



[2024] JMSC Civ. 117

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. SU2020CV01160**

<b>BETWEEN</b>	<b>CHARLES MONTIQUE</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>CONSTABLE AUDREY SMITH</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>ATTORNEY GENERAL</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>DETECTIVE CONSTABLE TASHANA HINDS</b>	<b>3<sup>RD</sup> DEFENDANT</b>

**IN OPEN COURT**

Anthony Williams instructed by Usim, Williams and Company represents the Claimant.

Kristina Whyte instructed by the Director of State Proceedings represents the Defendants.

**Heard: 8<sup>th</sup> and 9<sup>th</sup> of May, 19<sup>th</sup> of September, 2024**

***False Imprisonment – Malicious Prosecution – Whether there was Reasonable and Probable Cause Damages – Aggravated Damages – Exemplary Damages - Vindictory***

**THOMAS: J**

**BACKGROUND**

[1] The background to this case is that on the 1<sup>st</sup> of October 2014, Mr. Winston Brown was killed in the Nightingale Grove Community, Old Harbour, Saint Catherine. The Claimant, Mr. Charles Montique, was arrested on December 31, 2014. Mr. Montique was the subject of an Identification Parade on the 14th day of January, 2015. He was pointed out as the alleged offender by one of the alleged witnesses

Ms. Barbara Carby. He was then charged with the murder of Mr. Brown, Robbery with Aggravation in relation to the alleged witness Ms. Carby, illegal possession of firearm and illegal possession of ammunition. He was first brought before the Halfway Tree Parish Court (Gun Court Division) on the 27th day of January 2015 when his case was committed for trial at the Home Circuit Court of the Supreme Court of Judicature. On December 18, 2017, the charges were dismissed after the Crown offered no evidence against him.

## **The Claim**

**[2]** The Claimant has filed a Claim seeking damages for Special and General Damages, Aggravated Damages, Exemplary Damages and Vindictory Damages for False Imprisonment and Malicious Prosecution against the First, Second, and Third Defendants. In his Amended Particulars of Claim filed on March 15, 2022 Mr. Montique alleges that he was unlawfully and maliciously arrested and detained by the 1<sup>st</sup> and 3<sup>rd</sup> Defendant for the alleged murder of Mr. Winston Brown (o/c “Bunna”), despite they having no reasonable cause. He asserts that he was denied bail for about three years and held at various police stations and remand centres and that he was ultimately released on December 18, 2017, when the charges were dismissed after the Crown offered no evidence against him, based on the fact that the case did not meet the threshold of passing a no case submission.

## **The Defence**

- [3] In the Defence filed on the 5<sup>th</sup> of February 2021, the Defendants contend that the Claimant was arrested on reasonable suspicion that he committed the offences of murder, robbery with aggravation, and illegal possession of Firearm on the 1st of October 2014.

## **Liability**

### **The Evidence**

#### **of the Claimant**

- [4] The Claimant Mr. Charles Montique, in his evidence in chief states that at about 6:30 pm – 7:00 pm on the 1<sup>st</sup> October 2014, he was at a Bar, which is located off Old Harbour Main Road, in the parish of St. Catherine having a few drinks with a friend called “Tally” when he was informed about Mr. Brown’s death by a motorcyclist. He says shortly thereafter, he observed several persons heading in the direction where the alleged incident occurred.
- [5] He says: at no time was he armed with a handgun nor any gun at all, nor robbed Ms Barbara nor any one at all of any money nor personal belongings nor killed the deceased ‘Bunna”. He asserts that he does not have long steps nor long hands; he is 5ft 8 inches tall; He was not the person who committed any act of criminality against Ms Barbara Carby and/or Mr. Leroy Harrow and/or Mr. Winston Brown o/c “Bunna” on the 1<sup>st</sup> of October 2014.
- [6] He further states that; On the 31<sup>st</sup> of December 2014 at about 4:30 pm he was on Old Harbour Road outside a bar celebrating his 35<sup>th</sup> birthday with friends; being New Year’s eve. Other persons were gathered within the vicinity chatting and having drinks. He then saw a marked police jeep with two (2) police officers aboard from the Old Harbour Police Station. The jeep pulled up beside him and one (1) of the police officers enquired what he had in the bag he was carrying. After asking him his name they came out the jeep, searched his person as well as the bag he

was carrying and then ordered him inside the jeep in full sight of all the dozens of onlookers who looked puzzled.

- [7] He says: he felt very humiliated, embarrassed, nervous and bewildered because he was absolutely innocent of any wrongdoing whatsoever. He asserts that whilst walking over to the said police officers he did not have a limp; he has never walked with a limp throughout his entire life and at no point in time did any of the police officers question him about any limp or limping features when he was arrested; So he was taken aback when he later learned that the person the police officers were looking for walked with a limp and was very tall, at six (6) feet three (3) inches tall because he is five (5) feet six (6) to five (5) feet eight (8) inches tall and is often described as being short.
- [8] He states that; The police officers who arrested him took him to the Old Harbour Police Station where he was placed in a prisoner's cell; He was held at the Old Harbour lockup for about a month before he was brought to MIT in Kingston for a Question and Answer session; He was questioned for over two (2) hours whilst in the custody of the police on a murder which he knew absolutely nothing about. He answered all the questions asked to the best of his knowledge, He told the police officers where he was at the time they said the crime was committed.
- [9] He estimates time travelled by the police motor vehicle with him in their custody from the Old Harbour Police Station to the Major Investigation Task Force (MIT) in Downtown Kingston to be 1 hr – 1 ½ hr. The duration of the time that he was questioned at MIT he estimates to be 30 minutes .to 1 hour, after which he was handed over to the police personnel. He says that whilst being in the custody of the police when travelling to and from MIT and back to the Old Harbour Police Station, he was very depressed, nervous, embarrassed, humiliated and ashamed knowing his liberty of movement was totally restricted. He bemoans his treatment in the cell and the fact that he was kept there for (3) years without bail.

- [10] He also says that; whilst being housed at the Old Harbour Lockup he got severely ill and as such he was transported to the Denbigh Hospital on multiple occasions where he received medication and was placed on a strict diet so as to improve his health. He however contends that at the Old Harbour Lockup, he was not provided with the food required and as a result his health deteriorated as he became sick often.
- [11] He says further, that after some time he was taken to One Hundred (100) Man Police Station in Portmore, Saint Catherine where he was the subject of an identification parade. He was told to walk up to a line and say, “*give me the bag*” After the parade was concluded he says he was charged for murder. (the evidence reveals that he was also charged with robbery with aggravation, illegal possession of firearm and illegal possession of ammunition). He states his first Court appearance since his incarceration was in the Half Way Tree Parish Court, on or about January 27<sup>th</sup>, 2015.
- [12] He contends that; He was held in a humid, unsanitary, unventilated pungent cell at One Hundred (100) Man lockup for about two (2) years. Whilst there he says he fainted at least once and when he woke up he found that he was lying on the filthy passage floor and a warden was hitting him under his foot bottom with a piece of board. He also says that he made several desperate pleas to see a doctor, all of which were ignored, and he was simply placed back in the cell. He says many nights he was unable to sleep because of his inability to negotiate a space on the cold concrete floor coupled, with pain and anguish from his ailment.
- [13] Mr. Montique states that he was brought to Half Way Tree Court from One Hundred (100) Man Lockup about ten (10) times. He says this was one (1) of the lowest moments of his entire life, to be transported like a criminal amongst criminals and to have the entire courtroom looked at him in disdain as if he was this horrible member of society.

- [14]** He further says that in or about July 2016 he was transferred from the One Hundred (100) Man Lockup to the Gun Court Lockup at South Camp Road where he was held for another nine (9) or ten (10) months. He describes his stay at that lock-up as follows; “if there was ever hell on earth this must have been it minus the physical fire”. He alleges that; if the prisoners were unable to use the toilet when they went to shower then there was no other designated time available for them to excrete bodily waste and so they would all have to pass their faeces and urine in a bag and keep it until the next time they were scheduled to go and shower. They all had to hold their own bags while defecating in same, in the clear view of the other prisoners and all these bags were kept in the cell. He says, many times the bags had holes and the contents would leak out on the concrete floor where they slept.
- [15]** He maintains that it was commonplace for faeces to be on the concrete that he had to sleep on, and for rodents to run over his feet while he attempted to sleep. He says the odour from the cell was so pungent that at times it became unbearable, and that during these moments he felt embarrassed, shameful, uncomfortable and felt suffocated with the stinking smells of faeces and urine, as a result he had a series of belly pain.
- [16]** He alleges also, that within the first few months he developed severe dental issues. He says he was brought to the dentist on South Camp Road two (2) or more times where he lost about five (5) to six (6) teeth to extraction; this was because he was unable to care for his teeth properly and also visit his personal dentist for proper dental care.
- [17]** Mr Montique also states that after leaving the Gun Court Lockup he was further transferred to Horizon Remand Centre where his dental issues continued. He says had to visit the dentist on several occasions where he lost another five (5) or six (6) teeth. It is also his testimony that he developed severe stomach issues and had to visit the doctor at the Medical Centre at Horizon Remand Centre for medical treatment on several occasions.

**[18]** He further alleges that, whilst he was in custody, one (1) of his daughters was raped twice, and his pregnant girlfriend lost their baby daughter who was born stillbirth as a result of the stress his spouse had to endure because of his incarceration. The inability to be there with his spouse and children, he contends led him to suffer from periods of anxiety, depression, mental anguish and also, from feelings of abandonment, loneliness and mental disorientation.

**[19]** Mr. Montique asserts that the prosecution relied on very frivolous evidence, maliciously prosecuted him, and caused him to be kept in custody, until the 18<sup>th</sup> day of December, 2017 the charges were dismissed against him in the Supreme Court. This dismissal of the charges as he explains it was based on an application made by his Counsel, Mr. Anthony A. Williams who impressed upon the learned trial judge that there was a mistaken identification and the prosecution, Mr. A. Duncan, admitted that the Crown's case could not have gotten passed a No Case Submission and conceded that no prima facie case could have been established against him.

**[20]** He maintains that he was arrested without reasonable and/or probable cause and the prosecution proceeded with the matter against him without reasonable and/or probable cause, in having so set the law in motion, as such he believes the Police was actuated by malice having regard to all the particular facts of this case.

**[21]** He says he has been unable to get his life back on track having lost almost everything and that has been unemployed since his release from prison;

**[22]** His evidence on cross examination is as follows;

In his Question and Answer to the Police, he did tell the police that on October 1, 2014, between the hours of 7:20 pm and 7:45 pm, he was at a bar having a drink. He admits that he told the police he did not remember the name of the bar. He denies saying he did not remember the name of the bartender. He says that no one asked him about the bartender He also denies the suggestion that he did not

tell the police that he was having a few drinks with his friend named "Tally" He however admits that it is not contained in the Question and Answer.

**[23]** He admits that he was asked about having a broken leg at some time in his life and that his response was "yes" when he was a little boy he fell from a tree, but his foot is not bent and he does not have a limp. He also admits that his witness statement indicates that he is 5 feet 8inches tall but maintains, he is 5ft 6inches tall. He agrees that the identification parade form which he signed assessed him as 5 feet 11 inches tall.

**[24]** On re-examination he testifies that he has been insisting that he is 5 feet 6 inches tall because that is the height reflected on his voter's identification card. (His height was measured in court which reflects a height of 5feet 11 inches)

### **Other Statements**

**[25]** The Claimant also relies on the police statements of the alleged eyewitnesses to the murder, Ms Barbara Carby and Mr. Leroy Harrow; the statement of the ID parade office, Ms. Andrea Murray and the Identification Parade forms. However, I will only refer to the relevant portions of these statements regarding the issues under consideration.

### ***The Statement of Ms Barbara Carby***

**[26]** Ms. Carby in her statement to the police said that there were street lights in the area where Mr. Brown was shot and killed but they were far apart. However, she reported that at the time of the incident, it was moonshine. She also mentioned an incident on December 21<sup>st</sup> 2013 about 5:20 am, in which she alleged that she was robbed by the same man who killed the deceased. She said in that incident she was in the Spring Field community going to work, when upon reaching "Earnie's" gate she was approached by a man with a handgun.



- [27] She said the man said to her *“don’t mek nuh noise and gi mi yu phone”* The man was holding on to her right hand with his left hand and he had the handgun in his right hand. She said that *“the man talk in a ruff tone but not loud because I think it was because he was near to Earnic’s home”*. The man then told her to go on the dirt road. This is the same road on which the deceased died and she was robbed. The man then took her to an area on the dirt road, where he robbed her of cell phone and two silver watches. The man also told her he wanted to rape her. She told the man that she was menstruating. The man told her to show him. Immediately after he walked away. She said, that incident lasted for twelve to fifteen minutes.
- [28] As it relates to the incident of 1<sup>st</sup> October 2014, she said about 7:25 pm, she came off the bus at the Old Harbour Main Road bus stop. She saw the deceased and Leroy Harrow sitting on a concrete column at the entrance of Nightingale Grove. The deceased, Leroy Harrow and herself started walking on their way home.
- [29] She also said upon reaching close to “Earnie’s” house, she felt someone grab onto her handbag, that was on her shoulder. She heard a male voice said *“gi mi di bag”* She stated that she then looked up in his face, but he used his gun to block his face. She said that at this time Leroy was standing holding the bicycle and the deceased was still sitting on the bicycle. She gave the man the handbag. The man then went over to the deceased and said *“run”*. She heard the deceased say *“mi nah run thou.”* She then saw the deceased and the man wrestling. She then heard the gunman said to the deceased *“a weh yu a do a kill yu waa mi kill yu”* She then saw the gunman pointed the gun at the deceased and she heard an explosion.
- [30] Ms. Carby further reported that when she heard the explosions, Leroy ran off. After Leroy ran the gunman fired two more shots at the deceased. She then began to run. The gunman ran behind her, put the gun on her back, and said *“Gal yu caan run faster, yu hear mi say you must run faster or else mi ago kill yu”* Upon reaching the pump house the gunman ran past her. The gunman did not say anything else to her. She was watching the gunman after he ran past her in the bushes.

[31] She stated that the gunman was dressed in a dark coloured clothes. He is very tall, when she stood up she would have to look up in his face and she is five feet eight inches tall. She described his foot as long and slim. She said *“he moved frisky, like a senior criminal, like a don man. She stated that “The gunman have a long step. How this gunman step long, it was the same gunman who rob me the first time in December 2013.” He has the same, movements and the long step. The gunman hands are very long. The gunman is very flexible. The gunman run fast. When he was running he appears to be high in the air. The gunman is of a dark complexion, his face is long. The gunman has a normal voice not ruff and not soft but he used his voice in an aggressive and demanding way. If I should hear this voice again I will be able to recognize his voice. I recognized this voice when “Buno” dead and the said long step.”*

[32] In her statement Ms. Carby also said; the moonlight enabled her to see. The gunman was dressed in a dark colour pants but she does not remember the shirt. The gunman is about 6ft 3 inches tall. If she should see this tall man again she would be able to identify him because he is the same man who robbed her on December 21, 2013.

### ***The Statement of Mr. Leroy Harrow***

[33] On Mr. Lee Roy Harrow's account

The incident took place about 7:45 pm on Wednesday, October 1, 2014. He was on a bicycle, Mr. Brown on his bicycle and Ms, Carby was walking. He and Mr. Brown were riding very slow. When they reached a section of the canal bank almost to the back of one of the neighbour named Ernie's house, he heard a voice said *“anybody move dead.”* By that time the deceased was at the front, Ms Carby in the middle and he at the back but not far apart.

[34] He said after he heard the voice he looked and saw a tall image of a man wheeling around an object looking like a gun. He did not take what was going on seriously,

until he heard the deceased say, “a who you man”, and the man with the gun said, “bwoy a dead you waan, dead, run”.

- [35] Mr. Harrow said that by this time he had thrown down his bicycle. He heard the deceased say “him naah run”. As he was about to run off he heard the explosion. While running, Mr. Harrow said he heard two more explosions. He described the man who attacked them as “very tall could be about 6 feet 2-3 inches tall or more” He also said that the area was very dark so he could not get to see the face of the attacker or any part of him “good”.

***The Statement of Ms Andrea S. Murray,***

- [36] Ms. Murray, the identification parade officer, in her statement says that on the 14<sup>th</sup> of January, 2015 she conducted the visual identification parade. She says 9 men to include the Claimant, were placed on parade in a line with their hands to their side. She also says they were similar in heights and status in life. She states that Mr. Montique chose number 6 and that he said he was satisfied with the formation of the parade. She further states that when the witness Ms. Barbara Carby was called she asked her if she knew why she was here she said “Yes” to identify the person who robbed her of her belongings and killed her neighbour Winston Brown on the 1.10.2014 at Nightingale Grove, Old Harbour”.
- [37] Ms. Murray says that she told Ms Carby that there were nine (9) men in line and the person who robbed her may or may not be on the line-up. She informed her that the men will come in one after the other saying the following words “**Gimme de bag**”, and that when all nine men held their positions, she should walk along the line and if she saw the man she could call the number over his head. She said Ms. Carby looked and said number six (6). She informed Mr. Montague that he was pointed out, and he said “I have nothing to do with this I have witness”.

### **The Evidence of the Defence**

- [38] The evidence of Detective Corporal Tashana Hinds is that on Wednesday, October 1, 2014, she was then a Detective Constable of Police and was then assigned to the St. Catherine Major Investigation Task Force. Whilst, on duty, she received information from police control at 8:05 PM regarding a homicide at Nightingale Grove Farms, Old Harbour, St. Catherine. She arrived at the scene at 9:30 p.m., along the Rio Cobre canal bank in an area known as Cuba.
- [39] She says that while on the scene, she interviewed Mr. Leroy Harrow and Ms. Barbara Carby, who identified the deceased. She states that they reported to her that while walking home with the deceased they were ambushed by an armed man who robbed Ms. Carby of her handbag and cell phone before shooting and killing the deceased. She also says that during her investigation, she discovered that Closed Circuit Surveillance cameras were installed near the crime scene. She then requested to view the footage from Mr. Derrick Dunn, the owner of the premises.
- [40] She says further that on Saturday October 11, 2014 about 1:00 pm, she received an 8 gigabyte red and black sandisk cruzer blade USB drive from Mr. Derrick Dunn with CCTV footage from his surveillance camera. She viewed the footage that she received from Mr. Dunn and she observed the image of a male walking along the roadway. She states that she further observed that the image of the male was walking with a limp towards his left. She says she immediately caused the said 8 gigabytes red and black sandisk cruzer blade USB drive and the complainant's cell phone number that was stolen to be sent to the Jamaica Constabulary Force Communication and Cyber Crime Unit for analysis.
- [41] It is Ms. Hind's evidence that, on December 31, 2014, she received information from Detective Corporal Andrey Smith regarding Charles Montique, also known as "Mad Ras," who had been taken into custody at the Old Harbour Police Station. It is also her evidence that the following day, January 1, 2015, she visited the station, where Detective Corporal Smith pointed out Mr. Montique. She identified herself

and informed Mr. Montique that she was investigating the murder of Winston Brown, also known as "Bunna," and that she believed he could assist in the investigation.

**[42]** She states that she cautioned Mr. Montique and he said "Offica me know Buna long time why me woulda waan kill him". She alleges that she noticed that when Mr. Montique was walking towards her, his left foot limped towards his left side and that she asked him what happen to his left foot, "When he said, when I was a boy me drop from a breadfruit tree and bruk my left foot and go to the hospital".

**[43]** Ms. Hinds also mentions a Question-and-answer interview that was conducted with Mr. Montique on the January 6, 2015. She asserts that during the interview Mr. Montique stated that at the time of the incident, he was at a bar having a drink, but he could not provide the name of the bar nor any witnesses to support his alibi.

**[44]** She says further that; On January 14, 2015, an identification parade was conducted with Mr. Montique , and later that day, she received information that Mr. Montique was identified by the complainant during the parade; On January 15, 2015, around 10:00 AM, she went to the Portmore Police lock-up where Mr. Montique was being held; She reminded him of the allegations that on October 1, 2014, he shot and killed Winston Brown and robbed the complainant of her handbag, which contained \$7,000, and a silver Alcatel cell phone valued at \$7,000;. She informed him of the charges for murder, robbery with aggravation, and illegal possession of a firearm, and formally charged him; He was brought before the court on January 27, 2015, and later discharged on December 18, 2017, when the Crown offered no evidence against him.

**[45]** She maintains that throughout the investigation, she lawfully fulfilled her duties and had reasonable and probable cause to believe that Mr. Montique had committed the offences for which he was charged.

**[46]** On Cross examination, Ms. Hinds admits that Ms. Carby said the attacker was very tall. She agrees that there is a difference between tall and very tall. She

agrees that in the Question Answer there is no reference to Mr. Montique having any left foot limping.

- [47]** She confirms that after she observed the CCTV camera she thought it prudent to look at the video footage to see if it would assist her in the investigation. She agrees Ms Carby told her the incident took place at 7:35 pm. She agrees that according to Ms. Carby the person would have committed the offence and ran off about 7:45 pm. She agrees that the timing on the video started at 6pm but said that ambiguity was cleared up by a Mister Dunn.
- [48]** She also confirms that what was striking about the person based on Ms. Barbara Carby's statement was the long step that she was explaining to her whilst she was interviewing her and that led her to retrieve the footage. She admits that Ms. Carby did not make reference to the offender having any limp. She insists, that based on her observation of the man in the video, he walked with a limp. She says further that the man was making long steps based on how he was positioned. She admits that in her 16 years in the force she has seen a man who is drunk and walking. She however says that she cannot say if the man she saw in the video was a drunk or was walking with a limp.
- [49]** Ms. Hinds admits that it is not in her statement that she told Mr. Montique that Ms. Carby, had reported that he was the same person who robbed her in 2013 whom she recognized by his voice. She now agrees that the person in the video neither appeared to be a drunken man nor had a limp. She further agrees that the man in the video was not wearing a dark pant. She says her instructions to the team was to assist in identifying a man who walked with a limp, of dark complexion, was a little bit over 6 feet tall.
- [50]** She agrees that she told Corporal Smith that he was supposed to look for a tall man. When confronted with the aspects of Ms Carby's and Mr. Harrow's statements describing the person as very tall and not just tall her response was that she gave Mr. Smith the height of the offender as over 6 feet. She further admits

that neither herself nor any other police officer on her team visited any bar on the Old Harbour main road?

- [51] She also agrees that there is no indication on the ID parade form that the question as to whether, prior to this parade Ms. Carby had seen any broadcast or published print or photograph of any description of the suspect relating to the offence was put to Ms. Carby, as there is no response by Ms. Carby to this question on the form.
- [52] Ms. Hinds disagrees with the suggestion that herself and Corporal Andrey Smith arrested and charged the wrong man. She was asked to clarify how it is based on the eyewitnesses' statements she had been investigating someone with a limp. She says when she was interviewing her, Ms Carby demonstrated the walking to her. She was asked to demonstrate what Ms. Carby demonstrated to her. (Ms Hinds was asked to show this demonstration to the court. Her demonstration was someone walking and bouncing from side to side.)
- [53] On re-examination, she states that to her mind the demonstration given to her by Ms. Carby led her to commence her investigation into a suspect who walked with a limp.
- [54] In relation to the video footage she obtained from Mr. Dunn, she says that it is hard to say based on the footage what colour pants the person was wearing as the video is in black and white, and not in coloured. She also testifies that Mr. Dunn gave a witness statement clarifying the discrepancy between the time of the incident and the time captured on the video.
- [55] She was asked by the court, whether on her observation of Mr. Montique and the description given by Ms. Carby she would describe Mr. Montique's foot or leg as long and slim. She says "not really". She was also asked if she would describe him as walking with long steps. She said no. She was also asked if she had asked the Claimant to walk when he was detained She said she did not specifically

ask him to walk but she made her observations when they took him from the cell block. She however says that she did not observe any long steps

### **Issues**

[56] The issues arising in this case are;

- I. As it relates to liability for false imprisonment; Whether the Claimant was detained and or arrested without any lawful justification
- II. As it relates to liability for Malicious prosecution;
- III. Whether the Claimant was prosecuted without any reasonable and probable cause.

### **False Imprisonment**

The Law

[57] The principle of law as it relates to False imprisonment was discussed in the case of **Flemming v Detective Corporal Myers and The Attorney General** (1989) 26 JLR 525 at page 530 Carey P (Ag) had this to say;

*“Where the person arrested is released, upon proof of his innocence or for lack of sufficient evidence before being taken to court no wrong is done to him. Where however he is kept longer than he should, it is the protracted detention which constitutes the wrong, the “injuria”. This abuse of authority makes the detention illegal ab initio. I see nothing either in principle or in authority to prevent an action for false imprisonment. Indeed, it is a valuable check on abuses of authority by the police.”*

*The burden is on the claimant to prove that the police had no lawful justification for his arrest. However, if it is shown that the arrest was unjustifiable and the period of detention unjustifiably lengthy, the onus shifts to the defendant to show whether in all the circumstances, the period of detention was reasonable – see **Flemming v Det. Cpl. Myers and The Attorney General.**”*



- [58] In the instant case counsel for the Defendant Ms. Whyte, maintains that the Claimant's initial detention was lawful based on reasonable and probable cause. She however says that she concedes that the delay in bringing the Claimant before the Court, resulting in his detention from December 31, 2014, to January 27, 2015, was unlawful.
- [59] Notwithstanding this admission, the Defendants argue that a claim for false imprisonment cannot succeed for the entire duration of the Claimant's detention. They assert that after the Claimant's first court appearance, his continued detention was due to a judicial act, which cannot result in liability. In support of this position counsel relies on the authority of the **Attorney General of Jamaica, Corporal Orville Clarke v Clayton Tyndale** [2020] JMCA Civ 60.

### Discussion

- [60] I will first state that throughout this case I recognize and will apply the legal principle that in all aspects the Claimant bears the burden of proof on a balance of probabilities to prove that he is entitled to the remedies sought. Evidently, on this issue, the Defendants have conceded liability for false imprisonment but this concession is limited to the period of detention from the time of arrest, that is the 31<sup>st</sup> of December 2014 to the date of January 27<sup>th</sup>, 2015 when Mr. Montique was brought before the court.
- [61] Accordingly, this court looks to the case law for guidance. In the case of the Attorney **General of Jamaica, Corporal Orville Clarke v Clayton Tyndale** (Supra) Edwards JA clearly outlines the principle on this issue. At paragraph 39 she stated;

*“There is no doubt that there exists an established principle of law that in cases of false imprisonment the act of remand by a judicial officer breaks the chain of causation. This principle goes back to statements made in the very old case of Lock v Ashton that damages could not be given for a remand, which was the independent judicial act of the magistrate”.*

[62] Having reviewed cases such as ***R v Governor of Brockhill Prison ex parte Evans (No 2)***, ***Harnett v Bond*** [1925] AC 669), at paragraph 47 she came to the conclusion that;

*“There is settled authority, therefore, that no action can lie for false imprisonment for a period of detention resulting from a court order. There is also settled authority that the chain of causation can be broken by an independent intervening act and that judicial action can operate as a novus actus interveniens to break the chain of causation”.*

[63] The authorities clearly indicate that false imprisonment can only succeed for the period where the Claimant was detained prior to or without an order from the court, even where he has been acquitted or released on lack of evidence on the charge for which he was arrested. The reasoning behind this position is that detention by an order of a judicial authority is not deemed unlawful.

[64] Therefore, as it regards the Claim for False Imprisonment, the Defendant having admitted liability and in accordance with the settled law, I find that the Claimant is entitled to Damages for False imprisonment from the period of the date of his detention to the time he was first taken before the court. In any event the Counsel for the Claimant in their supplemental submissions do not seem to be pressing for any finding of liability for false imprisonment beyond this period.

### ***Malicious Prosecution***

[65] At common law the cases have established the necessary elements that a Claimant must prove in order to succeed in a case of Malicious prosecution. These are:

- (1) that the defendant prosecuted the claimant (whether by criminal or civil proceedings); (2) that the prosecution ended in the claimant's favour; (3) that the prosecution lacked reasonable and probable cause; (4) that the defendant acted maliciously; and (5) that the claimant suffered damage (See the cases of ***Glinski v McIver*** [1962] AC 726 (***Williamson v Attorney***

**General of Trinidad and Tobago** [2014] UKPC 29; **Stuart v Attorney General of Trinidad and Tobago** [2022] UKPC 53,)

[66] This was outlined in the case of **Stuart v Attorney General of Trinidad and Tobago**, at para 1 where the court said;

*“The tort of malicious prosecution has five elements all of which must be proved on the balance of probabilities by a claimant: (1) that the defendant prosecuted the claimant (whether by criminal or civil proceedings); (2) that the prosecution ended in the claimant’s favour; (3) that the prosecution lacked reasonable and probable cause; (4) that the defendant acted maliciously; and (5) that the claimant suffered damage.*

[67] Additionally, **Section 33** of the **Jamaica Constabulary Force Act** has codified the circumstances on which malicious prosecution can be grounded. The provision states:

*“Every action to be brought against any Constable for any act done by him in the execution of his office, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done either maliciously or without reasonable or probable cause and if at the trial of any such action the plaintiff shall fail to prove such allegation he shall be non-suited or a verdict shall be given for the defendant.”*

[68] In the instant case, I find that elements one 1 and 2 have been satisfied on the basis that there is no challenge regarding these elements by the Defendant. It has not been contested that the Claimant was prosecuted by the 3<sup>rd</sup> Defendant. Neither has it been contested that the prosecution ended in the Claimant’s favour by the prosecution offering no evidence against him resulting in a dismissal of the charges.

[69] The next issue therefore is whether the Claimant has proven on a balance of probabilities that the prosecution lacked reasonable and probable cause and was thereby activated by malice in prosecuting him.

[70] Counsel Mr. Williams’ submissions on this issue are summarized as follows;

- (i) Detective Corporal Hinds, palpable failed and/or neglected and/or refused to ensure that the case against the Claimant was properly investigated by her with an honest belief in the guilt of the Claimant. The absence of reasonable or probable cause suggests that Detective Corporal Hinds may have had an improper motive, as "malice" in legal terms includes motives beyond merely seeking justice;
- (ii) Detective Corporal Hinds had no reasonable or probable cause for prosecuting Mr. Montique due to significant deviations from the proper investigative process, including failing to find a suspect matching the descriptions provided by witnesses, Ms. Barbara Carby and Mr. Leroy Harrow. Neither Ms. Carby's nor Mr. Leroy Harrow's witness statements mentioned that the alleged offender had or walked with a limp at the time of the offences. Corporal Hinds, had a legal, ethical, and mandatory duty to search for a suspect consistent with the descriptions given by the witnesses, Ms. Carby and Mr. Harrow. However, she pursued a suspect with a limp, a characteristic never mentioned by either witness. She gave instructions that the suspect to be arrested who walked with a limp;
- (iii) The investigation started on a false premise regarding non-existent physical identification features /characteristics which led Corporal Hinds and her team to pursue the wrong person. The Claimant did not have any limp or limping features at all. Corporal Hinds says that she observed on the CCTV a man walking with a limp. This perception is baseless and unsupported. When during the trial, Mr. Montique was asked to walk across the court room, Ms Hinds stated that he did not walk with a limp. This raises the question of why the limp was so important to Detective Corporal Hinds when it was never mentioned in the witness statements of Ms. Barbara Carby or Mr.

Leroy Harrow. This was an apparent invention of facts by Detective Corporal Hinds;

(iv) During re-examination, Corporal Hinds claimed that Ms. Carby demonstrated how the suspect walked, leading her to conclude that the suspect had a limp. However, this explanation was problematic because there was no mention of any such demonstration in Corporal Hinds' witness statement or any other witness statements. This situation illustrates the confusion and baseless assumptions in the case;

(v) The unilateral creation of a "limping" man by Corporal Hinds misdirected the investigation with a subjective and unsupported interpretation, leading to the false imprisonment and malicious prosecution of Mr. Montique;

(vi) Detective Corporal Andrey Smith actively searched for a man who walked with a limp and subsequently arrested Charles Montique on December 31, 2014. He did not take reasonable care to inform himself of the true facts of the case;

(vii) Corporal Hinds compromised the integrity of the investigation by setting the law in motion against Mr. Montique without reasonable or probable cause. She had no authority to instruct Corporal Smith to search for a suspect with a limp. Furthermore, Ms. Hinds' actions suggest a lack of concern for presenting a proper case based on reasonable evidence;

(viii) Given the trauma of both events, the Defendants did not adequately explore Ms. Carby's familiarity with the gunman's voice or the distinctive features that made it recognizable. The description of the gunman's voice, as a "normal voice" did not provide any special features or special characteristics of the gunman's voice.

However, an aggressive tone lacks distinctive features. It is merely a change in tone, not a unique characteristic. The Defendants could not have reasonably believed that such an indistinct description would lead to an accurate identification. Arresting Mr. Montique under these conditions shows a reckless disregard for evidence and suggests malice. Consequently, voice identification could not support their honest belief in the accused's guilt. (He relies on the cases of; **Neville Barnes v R** [2019] JMCA Crim 12 which **cited** the case of case of **R v Rohan Taylor et al** (1993) 30 JLR 100}

(ix) Ms. Barbara Carby described the gunman as very tall, about 6 feet 3 inches to the point she had to look up in his face and she is five feet eight inches tall. However, only three out of nine men in the Identification Parade matched this height. Charles Montique, did not fit the description, significantly skewing the line-up and heightened the risk of mistaken identification. Detective Corporal Hinds also acknowledged that Mr. Montique is not a tall man. Therefore, the Defendants could not have reasonably believed Mr. Montique was the very tall person described by the witnesses. A careful and prudent officer would ensure that Mr. Montique matches the witness's description. The failure to do so only amplifies the unreasonable approach taken by the Defendants without grounds to prosecute Mr. Montique who is a fairly short man under 6ft.

(x) The witnesses described the suspect as having a "long step," which is open to interpretation. Detective Corporal Hinds admitted that she did not believe Mr. Montique had long steps or hands, revealing that the Defendants were careless or reckless in considering the suspect's description, as Mr. Montique could not have grown shorter in any form since he was arrested and/or prosecuted. The Defendants could not have genuinely believed Mr. Montique was guilty because they failed to verify his alibi. Mr. Montique stated he

was at a bar during the incident and provided its location, though he did not know the bar's name. Detective Corporal Hinds said she did not visit the bar provided by Mr. Montique to verify his alibi because she did not know its name. However, many bars in Jamaica lack official names. A thorough investigation should have included checking the location Mr. Montique provided. The Defendants' failure to follow up on this lead suggests a lack of diligence in investigating the case, which could have exonerated Mr. Montique and directed attention toward the actual perpetrator. It is unreasonable for the police to dismiss Mr. Montique's alibi without investigation while claiming to honestly believe he was probably guilty of the crime.

(xi) The CCTV footage provided by Mr. Derrick Dunn was of poor quality so that Corporal Hinds could not have seen Mr. Montique or any details about a limp in the footage, or any man walking with a limp so much so as to form part of the evidence against Mr. Montique. The footage shows a figure walking/ but it is unclear whether the individual is male or female. This ambiguity renders the footage unreliable for identifying any suspect, including Mr. Montique. During cross-examination, Detective Cpl Hinds conceded that the person walking in the CCTV Footage had three (3) possible divergent possibilities, namely:

- A drunken man with no limping features or;
- simply someone who is not drunk but with that 'style' or 'way' of walking, or
- a man who is drunk and also has a limp.

Detective Cpl Hinds agreed that the gait observed in the CCTV footage does not necessarily indicate a limp, which significantly undermines her credibility. Her acknowledgment of multiple interpretations of the footage challenges the claim that she reasonably believed Mr. Montique was the culprit. This admission

highlights the lack of honest belief in Mr. Montique's guilt. The Defendants' case fails to meet both subjective and objective standard. The poor quality should have prevented her from making definitive conclusions about Mr. Montique's guilt.

- (xii) Ms. Barbara Carby's description of the clothing the offender was wearing a dark pant, contradicts what is shown on the CCTV footage which shows a figure in light-coloured clothing. Additionally, the footage's timestamp does not match the incident time. The police should have resolved these discrepancies before charging Mr. Montaque. It should have been apparent from the outset to the Second Defendant's servants and/or agents that based on the tenuous nature of the evidence of the complainants/eyewitnesses, the evidence could only remotely link the Claimant to the crimes; instead, it took the Defendants three years to accept this fact much to the detriment of the Claimant.

**The submissions of the Defendants are summarised as follows;**

[71] Ms. Whyte made the following submissions:

- I. Quoting from (**Jerome Freckleton v The Attorney General of Jamaica and Anor.** [2018] JMCS Civ. 127:

“The definition of reasonable and probable cause that has stood the test of time was pronounced by Hawkins J in his oft quoted judgment in **Hicks v Faulkner** (1878) 8 QBD 167, at page 171 and approved by the House of Lords in **Herniman v Smith** [1938] AC 305. was defined to be:

*“an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a 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.”*



- II. For there to be reasonable and probable cause, the accuser must first be aware of the existence of a state of circumstances, which causes him to honestly believe that the accused is probably guilty of the crime he imputes. His awareness of the circumstances may be the result of either his own perception or information received: *The litmus test of the reasonableness of the accuser's purported honestly held belief is the coincidence of that belief with that of the ordinarily prudent and cautious man.*” (She refers to **Hicks v Faulkner**, *supra*, at page 173. She also refers to case of **Rennon Walker v Deputy Superintendent Leon Clunis v Attorney General** [2016] JMSC Civ. 84 as also section 33 of the Constabulary Force Act which provides that:
- III. There is a subjective and objective component of the test of honest belief. (She quoted from a passage in the case of **Glinski v Mclver** [1962] 1 All E.R. 696 at 710 F in which Lord Denning said;
- IV. ‘...., even if the jury answers: “Yes, the defendant did honestly believe the accused was guilty,” it does not solve the problem. Honest belief in guilt is no justification for a prosecution if there is nothing to found it on. His belief may be based on the most flimsy and inadequate grounds, which would not stand examination for a moment in a court of law. In that case he would have no reasonable and probable cause for the prosecution. He may think he has probable cause but that is not sufficient. He must have probable cause in fact. In this branch of the law, at any rate, we may safely say with Lord Atkin that the words “if a man has reasonable cause” do not mean “if he thinks he has”: see *Liversidge v Anderson*.” She also relies on **Greg Martin v Detective Sergeant Halliman and the Attorney General of Jamaica** Claim No 2007 HCV 01096. It must be shown that the prosecutor lacked reasonable and probable cause. She also relies on the case of **Trevor Williamson v The Attorney General of Trinidad and Tobago** [2014] UKPC 29, to say that

*“In order to make out a claim for malicious prosecution, it must be shown, among other things, that the prosecutor lacked reasonable and probable cause for the prosecution and that he was actuated by malice. These particular elements constitute significant challenge by way of proof. It has to be shown that there was no reasonable and probable cause for the launch of the proceedings. This requires the proof of a negative proposition, normally among the most difficult of evidential requirements.... “What is clear is that, Malice can be inferred from a lack of*

*reasonable and probable cause—Brown v Hawkes [1891] 2 QB 718 at 723. But a finding of malice is always dependent on the facts of the individual case. It is for the tribunal of fact to make the finding according to its assessment of the evidence”.*

- V. Even if this court were to accept that the claimant is entirely innocent of the charges brought against him, that does not mean, a fortiori, that there was malice in having prosecuted him, or that there was a lack of reasonable and probable cause for having prosecuted him. This court does not know what information/materials/witness statements the prosecutor had in his/her possession at the time when the claimant was acquitted. That is what this court would need to know in order to properly be able to conclude that said element of the tort of malicious prosecution, has been duly proven by the claimant. Mere proof of acquittal, just as mere proof of either no evidence or no sufficient evidence having been led by the prosecution against the accused, at trial, is not enough. *(She relies on the cases of **The John Gaynor case** (op. and the case of Delroy Thompson).”*
- VI. Insufficiency of the Crown's evidence in the criminal case does not automatically imply that the charging officer acted maliciously or without a proper basis when initiating the prosecution. The court ought to distinguish between how the Crown handles evidence and conducts the prosecution, and the actions of the charging or investigating officer. The Crown's decision to offer no evidence against the Claimant in the criminal case was not within the remit or control of the 1st or 3rd Defendants. This decision, made about three years after the Claimant's arrest and charge, does not, by itself, indicate malice or unreasonableness in the initial arrest and charge. The mere failure to lead evidence cannot, in and of itself, suffice to prove either that the prosecutor was actuated by malice, or that there did not exist reasonable and probable cause for the prosecution
- VII. At this trial it was confirmed that the Claimant's height is 5 feet 11 inches, this completely extinguishes his claim that he was only 5 feet 6 to 5 feet 8 inches tall and often described as short. To address this discrepancy, the Claimant sought to introduce new evidence that his Voter's Identification Card reflected a height of 5 feet 6 inches. The Claimant could not clearly explain how he came to believe the height on his ID card reflected his actual height. The ID card has little probative value compared to the Claimant's true height, which was carefully measured at trial. During cross-examination, the Claimant was shown the Jamaica

Constabulary Force Visual Identification Unit Parade Form which confirmed his height as 5 feet 11 inches, alongside his signature. Although the Claimant later stated that the police did not inform him of his height at the parade, this does not negate the veracity of the form's contents concerning his height. Barbara Carby, the complainant in the criminal proceedings, described the assailant as being 6 feet 3 inches tall in her witness statement and noted her own height as 5 feet 8 inches. Given the Claimant's actual height of 5 feet 11 inches, he could have reasonably been considered as tall from the complainant's perspective. The Claimant's faulty evidence about his height, the alignment of his height at the identification parade with his true height ascertained at the trial, and the fact that he was taller than the complainant there is no significance that there was no reasonable or probable cause for the police to suspect him based on height.

- VIII. In his evidence-in-chief, the Claimant denied ever walking with a limp throughout his entire life or being questioned by police about any limp or limping when arrested. However, during cross-examination, it was revealed that the 3rd Defendant had asked him about his foot, to which the Claimant responded that "When I was a boy mi drop out a breadfruit tree and bruk mi left foot and go to the hospital." This being out, the Claimant in court, stated that it was actually his right foot that was injured. The Claimant's response during cross-examination was less than forthright in his evidence in court discredits him as a witness of truth. In contrast, the 3rd Defendant presented herself as honest and credible. During cross-examination, she admitted that the complainant did not mention the offender having a limp, however, during re-examination she clarified that the suspect had a limp based on her interview with Ms. Carby. The 3rd Defendant demonstrated in court the appearance of a person with a limp that she was looking for and, after the Claimant was asked by the Court to walk across the courtroom, she candidly stated that she did not observe any long step described by the complainant but did observe a limp when the Claimant walked from the cell block.
- IX. The argument of counsel for the Claimant that the Claimant could not fit the description of the offender based on his manner of walking is unfounded. Counsel contends that the focus on the 3rd Defendant's use of the word "limp" to describe how the offender walked is unwarranted. This is because the 3rd Defendant observed the Claimant's walk, demonstrated the suspect's walk, the image she described as seeing in the CCTV footage, and the information from her interview with the complainant. Based on these factors, there is no basis to find that the

3rd Defendant acted maliciously or without reasonable and probable cause in prosecuting the Claimant.

- X. The Claimant's Counsel made much ado about the time shown on the video footage, which was a time after 6:00 p.m., and the complainant's statement, which stated that the incident took place after 7:35 p.m. However, the 3rd Defendant's evidence is that Mr. Derrick Dunn clarified this discrepancy in his statement. Malice cannot be inferred from the alleged inconsistency, especially when the relevant evidence was available to the Court that the 3rd Defendant considered and addressed the matter in her investigation.
- XI. It was suggested that an irregularity occurred in the identification parade due to the differing heights of the men in the lineup compared to the height given by the complainant. A review of the lineup's varying heights showed that the Claimant was not the tallest person in the parade, establishing that the positive identification was not solely based on the Claimant's height. Despite criticisms of the identification parade, by Counsel for the Claimant, there is no evidence that the integrity of the parade was diminished or that the 3rd Defendant was wrong in accepting the identification and charging the Claimant.
- XII. During cross-examination, the Claimant confirmed that in a police Question and Answer (Q&A) interview, he stated he was at a bar in Grove on October 1, 2014, between the hours of 7:20 p.m. and 7:45 p.m. but couldn't recall the bar's name but it is on the main road. However, in his statement he states the name of the another person as Tally. This is an unconvincing fabrication on the part of the Claimant. Despite the Claimant's evidence-in-chief that he was with a friend called "Tally" at the time of the incident, his evidence in the trial that he informed the police of this in the Q&A is groundless. The evidence before the Court includes a record of 55 questions and responses, and no reference of a person named "Tally" was made. No suggestion was raised that the document containing these questions and answers was inaccurate. The evidence of the 3rd Defendant's that the Claimant was unable to state the name of the bar or any witnesses during the interview, which hindered further investigation into the alleged alibi should be accepted as credible;
- XIII. The Claimant's complaints regarding the quality of the evidence are insufficient to prove that the police acted with malice. There is no evidence suggesting that the 1st or 3rd Defendants were motivated by any illegitimate objective in carrying out their duties. Rather, the 3rd

Defendant, the investigating officer, provided that she conducted a thorough investigation, which included processing the crime scene, interviewing witnesses, reviewing video footage, conducting a question-and-answer session with the Claimant and placing him on an identification parade. It is undisputed that the 3rd Defendant did not charge the Claimant until he was positively identified by the complainant at an identification parade. In this case, the 3rd Defendant acted on her honest belief that the Claimant might be guilty. She received information from Corporal Andrey Smith that the Claimant was in custody at the Old Harbour Police Station on December 31, 2014. She attended the station the next day where he was pointed out by Corporal Smith and personally observed him at the station, noting a limp on his left side. She continued her investigation and garnered additional information, including the positive identification in the parade. The 3rd Defendant's actions met both the subjective and objective elements of reasonable and probable cause. Accordingly, there is no basis to impugn her actions, as there is no evidence proving she acted with malicious intent or improper motive in charging the Claimant.

## Discussion

[72] The earlier cases such as **Hicks v. Faulknor** (1878) 8 QBD 167, which is relied on by counsel for the Claimant define reasonable and probable cause thus;

*“an honest belief in the guilt of the accused based upon a conviction, founded upon reasonable grounds, of the existence of a 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.”* (See the judgment of Hawkins. J. See also the case of **David Foster v The Attorney General and Corporal Ann Jackson** (2014HCV 01791)

[73] However, Lord Denning in the case of **Glinski v Mclver** [1962] AC 726; at page - 759 went on to explain that;

*“Guilt or innocence is for the tribunal and not for him ... So also with a police officer. He is concerned to bring to trial every man who should be put on trial, but he is not concerned to convict him. ... No, the truth is that a police officer is only concerned to see that there is a case proper to be laid before the court.”*

[74] This principle was also applied in the case of **Kevin Stuart v Attorney General of Trinidad and Tobago (Trinidad and Tobago)** [2022] UKPC 53 where at paragraph 26 their Lordships stated that:

*“It has commonly been stated that the honest belief must be as to the accused’s guilt in respect of the offence charged: see **Hicks v Faulkner** (1878) 8 QBD 167, 171, per Hawkins J, which was approved by the House of Lords in **Herniman v Smith** [1938] AC 305. But in the Board’s view, the principled and correct approach was articulated by Lord Denning in the House of Lords in **Glinski v McIver** [1962] AC 726. He said at pp 758-759: “[T]he word ‘guilty’ is apt to be misleading. It suggests that in order to have reasonable and probable cause, a man who brings a prosecution, be he a police officer or a private individual, must, at his peril, believe in the guilt of the accused. That he must be sure of it, as a jury must, before they convict. Whereas in truth he has only to be satisfied that there is a proper case to lay before the court. ... After all, 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 and not for him ... So also with a police officer. He is concerned to bring to trial every man who should be put on trial, but he is not concerned to convict him. ...No, the truth is that a police officer is only concerned to see that there is a case proper to be laid before the court.”*

[75] In the case of **Stuart**, at paragraph 13, the Privy Council said that the:

*“lack of reasonable and probable cause” element, there is an objective aspect to this (whether the Officer had reasonable grounds for bringing the case to court) and a subjective aspect (whether Officer had the honest belief that this was a proper case to bring to court). The claimant would succeed on this element if he could prove that the officer did not have the required reasonable grounds or lacked the required honest belief.”*

[76] Essentially the determination of the issue is not so much about the officer being convinced about the guilt of the accused but her honest belief that the quality of the case that she has placed before the court is a proper case for a tribunal to consider.

[77] Therefore the relevant consideration in this case is whether the claimant has, adduced evidence tending to establish the absence of an honest belief operating on the minds of the 1<sup>st</sup> and 3<sup>rd</sup> Defendant that they were putting a proper case before the court( the subjective element) ; and whether the ordinary and

reasonable investigation armed with the information that was available to the Defendants would have had an honest belief that in arresting and prosecuting Mr. Montique they would have been putting a proper case before the court( the objective element).

**[78]** I agree with counsel for the Defendant that the fact that no evidence was offered against the Claimant by the prosecution without more, is insufficient to establish the absence of reasonable and probable cause on the part of the Defendants. The Claimant must put before the court the circumstances in which the prosecution was instituted, which goes beyond proving that he was acquitted of the facts before the court, or that the prosecution withdrew the charges against him, unless those facts were within the personal knowledge of the defendant. (See the cases of ***Abrath v North Eastern Railway Co*** (1883) 11 QBD 440 and ***Glinski v McIver*** [1962] AC 726) Therefore it is incumbent on me to examine the information on which the 1<sup>st</sup> and 3<sup>rd</sup> Defendant acted in causing the arrest and charge of Mr. Montique.

**[79]** It is apparent that the information regarding the commission of the murder, and the accompanying offences for which the Claimant was arrested charged did not come to Ms. Hinds from her own personal knowledge but information provided by two alleged eye witnesses, Ms Carby, and Mr. Harrow, as also her observation of the video footage provided by a Mr. Dunn. It was therefore her responsibility to be guided by these information during her investigation in order to put a proper case before the court. At this juncture I will conduct a review of that information.

### **Description by the Witnesses of the Offender**

**[80]** Despite saying there was moonlight, and that there were street lights at the location but they were far at part, Ms. Carby in her statement. clearly expressed a challenge with regards to visual facial identification of the offender. She says the offender used the gun to block his face. However, she was able to provide other physical features that were quite distinctive about the offender. She says he is very tall.

When she stood up she had to look up in his face and she is five feet eight inches tall. Additionally, she gave a specific height as to what she described as very tall, that is, about 6 ft 3 inches tall. Other specific features that she describes were his long slim foot, long steps and very long hands. She also said when he was running he appeared to be high in the air.

**[81]** Mr. Harrow's information regarding the visibility of area at the time of the murder conflicts with that of Ms. Carby as he described the area as very dark. However, he placed himself in close proximity to Ms Carby saying they were not far apart, thereby establishing the opportunity to make some observation of the offender like she did. It is of some significance that he also provided the police with information regarding distinct physical features of the offender that was consistent with that provided by Ms. Carby. He said the man who attacked them is very tall could be about 6 feet 2-3 inches tall or more.

**[82]** In light of the fact that both witnesses put the offender's height above 6ft, in pursuing the investigation with the aim to put a proper case before the court, contrary to the position taken by the Defence Counsel, it was not open to the police to speculate that because Ms. Carby was 5ft 8inches and she said she was able to look up in the Offender's face she probably meant under 6 ft. This is in circumstances where the witnesses specifically described the offender's height as over 6ft, in addition to providing an approximate height as to what they meant by over 6 feet.

**[83]** Having assessed Mr. Montique's height at 5ft 11, it would have been obvious to Ms. Hinds and her team that in arresting a man of 5ft 11 inches they would have been acting contrary to the information provided by both witnesses.

**[84]** Ms. Hinds says that she observed on the video footage the image of a male walking with a limp towards his left. She also states that when she first observed Mr. Montique when he was taken from the Lock Ups she noticed that when he was walking towards her, his left foot limped towards his left side. She asked him what



happen to his left foot “When he said when I was a boy me drop from breadfruit tree and bruk my left foot and go to the hospital”.

**[85]** I recognize the ambiguity regarding the time stamp on the video footage. I accept that an explanation was given for this by Mr. Dunn. Moreover, in light of the other evidence before me I find that the content of the video footage is relevant to my resolution of the issues under consideration.

**[86]** Having viewed the video several times I do not share the view of Mr. Williams that the quality is so poor that it renders it unreliable. It is from the view that, there is material content on the video, that was sufficiently clear, that should have led the investigation away from Mr. Montique.

**[87]** I have observed nothing in the gait of the person on the video that could convey the impression that he was walking with a limp. However, features that were consistent with those described by the eye witnesses were conspicuously displayed by this individual. He is in fact unusually tall, his hands and legs are unusually long. As a result of his long legs his steps were also unusually long. Ms. Hinds said she observe a limp. I observed none. So even if there was a limp it would have to be so slight not to be immediately obvious to all viewers of the video footage.

**[88]** On cross examination Ms. Hinds agrees that what was striking about the person based on Ms. Barbara Carby’s information was the long steps that led her to retrieve the footage. However, relevant to my determination of the issue is the fact that neither of the eye witnesses made any reference to the offender walking with a limp. In addition to saying that based on her observation the man in the video footage was walking with a limp, Ms. Hinds also admits that she observed the long steps of the man in the video based on how he was positioned.

**[89]** Nonetheless her instructions to Mr. Smith was to search for a man with dark complexion, a little over 6 feet who walked with a limp. Accordingly, I form the view that Ms. Hind’s failure to include the long steps in her instructions to Mr. Smith

indicates that she would have provided instructions to Mr. Smith regarding the description of the suspect that were not consistent with the information provided by the witnesses, as well as her own observation, in light of her admission that she observed the long steps on the video footage. This is considering the fact that the very tall stature, long hands and long steps as described by Ms, Carby were very pronounced in the video footage.

**[90]** Considering the fact that the video footage did not record the commission of the murder, the only investigative assistance it would have provided the officers with, in the absence of the description provided by the witnesses, was that it placed the person in the general area, where the crime was committed. In essence where there was no material on the footage that accorded with the report of the witnesses it would have been useless to the investigators.

**[91]** Furthermore, not being an eye witness to the murder, in deciding whether Ms Hinds had an honest belief that she was placing a proper case before the court I examine her conduct in relation to the material she was seized of. If she honestly intended and believed that she was putting a proper case before the court she would have recognized that her reliance on her observation of material on the video could only be grounded on the fact that she found that such material was consistent with the report of the witnesses. It could not have been founded on her own independent observation of a feature that conflicts with the report of the eyewitnesses.

**[92]** In fact, Ms. Hinds eventually admits on cross-examination that the person in the video neither appeared to be a drunken man or walking with a limp.

**[93]** Additionally, her witness statement lacks any indication that she made any note of any of the significant features of this man, she observed in the video footage that were apparently consistent with the description provided in the report of the witnesses or that this information was pass on to Mr. Smith the arresting office.

**[94]** In my view the absence of an honest belief of Ms Hinds as the lead investigator in the crime, that she was putting a proper case before the court, is demonstrated on the evidence, that her mind was not engaged in gathering evidence consistent with the report that she received. In her examination of the video footage she brought her mind to focus on a particular physical feature of the person in the footage that was unobtrusive to put it mildly, while demonstrating no interest in observing and acting on the information regarding prominent physical features that were in fact consistent with the report that she received. As Mr. Williams so aptly put it, this limp appears to be an invention of Ms. Hinds. So far I have unearth no reasonable or probable cause why Ms. Hinds acted in this fashion.

**[95]** I find also that officer Smith, for his own part did not, and could not have honestly believed that in arresting Claimant he was contributing in putting a proper case before the court. The fact is, though provided with the information that the offender was over 6 feet, in arresting the Claimant he arrested someone who clearly did not fit that description he was given.

### **The Identification Parade and Voice Identification**

**[96]** Mr. Williams has taken the position that, given the fact that Ms. Carby provided no special features or special characteristics of the gunman's voice, voice identification could not have supported an honest belief by Ms Hinds and her team in the accused's guilt. He further submits that the conduct of the Identification parade heightened the risk of mistaken identification. The position taken by Counsel for the Defendants is that despite the criticisms of the identification parade, by Counsel for the Claimant, there is no evidence that the integrity of the parade was diminished or that the 3rd Defendant was wrong in accepting the identification and charging the Claimant.

**[97]** I share the conclusion of counsel for the Claimant but not necessarily for the same reasons. It is in fact the law that the cogency of evidence regarding voice

identification depends of the familiarity of the witness with the offender and his voice. (See **Neville Barnes v R, (Supra); R v Rohan Taylor et al (Supra)**)

**[98]** It has also been demonstrated on the evidence that Ms. Carby did not have a high degree of familiarity with the voice of the offender as she had only encountered him on two occasions to include the night of the murder. The law also says the less familiar the witness is with the offender's voice, *"the greater the necessity there is for more spoken words to render recognition possible and therefore safe on which to act."* (See **Neville Barnes v R, (Supra); R v Rohan Taylor et al**).

**[99]** Therefore, while I do not necessarily agree that the mere holding of the voice identification parade points to the absence of proper motive, in the case of Mr. Montique, the manner in which the parade was conducted engenders real reason to question the motive of Ms. Hinds and her team. They were armed with the information that the offender in the murder of the deceased was a stranger to Ms. Carby, she alleging that she had only encountered him on one previous occasion, under difficult circumstances during the course of him robbing her. It would have been quite arguable that an honest interest in the ends of justice were demonstrated, where it is evident that the officers were guided by this information in their conduct of the voice identification parade.

**[100]** However, quite to the contrary, my observation on the evidence leads me to the conclusion that the identification parade officer conducted the voice identification parade with a careless disregard for the aforementioned information. I will proceed to highlight the salient aspects of the parade which led me to the aforementioned conclusion.

**[101]** When I examine the statement of Ms Andrea Murray and the information on the identification form, it is apparent that the identification parade was based primarily on voice identification. In adopting this approach, I find that Ms. Hinds and her team have demonstrated that they lacked interest in putting a proper case before the court. Ms, Carby in her statement clearly put forward two (2) characteristics

by which she professed she would have been able to identify the offender. One was his voice which she describes as normal, which is a clear indication that it is not easily distinguishable from other voices. The second and more significant was his long steps which was evidently a distinct or unique feature. Nonetheless I find no reasonable and probable cause why the participants on the parade were not in addition to speech ask to demonstrate their gait by Ms Murray for the witness Ms. Carby to observe them.

**[102]** Additionally, the very manner in which the voice identification was conducted displayed that the officers were not concerned with putting a proper case before the court. Now Ms, Carby in her statement, while describing the tone in which the offender spoke, that is rough or aggressive which expresses only the emotional state of the speaker, did not identify any unique feature about his voice. She said he had a normal voice.

**[103]** She however indicated that she heard the offender saying several words during the night on the murder, which was the 1<sup>st</sup> of October, 2014 and on a previous occasion, that is December 21<sup>st</sup> 2013, when she alleged that she was robbed by the same person who committed the murder. She said on the occasion of the 21<sup>st</sup> of December 2013 she the man said to her. “don’t mek nuh noise and gi mi yu phone” The man then then took her to an area on the dirt road, where he robbed her of cell phone and two silver watches. The man also told her, he wanted to rape her. When she told the man that she was menstruating, he told her to show him.

**[104]** On the night of the 1<sup>st</sup> of October 2014, she said she heard the voice of the offender say “**gi mi di bag**” She heard the man saying to the deceased,” **run**. She also says that after she saw the deceased and the offender wrestling she heard the offender say to the deceased “a **weh yu a do a kill yu waa mi kill yu**” Additionally she also said he spoke to her when she ran off after hearing the explosion. She said. she then began to run. The gunman ran behind her put the gun on her back and said

**“Gal yu caan run faster, yu nuh hear mi say you must run faster or else mi ago kill yu”**

[105] However, during the identification parade the participants were restricted to saying only three words, which are **“gimmi the bag** ‘in the hearing of a witness, who did not have a high degree of familiarity with the offender and his voice, and who had indicated that she heard him saying several words.

[106] Moreover, Ms Murray’s statement indicates that it was not the witness who requested the words that she needed to hear spoken in order to make a correct identification, but it was Ms. Murray who made the decision to restrict the number of words that the participants should utter. I find no reasonable cause as to why the identification parade was conducted in the afore-mentioned manner.

[107] In the case of ***Matadai Roopnarine (Appellant) v Attorney General of Trinidad and Tobago (Respondent) (Trinidad and Tobago)*** [2023] UKPC 30 the Privy Council at paragraph 21 had this to say about malice;

*“The proper motive for a prosecution is a desire to secure the ends of justice. Malice will be established if it is shown that this was not the motive of the defendant or that something else was. Malice may be inferred from lack of reasonable and probable cause but this will depend on the facts of the individual case”*

[108] It is my view that it was the demonstrable lack of interest in pursuing the end of justice in the manner in which the identification parade was conducted that created or exacerbated the danger of mistaken identification of the Claimant by the witness Ms. Carby as the person who murdered Mr. Brown.

[109] I take note of the fact that counsel for the Defendants has placed much emphasis on the conflict in the evidence of the Claimant regarding his Alibi. That is regarding whether or not he had provided the officer with the name of the person he was drinking with. However, this in and of itself did not absolve Ms. Hinds and her team from doing a proper investigation so as to put a proper case before the court.

**[110]** In my view if they were serious about verifying his alibi they had the opportunity to invite him to go with them to the location to point out the bar on the Old Harbour Main Road; to make enquires as to who was the bar tender on the night in question and to make the necessary enquires of her. This they failed to do. It is trite law that the fact that an accused person does not have an airtight alibi does make him guilty of the crime, as persons can have various reason unrelated to the crime to lie.

**[111]** It is my view on the evidence, that Ms Hinds and her team, invested no serious effort, in properly investigating the murder of Mr. Brwon in order to put a proper case before the court. I find that she herself could not have had any honest belief that in arresting and charging Mr. Montique she was putting a proper case before the court. She was in possession of the video footage which clearly demonstrated that Mr. Montique did not possess any of the unique physical features of the person seen in the footage and which were described by the witnesses. She based her investigation on information that was not provided by any of the witnesses, which she eventually admitted, was not seen on the footage. In fact, it obvious to the reasonable investigator, would have been so obvious to Ms Hinds, which she eventually admitted, that Mr. Montique did not possess any of the physical features described by the witnesses, and seen in the person in the video footage. She even admits that Mr. Montique does not possess the limp on which she had based her investigation.

**[112]** Having assessed Mr. Montique's height as being under 6 feet, and observed his gait, Ms. Hinds would have realized, even before the ID parade was conducted, that with the exception of the voice to which they had no particularized reference, he possessed none of the unique features described by the witnesses.

**[113]** As a consequence, I form the distinct impression that Ms. Hinds and her team, knowing fully well that the Claimant lacked the special features of the offender as indicated by the witnesses, had no proper foundation or basis for putting him on that parade. That is, there was no reasonable cause or honest belief that Mr. Monique was the proper person to put before the court regarding the alleged

murder. Concerning a proper motive, that is to seek the end of justice I find that this conduct of the part of the officers amounts to an aberration.

[114] Contrary to the submissions of counsel for the Defendant, in my view, in order to establish malice, there is no need for the Claimant to adduce” evidence suggesting that. the 1st or 3rd Defendants were motivated by any *illegitimate* objective in carrying out their duties.” It is justifiable to draw the inference of malice once it is found that Ms. Hinds lacked the required honest belief. “It is not incumbent on the claimant to specify and prove the precise motive for the prosecution because, on the facts of the case given the lack of honest belief, the motive could not have been a proper one”. (See **Kevin Stuart v Attorney General of Trinidad and Tobago** paragraph 17).

[115] Accordingly, I find that the Claimant has proven on a balance on probabilities that the 1<sup>st</sup> and 3<sup>rd</sup> Defendant in setting in motion the prosecution for the offence of murder, robbery with aggravation, illegal possession of firearm and illegal possession of ammunition they had no reasonable and probable cause to do so. As such I find them both liable for malicious prosecution. Considering the fact that in so doing they were employees of the State acting in the course of their duties I find that the 2<sup>nd</sup> Defendant is vicariously liable.

## **DAMAGES**

### Special Damage

[116] The Claimant Claims the following for special damages

- |      |  |                |
|------|--|----------------|
| (i)  | Legal Fees:  | \$500,000.00   |
| (ii) | Loss of Earnings from Loss of employment as a Caretaker \$15,000 per fortnight | \$2,160,000.00 |



(iii) Farming per month for 3 years and cont. \$30,000.00

**[117]** In his evidence he states that; prior to being incarcerated he had a farm of over one (1) Acre at Nightingale Grove, Old Harbour, in the parish of Saint Catherine where he planted, callaloo, pumpkin and pak choi. Whilst doing farming he was also a Caretaker for a farm in Old Harbour, Saint Catherine which was owned, managed and operated by Mr. Alvan Bailey. He says he also earned an income of \$30,000/\$40,000 on average per month by selling his farm produce at the market and several other places. The callaloo and pak choi were due to be harvested in or about April 2015 and the pumpkin in August 2015.

**[118]** He says further that as a result of this incarceration, he was deprived of his said income since December 2014 up to the time he was released in 2017 and furthermore he was unable to do any farming or obtain farm lands or to get a job since his said release in 2017, and as at the date hereof he still unemployed due to the challenges of incarceration. In his oral evidence on amplification of his witness statement he says he sold in Spanish Town, Old Harbour, and Linstead Market wherever the market is good. He says he sold callaloo, pakchoi and pumpkin. He usually takes 100 pounds of callaloo to the market, which he sold for \$150.00 per bundle, for that amount of the callaloo he would make a \$15,000.00 or a \$13,000.00. He would reap pumpkin that he would sell at \$50.00. per pound. He would take between 50 and 75 pounds of pakchoi to the market that he would sell for about \$150.00 per pound.

**[119]** He also says that since returning from prison he has not been able to secure any land to farm on; in addition, he was ostracized by the community he resided in and was even told by his previous employer, where he worked as a caretaker, that he couldn't re-hire him because of all that transpired, and he did not want to be associated with person charged especially for murder which has been rampant in Jamaica.

[120] On cross exam he admits that he told the police he started working with Mr. Bailey from July 2014 and that Mr, Bailey used to pay him a salary. He answered yes to the question if that was the source of his income. On re-examination he says at the time of his arrest he was working with Mr. Bailey as a caretaker and farming separately for himself.

[121] Counsel Ms Whyte submits that it is a settled principle of law that special damages are required to be specifically pleaded and proved. That the Claimant has failed to provide strict proof of all the expenses claimed under special damages as required by **Attorney General of Jamaica v Tanya Clarke (nee Tyrell)**. She argues that the item for cost of legal expenses should be disallowed on the basis of the absence of documentary proof.

[122] She further submits that the Claimant has failed to provide sufficient evidence to establish his earnings prior to the incident as a Farmer and Caretaker. She points out that; the court is not obliged to accept unchallenged prima facie evidence in all circumstances; the Claimant's mere assertions of earning \$30,000/\$40,000 monthly from farm produce and \$15,000 fortnightly as a Caretaker are insufficient for claiming loss of earnings; though during the trial, the Claimant provided evidence through amplification of crop sales, including callaloo, pumpkin and pak choy stating that he sold 100 pounds of callaloo at \$150 per bundle, earning \$15,000 or \$13,000; 100 pounds of pumpkin at \$50 per pound and 75 to 100 pounds of pak choy at \$150 per pound; allegedly sold at the market, he did not provide particulars on the number of sales made on a regular basis, harvesting expenses, or profit made. She submits that; the only evidence of total sales related to \$15,000 or \$13,000 allegedly for callaloo, without indicating the time period these sums were earned. She posits that these are abstract figures which make it difficult to assess his alleged monthly income.

[123] She also contends that the Claimant's estimate of \$450,000 in crop loss should be disregarded, as it was neither pleaded nor particularized in the Amended Particulars of Claim. (She relies on the cases the **Attorney General of Jamaica v**

**Tanya Clarke (nee Tyrell)** (unreported SCCA 109 of 2002 delivered December 20, 2004): **Murphy v Mills** (1976) 14 JLR 119; **Bonham-Carter v Hyde Park Hotel Ltd.** (1948) 64 TLR 177; **Ratcliffe v Evans** (1892) 2 QB 524; **Walters v Mitchell** (1992) 29 JLR 173 **Kevin Ellis v The Attorney General of Jamaica & Ano.** [2022] JMSC Civ 154).

[124] However, Counsel Mr. Williams submits that; given the nature of the previous informal employment of claimant where he was paid in cash by his former employer and the nature in which he sold his produce at the market, receipts to justify his said income is impractical. He asks the court to accept the claimant's oral evidence alluding to the said income

### **Discussion**

[125] Having reviewed the cases , it is settled law that Special Damages must be specifically pleaded and strictly proved .( See : **Murphy v Mills** (; **Bonham-Carter v Hyde Park Hotel Ltd.**, (Supra) However , what is reasonable to ask of the plaintiff in strict proof, in the particular circumstances is determined by the experience of the court (See **Walters v Mitchell**; *Grant v Motilal Moonan Ltd* (1988)43 WIR 372; *Central Soya of Jamaica Limited v Junior Freeman*SCCA18/84 (unreported; **Hepburn Harris v Carlton Walker** SCCA No40/90).

[126] In the case of **Ezekiel Barclay and another v Kirk Mitchell** (unreported), Supreme Court, Jamaica, Suit No 2000 CLB 241, judgment delivered 13 July 2001, a farmer in a personal injury case made claims for special damages for transportation costs, inter alia Anderson J, in granting the award for this aspect of the Claim for special Damages, at page 119, stated that

*“It would be most uncommon for a driver of hired transport to have provided receipts”*

[127] Additionally, in the case of **Central Soya Jamaica Ltd V Junior Freeman** the court pointed out that “in casual work cases it is always difficult for legal advisers to obtain and present an exact figure for loss of earnings and although the loss

falls to be dealt with under special damages, the Court has to use its own experience in these matters so as to arrive at what is proven on the evidence” (See the Judgment of Rowe. P on page 11).

[128] In the case of **Desmond Walters v Carline Mitchell** (1999) 29 JLR 173, Mr. Walters was a pushcart vendor whose claim for loss of income, without any supporting documents, was granted in the court below. On appeal, in upholding the lower court’s decision. Wolfe JA (per Wolfe JA, at page 176C had this to say;

*“Without attempting to lay down any general principle as to what is strict proof, to expect a sidewalk or a push cart vendor to prove her loss of earnings with the mathematical precision of a well-organized corporation may well be what Bowen, L.J., referred to as ‘the vainest pedantry’*

[129] He says further; *that a person involved in the sidewalk vending trade is in a small scale of trading. “Persons so involved do not engage themselves in the keeping of books of accounts.”*

[130] In the more recent authority of **The Attorney General v Peter Badoo** [2020] JMCA Civ 10 at paragraph 62 Frank JA in addressing this issue stated;

*“... the decision to accept or reject loss of income claims, based solely on oral evidence, will be influenced by the type of occupation in which a claimant is engaged. So that, it might be unreasonable for one to expect, say, a street-corner-based soup vendor to provide much by way of documentary support for claimed loss of earnings; but not so unreasonable to expect such proof from a worker in an established hotel”.*

[131] In the instant case, as I understand it, Counsel for the Defendant is not taking issue with the assertions of the Claimant that he was a farmer prior to being incarcerated. Her issue relates to whether or not he has sufficiently proven the quantum in loss of earning he is claiming. Her contention is that his evidence is too abstract to be properly quantified.

[132] However, I do not expect that the Claimant would be able produce receipts where his claim for compensation involves the informal sector such as a small vegetable farmer. Contrary to Ms Whyte’s view of the evidence, I find that it is clear from the evidence given on amplification that the quantity of produce taken to the market

for sale relates to the monthly earning of \$30,000 that he had mentioned in his statement.

[133] However, in my view, his evidence as it relates to the sale of callaloo lacks clarity. He states that he sold callaloo for \$150, per bundle. He says he sold 100 pound per month. However, he has not provided a weight for each bundle of callaloo. In this regard, I find it difficult to quantify the value of callaloo sold per month. However, I find that he has sufficiently proven his sales regarding pumpkin and pakchoi per month, which I find to be reasonable. The sum for pakchoi based on his evidence would be  $(\$150.000 \times 50)$  \$7500. This amounts to \$270,000 for the 3 years.

[134] His earnings from the pumpkin per month based on his evidence would be  $(\$50.00 \times 100)$  \$5000. This amounts to \$180,000. Nonetheless, I find that he had adduced no evidence to prove the loss of crop that he alleges was over \$450,000. Additionally, I agree with counsel for the Defendants that he cannot recover for this sum, he having not pleaded it in his Amended Particulars of Claim. (See ***the Attorney General v Peter Badoo supra***).

[135] Furthermore, more I find that Mr. Montique has failed to prove his loss of earnings as a caretaker. He has produced no documentary evidence regarding his salary, whether in the form of a statement from his former employer or a pay slip. Counsel in his submission indicates that he was paid by cash. However, no such evidence came from the Claimant. Additionally, his claim for legal fees has to fail as it is expected that in light of the fact that the practice of law falls within the formal sector he would have provided documentary proof. This he has failed to.

[136] Consequently, I find that the sum in special damages that has been proven by the Claimant for loss of earnings is \$450,000.

## **GENERAL DAMAGES**

### **False imprisonment**

[137] It is settled law that period of detention will in principle be lawful if it is carried out pursuant to a Court Order ( See ***Diamond v Minter and others*** [1941] 1 KB 656 and the statement of Lord Hobhouse in ***R v Governor of Brockhill Prison ex parte Evans (No 2)*** [1998] 4 All ER 993. ***John Crossfield v The Attorney General of Jamaica and Corporal Ethel Halliman*** [2016] JMCA Civ. 4)

[138] In the instant case, it is uncontested that the Claimant was initially incarcerated for 28 days, from December 31, 2014, to January 27, 2015, before being brought to court. I therefore find that he is entitled to damages for False Imprisonment for that period.

[139] The courts have pronounced that the basis for arriving at a quantum for False Imprisonment are; the injury to the feelings of the Claimant; the initial shock; the indignity; mental suffering, disgrace and humiliation as well as the lost to social status and injury to reputation (See ***The Attorney General v Glenville Murphy*** ([2010] JMCA Civ. 50; and ***John Crossfield v The Attorney-General of Jamaica*** [2016] JMCA Civ. 40).

[140] The recent Privy Council case of ***Douglas Ngumi v The Attorney General of Bahamas and others*** [2023] UKPC 12, also provides a guide as to how the assessment of damages for false imprisonment is to be undertaken. At paragraph 71 to 73, the court stated that;

*“The evaluative exercise called for in assessing the physical and mental deprivation caused by false imprisonment is no less difficult, and is even less precise. There are no guidelines and no mathematical formula is available to be relied on in every case. Rather, the assessment must be sensitive to the unique facts of the particular case and the degree of harm suffered by the individual concerned, while at the same time reflecting a reasonable degree of proportionality to assessments made in similar cases and to awards for personal injury given the parallels between these two types of award.*”

[141] And further;

*“It is now well-established that the initial shock of unlawful arrest and imprisonment may attract a higher notional element than a later period of detention because people do tend to adjust to their changed circumstances, and the initial shock generally gives way to adaptation and resignation, though this may not always be the case. The way in which the arrest was effected and any attendant publicity may be relevant factors in the assessment. Likewise, in assessing compensation for any later period of unlawful detention that follows, any loss of reputation, loss of enjoyment of life or normal experiences foregone, are likely to require consideration alongside the obvious factors of the length of and conditions and treatment in detention .....The appropriate figure should “reflect compensation for the long period of wrongful detention ... any element of aggravation ... the conditions of his detention and ... the misery which he endured” and accordingly, the “final figure for compensatory damages should therefore amount to an overall sum representing appropriate compensation for the period of [lengthy] detention, taking account of the inhumane conditions and the misery and distress suffered”. That is the correct approach”*

[142] Regarding the quantum of damages for false imprisonment, the Counsel for the Claimant commends the following cases for the court’s consideration.

- (i) **David Foster v The Attorney General and Corporal Ann Jackson** (2014HCV 01791)
- (ii) **John Crossfield v The Attorney-General of Jamaica** (Supra)
- (iii) **The Attorney-General of Jamaica v Clifford James Court of Appeal** COA2021CV00012
- (iv) **Attorney General v Peter Badoo.**

[143] Mr. Williams, Counsel for the Claimant submits that; the Claimant was hosting his birthday celebrations on New Year’s Eve when the police officers arrested him in full view of the patrons attending same; he developed multiple complications whilst in custody and visited the doctor several times; he suffered multiple humiliations, mental sufferings, loss of social status and injury to reputation, so much so that he had to migrate from the community after leaving prison because he was ostracized by the community and unable to find work. He suggests that an appropriate award for damages for False Imprisonment is \$7,500,000.00.

[144] Counsel Ms. Whyte submits the following cases for the court's consideration.

(i) **Abraham Grant v The Attorney General** (unreported Suit No. C.L. 1988/G071 delivered October 7, 1994)

(ii) **Allan Currie v The Attorney General for Jamaica** (unreported Claim No. CL 1989/C-315 delivered August 10, 2006)

(iii) **Jahmeil Dodd v The Attorney General and Ano.** [2017] JMSC. Civ. 9

[145] She submits that the Court should disregard the following evidence of the Claimant; *“That he was severely ill while in the Old Harbour lockup and had to visit Denbigh Hospital multiple times, where he was prescribed a strict diet. A police officer informed him that the station could not provide the necessary food”*

[146] She contends that despite these claims, no medical report has been presented to verify the illness or treatment and the Court is encouraged to consider the availability of hospital records to substantiate the Claimant's assertions. She further submits that that there is no evidence linking the Claimant's alleged medical illness or his dental conditions to his detention. She proposed an award of \$1,000,000.00 which she considers to be reasonable.

## **Discussion**

[147] I accept the following unchallenged evidence as proven facts by the Claimant. He was arrested in the presence of friends and other onlookers while at his birthday party celebration. He had never been in custody prior to this. For the period of illegal detention, that is 28days, he was held at the Old Harbour Police Lock up. During that period, he was transported from the Old Harbour Police Station to the Major Investigation Task Force (MIT) in Downtown Kingston to be questioned and taken back to the Old Harbour Police Station. The estimated travel time was 3 hours. Whist being in custody he was very depressed, nervous, embarrassed, humiliated and ashamed. He lost his job as a caretaker and the opportunity to



farm on his former employer's land. Since then he has not been able to obtain employment. He has been ostracized by community members and as a result had to relocate to a different community.

[148] However, I agree with counsel for the Defendants that he has not adduced sufficient evidence to prove that he got so severely ill with stomach issues, to the point that he was transported to the Denbigh Hospital on multiple occasions where he received medication and was placed on a strict diet so as to improve his health. This is in light of the fact that he has failed to produce any medical evidence from the Denbigh Hospital.

[149] Nonetheless, having reviewed all the cases presented by both counsel and taking into consideration the circumstances surrounding the Claimant's arrest, the offences for which he was arrested, the length of the illegal detention, I find the case of **The Attorney General v Peter Bando**, to be more current and comparable to the instant case.

[150] In the **Bando** Case, the Claimant Mr. Bando, on June 5, 2005, discovered a dead body on the property at Merrils Beach Resort, Westmoreland, where he was employed as a property and security manager. He reported his discovery to the police. He was then arrested on suspicion of murder and was not brought before the court until June 24, 2005, after his attorneys filed a habeas corpus application. Although he was initially denied bail in the Westmoreland Parish Court on June 28, 2005, a Supreme Court judge later granted him bail. Despite this, due to administrative delays, he remained detained until April 25, 2009, even after being committed to stand trial on April 21, 2009. It was established that the period of unlawful detention for Mr. Bando was 23 days. He was arrested, while acting within the scope of his employment, in full view of on-lookers. While in custody, he was deprived of pain medication which had been prescribed for injuries received while in custody. He was assaulted by the police during a question-and-answer session. The condition of the cell in which he was kept was deplorable and led to his developing skin fungus and depression as a result of the entire ordeal. He had

to leave his job and was unable to obtain alternative employment due to the stigma associated with his prosecution for the charge of murder. In April 2020, the Court of Appeal adjusted the quantum for False Imprisonment to \$250,000.00 for the first day and \$180,000.00 per day thereafter, an award for \$4,210,000.00 was granted, (The Judgment in the court below was handed down on the 26<sup>th</sup> of April 2017. The CPI for that period was, 91.7, the CPI for July 2024, is 137.5)

[151] In my view, the shame, embarrassment and disgrace Mr. Montique would have experienced in being arrested for a serious charge of murder is comparable to Mr. Bando's arrest. Not only was Mr. Montique's arrest done in public, in the presence of friends and other onlookers but it effectively cut short his birthday celebration. That day and occasion which should have been a special, and memorable celebration was cut short. While I recognize the difference with the **Bando's** case, that Mr. Bando was arrested during the course of his employment, I find that the mental effect is comparable, as Mr. Montique was arrested on a day and occasion that was special to him.

[152] I also note also that assault, illness, (developing skin fungus and depression), and deprivation of medication during the period of and connected to the illegal detention were established in the **Bando Case** but not so established in the instant case. Additionally, in the instant case the Claimant gave no evidence of deplorable condition in the Old Harbour Lockups, while in the **Bando case**, that was established to be so during the period of illegal detention.

[153] However, I also make the observation that while in the Bando **case** the Claimant was charged for the single offence of murder, in the instant case the Claimant in addition to the charge of murder, Mr. Montique was facing the additional charges for additional offences of illegal Possession of Firearm, Illegal Possession of Ammunition and Robbery with Aggravation. Consequently, in balancing the differences between the Bando Case and the instant case I find that the difference in the Bando only slightly outweighs the difference in the instant case. In that regard for the first day of initial shock, I apply a rate of \$240,000 which

applying the CPI for July 2024 (137.5) revalue to \$359,800. For the remaining 27 days, I apply a rate of \$160,000 per day. When revalue this figure updates to \$6,477,644. The total award for false imprisonment is therefore \$6,837, 444.

### **Malicious Prosecution.**

[154] In the Appeal Court, in the case of **John Crossfield v Attorney General**, at paragraph 30, President Morrison made the observation that;

*“So it appears that injury to reputation, injury to feelings - that is, the indignity, humiliation and distress caused to the claimant - and the overall length of the prosecution are all relevant factors in arriving at an appropriate award of damages for malicious prosecution.”*

[155] In **McGregor on Damages 17th ed para 38-004**; the learned author outlined the factors that are considered as affecting the award of damages for Malicious Prosecution as; *“the seriousness of the offence charged, length of time the prosecution lasted, number of times he attended court, any damage to reputation or credit, mental distress or anxiety, humiliation and or disgrace and any inconvenience, indignity and discomfort caused from the fact of the charge against him. Any anxiety felt from the arrest or imprisonment up to the hearing of the case is also included and is the same as would have been recoverable for false imprisonment, the prosecution having created a risk of conviction and loss of liberty and resulting injury to feeling”.*

[156] In the case at bar, Mr. Williams submits that the Claimant had to endure the indignity of going to court in handcuffs multiple times for the charges of murder, and robbery with aggravation. illegal possession of firearms and illegal possession of ammunition. He commends the following cases for the court’s consideration.

(i) **Roderick Cunningham v Attorney General and others** [2014] JMSC Civ. 30,

(ii) **Allan Currie v Attorney General of Jamaica** (In the Supreme Court of Judicature of Jamaica) CL 1989/C-315, delivered in August, 2006),

(iii) **The Attorney General v Peter Badoo**

He submits that an award of **\$10,000,000** would be appropriate given the seriousness of the charges and the length of the prosecution and the number of times the Claimant had to be brought before the court.

[157] However, Counsel Ms, Whyte is of the view that of all the cases relied on by Mr. Williams the circumstances of the prosecution are more serious than in the instant case. She emphasizes the point that reputational damage suffered by the Claimant in the ***Bandoo*** case was of paramount importance. She takes the view that in the instant case, while the Claimant claims community ostracism after prison, his evidence of reputational damage is palpably deficient. His prior occupation as a Farmer/Caretaker she says is also a relevant consideration. Counsel submits that an award of no more than **\$2,000,000.00** would be appropriate.

[158] The Claimant also seeks aggravated damages. Mr. Williams submits that the Claimant suffered dearly whilst he was in custody. He was brought to the doctor on multiple occasions because of severe health challenges. His family was torn apart, and his young 9-year-old daughter raped during his tenure in prison. He posits that had it not been for the malicious actions of the First and Third Defendants, the Claimant would not have endured the suffering and pain he encountered whilst incarcerated. He relies on the cases of ***Carlton Graham v The Attorney General for Jamaica (2023)*** JMSC Civ. 167; and ***Kelly Etta May v Attorney General of Jamaica and Constable Janet Grant***. He considers an award for aggravated damages of **\$3,000,000** to be appropriate.

[159] However, Ms. Whyte in resisting an award under this head submits that the Claimant's evidence failed to demonstrate any malicious, fraudulent, or cruel conduct by the 1st and 3rd Defendants, or any agents of the state to justify an award for aggravated damages. Therefore, no such award should be granted. She relies on the authority of ***Denese Keane-Madden v The Attorney General of Jamaica & Ano.*** [2014] JMSC Civ. 23:

## Discussion

[160] In that case of Denese **Keane-Madden v The Attorney General of Jamaica & Anor**, Edwards J as she then was discussed the basis on which aggravated damages should be awarded. At paragraph 45 she stated that:

*“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 17th 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 tends 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”.*

[161] At paragraph 46 she said;

*“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 16th 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 17th edition at paragraph. 11-0001. Damages under this head are compensatory and not to be lumped with exemplary damages which are punitive.*

[162] The following unchallenged evidence of the Claimant I accept as factually proven. He had feelings of depression anxiety and mental anguish I accept that this was as a result of him not being able to be with his daughter at a time when she would have needed him, being the victim of a crime, as also not being able to be with his girlfriend who would have gone through the emotional trauma of losing their child who was stillborn.

**[163]** I accept his evidence that while at the 100-man police station lock up, the conditions of the cell were humid and unsanitary, unventilated, and carried a pungent smell. He had to sleep on the filthy floor passage. Many nights he was unable to sleep because of his inability to negotiate a space on the cold concrete floor. The cell was also infested with rodents. A warden hit him on his foot with a piece of board. While he was in pain his pleas to see a doctor were ignored.

**[164]** I also accept his evidence that whilst at the Gun Court Lockup, if he was unable to use the toilet when he went to shower, he suffered the humiliation of having to pass his faeces and urine in a bag in the clear view of other prisoners and had to keep it until the next time he was scheduled to go to shower. I accept that because other prisoners had to do the same thing many times the contents would leak out on the concrete floor where he had to sleep. I accept that at times the pungent odour was unbearable. I accept that in addition to this, he had to succumb to the unhealthy condition and discomfort of rodents running over his feet while he attempted to sleep. I accept that during these moments he felt embarrassed, shameful, uncomfortable and felt suffocated with the stinking smells of faeces and urine.

**[165]** However, I agree with counsel Ms. Whyte that he has not sufficiently proven that while at the Remand Centre, he lost 5 to 6 teeth and that he developed severe stomach issues. This is in light of his evidence that he was treated by a dentist and a medical doctor, yet he has produced no medical evidence in support. Consequently, I reject this aspect of his evidence.

**[166]** Nonetheless, I accept his evidence that after he returned to his community at the end of the prosecution he was ostracized. I accept that he was unable to return to his former employment as his former employer did not want to associate with him arising from his prosecution for murder. Contrary to the position taken by counsel for the Defendants I find that while the impact of reputational loss as a caretaker or farmer may not be as high as that of a police officer, the fact that he was never arrested prior to this, and the fact that his former employer and other members of

the community refused to associate with him as a result of the charges point to diminution in his reputation as a caretaker in the eyes of the community.

[167] Additionally, I do not understand the cases to be saying that the Claimant has to prove actual malice or fraud on the part of the Defendants to benefit from an award for aggravated damages. In my view it is sufficient to prove that, the heightened mental distress, embarrassment, humiliation, depression and anxiety that he experienced flowed naturally from the actions of the Defendants as result of the false imprisonment and their perseverance in maintaining the prosecution. (See the case of **Walter v Alltools** (1944) 61 TLR 39 (CA) ;in this case for 3 years.

[168] In light of my assessment and view of the evidence I find that in addition to the award for malicious prosecution, the Claimant is entitled to have that award increased to add a sum for aggravated damages.

[169] Having reviewed all the cases presented by Counsel I must state from the outset that I find that the cases of Carlton **Graham v The Attorney General**; and **Kelly Etta May v Attorney General of Jamaica and Constable Janet Grant** are of little relevance to the instant case. I observed that the charges and circumstances of arrest and detention were way less serious than in the instant case. In the **Carlton Graham** case, the time spent in custody was 8 hours and the charges were for the offences of Obtaining Goods by False Pretence and Conspiracy to Defraud. He was acquitted after a full trial. In the **Kelly Etta May** case the Claimant spent a total of five days and 11 hours in custody. She was charged for the offence of Failing to Leave the Airport. It is quite obvious that these cases have little or no comparison to Mr. Montique's experience. The charges are quite dissimilar, and the period of detention is much shorter. That is 5 days plus 11 hours for Ms. Kelly Etta May and 8 hours for Mr. Graham.

[170] However, having reviewed the other cases which I consider to be of greater relevance, I find the most comparable to the instant case to be the case of **Allan Currie v Attorney General of Jamaica** for the following reasons:

The offences charged in the instant case are more serious than in the Roderick Cunningham case as he was not charged for murder. Mr. Cunningham's prosecution lasted for 4 years while in the instant case it lasted for three years. Having been taken to court 40 times, Mr. Cunningham's court appearances appear to be more than that of Mr. Montique. When compared with the **Bandoo** case, despite the similarities in the fact that both were charged for murder, Mr. Montique had the additional charges of robbery with aggravation, illegal possession of firearm and illegal possession of ammunition. It is also apparent that damage to reputation in the **Bandoo** Case would have been more serious, the Claimant in that case having been arrested during the course of his employment as a property manager. Additionally, he being the person who discovered the crime, in exercising his civic duty to report the crime suffered, shame and embarrassment as a result. Furthermore, while the prosecution in the instant case lasted for 3 years the prosecution in the **Bandoo case** lasted for a much longer period. That is 7 years.

[171] The relevant details of **Curry's case** are as follows: The Claimant while travelling in a Public Passenger bus which was stopped by the police, was asked along with other passengers to exit the bus. After he exited he was beaten, hit in head with a gun dragged up, taken behind the bus, where his life was threatened with a firearm being pointed at his head and neck. He was put to lie face down in a police land Rover with feet hanging out, then transported to the Central Police Station. At the police station he was beaten with wood, and gun, pushed in his mouth, breaking two of his teeth which were subsequently removed. The Claimant was charged for murder and illegal possession of a Firearm. Before his incarceration, he was employed at a wholesale. After his release, it took him some time to obtain employment. While in custody he was worried about his baby's mother and three sons, as before being in custody he was the sole breadwinner. Sometimes he would not eat. He was awarded for malicious prosecution and aggravated damages, for a Claimant who was prosecuted for about 2 years, a sum of \$2,000,000.



[172] When I compare the **Curry case** with the instant case the charges are similar and the social status of both Claimants would be at the same level despite the difference in the type of industry. Mr. Curry's anxiety about the welfare of his girlfriend and children is similar to evidence of Mr. Montique regarding his girlfriend and daughter. There is no indication in the details as to how many times Mr. Curry would have been taken to court. However, the notable difference between the Curry case and the instant case is that the treatment meted out to Mr. Curry in terms of the physical harm and embarrassment was much more serious than what Mr. Montique endured. Additionally, the length of Mr. Montique's prosecution was 1 year longer than that of Mr. Curry. Consequently, I arrive at the conclusion that the award for Malicious prosecution should be higher for Mr. Montique but that for aggravated damages should be lower. However, in balancing both factors, I come to the conclusion that the total award for malicious prosecution and aggravated damages balances to be the same as in the Curry case. That sum for Mr. Curry was \$2,000,000 in April of 2006. In July of 2024 this revalue to \$7,472,826.

[173] Therefore, the award to the Claimant for malicious prosecution and aggravated damages is \$7,472,826.

### **Exemplary Damages**

[174] Mr. Williams submits that the Claimant should be awarded exemplary damages as the Claimant was made to suffer dearly because of the unconstitutional conduct of the First and Third Defendants. The conducts that he expresses to be arbitrary and unconstitutional are; "the taking of the Claimant from his birthday party on New Year's Eve; locking him away for 3 weeks before he was brought to see a judge; the Defendants relying on an ID Parade that was evidently flawed with vital information missing from the said form to authenticate its validity, and a video footage that with not one iota of evidential value to cause bail to be denied." (He relies on the case of **Rookes v Barnards** [1964] AC 1129).

[175] He further submits that:

*“the actions of the First and Third Defendants were sufficiently outrageous, malicious and cruel, as for such an egregious error to be made by both parties; cannot be mere coincidence. Both parties totally ignored the witness statements and without any rational embarked on a mission contrary to proper policing policy. The Third Defendant, on a folly of her own, directed the First Defendant to search for a man who had a limp. She admitted that the height of the Claimant doesn’t match the height described by the Complainant. She didn’t conduct investigations base on the information received from the Complainant in her statement.*

He submits that an award of **\$3,000,000** would suffice under the circumstances.

[176] However, counsel Ms Whyte Submits that: *“An award in this category 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.”*

[177] She further submits that the evidence relating to this matter falls short of revealing any conduct of the police which rises to the degree of malice, ill-will, or cruelty to justify an award for exemplary damages. This claim should therefore be refused. (She relies on **Rookes v Barnard; Douglas v Bowen** [1974] 22 W.I.R. 333 :)

### **Discussion**

[178] The case of **Rookes V Bernard** clearly establishes that the purpose of exemplary damage is not to compensate but to punish and deter. Lord Devlin outlined the circumstances in which such an award would be appropriate. These are the cases in which (i) the claimant has been the victim of oppressive, arbitrary or unconstitutional actions by servants of the government; (ii) the defendant’s conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the claimant; and (iii) the award of exemplary damages is expressly authorised by statute. (See page 407)

[179] However, at page 411 he issued a caution. He warning is *that*;

*“First, the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour. The anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence. Secondly, the power to award exemplary damages constitutes a weapon that, while it can be used in defence of liberty ... can also be used against liberty. Some of the awards that juries have made in the past seem to me to amount to a greater punishment than would be likely to be incurred if the conduct were criminal; and moreover a punishment imposed without the safeguard which the criminal law gives to an offender. I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used with restraint ...”*

[180] ***Roderick Cunningham v The Attorney General et al***, is a local authority which gives a clear demonstration of the circumstances in which exemplary damages should be awarded. The other Defendants in that case who were sued along with the Attorney General were members of the Jamaica Constabulary Force.

[181] The salient facts of that case are on the 16th of May 2000, Mr. Cunningham, whilst walking in a lane off Jacques Road in the Mountain View Avenue area of Kingston, Jamaica, at about 8:30 pm, encountered heavy gun fire. A bullet ripped into his leg and he fell to the ground. He then crawled into a yard and was assisted inside the house by someone. His leg was shattered with the bones exposed. Whilst he lay bleeding inside the house, he fell into unconsciousness. When he awoke he saw the 3<sup>rd</sup> Defendant and other soldiers over him. They pulled him from the house into the lane and placed him into the trunk of a police car along with another man who appeared to be dead. Locked in the trunk of the car he was transported to the Kingston Public Hospital where he was removed to the emergency area bleeding and in pain.

[182] He was placed on a ward where the 2<sup>nd</sup> Defendant came to see him. Thereafter, his hands were swabbed for gunpowder residue. No gunpowder residue was found. On the morning of the 17th May 2000, he was taken into surgery and as a result of the damage done by the gunshot injury, his right leg was amputated. He was subsequently arrested and charged by the 2<sup>nd</sup> Defendant for illegal possession of a firearm and ammunition, shooting with intent, and wounding with intent. He

spent five days in hospital under police guard. During that time, he was handcuffed to a bed rail.

[183] After being discharged he was taken into custody at the Elliston Road Police Station in Kingston then onto Port Royal Police Station where he was locked up for two weeks without facing the court. He was taken to the Gun Court on the 12th June 2000. He was taken to court without crutches and had to hop into court whilst holding onto the walls. He was humiliated and embarrassed as he was stared at by civilians and police. One police officer offered his shoulder to assist him in getting into court. He was later offered bail by the court with condition that he report to the police station every day. He attended court thereafter for a period of four years and ten months, where the case was called up numerous times. In March 2005 the case ended when the trial judge upheld a no case submission. Although he was dismissed he was placed back into custody and fingerprinted.

[184] Edwards J, as she then was, in the court below, in a carefully crafted exposition, outlined the purpose of exemplary damages and the circumstances in which it should be awarded. At paragraph 37 she stated that;

*“The purpose of exemplary damages is to punish wrongdoers for conduct, which, in some cases, is referred to as contumelious or highhanded disregard of a claimant’s rights or behavior described as arrogant, flagrant, oppressive or outrageous. It is also made to act as deterrence against potential offenders ... the test of outrageousness is applicable to Jamaica. It captures the elements of oppression and arbitrariness, (in the sense of arbitrary and oppressive behavior) as well as unconstitutional actions, in the sense of high handed cynicism and the flagrant disregard for people’s rights. Such a test would limit the award to the most appropriate cases where there is truly outrageous conduct. Otherwise aggravated damages may be sufficient”.*

[185] This expression of the law was endorsed by Morrison P in the Court of Appeal when the case went on appeal (See the judgment of the Court of Appeal at [2020] JMCA Civ. 34) Further, in the judgment Edwards J as she then was made the following observations:

*“There was no evidence that the Claimant wounded anyone. He was found hours after the shooting in a house. There was no evidence that he was*

*found clutching a gun. Evidence was given by the Defendant that no gun powder residue was found on his hand.”*

[186] After making these observations she outlined the actions of the police officers that she considered to be the basis for the award of exemplary damage. At paragraph 42 she said:

*“Their actions in handcuffing the amputee to his bed after amputation under police guard was oppressive and cruel, their imposition of charges of shooting with intent and wounding with intent, the continued prosecution of said charges in the face of negative swab results was arbitrary and high handed. The failure to take the [respondent] to court within a reasonable time to be considered for bail was unconstitutional and callous. Their actions taken as a whole might be considered to be outrageous in the extreme”*

[187] In other cases, such as; ***Keith Bent v The Attorney General*** 1998/B385, exemplary damage was awarded in circumstances where a police officer unlawfully pointed a firearm at a member of the public.: In ***Maxwell Russell v The Attorney General et al*** claim No. 2006 HCV 4024 an award was made where the Claimant was shot in the back by the police.

[188] In my view the conduct of Ms. Hinds and Mr. Smith were definitely without probable cause, and can be described as, extremely inefficient, highly negligent, and definitely unacceptable. However, I do not find that they were so egregiously oppressive or arbitrary and high-handed to the point that warrants an additional award above that already awarded as compensation. In essence, it is my view that the amount awarded for aggravated damage which is included in the award for malicious prosecution is sufficient compensation. Therefore, the claim for exemplary damage is denied.

## Vindictory Damages

[189] In his Amended Particulars of Claim, Mr. Montique avers that the grounds for the claim for Vindictory Damages is that by the actions of the 1<sup>st</sup> and 3<sup>rd</sup> Defendant he was deprived of his right to carry on his life in Jamaica free from unjustified executive interference, mistreatment and oppression. Mr. Williams submits that the Claimant's constitutional rights to liberty, and rights to protection from cruel and inhumane treatment were violated and cannot be adequately compensated with an award of general, aggravated and/or exemplary damages. He asserts that the Claimant's young daughter was violated and raped whilst he was in prison and he unable to offer the protection and comfort that a daughter seeks from her father. Under the circumstances he submits that an award of **\$2,000,000** is appropriate for vindictory damages. He relies on the case of **The Attorney General v Ramanoop [2005] 2 WLR 1324** ('Ramanoop')

[190] Counsel Ms. Whyte submits that the Claimant's statement of case has failed to specify which constitutional right was allegedly infringed. Counsel submits that this failure is fatal for claiming vindictory damages, as no award can be reasonably made for an unidentified breach. Additionally, Counsel submits that fairness and the application of the overriding objective dictate that the Defendants be made aware of the nature of the claim. "Even if the Court infers a breach of the right to liberty from the facts, awarding vindictory damages would likely duplicate the award for false imprisonment, which is deemed unjustified. 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." (She relies, on the **Attorney General v Ramanoop**)

## **Discussion**

[191] I agree with counsel Ms. Whyte that the particular constitutional right that the Claimant is alleging to have been infringed was not clearly particularized in his

statement of case, but from the pleadings the infringement of the right to liberty can be inferred. Mr. Williams in his submission is adding the right to protection from cruel and inhumane treatment which was not so particularized.

[192] However, in the case of the **Attorney General v Ramanoop** ('Ramanoop') Lord Nichols stated that "the nature of constitutional damages is designed "... *to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach and deter further breaches...*"

[193] In that case the behaviour of the police was described by the Privy Council as quite appalling. The police officers entered the Claimant's home, then they handcuffed him, slapped him across the face and neck, and beat him while clothed only in his underwear. He was taken outside and shoved into the back seat of a car and taken to the police station. At the station the police rammed his head against a wall, causing a wound from which blood gushed at once. He was then handcuffed to an iron bar and taunted by the police officer who poured rum over his head, causing the wound to burn and blood and rum to run into his eyes. He was taken to a bathroom and soaked in the shower while the Police Officer spun him around by the shoulders until he was dizzy.

[194] He was later coerced into signing a written document by the officer, who when he refused to sign, slapped him in his head. The officer threatened that if he refused to sign he could not leave the station. As he was losing blood and feeling weak and dizzy, the Claimant signed the document as instructed because he was afraid of what the police officer, might do to him.

[195] In the case of **Merson v Cartwright and Anor** 2005] UKPC 38, a case from the Bahamas, the behaviour of the police officers as state agents was described as a "deplorable abuse of power". At paragraph 18 the Privy Council had this to say;

*"When exercising this constitutional 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.”*

**[196]** This pronouncement clearly indicates that an award for damages for the breach of a constitutional right is not automatic. In an appropriate case a declaration will also suffice.

**[197]** In that case, the Claimant was a visitor to island of the Bahamas. The police entered the house of her father’s while her father was out of island with a search warrant to search the home. She was present, clad in a bath suit. She asked the police for permission to go to the bathroom to change her clothes to more suitable clothing. While changing the Police threatened to kick down the door if she did not come out within two minutes. She was arrested and taken to the police station lock up. She was not allowed to see/speak with her visitors. She was not fed. She shared a cell with male prisoners. When she requested to use the bathroom she was at all times escorted by male officers. She had to leave the door ajar while using the bathroom which had no light bulbs.

**[198]** However, in the instant case, despite the fact that the conditions in which Mr. Montique was held were deplorable, I find that he was adequately compensated by the award for false imprisonment and aggravated damages. Additionally, I have not found that the behaviour of Ms. Hinds and Mr. Smith, or any other state agent towards Mr. Montique can be adequately described as a deplorable use of power, or even appalling, so as to engender public outrage. As such I find that there is no need for this court to award constitutional damages “... *to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach and deter further breaches...*”

**[199]** Consequently, the Claim for Vindictory Damages is denied. In light of the foregoing, I make the following orders;



**[200] Orders**

(i) Judgment for the Claimant for False Imprisonment and Malicious Prosecution

(ii) Damages are Awarded as Follows:

Special Damages	\$ 450,000.00
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Interest at the rate of 3% from 31.12 2014 to 20 9.2024

**General Damages**

False Imprisonment	\$6,837,444.00
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Malicious Prosecution to include

aggravated damage	<u>\$7,472,826.00</u>
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Total	\$14,310,270.00
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Interest on general Damages at the rate of 3 % from 31.12 2014 to 20.9.2024.

Cost to the Claimant to be agreed or Taxed.

**A. Thomas  
Puisne Judge**