEANE-MADDEN</b>             | <b>CLAIMANT</b>                 |
| <b>AND</b>     | <b>THE ATTORNEY GENERAL OF JAMAICA</b> | <b>1<sup>ST</sup> DEFENDANT</b> |
| <b>AND</b>     | <b>CORPORAL T. WEBSTER-LAWRENCE</b>    | <b>2<sup>ND</sup> DEFENDANT</b> |

**Mr. Michael Lorne and Ms. Susan Dodd for the Claimant**

**Ms. Tamara Dickens instructed by the Director of State Proceedings for the Defendants**

**Heard: July 22<sup>nd</sup> and 23<sup>rd</sup>, December 20, 2013 and February 14, 2014.**

***ASSESSMENT OF DAMAGES-FALSE IMPRISONMENT-MALICIOUS PROSECUTION-WHETHER BAD CHARACTER A MITIGATING FACTOR IN THE AWARD OF DAMAGES-EXEMPLARY DAMAGES-AGGRAVATED DAMAGES-VINDICATORY DAMAGES.***

**Edwards J.**

### **Background**

[1] On the 17<sup>th</sup> day of September 2011, the Claimant, Denise Keane-Madden, arrived at the Norman Manley International Airport, after a short visit to Trinidad. Upon entry to the custom hall she was approached and questioned by the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant is a woman detective corporal of police attached to the Transnational Crimes and Narcotics Division. After questioning the Claimant, the 2<sup>nd</sup> Defendant then conducted a search of her luggage. The search revealed, amongst other items, a sealed bottle of downy fabric softener (the downy) inside the Claimant's luggage. During questioning, she revealed that she had purchased the bottle of downy for her husband

whilst in Trinidad. The 2<sup>nd</sup> Defendant conducted two preliminary tests on the contents of the bottle. From the results of the tests she formed the view that the bottle may contain cocaine. The Claimant was so informed and taken into custody. The 2<sup>nd</sup> Defendant also caused the bottle of downy to be sniffed by the canine narcotic sniffer dog which examined the bottle and sat. This was, apparently, a signal for the presence of cocaine in the bottle.

[2] The bottle was taken to the government forensic lab for testing and again preliminary tests suggested the presence of cocaine in the downy. On the 21<sup>st</sup> day of September 2011, the claimant was charged for the offences of possession of cocaine, dealing in cocaine and importing cocaine. She was discharged by the court on 19<sup>th</sup> day of December 2011, after the forensic report showed that the analysis done on the bottle of downy was negative for the presence of cocaine. She spent 94 days in custody without bail. It is this turn of events that caused the Claimant to file this action. The Claimant had two previous convictions on drug related charges, first in 2009 for cannabis and then in 2011 for cocaine.

### **The Claim**

[3] The Claimant filed a claim in the Supreme Court for False Imprisonment and Malicious Prosecution against the Attorney General of Jamaica as 1<sup>st</sup> Defendant and Corporal T. Webster Lawrence, 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant admitted liability for Malicious Prosecution and the matter proceeded to a contested assessment of damages.

[4] The Claimant sought the following in damages:

1. Special damages.....\$ 570,000.00
2. Damages for False Imprisonment.....\$19,928,000.00
3. Damages for Malicious Prosecution.....\$ 2,500,000.00
4. Exemplary Damages.....\$ 2,500,000.00
5. Aggravated Damages.....\$ 2,500,000.00
6. Vindictory Damages.....\$ 1,000,000.00

TOTAL..... \$ 28,998,000.00

### **Special Damages**

[5] Counsel for the Claimant submitted that as a self-employed clothing vendor she often earned an average of Five Thousand Dollars (\$5,000.00) per day from sales and should be awarded damages for loss of earnings at that rate for 94 days, totalling Four hundred and Seventy Thousand Dollars (\$470,000.00). At paragraph 40 of her witness statement, the Claimant averred that as a result of her incarceration she lost her business. No further details were given. In amplifying that statement, she claimed that her loss was in the loss of sale of stock of clothing, kitchen items, sheets and men's shoes. She said that she travelled back and forth to Curacao for stock but that during her incarceration she was unable to do so.

[6] She claimed that she would make purchases at the free zone, buying in bulk with other vendors, then sharing the stock. This she did sometimes twice per week, sometime every two weeks. She would then sell wholesale and retail. She said her weekly income was good, as on a good week she would earn twenty-five thousand dollars (\$25,000.00) but on a bad week she would earn twenty thousand dollars (\$20,000.00). She admitted that this would not be all pure profit as there would be expenses. Her profit would be between fifteen thousand dollars (\$15,000.00) and nine thousand dollars (\$9,000.00).

[7] She gave evidence that whilst she was incarcerated she had stock. She did manage to sell some stock with the aid of her husband. However, she was only able to sell the stock she had as she was unable to travel during her incarceration. She also claimed a return of her legal fees resulting from her prosecution. She claimed to have paid thirty thousand dollars (\$30,000.00) to her attorney but her husband had the receipts. No receipts were produced to the court and her husband was not called as a witness.

[8] The Claimant was unable to prove these claims to the satisfaction of the court. The evidence showed that her husband and herself had been incarcerated in 2011 for drug related convictions; she for a period of nine months. During that period neither of

them could travel to make purchases. During those periods no trading took place. It was after being released from prison on the second occasion that she immediately went to Trinidad. Her husband had been released before her, having received 7 months. No evidence was given that he had travelled and purchased stock prior to her sentence coming to an end. Although she was a vendor, this trip to Trinidad was not a buying trip and she admitted that she did not go to shop but to “cool out”.

[9] She claimed to have had goods at the time of her arrest by the 2<sup>nd</sup> Defendant but her husband who had to be visiting her was unable to carry on the business and therefore she suffered loss. Her evidence as to her volume of stock at the time of incarceration; when it was that she last travelled or how often and her sales was sparse and inconclusive. She offered no assistance to the court to make a determination as to her loss of earnings, if any. Not one receipt for the purchase of stock was tendered to the court. There was no stock book and no sales book as one would expect to find in vending on this scale.

[10] I am mindful that a claimant must prove loss. I am also mindful that in the informal sector it may not always be possible to provide proof of earnings. However, no Claimant should be allowed to make mere assertions and throw figures at the court without evidence in support. In this particular case, the business carried on by the Claimant, as described by her, suggests trade at a level where if it took place at all, she ought to be in a position to provide some evidence of it. This she failed to do. In the case of her attorney’s fees resulting from her arrest and imprisonment, it is expected that some documentation of those payments would be presented to the court in one form or the other. Even though the court recognises the Claimant’s right to recover such costs, she cannot not do so without proof of it.

### **Damages for False Imprisonment**

[11] Counsel for the Claimant submitted that she was falsely imprisoned and denied her liberty for 94 days from the 17<sup>th</sup> day of September 2011 to the 19<sup>th</sup> day of December 2011 and should be awarded damages of Nineteen Million, Nine Hundred and Twenty-Eight Dollars (\$19,928,000.00). Counsel relied on the authority of **The Attorney**

**General v Glenville Murphy** 2010 JMCA Civ. 50, where Mr. Murphy was awarded One Hundred and Eighty Thousand Dollars (\$180,000.00) for false imprisonment for one day. He submitted that using the current consumer price index (CPI) the figure awarded in **Murphy** was equivalent to Two Hundred and Twelve Thousand Dollars (\$212,000.00) per day. Counsel for the Defendants submitted that the 2<sup>nd</sup> Defendant acted reasonably based on the tests she conducted and the preliminary results she obtained from the forensic laboratory.

[12] The duty of the police is encapsulated in section 13 of the Constabulary Force Act. Section 13 authorises the police to keep watch by night and day, preserve the peace, detect crime, apprehend or summon before a Justice, persons found committing any offence or those they reasonably suspect of having committed any offence. They are not however, mandated to carry out these duties without lawful justification. The suspicion must be reasonable and the arrest must be justified. See Harris J.A. in **Murphy** at paragraph 8.

[13] False imprisonment arises where a person is detained against his will without legal justification. The legal justification may be pursuant to a valid warrant of arrest or where by statutory powers, a police officer is given power of arrest in circumstances where he honestly and on reasonable grounds believed a crime had been committed. However, the police have a duty to bring the party before the court within a reasonable time. It is possible for there to be a lawful arrest but the claimant is later found to be innocent and released before taken to court. In such a case, where the period of detention is reasonable, then no liability will lie. Where the period of detention is unreasonable, it may constitute a tort. See the reasoning of the Court of Appeal in **Peter Flemmings v Det. Cpl. Myers et al**, [1985] 26 JLR 525. In **Murphy** the court upheld the view that the test of reasonableness in section 13 is both objective and subjective in its element. There must not only be a suspicion in the mind of the arresting officer but there must be reasonable grounds for forming such a suspicion.

[14] The Claimant admitted in cross examination that the 2<sup>nd</sup> Defendant approached her and asked for a search of her bag. She admitted that the downy was tested in her

presence. She said she saw when the 2<sup>nd</sup> Defendant threw the downy in an item for testing. She admitted that the downy did change colour. She admitted that it was after the downy changed colour that she was advised by the 2<sup>nd</sup> Defendant that it seemed to contain drugs. She said the downy was tested twice, once at the airport and once at Spanish Town road (narcotics division) and both times it was said to be positive.

[15] The Claimant also admitted that she was asked to accompany the 2<sup>nd</sup> Defendant to the narcotics office and was advised why she was there. The 2<sup>nd</sup> Defendant's evidence is that when she took the downy to the lab on the 19<sup>th</sup> September, a preliminary test was done in her presence by the analyst and she was told it was positive for the presence of cocaine. The analyst gave her a receipt on which she pointed to the presence of cocaine after preliminary testing. On that basis she charged the Claimant for the offences.

[16] In this case, it could be argued, that the 2<sup>nd</sup> Defendant having done her preliminary test and getting a positive reading could have been justified in believing that in all probability, there was an unlawful drug present in the downy, thus justifying the initial detention of the Claimant. Bolstered by the false positive results at the laboratory, coupled with the actions of the sniffer dogs, it could be argued that she was further justified in charging the accused.

[17] As a result of these false positives the Claimant was detained without judicial remand for exactly six days. The 2<sup>nd</sup> Defendant's actions formed the basis of the Claimant's claim under this head. In my view, in normal circumstances, these series of actions by the police would satisfy both the subjective and the objective test, as outlined in **Murphy**. The results of the test would give the officer an honest belief a crime had been committed. It would also normally provide reasonable grounds for such belief. This would be the case certainly in the initial phase of the events.

[18] However, a peculiar feature of this case has given this court pause. The report from the analyst (which both sides agreed on) indicated that preliminary testing on all solids and liquids suspected to contain narcotics sent to the lab, is a standard procedure. The report indicated that further analysis was required to confirm the

presence of narcotic drugs. The analyst indicated that she did perform preliminary tests on the liquid sent to her by the 2<sup>nd</sup> Defendant which gave a positive result. These preliminary results were written on the receipt for the exhibit. This is the receipt tendered into evidence and on which the 2<sup>nd</sup> Defendant based her actions in arresting the Claimant. However, the peculiarity to which I refer comes from the statement of the analyst thereafter, where she says:

*“It is our experience that certain household chemicals, detergents, lotions, shampoos and fabric softeners tend to give a positive reaction with the preliminary tests reagents. This is because these products contain compounds that would give a reaction similar to that of the alkaloid. These types of reactions are called false positives. The blue liquid in FL 3002/2011 was subjected to further confirmatory analyses which revealed that it did not contain cocaine.”*

[19] The blue liquid in FL 3002/2011 is the downy taken from the Claimant’s luggage. The analyst went on to state that she performed preliminary test on an independent sample of downy which also gave a positive reading. A further confirmatory test analysis on this independent sample, proved negative also. The danger therefore, to the innocent citizen who has these household chemicals in their possession, is immediately apparent. This causes the 2<sup>nd</sup> Defendant’s approach, though seemingly reasonable, to be unreasonable in the circumstances of what ought to be within her knowledge. The susceptibility of these types of ordinary household items to false positives ought to be known to the 2<sup>nd</sup> Defendant, who is experienced in this area. It really explains why she did so many tests and why she only arrested the Claimant after the preliminary results from the lab. But in the circumstances, it was not enough to divest her or the Crown in general, of liability. If the susceptibility of these substances to false positives was known to the agents of the state, then to produce a certificate of the confirmatory test so long after the preliminary test, I find to be unreasonable. No person found with such items should be detained for longer than a few hours for the necessary confirmatory tests to be done. To arrest, keep in custody without station bail and object to bail being given to the Claimant was unjustifiable in the circumstances.

[20] On the issue of damages, counsel for the Defendants relied on the following authorities:

- i. **Kerron Campbell v Kenroy Watson and the Attorney General of Jamaica** Suit No. C.L.C. 385 of 1998 where the sum of Seventy Thousand Dollars (\$70,000.00) was awarded for three (3) hours of false imprisonment.
- ii. **Everton Foster v The Attorney General of Jamaica et al** Suit No. C.L. F-135/1997 where a sum of Forty Thousand Dollars (\$40,000.00) was awarded for approximately three (3) hours of false imprisonment;
- iii. **John Crosfield v The Attorney General of Jamaica et al** Claim No. CL E 219 of 2001 where a sum of Two Hundred and Forty Thousand Dollars (\$240,000.00) was awarded for four days of false imprisonment;
- iv. **Maxwell Russell v The Attorney General for Jamaica et al** Claim No. 2006 HCV 4024 where a sum of Five Hundred and Fifteen Thousand Dollars (\$515,000.00) was awarded for 12 days of false imprisonment;
- v. **Cornel McKenzie v The Attorney General of Jamaica** Suit No. C.L.M. 088/2002 where a sum of Seventeen Thousand (\$17,000.00) per day was awarded for twenty-six (26) days of false imprisonment amounting to Four Hundred and Forty-Two Thousand Dollars (\$442,000.00).

[21] In assessing damages under this head, the court is entitled to consider the loss of liberty, any attending injury to hurt pride and feelings, loss of time, loss of social status or reputation, mental anguish and social discredit. In *McGregor on Damages* 17<sup>th</sup> edition, page 1396, paragraph 37-007, the learned editors noted;

*“The details of how damages are worked out in false imprisonment are few: generally it is not a pecuniary loss but a loss of dignity and the like, and is left much to the jury’s or judge’s discretion. The principal heads of damages would appear to be injury to liberty, i.e. the loss of time considered primarily from a non pecuniary view point, and the injury to feelings, i.e. the indignity, mental suffering, disgrace and humiliation, with any attendant loss of social status and injury to reputation.”*



[22] In **Murphy**, the Claimant was accused of incest with his daughter on the complaint of her half-sister. No interview was done with the daughter herself and she was not examined until a day after the accused was already in custody. Upon being medically examined the daughter was found to be virgo intacto. The Claimant was released and being aggrieved, brought suit against the state. He was assaulted by the police and was forced to live outside his district for seven years not only because of the stigma occasioned by his arrest but also because he had been physically attacked by members of his community.

[23] A false imprisonment does not only affect individual liberty but it can also affect reputation. This was the approach taken in **Murphy** at first instance and approved at the Court of Appeal. Although the Court of Appeal made it clear it should be reflected as a lump sum and not as separate heads. It was also the approach taken by the court in the case of **Everton Foster**.

[24] In the case of **Maxwell Russell**, the court accepted 12 days as the period of imprisonment but refused compensation for damages to reputation as there was no such evidence, having accepted that this was a factor in other cases being reviewed. The court however, did consider damages as a result of humiliation, indignity and injury to feelings.

[25] Counsel for the Defendants submitted that, although in the cases cited the court found there was a lack of reasonable and probable cause, in the instant case the 2<sup>nd</sup> Defendant acted with reasonable and probable cause when she detained and arrested the Claimant. This fact, she submitted, must be made to bear on any award, if any, given. Counsel further submitted that as the Claimant had previous convictions for similar offences the features of injury to hurt feelings and reputation is palpably absent. She opined that the claimant having been arrested twice previously, would have suffered no initial shock when she was arrested on this occasion.

[26] The claimant was arrested September 17, charged September 21, taken to court and remanded September 23 and released December 19<sup>th</sup>. In the case of **John Crosfield** it was said that a remand pursuant to a judicial order curtails and limits a

Claimant's entitlement to damages to the period prior to the order. In that case Morrison J. (Ag.) as he then was, cited **Diamond v Minter** [1941] 1 KB 656 and **R v Governor of Brockhill, ex p. Evans** (No. 2) [1998] 4 ALL ER 993. Until that judicial order to remand is set aside the imprisonment is not tortuous.

[27] Counsel further submitted that on those authorities, any damages awarded for false imprisonment should be for no longer period than six days. She asked the court to pray in aid the authority of **Cornel McKenzie** to act as a guide in the award of damages for false imprisonment. The award in that case was \$17,000 per day for a Claimant who had never before been incarcerated, which updates to \$49,640 using the current CPI.

[28] It is true that the Claimant had been convicted twice. Whilst it could be said, like counsel for the Defendants did say, that in such circumstances there would be no shock or hurt pride, it could also be said that the Claimant had done her time and paid her debt to society and may very well suffer shock and hurt pride in learning society and the police had lost trust in her. This is so, especially, when she had not been transporting drugs on this occasion. In any event I do take the point that being familiar with the "system" may have cushioned the impact of any possible trauma caused by the detention and subsequent arrest.

[29] Based on the approach approved by the learned Judge in **John Crosfield**, which I accept as correct, the Claimant's claim for damages for false imprisonment would be measured in terms of the days leading up to her court appearance and remand. I do not accept her counsel's contention that the judge was influenced in remanding the accused by the defendant's false claim of four convictions. I hardly think the issue of a previous conviction for drugs would be affected by whether there were two or four convictions, to impact the judicial mind when deciding whether to remand. This is so, even if I were to accept that the Defendant maliciously told the court four convictions, which I do not.

[30] The Claimant, is therefore, entitled to six days for false imprisonment from the 17<sup>th</sup> day of September to the 23<sup>rd</sup> of September. In this case because of the Claimant's two previous convictions, the elements of injury to pride, reputation, self-esteem and dignity were absent. There was some embarrassment caused from being handcuffed to

a rail. The officer acted based on misleading science which led to a wrong being committed against the claimant. I deem an award of one hundred and eighty thousand dollars (\$180,000.00) for six days to be adequate compensation in this case.

### **Damages for Malicious Prosecution**

[31] The Claimant submitted that the charges against her were made maliciously and without reasonable and probable cause; that all tests had proved that the downy did not contain cocaine or other drugs yet prosecution commenced and continued for the purpose of depriving her of liberty.

[32] At common law this tort is committed where the Defendant maliciously and without reasonable and probable cause initiates against the Claimant a criminal prosecution which terminates in the Claimant's favour and which results in damage to the Claimant's reputation, person or property. The applicable principles were set out in **Wills v Voisin** [1963] 6 WIR 50. At common law a Claimant seeking damages for malicious prosecution would have to prove the following:

- i. That the law was set in motion against him on a charge of a criminal offence;
- ii. That he was acquitted of the charge or that otherwise it was determined in his favour;
- iii. That the prosecutor set the law in motion without reasonable and probable cause;
- iv. That in so setting the law in motion the prosecutor was actuated by malice.

[33] A failure to establish any one or more of these requirements will result in the Claimant failing in his action for malicious prosecution. Under section 33 of the Constabulary Force Act of Jamaica, the Claimant would need to prove only malice or lack of reasonable and probable cause. In the Jamaican context, in a claim against the police, based on the statutory provisions and unlike the common law, a claim need only be framed in the alternative. It is clear therefore, that in this tort, the Claimant claiming

against a member of the Jamaica Constabulary Force must show that the prosecution was unlawful. He must establish malice, or the absence of reasonable and probable cause. See the reasoning of Forte J in **Peter Flemming**. Liability for malicious prosecution would arise where the claimant proves that the defendant acted maliciously or without reasonable and probable cause in prosecuting. It is the act of prosecuting not of imprisoning or detaining which must have been done without reasonable and probable cause.

[34] In **Hicks v Faulkner** [1878] QBD 167, Hawkins J attempted a definition of reasonable and probable cause. He said:

*“I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of the state of circumstances which assuming them to be true would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed”.*

In the case **Glinski v Mclver** [1962], 1 All ER 696 a decision of the English House of Lords, Lord Denning noted that the use of the word guilt, in **Hicks v Faulkner** was misleading. He took the view that a police officer only had to be satisfied that there was a proper case to lay before the court. In speaking of the police officer’s state of mind he noted that;

*“...he cannot judge whether the witnesses are telling the truth. He cannot know what defences the accused may set up. Guilt or innocence is for the tribunal not for him.....It is for them to believe his guilt, not for the police officer. Were it otherwise, it would mean that every acquittal would be rebuff to the police officer... no the truth is that the police officer is only concerned that there is a case proper to be laid before the court.”*

[35] I agree with and respectfully adopt the view expressed by Lord Denning. I would only add that if the police officer was presented with evidence tending to show that the Claimant had committed a crime, then it is his duty to prosecute regardless of his views on possible innocence or guilt. He would then have reasonable and probable cause to

prosecute. If there was no evidence presented to the officer on which to act or the evidence was so tenuous as to be of a nature which ought to place the officer on enquiry then there may be evidence of a lack of reasonable and probable cause.

[36] In the instant case the Claimant did not aver that the officer acted with malice. The only question therefore, is whether on the evidence there is absence of reasonable and probable cause. The 1<sup>st</sup> Defendant admitted that the action taken by the officer was without reasonable or probable cause. The Claimant is entitled to her damages. The only question is how much.

[37] The Claimant relied on the authority of **Allan Currie v The Attorney General of Jamaica** Claim No. 1989 C 315, decided August 10, 2006, where the court awarded two million dollars (\$2,000,000.00) for malicious prosecution. The Defendants relied on the following authorities:

- i. **Kerron Campbell v Kenroy Watson and the Attorney General of Jamaica** where the sum of Ninety Thousand Dollars (\$90,000.00) was awarded for malicious prosecution where the prosecution went on for approximately four (4) months on a charge against the Claimant for possession of ganja, assaulting a police officer and resisting arrest..
- ii. **Everton Foster v The Attorney General of Jamaica et al** where a sum of Fifty Thousand Dollars (\$50,000.00) was awarded for malicious prosecution where the charge against the Claimant was for indecent language.
- iii. **John Crosfield v The Attorney General of Jamaica et al** where a sum of Five Hundred Thousand (\$500,000.00) was awarded for malicious prosecution.
- iv. **Maxwell Russell v The Attorney General for Jamaica et al** where a sum of Two Hundred and Fifty Thousand Dollars (\$250,000.00) was awarded for malicious prosecution where the prosecution went on for nearly a year on a charge against the Claimant for assault at common law.

[38] The Claimant requested damages for malicious prosecution of \$2.5 million in keeping with the authority of **Allan Currie** as updated. The 1<sup>st</sup> Defendant argued that the case at bar and the **Allan Currie** case have significantly different features and

therefore it should not be relied upon by the court. She pointed out that **Allan Currie** had significant aggravating factors which indicated several severe breaches by the agents of the state. This she said called for aggravated damages. She suggested that there were no such circumstances alleged in this case. Counsel also pointed out, that in **Allan Currie**, the Claimant had been charged with several serious offences including murder. He was acquitted of the murder after two years and dismissed several months later on the remaining gun charges. The prosecution of **Allan Currie** spanned a two year period whilst that of the Claimant was a few months for drug offences. Further aggravating features in **Allan Currie**, highlighted by counsel, was the fact that the court had found that the officers in **Allan Currie** acted both with malice and without reasonable and probable cause in concocting and manufacturing a case against the Claimant.

[39] Counsel submitted that in this case the 2<sup>nd</sup> Defendant acted based on the results of the cobalt test done on the spot by her on a sample of the downy. The Claimant admitted that she saw the two tests conducted by the 2<sup>nd</sup> Defendant and that she herself saw the sample change colour and it was explained to her that the change in colour was indicative of the presence of cocaine. Furthermore, counsel said, the same preliminary test was conducted at the government forensic laboratory and again the results were suggestive of the presence of cocaine. It was on the basis of her testing and the results at the lab that she prosecuted the Claimant.

[40] Counsel for the Defendants also pointed out that the actions of the sniffer dog at the narcotics division was also suggestive of the presence of cocaine. It was also submitted that the fact that the 2<sup>nd</sup> Defendant waited until after the conduct of three separate test before prosecuting the Claimant was proof positive that she was not actuated by malice but acted reasonably and with justification. She suggested that the actions of the police was neither high handed nor oppressive.

[41] On that basis, counsel for the Defendants recommended the case of **Kerron Campbell** to the court in deciding what level of award to make in this category. In **Kerron Campbell** the Claimant was charged with three minor offences and the prosecution lasted four months. In that case there was no reasonable and probable

cause for the prosecution. He was awarded a sum of \$90,000 which updates to \$214,200 in today's money. Counsel argues that the sum for this claimant should be reduced because **Kerron Campbell** had a clean record and there had been no justification for his arrest. She suggested an award of \$150,000 for malicious prosecution.

[42] The claimant still has to prove that she suffered damages as a result of her prosecution. See **Halsbury Laws of England**, 4<sup>th</sup> edition; paragraph 134. She claimed that she was a vendor and lost her business because whilst in custody she could neither buy nor sell and her husband was unable to conduct business on her behalf. No evidence was given as to her diminution in reputation and character and perhaps in light of her two previous convictions and prison terms for similar offences it is not all together surprising. In **John Crosfield Morrison J (Ag)** as he then was, said this:

*“Every arrest and indeed any arrest carries with it the odium of compromised respectability. Right thinking members of society frown upon criminal conduct. The greater one's standing in the society the greater the opprobrium. In the instant case not one shred of evidence was led to persuade this tribunal as to his reputation and standing in the community. In fact this Claimant suffered no diminution in these intangibles as after his release his avocation flourished.”*

I agree with my learned brethren and damages for malicious prosecution are not automatic but must be proved as suffered.

[43] The Claimant alleged several things which turned out not to be true. She said sniffer dogs attacked her person. This was not true. It is true she was handcuffed to the rails at the police post. She said this caused her embarrassment. No abuse at the station was alleged or proved. She admitted she was placed in a cell by herself and that she had the use of amenities. There was no evidence of her having suffered as a result.

[44] I however, take into account the fact that the prosecution went on for days even after the downy was tested and a certificate prepared by the analyst certifying it negative for the presence of cocaine. The charges against her were serious but with two previous convictions for similar offences it could hardly be said that her respectability

had been compromised. I find that in the circumstances of this case an award of two hundred and fifty thousand dollars (\$250,000.00) is appropriate as damages for malicious prosecution.

### **Aggravated Damages**

[45] Aggravated damages are imposed on a Defendant whose conduct increased the injury to the Claimant, causing distress, embarrassment and or humiliation and damage to reputation. In McGregor on Damages 17<sup>th</sup> edition, the learned editors in considering the factors tending to lend support to an award under this head said at page 1400 paragraph 37-012:

*“The manner in which the false imprisonment is effected may lead to aggravation or mitigation of the damage and, hence of the damages. The authorities illustrate in particular the general principle stated by Lawrence L. J. In Walter v Alltools “that any evidence which tend to aggravate or mitigate the damage to a man’s reputation which flows naturally from his imprisonment must be admissible up to the moment when damages are assessed. A false imprisonment does not merely affect a man’s liberty; it also affects his reputation. The damages continue until it caused to cease by an avowal that the imprisonment was false”.*

[46] This approach was recognised and adopted by Sykes J in the unreported judgement in **Leeman Anderson v The Attorney General of Jamaica** CLA 017 of 2002, decided July 16<sup>th</sup> 2004. Aggravated damages are awarded where the defendants conduct is sufficiently outrageous to merit condemnation and punishment. The outrageous behaviour usually carries features of malice, fraud, cruelty, insolence and the like. See McGregor on Damages 17<sup>th</sup> edition at paragraph. 11-0001. Damages under this head is compensatory and not to be lumped with exemplary damages which are punitive.

[47] The claim for aggravated damages was particularized as follows:

*“That despite finding nothing incriminating on the claimant or in her luggage, the 2<sup>nd</sup> defendant persisted in her malicious attempts to dehumanize the claimant by presenting false*



*positive tests for the fabric softener as if it contained cocaine, knowing that the substance was harmless.”*

Counsel for the Claimant submitted that she was insulted, ridiculed, and subjected to various indignities. He relied on the authority of **Sharon Greenwood-Henry v the Attorney General of Jamaica** Claim C.L. 116 of 1999, where in a cause of action for false imprisonment, seven hundred thousand dollars (\$700,000.00) was awarded for aggravated damages. In **Greenwood-Henry** she was pulled from the line of passengers at the airport for no apparent reason, subjected to a cavity search in the airport bathroom, taken to the lock-ups, then to the Kingston Public Hospital where she was again subjected to a cavity search, x-rayed, and given a laxative. There was no trace of drugs found. She was kept overnight without food or water or opportunity to take a bath; blood samples were taken from her after which she was released at the hospital, mid-day the following day, to fend for herself. She suffered indignities, injury to pride and self-esteem, mental suffering and anguish, all in a climate of fear and intimidation. She suffered post traumatic stress disorder arising from her ordeal.

[48] Counsel also relied on the authority of **Enid Campbell et al v The Jamaica Public Service Company** [2013] JMSC Civ 22. In that case the Claimant was awarded Two Million Five Hundred Thousand Dollars (\$2,500,000.00) for aggravated damages. It should be noted though that this case arose from a breach of the grant of an easement and was not at all useful to the court in this case.

[49] The Claimant averred that she was insulted, ridiculed, subjected to various indignities, denied phone calls, legal representation and access to family. That she was placed in custody under horrible and dehumanising conditions, denied sanitary conveniences, denied change of clothing, denied food and that sniffer dogs were let loose on her. During the evidence none of this was proved or accepted as true. In the round there was no action of the state which was proved to be arbitrary and excessive in this case. There are no aggravating features. Her treatment at detention and arrest does not reach a standard requiring compensation.

## Exemplary Damages

[50] The claim for exemplary damages was particularized in the following terms:

*“Being kept in the horrible conditions at Duhaney Park police lock-up for eight days, having to sleep on a concrete slab, being denied sanitary facilities, being fed on no regular schedule, kept in a small cramped cell with other women, unable to bathe properly and continually denied bail based on the word of the 2<sup>nd</sup> defendant who had deliberately concocted the “positive” test for cocaine to deny the claimant her liberty, then for eighty six days as an inmate of Fort Augustus Adult Correctional centre in St. Catherine.”*

[51] The Claimant submitted that she was subjected to degrading and dehumanizing treatment when she was kept in horrible conditions at the Duhaney Park Police Lock-up. Even though the claimant had averred a denial of a phone call, in evidence she admitted to having been allowed to make a call. Her personal phone was confiscated however. She said she was searched but no drug was found on her person. The evidence I accept is that it was her luggage which was searched. The allegations of cruel and degrading treatment and the horrible conditions at Duhaney Park Lock-ups turned out to be admittedly false. She was later taken to Fort Augustus Adult Correctional Centre.

[52] The Claimant in her evidence at the hearing retracted many of these allegations. For one, she claimed in her witness statement that she was placed in a cell with only men. In evidence she said this was not true and that she meant that only male officers were at the station when she was taken there. She said she was not allowed phone calls but in evidence it turned out that she was allowed phone calls. She further admitted that there were sanitary conveniences at the Duhaney Park Lock-up and that she was the only one in her cell.

[53] The Claimant also averred that she was only denied bail because the 2<sup>nd</sup> Defendant maliciously told the court she had four previous convictions. The 2<sup>nd</sup> Defendant denied this. She said she told the court about the Claimant’s previous convictions but not how many. The backing on the information was tendered into evidence by the Claimant where on it is written four previous convictions. Counsel for

the Claimant asked the court to view it as *prima facie* evidence that the judge was told that she had four previous convictions and that this would have weighed on her mind in denying bail.

[54] The claimant also contended that she was forced to do a urine test. She claimed also that her wig was pulled from her head and she was ordered to lift up her blouse. She insisted that she was given a body search at the airport. She also claimed to have been laughed at and jeered at by the police. All these were denied by the 2<sup>nd</sup> Defendant.

[55] The Claimant relied on the authority of **Sharon Greenwood-Henry** where in a cause of action for false imprisonment, Seven Hundred Thousand Dollars (\$700,000.00) was granted for exemplary damages. In that case, the claimant was subjected to a vaginal examination by a female police officer in circumstances of questionable hygienic conditions. At the hospital without lawful excuse or justification she was subjected to an anal and vaginal examination. She was intimidated into drinking a laxative which she neither wanted nor requested. Even though the x-ray and laxative did not produce any evidence of drug trafficking she was detained over night and had blood samples taken from her without her free and voluntary consent. She was later abandoned at the hospital by the police and had to be assisted home.

[56] The House of Lords in **Rookes v Barnard** [1964] AC 1129 at pages 1226 – 1227 laid down three categories of cases where exemplary damages may be awarded:

*“...there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal...The first category is oppressive, arbitrary or unconstitutional action by the servants of the government...Cases in the second category are those in which the Defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff...To these two categories which are established as part of the common law there must of course be added any category in which exemplary damages are expressly authorised by statute.”*

[57] In the judgment delivered by Luckhoo P (Ag), the Court of Appeal of Jamaica in **Douglas v Bowen** [1974] 22 W.I.R. 333 at page 344 stated that:

*“...the categorization decided in **Rookes v Barnard** as explained in **Cassell & Co. Ltd. v Broome** ought to be adopted and applied in Jamaica...”*

[58] Whether or not to make an award in this category is at the discretion of the judge. It is generally exercised in favour of the claimant where a defendant exhibits unacceptable and or outrageous behaviour towards the Claimant which connotes malice, ill-will, cruelty, insolence and fraud. In fact, it may be argued that it is the conduct of the police which has generated many of the awards to date, both here and elsewhere in the Commonwealth.

[59] In this case the Claimant has failed to prove any action by the 2<sup>nd</sup> Defendant or any organ of the state which falls in any of the three categories outlined in **Rookes v Barnard** and approved in **Cassell & Co. Ltd. V Broome** to justify an award in this category.

### **Vindictory Damages**

[60] The Claimant pleaded vindictory damages. In her particulars of claim she stated:

*“The claimant was denied her constitutional protection by the arbitrary power of servants and or agents of the government who assumed that she was carrying drugs without proof, created false/positives to bolster the accusation, refrained from court attendance on three (3) separate occasions to elongate the incarceration of the claimant, and avoided due process of law by releasing her from a holding area and not bringing her before a court of competent jurisdiction; such action done by the defendants to evade liability from their trampling of the claimant’s constitutional rights. Until this day the claimant has not seen nor heard of any test carried out at the forensic laboratory. The fact that her case was dismissed and she was not brought before the court and told so by the*

*learned Resident Magistrate is disrespect to her dignity and a denial of a lawful process. The second defendant lied and was in complete disrespect to the court in that at all times the Downy was in the claimant's suitcase at the Narcotics Division and yet she told the court that she had taken it to the forensic laboratory for testing."*

[61] This type of claim must best be referred to as vindicatory or constitutional because it is compensatory but must never be confused with exemplary damages or punitive damages. Apart from the fact that exemplary damages are punitive, to refer to damages given under this head as exemplary runs the risk of duplication as exemplary damages does not fall within the ambit of compensation. See **The Ag. of Trinidad and Tobago v Ramanoop**, PCA No. 13 of 2004 (delivered March 25, 2005); **Merson v Cartwright and the AG of the Bahamas** PCA No. 61 of 2003 (delivered October 13, 2005) and **Ag. of St. Christopher, Nevis and Anguilla v Reynolds** [1980] AC 637.

[62] In **Ramanoop** the Privy Council was deciding the issue of whether the court had the jurisdiction to grant exemplary damages for breaches of the human rights provisions enshrined in the constitution of Trinidad and Tobago. At paragraph 17, 18 and 19 the court said:

*"Their lordships view the matter as follows. Section 14 recognises and affirms the court's power to award remedies for contravention of chapter 1 rights and freedoms. This jurisdiction is an integral part of the protection chapter 1 of the constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of state power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the state's violation of a constitutional right. This jurisdiction is separate from and additional to ("without prejudice to") all other remedial jurisdiction of the court. When exercising this jurisdiction the court is concerned to uphold, or vindicate the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this*

*compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its objective. Accordingly, the expressions "punitive damages", or "exemplary damages" are better avoided as descriptions of this type of additional award."*

[63] Here the Privy Council recognised the need for a remedy additional to the declarations and compensatory damages already provided for. Such a remedy would serve to discourage future breaches of the same kind.

[64] The Jamaican Constitution provides protection to the citizenry from arbitrary arrest and detention. Therefore, no person is to be deprived of their liberty save in certain authorized cases one of which is upon reasonable suspicion of having committed or about to commit a criminal offence. The powers given to the police in the Constabulary Force Act, section 13, ought to be exercised in keeping with these constitutional guarantees.

[65] Section 19(1) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment Act 2011) authorizes any citizen who alleges a contravention of their right under the charter to apply to the Supreme Court for redress. This application is without prejudice to any other action with respect to the same matter which is lawfully available to that person. Subsection 4 of section 19 gives the Supreme

Court the discretion to decline to exercise its powers to grant redress under the Charter if it is satisfied that adequate means of redress for the breach alleged is available under any other law.

[66] Counsel for the Claimant argued that she was denied her constitutional protection by the arbitrary power of servants and or agents of the government who assumed she was carrying drugs without proof; that they created false positives tests to bolster the accusations and refrained from attending court on three occasions to ensure her continued incarceration. He also argued that they avoided the due process of law by releasing her from the holding area without bringing her before a court of competent jurisdiction.

[67] The claimant averred that the 2<sup>nd</sup> Defendant lied by saying that the downy was taken to the Forensic Laboratory for testing when at all times the downy was in her luggage. The Claimant also averred that her constitutional rights were trampled upon as to date she had not seen or heard of any test carried out at the forensic laboratory. She was obviously misguided since there was a forensic report indicating receipt and testing of the downy from the 2<sup>nd</sup> Defendant, which was later relied on by the Claimant. The explanation for the downy being in the claimant's luggage is to be found in the forensic certificate itself. The luggage with the downy was sent to the laboratory. The luggage was sent back with the downy after testing. Since it was taken from the Claimant she ought to have known this fact.

[68] Counsel for the Claimant pointed out that in **Sharon Greenwood-Henry**, although vindictory damages had not been pleaded in that case, the decision of the Hon. Mr. Justice Sykes was that if it had, vindictory damages would have been granted. The Claimant also relied on **Merson v Cartwright**. In that case, the court, at all levels, found that the police had acted in a callous, unfeeling, high handed, insulting, malicious and oppressive manner. It was found that false allegations were levelled at the appellant as a ruse to justify her unlawful arrest and that the appellant had been subjected to humiliation and degradation. It was also found that the actions of the police were an affront to humanity and womanhood.

[69] In **Merson v Cartwright**, the judge at first instance said:

*“In my view, the plaintiff is entitled to damages to compensate her for the wrongs done to her by officers of the Crown (the State) and the factors to be taken into account in assessing those damages should include an amount for the humiliation, i.e. the injury to the plaintiff’s dignity and pride which she endured as well as the insanitary conditions in which she was incarcerated at CPS. In addition, she is entitled to be compensated for the loss of personal liberty, the mental and physical suffering, the fear induced by the implicit threats, e.g. by the police officers at CPS who told her that he ‘would not put up with any nonsense’ from the plaintiff, the oral abuse by Sgt McCoy as well as the humiliation of having to use the prisoner’s bathroom in the presence of male officers both at CPS and at APS even if their backs were turned.”*

[70] The Privy Council in hearing the appeal brought by the state considered whether, in making an award for constitutional redress, the learned judge was duplicating the awards already made under the tortious heads. In doing so the learned Law Lords looked at the overlap between tortious claims and claims for breaches of the constitutional guarantees. It was accepted that some constitutional breaches would also involve torts and some would not although others may constitute aggravating factors relevant to the torts.

[71] In granting vindictory damages the court is concerned with upholding or vindicating the constitutional right which has been contravened. If damage has been suffered it will be compensated, at the discretion of the court. Such an award vindicates the infringed constitutional right. The Privy Council in **Merson v Cartwright** recognised that such an award may be required to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach and deter further breaches. Their lordships however, citing **Ramanoop**, added the proviso that “constitutional relief should not be sought unless the circumstance of which the complaint is made includes some feature which makes it appropriate to take that course”. They highlighted the fact that the purpose of vindictory damages was not



punitive. It was to vindicate the right of claimants to carry on their life free from unjustified executive interference, mistreatment or oppression.

[72] There is no doubt and I accept that in an appropriate case, such an award can be made even where there is a claim under the nominate torts. The issue here is whether this Claimant has raised sufficient matters indicative of an infringement of her constitutional rights which are not covered by the nominate torts and which would move this court to exercise its discretion to award vindictory damages. In cases where such an award had been made there were indications of appalling and outrageous breaches of the claimant's constitutional rights on the part of agents of the state.

[73] This is not the typical case where there was any element of cruel, inhumane or degrading treatment meted out to the Claimant. She was released the day the certificate was produced in court declaring there was no cocaine in the downy. The court's record shows that the matter was withdrawn based on the analyst report. However, the certificate was prepared from the 30<sup>th</sup> November. There was a court date on the 1<sup>st</sup> of December, one day later. Perhaps if checks had been made at the laboratory on the day of the 1<sup>st</sup> of December, the Claimant would have been released from that date. Instead she was remanded in custody until the 19<sup>th</sup> of December.

[74] In my view the additional nineteen days was an unnecessarily long period of delay when a call to the laboratory on the court date of the 1<sup>st</sup> December would have secured the Claimant's liberty. This was the duty of the agents of the state. They failed in their duty towards her. The Claimant's right to her liberty arose on the 1<sup>st</sup> December when it was clear beyond a doubt that she had not been in possession of cocaine. The delay was an infringement of her constitutional right to liberty deserving of vindication. This is not a factor which could be covered under the nominate torts as the period would be covered by judicial order so false imprisonment would not arise, neither would it strictly fall within the scope of malicious prosecution. There is no possibility of overlap.

[75] I must consider therefore, whether any redress is necessary for the period the claimant unduly spent in detention. I believe it is so necessary. It is the duty of the police and or the prosecution service to secure any documentary proof of the charges

necessary to the prosecution of the case against an accused person. Where such proof is in the hands of an expert/examiner or analyst, whether forensic or otherwise, the duty extends to ensuring that attempts are made to collect the results on each and every occasion the accused, whether in custody or not, attends a court hearing. This will ensure that where the proof is not available or the results are negative, which would result in the early freedom of the accused, such a situation will be brought to the notice of the judicial tribunal at the earliest possible time.

[76] The Claimant was incarcerated for an unnecessarily and unreasonably long period which was a breach of her fundamental right to liberty and deserves redress. I therefore, award five hundred thousand dollars (\$500,000.00) as vindictory damages.

### **Conclusion**

[77] The Claimant is entitled to damages for false imprisonment, malicious prosecution and vindictory damages in the following amounts:

1. \$180,000.00 for false imprisonment;
2. \$250,000.00 for malicious prosecution; with interest at 3% from 31 January 2012 to 14 February 2014.
3. \$500,000.00 for vindictory damages;
4. Cost to the Claimant to be agreed or taxed.