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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. CL. B. 099 OF 1997

BETWEEN	**ARTHUR BAUGH**	**CLAIMANT**
AND	**COURTS (JAMAICA) LIMITED**	**FIRST DEFENDANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**SECOND DEFENDANT**

Miss Judith Clarke instructed by Judith M. Clarke & Company for claimant
Miss Sherry Ann McGregor and Miss Ayana Thomas instructed by Nunes Scholfield Deleon and Company for the first defendant
Miss Nicola Brown instructed by the Director of State Proceedings for the second defendant

June 13, July 14 and October 6, 2006

FALSE IMPRISONMENT, SECTIONS 15 (3) AND 26 (8) OF THE CONSTITUTION OF JAMAICA, MALICIOUS PROSECUTION, DEFAMATION, UNFAIR DISMISSAL

SYKES J

1. Mr. Arthur Baugh's employment with Courts (Jamaica) Limited ("Courts") that began so promisingly on May 25, 1995, came to an abrupt and ignominious end on November 19, 1996, when he was taken into custody by Detective Sergeant Derrick Knight (now Deputy Superintendent) because he was suspected of committing two serious offences: larceny and conspiracy to steal. Later that day Mr. Baugh was charged with larceny of a Sony and an Akita component sets and conspiracy to defraud. Having been charged with the felony and misdemeanour he was first taken to court at the Resident Magistrate's Court for the Corporate Area on November 21, 1996, having sojourned in the cells of the Hunt's Bay Police Station from the evening of Wednesday, November 19, 1996, to the morning of Thursday, November 21, 1996. An examination of the police statements collected in the matter as well as Mr. Knight's statement shows that all investigations and laying of charges were completed on November 19, the same day he was taken into custody. No evidence has been forthcoming from the Attorney General explaining this delay in putting Mr. Baugh

before the court on Wednesday, November 20, 1996. On January 6, 1997, the serious charges against Mr. Baugh collapsed because Court sent a letter to the Clerk of Courts alleging that its employees were fearful and did not wish to give evidence. Before this ignominious retreat by the prosecution Mr. Baugh was granted bail on November 21, 1996, but was not able to take advantage of the offer until November 26, 1996.

2. If that were not enough on his return home Mr. Baugh received a letter dated November 21, 1996, from his employers in these terms:

> *Due to your involvement in the recently attempted larceny from the Distribution Centre, of items which are the property of Courts (Jamaica) Limited, I regret to advise that we have lost confidence in you and your services are hereby terminated with immediate effect.*

3. The letter was signed by Mrs Ouida Ridgard, Director of the Human Resource Division. These events precipitated the efforts by Mr. Baugh to seek redress.

4. By an amended writ of summons and an amended statement of claim Mr. Arthur Baugh is claiming damages against Courts, the first defendant and the Attorney General of Jamaica ("AG") the second defendant. As against the Courts he claims damages for false imprisonment, malicious prosecution, defamation and wrongful dismissal. In respect of the AG he seeks compensation for false imprisonment and malicious prosecution. There was also a claim for aggravated and exemplary damages but these have been abandoned by Mr. Baugh. I shall deal with the claim for false imprisonment first

False imprisonment

5. In the case of ***Peter Flemming v Det. Cpl. Myers and the Attorney General*** (1989) 26 J.L.R. 526 a little noticed examination of the interplay between section 15 (3) of the Constitution of Jamaica and the tort of false imprisonment occurred. Two of the three judges who heard the appeal discussed the connection. I shall refer to that discussion later. The facts are that Flemming brought an action for false imprisonment and malicious prosecution. He had been arrested and charged with murder. He was connected to the crime by a statement given by someone who was supposed to be an eyewitness. The witness did not turn up to support the charge. The result was that the criminal proceedings were terminated in his favour. After his initial arrest he was held in custody fourteen days before he was brought to court. There was no explanation for this undue delay. The trial

judge dismissed his claims for false imprisonment and malicious prosecution. On appeal the judge's dismissal of the malicious prosecution claim was upheld on the basis that there was reasonable and probable cause to charge the claimant because the police had a statement from an alleged eyewitness who could not be found when needed. The claimant succeeded on the false imprisonment claim. All three Justices of Appeal agreed that fourteen days was too long for the claimant to be in custody before being placed before the court. The case establishes that there can be a successful claim for false imprisonment even if the claim for malicious prosecution fails. Liability in these circumstances for the tort of false imprisonment is predicated on the undue delay in taking the accused before the court if he has not been granted bail.

6. Section 15 (3) of the Constitution states:

> *Any person who is arrested or detained*
>
> *(a) for the purposes of bringing him before the court in execution of the order of a court or;*
>
> *(b) upon reasonable suspicions of his having committed or being about to commit a criminal offence,*
>
> *and who is not released, shall be brought* ***without delay*** *before a court; and if any person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence is not tried within a* ***reasonable time****, then, without prejudice to any further proceedings which may be brought against him, he shall be released unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.* (My emphasis)

7. The discussion of section 15 (3) in ***Flemming*** arose because counsel for the claimant advanced two propositions. First, a period of 72 hours was a reasonable time for the police to have someone in custody before taking him before a court. The court rejected this argument and all three judges held that reasonableness depends on the circumstances of the case. Second, having regard to section 15 (3) the detention was more than the time permitted by the Constitution. It seems that counsel had submitted that the phrase *without delay* conveyed the sense of immediacy whereas *reasonable time*, has built within it the idea that there may be some delay which might breach the *without delay* standard but still satisfies the test of *reasonable time*. Counsel's submissions were rejected by Carey P (Ag) and by Forte J.A. (as he was at the time). Each rejected the argument for different reasons.

8. In discussing the liability for false imprisonment Carey P (Ag) noted that in Jamaica there was no general statutory provision indicating when a person charged with a criminal offence should be brought before the court. His Lordship noted that the Constitution required that persons who were not granted bail should be brought before the court "without delay". He then added that the issue before the court was a contravention of the common law. Inferentially, he appears to be saying that he did not see the need to consider the Constitution any further because no claim was being made under the Constitution.

9. Forte J.A. at page 532I – 533A, immediately after citing section 15 of the Constitution states:

> *At common law, a police officer always had the power to arrest without warrant, a person suspected of having committed a felony. In those circumstances however, he was compelled to take the person arrested before a Justice of the Peace within a reasonable time. The fundamental rights and freedoms which are preserved to the people of Jamaica by virtue of the Constitution, are rights and freedoms to which they have always been entitled. In D.P.P. v Nasralla [1967] 3 W.L.R. 13 at page 18 Lord Devlin in delivering the judgment of the Board acknowledged this proposition. In referring to Chapter III of the Constitution which preserves the fundamental rights and freedoms he stated:*
>
> > *This chapter as their Lordships have already noted, proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law.*
>
> ***It is my view, therefore, that the words "without delay" as used in section 15 (3) ought to be construed in the light of the common law right which had previously existed and in arriving at the appropriate period which would constitute action "without delay", all circumstances of the particular case should be examined in order to determine whether the person arrested was brought before the Court within a reasonable time.*** (My emphasis)

10. The lasting and invaluable significance of this passage is not so much the result of the analysis but the recognition that the Constitution is not divorced from the common law in the tort of false imprisonment. Forte J.A. did not say that, conceptually as Carey P (Ag) suggested, there is no connection between section 15 (3) of the Constitution and the tort of false imprisonment. In my view a fair reading of Forte J.A.'s judgment on this point is that had he found it possible to let the Constitution override common law he would have done so. He could not give effect to Constitution because he was bound by the ***D.P.P. v Nasralla*** [1967] 2 A.C. 238, a Privy Council appeal from Jamaica.

11. In ***Nasralla*** Lord Devlin read down the Constitutional provisions. In his view the Jamaican Constitution gave no further protection than that already provided by the common law. In this construct, it naturally follows that Lord Devlin would not see the possibility of the Constitution offering any greater protection than the common law. Lord Devlin was not fully cognisant of the need to interpret the bill of rights provisions in such a manner that would give the widest and fullest protection possible.

12. Since Lord Devlin's advice there as been a revolution in how constitutions are regarded and interpreted. The Judicial Committee of the Privy Council indicated that fundamental rights provisions are to be given a wide and liberal interpretation so that the citizen gets the fullest measure of protection offered by these provisions (see ***Minister of Home Affairs v Fisher*** [1980] A.C. 319 and ***Lambert Watson v R*** (2004) 64 W.I.R. 241).

13. In ***Watson*** Lord Hope speaking for the majority at paragraphs 15, 16 and 17 said:

> *[15] The Constitution of Jamaica was established by the Jamaica (Constitution) Order in Council, which was made on 23 July 1962. Apart from certain provisions which were brought into effect in Jamaica on 25 July 1962, the Order came into operation immediately before 6 August 1962. The Constitution was set out in the Second Schedule to the Order. Section 4(1) of the Order provides:*
>
> > *All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal such law) continue in force on and after that day, and all laws which have been made before that day but have not previously been brought into operation may (subject as aforesaid) be brought into force, in accordance with any provision in that behalf, on or after that day, but all such laws shall, subject to the provisions of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order*
>
> *[16] Chapter I of the Constitution contains the interpretation section, which is s 1, and a section that describes its effect, which is s 2.* ***Section 1 contains the following definition of the word 'law': ' "law" includes any instrument having the force of law and any unwritten rule of law and "lawful" and "lawfully" shall be construed accordingly'.*** *Section 2 provides:*
>
> > *Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void*
>
> *Section 48(1) provides that, subject to the provisions of the Constitution, Parliament may make laws for the peace, order and good government of Jamaica, and ss 49 and 50 give power to Parliament to alter the Constitution subject to the conditions which these provisions lay down. The effect of s 2 is that the Constitution is the supreme law of Jamaica.*
>
> *[17] Chapter III of the Constitution sets out the fundamental rights and freedoms to*

which every person in Jamaica is entitled. Section 13 states that every person in Jamaica is entitled to each and all of the following rights and freedoms, namely (a) life, liberty, security of the person, the enjoyment of property and the protection of the law, (b) freedom of conscience, of expression and of peaceful assembly and association, and (c) respect for his private and family life, and that the subsequent provisions of that chapter shall have effect for the purpose of affording protection to these rights and freedoms, subject to such limitations as are contained in these provisions to ensure that they do not prejudice the rights and freedoms of others or the public interest.

...

[41] In Director of Public Prosecutions v Nasralla [1967] 2 AC 238 one of the issues was whether section 20(8) of the Constitution of Jamaica, which provides that no person who has been tried for a criminal offence and either convicted or acquitted shall again be tried for that offence, was to be treated as declaring or intended to declare the common law on the subject or as expressing the law on the subject differently. Lord Devlin dealt with this point at pp 247-248, where he said:

> *"All the judges below have treated [section 20(8)] as declaring or intended to declare the common law on the subject. Their Lordships agree. It is unnecessary to resort to implication for this intendment, since the Constitution itself expressly ensures it. Whereas the general rule, as is to be expected in a Constitution and is here embodied in section 2, is that the provisions of the Constitution should prevail over other law, an exception is made in Chapter III. This chapter, as their lordships have already noted, proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed. Accordingly section 26(8) in Chapter III provides as follows ..."*

[42] These observations would plainly have had much force in this case if it were plain that the law under which the appellant was sentenced to death was a law which was in force immediately before the appointed day. But the issue in this case is whether the law under which he was sentenced falls within that description, when the provisions of section 26(8) are read together with those in section 26(9). ***Guidance as to how this issue should be approached is not to be found in any presumption as to whether the law which was in force immediately before the appointed day secured the fundamental rights of the people of Jamaica. It is to be found in the principle of interpretation, which is now universally recognised and needs no citation of authority, that full recognition and effect must be given to the fundamental rights and freedoms which a Constitution sets out. The rights and freedoms which are declared in section 13 must receive a generous interpretation. This is needed if every person in Jamaica is to receive the full measure of the rights and freedoms that are referred to****. Section 26(8) read with section 26(9) limits that protection. So it must be given a narrow rather than a broad construction. This means that careful attention must be paid to the precise meaning of the words used in section 26(9). If this amounts to what has been described as*

"tabulated legalism", it is perfectly in order in this context. (My emphasis)

14. From these passages *unwritten law* must include the common law. If it were not so then what we would have the possibility of the common law prevailing over the constitution – a possibility inconsistent with the position that the Constitution is the supreme law of Jamaica. The effect of Lord Hope's analysis is that the authority of ***Nasralla*** has been severely weakened. What was not so vividly expressed in the majority was made plain by the concurring minority.

15. The minority concurring opinion in ***Watson*** said at paragraph 61:

> *If, contrary to our view, the Board did hold in Nasralla that the effect of s 26(8) was to prohibit judicial modification or adaptation of any existing law to bring it into conformity with the human rights guarantees in Chapter III, we respectfully think that that decision should no longer be followed. The killing in question took place only two months, and the hearing by the Board took place some four years, after adoption of the Constitution. The decision was made at a time when international jurisprudence on human rights was even more rudimentary than when Ong Ah Chuan v Public Prosecutor [1981] AC 648 was heard nearly fourteen years later. The modern approach to constitutional interpretation, heralded by Minister of Home Affairs v Fisher (1979) 44 WIR 107, had yet to take full effect. No argument was addressed and no consideration given to the principles which should guide the interpretation of constitutional guarantees and savings clauses, to the special character of human rights guarantees, nor to the duty to modify (of which there was as yet little experience). No reference was made to obligations binding on Jamaica in international law, nor could it have been; at the date of the hearing Jamaica was party to no international human rights instrument other than the Universal Declaration of Human Rights, and that contains no article bearing on the right not to be tried twice for the same offence.*

16. The minority attacked the very foundation of the ***Nasralla*** advice and placed it (***Nasralla***) in its historical context. They demonstrated that human rights law and constitutional interpretation have moved on considerably since the days of ***Nasralla***.

17. The conclusion from these passages is that so far as Forte J.A. said in ***Flemming*** that "without delay" in section 15 of the Constitution had to be interpreted in light of the common law he is now at variance with ***Watson***. However, but as already pointed he was bound to come to that conclusion because of ***Nasralla***. The position is now reversed; the common law has now to be interpreted to accord with the Constitution.

18. Miss Brown submitted a thoughtful argument against the above conclusions. She accepted in principle that any existing law that conflicts with the Constitution must yield to the Constitution. She also accepted that existing law includes the common law. As a matter of necessary conclusion Miss Brown ought to have accepted that if the common law results in a lower standard of protection than that offered by the Constitution then the Constitution prevails. However, she submitted that the words *without delay* and *reasonable time* are different ways of expressing the same concept and thus she says there is no incompatibility between the Constitution and the common law in respect of the tort of false imprisonment. She further submitted that Forte J.A. in ***Flemming*** effected a reconciliation between the two expressions by using the common law to shed light on the Constitution. She sought to sustain this submission by relying on section 26 (8) of the Constitution which, she submitted, saved the common law that existed before the Constitution. Therefore she concluded the concept of reasonable time in the tort of false imprisonment was saved from being condemned for lack of conformity with the Constitution.

19. There are three difficulties with this argument. The first is that it does not give pride of place to the now generally accepted idea that the human rights provisions of the Constitution should be interpreted to give the widest possible protection to the citizenry. The Privy Council in ***Minister of Homes Affairs v Fisher*** accepted that notwithstanding that fact that a constitution is an Act of Parliament, it should be interpreted with less rigidity and greater generosity than a normal statute. In ***Lambert Watson*** Lord Hope restated the proposition that the rights and freedoms in section 13 must receive a generous interpretation. Unless this approach is taken, the argument goes, it is unlikely that the citizenry will get the fullest protection afforded by the constitution. If this is the fundamental premise then it follows necessarily that if there are two possible ways of reading the expression *without delay* and one of those readings enhances the protection afforded by the Constitution then that interpretation ought to be adopted unless there is a compelling reason not to do so.

20. The second difficulty with the proposition put forward by Miss Brown is that it does not give full and unrestricted effect to the analysis of sections 4 (1) of the Order in Council and 26 (8) of the Constitution in ***D.P.P. v Kurt Mollison*** [2003] 2 A.C. 411and ***Lambert Watson***. Both cases held that section 4 (1) preserved the existing law so that there would

not be vacuum. Both cases held that the wording of section 4 (1) recognised that the laws continued over into independence may have to be modified to bring them in line with the Constitution. The Board in ***Mollison*** held that the wording of the savings law clause was not so comprehensive as to undermine section 2 of the Constitution which declares that the Constitution is the supreme law (see paragraph 15 of ***Mollison***). The savings law clause's primary function was to prevent uncertainty. It was never intended to confer on pre-independence laws, written or unwritten, perpetual immunity from unconstitutionality.

21. The third difficulty with Miss Brown's submission is that it misses the larger principle on which ***Lambert Watson*** rests. Lord Hope, for the majority, at paragraphs 41 and 42 cites ***Nasralla*** and in particular Lord Devlin's passage in that case in which he (Lord Devlin) said, at pages 247 - 248 that "*All the judges below have treated [section 20(8)] as declaring or intended to declare the common law on the subject. Their Lordships agree. It is unnecessary to resort to implication for this intendment, since the Constitution itself expressly ensures it*". Lord Hope rejected the major premise of ***Nasralla*** which was that one looks at the bill of rights provisions on basis that it covers areas already secured by the common law. Lord Hope indicated that there is no need for any such presupposition. The starting point for Lord Hope was to look at the provisions themselves unshackled by prior knowledge of the common law and give them a wide and generous interpretation so that the widest protection, consistent with not trammelling on the rights of others, are realised. It seems to me that after ***Lambert Watson*** it not legitimate to use the common law to constrict any provision of the bill of rights.

22. The concurring minority appreciated that ***Nasralla*** was dealing primarily with the issue of common law verdicts from juries. They, however, more so than the majority understood that ***Nasralla*** was capable of being read to mean that the bill of rights is nothing more than the common law restated. If this was a permissible way of understanding the case the implication of it was that the bill of rights would not receive a generous interpretation because the new wine (bill of rights) would now be held and constricted by old wine skins (the common law) with the consequence that the bill of rights would not provide the necessary intended protection. The risk that the Board recognised was not merely academic. This was indeed how Forte J.A. read ***Nasralla***.

23. The inescapable conclusion from the passages cited from ***Watson***, as well as the decision of ***Mollison***, both appeals to the Privy Council from Jamaica, ***is*** that ***Nasralla*** is no longer good authority when it suggested that the Jamaican Constitution simply encapsulated rights already secured by the common law with the consequence that the interpretation of the Constitution is limited by what the common law says. Forte J.A. was bound by ***Nasralla.*** The Privy Council itself has undermined that the authoritative status of ***Nasralla***. The Court of Appeal has not had an opportunity to provide examine the relevance of ***Nasralla*** in the post – Watson era. Despite this it seem to me that if our highest court has effective annulled the effect of decision which would have been binding in me and on the Court of Appeal, then the way is clear to avoid that decision that our highest court has all but overruled on the specific point of the relationship between the common law and the Constitution.

24.I now make some observations about section 15 (3) of the Constitution. It is important to note that section 15 (3) uses the expressions *without delay* and *reasonable time*. It is difficult to escape the conclusion that the wording was deliberate. It is hard not to notice that the expression *without delay* attaches to the appearance before the court of the person detained whereas *reasonable time* is used in connection with the time for trial. Indeed the very structure of the provision makes it clear that the trial itself need not be immediate but taking the arrested or detained person before an impartial and properly constituted court is a duty of paramount importance imposed on the executive.

25. It may be argued that the Constitution cannot have this impact on a common law tort. This argument is not logically sustainable because the very case of ***Flemming*** shows that Parliament by an ordinary legislation lowered the threshold for claimants who bring an action against the police for malicious prosecution. The claimant only need prove the absence of reasonable or probable cause or malice but not both. If an ordinary legislation can have this effect it is difficult to see why the Constitution cannot have a similar effect on the common law tort of false imprisonment. It would be remarkable if an *inferior* law could produce the effect that it did in ***Flemming*** but the *supreme* law could not have a similar effect.

26. There is no need in light of the recent Privy Council decisions for a claimant to bring a constitutional claim to benefit from section 15 (3) of the Constitution which undoubtedly offers greater protection to personal liberty than the common law. Unless the constitutional standard is applied to the tort of false imprisonment it is difficult to see how anyone can benefit from section 15 (3). If the claimant brings a constitutional action under section 15 (3) it is quite likely that he will be told that other adequate remedies exist. The remedy that is in view is the false imprisonment tort that has a lower standard than the constitution which may result in the denial of a remedy even if the constitutional standard is breached. If I am correct in this then it difficult to see how anyone can secure the benefit of section 15 (3) without the constitutional standard being imported into the tort of false imprisonment.

27. I now go to another legal question namely the proof of false imprisonment. Miss Brown submitted that the claimant had failed to prove that he was falsely imprisoned. In ***Flemming*** Morgan J.A. dealt with the method of proof of false imprisonment. Her Ladyship in responding to the Attorney General's submission that the claimant had not discharged the burden of proving that the delay was unreasonable stated at page 538 I:

> *It is my view, however, that it is sufficient for the appellant to state the length of time he was in custody before being brought before the Resident Magistrate and it is only if the tribunal considers the time unreasonable that the reason preferred for the undue delay will be taken into account.*

28. Forte J.A. said at page 534 G:

> *In my view, having regard to the evidence that the appellant was detained for 13 days and in the absence of any explanation for the apparently long delay, the court ought to have found on a balance of probabilities that the defendant had no reasonable or probable cause to detain him for such a long period of time, albeit that the initial arrest was indeed lawful.*

29. These passages demonstrate how, as a practical matter the courts are to deal with this issue. The practical method of proof is:

(a) the claimant states the time he was arrested and the time he was either release or taken before a court;

(b) the court then makes a prima facie assessment of whether the delay is unreasonable;

(c) if the delay in unreasonable and therefore prima facie the tort of false imprisonment has been committed the court then takes into account any explanation.

30. What has been stated in paragraph 28 was in the context of the common law tort of false imprisonment using the common law standard. If we use the constitutional standard paragraph (a) remains the same. Paragraph (b) now reads the court then makes a prima facie assessment of whether the person was taken without delay before a court. If there appears to be a breach of the constitutional standard the court takes into account any explanation offered. It follows that only compelling necessity ought to prevent the accused being taken before the court. Administrative convenience is unlikely to provide a satisfactory explanation. It may be that in some cases the result may the same if either standard is used but an example of the difference in result is provided by this case. It could be argued that keeping the Mr. Baugh in custody an extra day was not unreasonable but is clear that he was not taken before the court, *without delay*, which in this case would mean the next day. The Hunts Bay Police Station is located just a few minutes away from the Resident Magistrate's Court for the Corporate Area. It is well known that that court sits every day from Monday to Friday each week.

31. The evidence is that Mr. Baugh was kept in custody for an additional day (November 20, 1996) after the investigation was completed on November 19, 1996. No explanation has been forthcoming from the second defendant to account for this situation. Mr. Baugh should have been placed before the courts *without delay* as required by the Constitution. If I am wrong in using the Constitution in this way I also hold that at common law the delay of one day when all investigations were completed, without any explanation, was unreasonable.

32. In my view by at least 6:00 pm on November 19, 1996, the police did not have any lawful basis to continue to hold Mr. Baugh in custody and so the false imprisonment began at that time. Mr. Baugh should have been released, admitted to bail or taken before the court the very next day. The failure to do this is a breach of the constitutional standard. The delay has not been explained. The tort of false imprisonment has been committed against Mr. Baugh. The only remaining question on this issue is the duration of the tort.

33. When he was placed before the court on November 21, the court appearance broke the chain. He was offered bail on November 21. The tort lasted from 6:00pm on November 19 and ended on November 21. Miss Clarke is claiming for the period up to November 26, 1996, when Mr. Baugh was able to take up the offer of bail. Until Mr. Baugh was bailed he

would be in custody. It does not seem right to describe this situation as continuation of detention by the police. The claimant had been brought before a judicial officer who made orders concerning the liberty of Mr. Baugh. It would seem to me that any remand after that would be the result of a judicial act. Willes J. explained as much in ***Austin v Dowling*** (1870) 5 C.P. 534, 540:

> *The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment. There is, therefore, at once a line drawn between the end of the imprisonment by the ministerial officer and the commencement of the proceedings before the judicial officer.*

Malicious prosecution

34. In Jamaica the current law is that the claimant is required to prove five elements in a malicious prosecution claim where the tortfeasor is a private citizen but only four where the tortfeasor is a police officer. Thus the police officer has less protection than the private citizen when sued for malicious prosecution. This is the result of the law as explained in ***Flemming's*** case where the court held that by virtue of section 33 of the Constabulary Force Act. In this regard the law in Jamaica differs significantly from other jurisdictions where no distinction is drawn, by either common law, between police officers and civilians (see ***Wills v Voisin*** (1963) 6 W.I.R. 50; ***Martin v Watson*** [1996] A.C. 74).

35. If the claimant is to succeed against Courts he must prove (a) that the proceedings were instituted or continued by the defendant; (b) that the defendant acted without reasonable and probable cause; (c) that the defendant acted maliciously; (d) that the proceedings were terminated in favour of the claimant and (e) the claimant suffered damage. I now examine the evidence. To succeed against the Attorney General the claimant must prove (a), (b) or (c), (d) and (e).

The evidence

36. In this case, Courts reported the matter to the police, who conducted investigations, collected statements and then arrested Mr. Baugh and his co-defendant Livingston Robinson. The circumstances that led Courts to call in the police are these. Miss Marie

Holman who testified on behalf of Courts said that she was the Warehouse Manager of Courts at its warehouse located at 1 Twickenham Close, Kingston 11. In 1996, according to her, Courts' policy was that goods stored at the warehouse were not to be taken outside unless instructions to that effect were given by the warehouse manager or one of the supervisors. Between 1:00pm – 2:00pm (the lunch period) there was not usually any work in the warehouse to be done unless the warehouse manager or supervisor gave direct orders for that to happen.

37. Miss Holman said that on November 19, 2006, she received information from Miss Jacqueline Williamson informing her that Messieurs Baugh, Livingston Robinson and Paul Wilks were in the warehouse during lunch time moving a freezer with two stereos inside without her (Williamson's) authorisation. Miss Williamson was a supervisor at the material time. Miss Holman said that she went to speak to the men. Wilks told her that Mr. Baugh and Mr. Livingston had asked him to move the freezer to the loading bay. According to her Mr. Baugh and Mr. Livingston did not say anything when she asked them for an explanation. She then spoke to Mrs. Ouida Ridgard and then called the police.

38. In Miss Holman's view all this seemed suspicious because the men were not authorised to move the freezer. The freezers were usually stored in the same sealed condition in which they arrived and the packaging is never opened. When she saw the freezer in question it had no seal and inside were two stereos which were the property of Courts.

39. The police officer said that when he arrived at Courts he spoke to and received a report from Miss Jacqueline Williamson. He said that Ms Williamson told him that "she had had previous conversations with the employees which convinced her of the guilt or participation of Arthur Baugh, the Claimant (sic) and Livingston Robinson" (see para. 4 of Knight's witness statement). The detective said that during the course of his investigations he recorded statements from Miss Williamson, Miss Charmaine McLaughlin, Mr. Paul Wilks and Mr. George Gordon. He said that based on his investigations and the statements collected he charged Robinson and Baugh with conspiracy to defraud and larceny. Indeed the basis of his belief could hardly be stated any plainer than this: *My investigations led me to honestly believe the report made to me by Ms Williamson, that Arthur Baugh and Livingston*

Robinson were responsible for the reported offence of larceny of the two (2) Component Sets (sic) (see page 6 of Knight's witness statement).

40. Miss Brown asked me to find that the officer spoke to Miss Holman and that she must necessarily have told him what she told the court. The factual foundation for this submission, according to Miss Brown, is the officer's testimony that he spoke to a number of potential witnesses. This meant that Miss Holman might have been one of them. This submission, in my view, is asking me to speculate. There is some evidence that Miss Holman spoke to the police (see testimony of claimant and Miss Holman) but there is no evidence of what she told the police. The officer in any event does not say in his witness statement that he spoke to Miss Holman or took into account what she said. Miss Holman's witness statement gives the impression that she did not have much to with the police when they arrived at Courts other than when she was informed by the police that they were taking away three men for questioning. In cross examination she admitted that she spoke to the police but that is as far as it goes. This evidence is not a reliable core on which to draw the inference contended for by Miss Brown. The fact is that no one attempted to find out what she told the police on their arrival. I cannot therefore conclude that she must necessarily have told the police what she said she did and what Wilks told her. I therefore conclude that Miss Holman did not tell the police of her conversations with the claimant which would have taken place, on her account, before the arrival of the police. It is perhaps convenient to look closely at the other evidence that Mr. Knight said he had which supported his decision to prosecute the claimant.

41. It will be recalled that he said that he took four statements. I shall summarise those statements. The first is that of Mr. George Gordon, a security supervisor employed to Ranger Security. He was on duty at Courts on the day in question. In the police statement he said that Miss Williamson asked him to accompany her and Miss Clacking into the warehouse. When he went in he saw Wilks beside a freezer. Wilks on being questioned said that Livingston Robinson had sent him to "fetch the deep freezer" (see page two of statement). Miss Williamson spoke to Wilks. He saw the component sets in the deep freeze. It is important to note that he does not mention seeing the claimant anywhere around and neither was he (claimant) spoken to by Miss Williamson in his (Gordon's) presence.

42. The second statement is that of Mr. Wilks. He asserted that it was Mr. Robinson who asked him to remove the freezer. He did not mention the claimant by name or description.

43. The third statement came from Miss Charmaine McLaughlin. She stated that she entered the warehouse with Miss Williamson and the security guard where she saw a "casual worker". She said that that casual worker said that "another co-worker had told him to take the freezer to the loading bay" (see page 2 of statement). Nowhere in the statement did she identify any of the workers by name and she did not mention Mr. Baugh's name.

44. The fourth statement came from Miss Jacqueline Williamson. She stated that on the day in question she was supervising the unloading of a container. Wilks and Robinson assisted in this. When the container was unloaded Robinson went to have lunch. Her suspicions were aroused because sometime shortly after Robinson left ostensibly to have lunch she saw him shifting some refrigerators. She asked Robinson what he was doing and he said he was making space for incoming goods that were outside. She went to collect her lunch and on her return she saw the claimant. She observed a freezer shelf out of its proper place. She asked Robinson and the claimant where the shelf came from and both said "from an open freezer" (see page 2 of statement). She did not bother to check which freezer the shelf came from and went to have her lunch. She told both men to leave the area and they did. While having lunch she told Miss McLaughlin about her suspicions. She, Miss McLaughlin and the security guard entered the warehouse. On entering the warehouse she saw Wilks stooping beside a freezer. She asked him what he was doing and he replied that "Robinson send him for this freezer to take to the loading bay for delivery" (see page 3 of statement). She gives some other details. This witness failed to incriminate Mr. Baugh.

45. I would observe that Miss Williamson's statement is markedly different from what Miss Holman said that Miss Williamson told her. According to Miss Holman, Miss Williamson reported to her that "she had discovered Arthur Baugh, Livingston Robinson and Paul Wilks in the warehouse during their lunch time in the process of moving a freezer with two stereos inside, without her authorization" (see para. 8 of Miss Holman's witness statement).

46. Lord Denning in ***Glinski v McIver*** [1962] A.C. 726, 759 stated the correct approach:

> ***Finally, even if the jury answer: "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.*
These reasons are, I trust, sufficient to show that the question and answer as to "honest belief" should not be used in every case. It is better to go back to the question which the law itself propounds: Was there a want of reasonable and probable cause for the prosecution? (My emphasis)

47. Lord Denning's formulation places a break on those extraordinarily suspicious persons who charge without a moment's thought about the strength of their case. Such a person cannot hide behind the wall of honest belief. Suspicion is not enough. The police don't have to rebut all possible or likely defences. Honest belief cannot exist in the air. It must be firmly rooted and grounded in objective facts. In light of the statements recorded by the police it is impossible to see the basis for the conclusion that the police had reasonable and probable cause to prosecute. None of the witnesses implicated Mr. Baugh. There was no basis for any adverse inference to be drawn against Mr. Baugh. The defect in Miss Brown's submissions is that she focused too much on the belief of the officer. She did not give sufficient heed to Lord Denning's words. I do not see how a man of ordinary prudence and judgment could conclude on the basis of the police statements that Mr. Baugh had committed the crime charged (see Dixon J in ***Commonwealth Life Assurance Society v Brain*** 53 C.L.R. 343, 382).

48. Mr. Baugh denies any involvement in any criminal activity. Mr. Baugh said that he saw Miss Williamson in the warehouse. When he saw her he was looking in the freezer and she told him to leave and go for lunch. He said that Robinson was there at the time and they both left. On his return he heard a commotion. By them the persons present were Miss Williamson, Miss McLaughlin, the security guard, Miss Holman and Mr. Wilks. He admitted that the police came and he confirmed that Miss Williamson had indeed asked him about a freezer tray. He was taken away by the police.

49. Mr. Knight has not demonstrated, in this case, that he had reasonable and probable cause to arrest the claimant. He has not told us all the information that went into his

decision so that it could be examined. Miss Brown submitted that it would be unfair to the police to ask him to say what he was told after all this time. I respond by saying that this is one of the frailties of trials. If the litigant cannot adduce the evidence required on a particular issue then he fails even if he has good reason for not putting forward the evidence. This is the inevitable result of our adversarial system – he who fails to prove cannot succeed. I conclude that the police are liable to Mr. Baugh for malicious prosecution.

Is Courts liable for false imprisonment and malicious prosecution?

50. Courts can only be liable if it can be shown that the police did not exercise any independent judgment when arresting Mr. Baugh. Courts reported its suspicions to the police who conducted investigations and made the decision to prosecute based on their investigations. There is no evidence that Courts had falsely or maliciously given false information to the police. Courts is therefore not liable for the tort of malicious prosecution.

51. There is no evidence of false imprisonment committed by Courts. Mr. Baugh expressly said that he was not detained or restrained while at Courts by any employee or anyone acting on its behalf. Based on the evidence the decision to remove the men from the property was solely that of the police uninfluenced by Courts.

Is Courts liable for libel?

52. The libel action arose out of the letter referred to earlier. There is no evidence that the contents of the letter were published to a third party. The highest that Mr. Baugh was able to take the matter was that he received the letter from his landlord. The envelope that had the letter was not sealed. There was some dispute over whether he was handed the letter at Courts or whether he received it at his home. In the final analysis the mode of delivery is unimportant since the claimant failed to establish that the letter was published to a third party.

The wrongful dismissal claim

53. Miss McGregor has taken the fundamental point that a wrongful dismissal claim is a claim for special damages which must be specifically pleaded. This, she submits, was not done. I agree with her and the claim fails for this reason. There is more than ample authority to support Miss McGregor's position (see ***Monk v Redwing Aircraft Company***

Ltd [1948] 1 K.B. 182; ***Hayward v Pullinger*** [1950] 1 All ER 581 and ***Phillips v Orthodox Unit Trusts Ltd*** [1958] 1 Q.B. 314).

Assessment of damages for false imprisonment and malicious prosecution

54. Quite a number of cases was cited. I shall refer to the most helpful of the lot. As I have already stated Mr. Baugh cannot recover for the seven days he spent in custody. The false imprisonment ended on November 21.

(a) assessment of damages for false imprisonment

55. The cases I am about to examine were cited by Miss Clarke. I note that in the case of ***Inasu Ellis v The Attorney General and Ransford Fraser*** SCCA No 37/01 (delivered December 20, 2004) the Court of Appeal did not deprecate counsel's use of the Consumer Price Index ("CPI") to update previous awards for false imprisonment and malicious prosecution (see page 10 of judgment). In the ***Ellis*** case the claimant was detained for seven hours and it was held that $100,000.00 was an appropriate award. There is the case of ***Gordon v The Attorney General*** C.L. 1992/G063 cited in ***Ellis*** in which the claimant was awarded $60,000 for false imprisonment. The summary in the Court of Appeal's judgment is not quite specific. It simply says the claimant was detained on May 2, 1991 and released on May 3, 1991. In the case of ***Hugh Perkins v The Attorney General*** C.L. P 123/86 (delivered January 20, 1994) Harrison J. (as he then was) awarded $30,000 to the claimant who was detained for four hours. Using the May 2006 CPI of 2332.6 the award is now valued at $125,528.72. Finally there is the case of ***Michael Bennett v The Attorney General of Jamaica and Aldolphus Williams v The Attorney General of Jamaica*** CL. 1993/B309 and C.L. 1993/W 237 (consolidated) delivered January 26, 1996. The claimants were detained for twelve days and awarded $180,000.00 each. Using the May 2006 CPI the current value is $470,651.27.

56. Miss Brown relied on the cases of ***Cornel McKenzie v The Attorney General*** C.L. M 022 of 2002 (delivered on June 26, 2003). The claimant was falsely imprisoned for twenty five days and awarded the sum of $442,000.00 at a rate of $17,680.00 per day. Her next case was ***Winston Simpson v The Attorney General*** C.L. 1993/S 144 (delivered May 10, 2002) where the sum awarded was at the rate of $7,000 per day for 120 days. Based on these two cases she submitted that the award should be $30,000.00. The case of ***Simpson***

does not indicate why $7,000.00 per day as opposed to any other sum was chosen. The same can be said for ***McKenzie***. No written reasons were apparently done in ***McKenzie***. All we have is the order of the final judgment. I did not find those cases of much assistance. Additionally, the awards may well be said to be too low and are not reflective of the stance taken by the Court of Appeal in ***Ellis***. Seven hours detention in ***Ellis*** produced an award of $100,000.00. There is no evidence that cases of ***Perkins*** and ***Bennett*** were cited to court that decided the cases relied on by Miss Brown. It is clear that ***Perkins*** and ***Bennett*** are more consistent with ***Ellis*** even though they were decided a decade before. The tort of false imprisonment is one which reflects the preeminence given to the liberty of the subject. An award of $200,000.00 is appropriate in this case.

(b) assessment of damages for malicious prosecution

57. Miss Brown submitted that a sum of $50,000.00 would be reasonable. Unfortunately, she did not indicate how she came by that figure. Miss McGregor on behalf of the first defendant in her written submission did not sufficiently distinguish between awards for false imprisonment and malicious prosecution. The lumping together of both awards is against the modern trend to individuate the awards so that the parties may know the award under each head and in the event of an appeal the appellate court is better able to assess whether the awards are reasonable (see ***Merson v Attorney General*** 67 W.I.R. 17 at paragraph 15 where the Lord Scott approved the dictum of the Court of Appeal of the Commonwealth of the Bahamas on this point).

58. In the tort of malicious prosecution the claimant must prove damage. He needs to prove, in this case, damage to his fame. Mr. Baugh has succeeded because to arrest a person of unblemished character for an offence of dishonesty necessarily results damage to fame and reputation because it implies that the person is a crook (see ***Rayson v South London Tramways*** [1893] 2 Q.B. 304 where the claimant was accused of driving on tram without paying).

59. In the case of ***Perkins*** Harrison J. awarded $100,000.00 for malicious prosecution. The current value using the May 2006 CPI is $417,355.52. There is the case of ***Kerron Campbell v Kenroy Watson*** C.L. C 385 of 1998 (delivered January 6, 2005) the sum awarded was $90,000.00. The problem in ***Watson*** is similar to the problem here. Counsel

has not put before me a sufficient number of cases in which individuated awards for malicious prosecution have been made.

60. The question is what is an appropriate level of compensation for an accusation of dishonesty? I have decided, in light of the absence of a sufficient number of cases presented, that the sum of $350,000.00 is sufficient in this case.

Costs

61. The claimant is to recover costs against the second defendant. The claimant is to pay the costs of Courts. The reasons for ordering the claimant to pay the Courts' costs are these. On the facts of this case, the claimant would have known from quite early that he would need to prove that Courts either itself arrested the claimant or the circumstances were such that even though physical act of arrest was done by the police the police did not exercise any independent judgment and simply acted on the report made by Courts if he was to succeed in his claim for false imprisonment. Neither could he have succeeded against Courts for malicious prosecution. Once a private citizen makes a report to the police and there is evidence that the police investigated the matter and made their independent judgment about the allegations against the person who made the report becomes increasingly difficult.

62. The claim of defamation was also difficult to prove since the claimant ought to have known that he had extremely low prospects of proving publication of the letter to a third party. The opportunities to take a close look at the claimant's allegations against Courts and how they were going to proved were not taken throughout. In these circumstances it is only fair that the claimant pays the costs of Courts whose resources and time were unnecessarily engaged.

Conclusion

63. No award is made for the loss of income arising from his dismissal. This is a claim for special damages which must be properly pleaded and proved. Proof there was but pleading there was not.

64. The second defendant is liable for the torts of false imprisonment and malicious prosecution. The sum awarded for false imprisonment is $200,000.00. The sum of

$350,000.00 is awarded for malicious prosecution. The total award is therefore $550,000.00 which attracts interest at the rate of 6% from the date of the service of the writ to the date of judgment.