



[2019] JMSC Civ 240

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

**CLAIM NO. 2012HCV06037**

<b>BETWEEN</b>	<b>MICHAEL TROUPE</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>LEON CLUNIS</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>OWEN ELLINGTON</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>TELEVISION JAMAICA LTD</b>	<b>3<sup>RD</sup> DEFENDANT</b>
<b>AND</b>	<b>CVM TELEVISION LTD</b>	<b>4<sup>TH</sup> DEFENDANT</b>
<b>AND</b>	<b>ATTORNEY GENERAL FOR JAMAICA</b>	<b>5<sup>TH</sup> DEFENDANT</b>

**CONSOLIDATED WITH:**

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

**CLAIM NO. 2013HCV03683**

<b>BETWEEN</b>	<b>SYLVAN REID</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>LEON CLUNIS</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>OWEN ELLINGTON</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>TELEVISIONJAMAICA LTD</b>	<b>3<sup>RD</sup> DEFENDANT</b>
<b>AND</b>	<b>CVM TELEVISION LTD</b>	<b>4<sup>TH</sup> DEFENDANT</b>
<b>AND</b>	<b>ATTORNEY GENERAL FOR JAMAICA</b>	<b>5<sup>TH</sup> DEFENDANT</b>

## **IN OPEN COURT**

Mr Leonard Green and Ms Sylvan Edwards instructed by Chen, Green & Company for the Claimants

Mr Ransford Braham, Q.C., Ms Marjorie Shaw and Mrs Terry-Joy Golaub instructed by Brown & Shaw for the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants

Mrs M. Georgia Gibson-Henlin Q.C., and Ms Coleasia Edmondson instructed by Henlin Gibson Henlin for the 3<sup>rd</sup> Defendant

Mr Charles Piper Q.C., and Ms Petal Brown instructed by Charles E. Piper and Associates for the 4<sup>th</sup> Defendant

**Heard:** June 4, 5, 6 and 14, 2018 and December 13, 2019

**Defamation – Libel – Whether words defamatory – Justification – Qualified privilege – Fair comment – Defamation Act, 1963**

**False imprisonment – Malicious prosecution – Whether claimed for or established**

**Damages – Assessment**

**LINDO, J.**

### **Background to Claim**

[1] On July 18, 2012, at about 5:30 a.m., search and seizure operations by the Jamaica Constabulary Force’s Anti-Lottery Scam Task Force of the Major Organised Crime and Anti- Corruption Agency and the Jamaica Defence Force, under the command of Superintendent Leon Clunis, (Supt. Clunis) were carried out in the parish of Saint James. This was at the respective places of residence of Mr Michael Troupe (Mr Troupe) and Mr Sylvan Reid (Mr Reid), as well as at the home of one of Mr Troupe’s sons.

[2] At the material time Mr Troupe was a businessman, Justice of the Peace, Parish Councillor and Deputy Mayor for Montego Bay and he resided at Pitfour, Granville in the parish. Mr Reid was a businessman, Parish Councillor, and a deacon in his church, and he resided at Cornwall Court, in Montego Bay.

- [3]** Arising out of the raid at the residence of Mr Troupe, an illegal High Point Ruger 9mm pistol with one magazine and five rounds of ammunition were found in a bathroom. US\$10,000.00 cash, concealed in a section of a book with pages cut to fit the size of the bills and J\$380,000.00 cash, found inside an inoperable computer, among other items, suspected of being used in lottery scamming, were also seized. Mr Troupe and his son Jevaughn were arrested and charged for the offences of Illegal Possession of Firearm and illegal possession of ammunition, while another son of Mr Troupe, Dwight, was charged with unlawful possession of property.
- [4]** Mr Troupe and his son Jevaughn appeared in the Western Regional Gun Court on July 25, 2012 and Mr Troupe was offered bail. Mr Troupe's son Jevaughn pleaded guilty to the offences of illegal possession of firearm and illegal possession of ammunition and on July 31, 2012, the charges laid against Mr Troupe were dropped.
- [5]** From the raid conducted at Mr Reid's home, laptops and other computers, cellular phones, flash drive, television set, a 2004 Toyota Harrier motor vehicle and documents relating to other motor vehicles were seized. Mr Reid was charged with unlawful possession of property. He remained in police custody until July 23, 2012 when he was offered bail. The case against him was dismissed before the commencement of the trial.
- [6]** The operation conducted at Mr Troupe's residence was video recorded by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and the video recordings of the arrest of Mr Troupe, and the visual likeness of Mr Reid, were broadcast on the television stations operated by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, Television Jamaica (TVJ) and CVM Television Limited (CVM) on the day the operations took place.
- [7]** Statements relating to the two operations were made by Supt. Clunis and then Commissioner of Police, Owen Ellington. Statements were made during the course of the police operations by Supt Clunis, and statements were made by Supt. Clunis

and by Commissioner Ellington, at a press briefing held at the Office of the Prime Minister later that day. The respective statements were published and broadcast by the 3<sup>rd</sup> Defendant in its Prime Time News broadcast and by the 4<sup>th</sup> Defendant in its Midday News and in its News Watch 8 newscast on the same day and certain words were said by the news reporters of the respective television stations in introducing the statements.

## **The Claims**

- [8]** On November 6, 2012, Mr Troupe instituted proceedings against the Defendants claiming: “damages, including aggravated, exemplary and constitutional damages, for defamation against the 1<sup>st</sup> Defendant, Leon Clunis ... and the 2<sup>nd</sup> Defendant Owen Ellington ... Damages for defamation against the 3<sup>rd</sup> Defendant TVJ ... and the 4<sup>th</sup> Defendant CVM TV ... Damages, including aggravated, exemplary and constitutional damages for false imprisonment against the 1<sup>st</sup> Defendant ... The Claimant claims further that by virtue of the utterances of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the publications of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants ... the Claimant suffered severe embarrassment and sustained damage. The 5<sup>th</sup> Defendant is sued in its capacity as the representative for the Government of Jamaica pursuant to the Crown Proceedings Act”
- [9]** The claim by Mr Reid, filed on June 20, 2013, mirrors that of Mr Troupe in substance, and will therefore not be restated.
- [10]** The Claimants allege that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants uttered and spoke defamatory words to the media with reference to them and that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants defamed them when they “irresponsibly caused the defamatory utterances and the words of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants along with comments from staff reporters ... and visual images of the Claimant to be published ...”. They aver that the words uttered by Supt Clunis and Commissioner Ellington and published by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants “in their plain meaning or by way of innuendo were defamatory”.

## The Defences

- [11] The 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants on December 28, 2012 and October 7, 2013, respectively, filed joint Defences in which they denied that the arrest of the Claimants was made falsely and maliciously, and stated that an investigation linking the Claimants to lottery scamming activities led to a seizure and search operation at their homes.
- [12] These Defendants admit that the 1<sup>st</sup> Defendant spoke the words complained of, but indicate that the 1<sup>st</sup> Defendant was justified in uttering the words as they are true in substance and in fact. In the Defence to the claim by Mr Reid, they deny that the words ascribed to the 1<sup>st</sup> Defendant were published “of and concerning the Claimant” and state that the words were fair comment on a matter of public interest. They also admit that the 2<sup>nd</sup> Defendant uttered the words complained of, but deny that the words were defamatory or that they caused damage to the reputations of the Claimants.
- [13] They also pleaded, *inter alia*, that, if necessary they “will rely on Section 7 of the Defamation Act”. They deny that the arrest of the Claimants was false, malicious, oppressive, arbitrary and unconstitutional and also deny that the 1<sup>st</sup> Defendant and his officers abused their powers as police officers.
- [14] The 3<sup>rd</sup> Defendant’s Defences were filed on December 28, 2012 and October 15, 2013. It admits to broadcasting and publishing the words of the 1<sup>st</sup> Defendant, denies that the words complained “bore or were understood to bear any defamatory meaning”, and states that the words are true to the extent that Mr Troupe was subsequently charged for illegal possession of firearm and illegal possession of ammunition. The 3<sup>rd</sup> Defendant contends that the words were published on an occasion of qualified privilege or were matters of public interest and the reportage was fair comment on matters of public interest.
- [15] In relation to Mr Reid, the 3<sup>rd</sup> Defendant states that the words complained of did not refer to him and are true to the extent that he was subsequently charged for

unlawful possession of property. It adds that the words were published on an occasion of qualified privilege and or are matters that the public had an interest in hearing and viewing.

**[16]** The 4<sup>th</sup> Defendant's defences to both claims were filed on February 15, 2013 and October 9, 2013, respectively. They aver that the publication of the statements was not defamatory of the Claimants and that the published words were true or substantially true, or in the alternative, they were fair comment on matters of public interest and the circumstances of the publication were protected by qualified privilege. The 4<sup>th</sup> Defendant admits that its videographer was 'alerted' to the existence of the raid in Cornwall Court, 'learnt' of the operation at Pitfour, and attended Pitfour and recorded the scene. It denies that the published words complained of were defamatory of the Claimants either in their plain meaning or by way of innuendo and also place reliance on the provision of Section 7 of the Defamation Act.

**[17]** No Reply was filed by the Claimants to the Defendants' defences.

**[18]** Both claims were consolidated by order of the court made on April 11, 2016 and were tried together. At the trial, the Claimants and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants gave evidence on their own behalf and did not call any other witnesses. The 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants did not present any evidence in support of their defence.

### **The Claimants' Case**

**[19]** Mr Troupe's witness statement dated April 18, 2018 and filed May 14, 2018, was allowed to stand as his evidence in chief after portions of paragraphs 3, 6, 31 and 41, and paragraphs 37 and 48 were struck out as offending the rule against hearsay.

**[20]** He states, among other things, that he was handcuffed, placed in the back of a truck, taken to Barnett Street Police Station and later remanded at the Freeport Police station where he was in custody from July 18, 2012 to July 25, 2012, and

was offered bail which he took up on July 31, 2012. He states further that he was put before the Western Regional Gun Court where he pleaded not guilty to the charges, his son Jevaughn pleaded guilty and was sentenced, and he, Michael Troupe, was discharged.

- [21]** Mr Troupe also says that the 1<sup>st</sup> Defendant uttered words which were untrue and defamatory of him and that the 2<sup>nd</sup> Defendant, in his capacity as Commissioner of Police, made statements which were defamatory of him at a press briefing. He says the words were published by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and “in causing the publishing of the defamatory words, utterances and images, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants acted irresponsibly ...”. He adds that the statements have seriously damaged his personal and professional reputation and he has suffered considerable distress, embarrassment and mental anguish.
- [22]** In cross examination, Mr Troupe denied that the statements attributed to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were opinions and agreed that lottery scamming was having an adverse effect on the reputation of Jamaica. He said that after the incident, he was re-elected to serve on the Parish Council in 2016 and that “through thick and thin his people never left him out”. He also agreed that the Police are always interested in finding illegal guns and stated that he assisted the police to stamp out the scourge of lottery scamming and has always had a good relationship with them.
- [23]** He agreed that he did not hear anyone tell any member of the media to come to his house at 5:30 that morning but that he heard the police on location call TVJ. He also said that he asked for the search warrant, the police “hold a piece of paper, like this, (gesticulating) in his hand”. He said he could not agree that it was a search warrant because he did not see it or read it. He also agreed that Supt Clunis’ statement about ‘targeted locations’ was in relation to the search warrant. In relation to the statements attributed to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, he said they were opinions, described Kerlyn Brown’s statement as one of fact, the statement of Supt Clunis as a comment, and the statement by Fabia Phillips Lawrence as an opinion. He said the police did not act “unconstitutionally”.

- [24]** In re-examination, he said he knew nothing about the book in which money was found, until he was told, and also said he had not seen the search warrant before it was shown to him in court.
- [25]** Mr Reid's witness statement dated March 14, 2018 stood as his evidence in chief after portions of paragraphs 6, 13, 14 and 31 were struck out as being hearsay.
- [26]** He states that at the time the police came to his house his entire family was at home and he was approached "in an aggressive manner" by the 1<sup>st</sup> Defendant, his house was searched, items and documents were taken by the police. He says further that he was taken to the Military Camp at Flankers where he was handcuffed and from there he was taken to the Freeport Police Station where he was held until July 25, 2012 when he was offered bail by the court and a "travel ban was placed on [him]". He adds that he was charged for "illegal possession of property", and he attended court on several occasions and was discharged.
- [27]** Mr Reid also states that during the course of the raid at his residence the 1<sup>st</sup> Defendant uttered words which were untrue and "defamed [him]", that the words of the 1<sup>st</sup> Defendant and his (Mr Reid's) visual likeness were broadcast by the 3<sup>rd</sup> Defendant and that the 2<sup>nd</sup> Defendant uttered words which were defamatory of him at a Press Briefing which were broadcast by the 4<sup>th</sup> Defendant.
- [28]** In cross examination, he said the Honda Civic car taken from his premises belonged to his wife. He denied that he refused to speak to the police officers, indicating that he spoke with them throughout the operation and adding that the ladies [officers] were 'generous'. He said he was instructed not to use his phone but at one point when his phone rang, he was allowed to answer it. He also said that no question was asked by the police in relation to the items taken and he could not recall if he was requested to sign any document in relation to the items. He stated that after he was taken to the 'soldier camp' and kept there about three hours, he was taken to the Freeport Police Station.



**[29]** He also said that the vehicles with 'Anti Lottery Task Force' written on them were visible to the public, including the journalists who were present. He said he could not recall seeing himself in any of the 'clips'. When it was suggested to him that CVM was not at the scene at his house taking footage, he said there were journalists outside and he could not tell who were there and when confronted with his evidence in chief in which he said that CVM camera crew were there, he said "If that's what the statement says, that's what happened ..."

### **The Defendants' Case**

**[30]** The 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants provided no witness statements and presented no evidence at the trial.

**[31]** Mr Milton Walker gave evidence on behalf of the 3<sup>rd</sup> Defendant. His witness statement dated May 24, 2018, stood as his evidence in chief. His evidence is that the initial reports in the matter were gathered by Sandy Shippy on location in Montego Bay, and Vashan Brown at a press conference at Jamaica House. He states that the broadcast concerns a matter of public interest "that is, lotto scamming", which has attracted international attention and that the area where the raid took place was regarded as "the so called epicentre of the lottery scam at the time when the broadcast and publication was aired".

**[32]** He makes reference to a documentary by Don Rather, "a former United States Network Anchor and managing Editor (CBS Network)", and states that the steps taken to gather and present the information were responsible and fair. He adds that the editorial team of TVJ took a decision to air the footage on the basis that it was in the public interest.

**[33]** He states further that the words spoken by the 1<sup>st</sup> Defendant which were broadcast and aired are "true to the extent that Mr Troupe was charged at a future date for illegal possession of firearm and illegal possession of ammunition" and that the words published were "... on an occasion of qualified privilege ...". He concludes

that, in the circumstances, the 3<sup>rd</sup> Defendant's report was "fair and an (sic) accurate and in keeping with the tenets of responsible journalism".

- [34]** When cross-examined by Mr Green, he said he has been a journalist for twenty-six years and that it is part of his duties to make editorial judgments. He said he did not think he specifically wrote the newscast in question but "would have looked over some of the scripts on that day". He admitted that at the time of the broadcast of Prime Time News "the police officers told us that the men were arrested and they were detained".
- [35]** He said he could not recall if there was a midday broadcast on TVJ as it relates to the incident and agreed that "[his] crew" was early on the scene at Mr Troupe's house, although he did not know the specific time. He said that at the time of the broadcast of Prime Time News, TVJ had knowledge that the investigations were incomplete, and that when they went to broadcast, "our information at the time" was "that the gentlemen were charged". He then admitted that TVJ published the story even without knowledge that charges had been laid.
- [36]** He disagreed that little investigation was done about the circumstances of the case before publication, and said "we reported on what the police did from a specialist task force dealing with a major scourge in the city of Montego Bay...it also involved two public officials and that in and of itself is a major issue ... in terms of corruption and issues like that".
- [37]** When asked if care was exercised in the presentation of news about persons who are being charged, Mr Walker said "... one should be careful ... that the facts are correct, that you get the story, all elements of the story ... ". He agreed that there are certain circumstances where it would be prudent and wise not to show the faces of persons before they are taken to court and said he did not think it was prudent, in this case, not to display the facial images of the Claimants. In response to whether he or any of his staff sought to find out what charge was to be laid

against the Claimants, Mr Walker said from his recollection the police “were not forthcoming with that particular information ...”

- [38]** It was suggested to Mr Walker that the way the story was presented gave the impression that the charges to be laid were lottery scamming charges and he said that was an opinion. He then said, “I can’t comment on it. As for Mr Troupe, I think that could be, based on what the police, the senior police officer Clunis, said, the head of lottery Scam Task Force said that he could be, yes”.
- [39]** Mr Walker said TVJ made an effort to get the Claimants’ side of the story and did not, as they were in custody. He agreed that the allegations were serious and he identified the police and Supt Clunis, “the main one”, as the source of the information. He described Sandy Shippy’s statement as a fair reflection of the day’s activities and the statement of Vashan Brown, he described as a journalistic comment. He said the reference to “big wigs” in the statement would “possibly” include Mr Troupe and Mr Reid and the reference to “top-tier actors” was mere repetition of what the Commissioner said. He added that for the purposes of the story, he would accept that the Claimants had attracted the attention of the Task Force. He denied that the presentation of the story and the editorial comments would have brought the Claimants into disrepute.
- [40]** In seeking to clarify his evidence where he had said “that is not my information that the men will be charged”, he indicated that his information was that they would be charged.
- [41]** The witness statement of Michelle Thomas, the 4<sup>th</sup> Defendant’s witness, was accepted as her evidence in chief. She states that she was involved with others in the broadcast relating to the arrest of the Claimants. She identifies Kerlyn Brown as the News Anchor and Damien Phillips, David Brown and herself as the reporters “who contributed to the Newswatch at 8:00 p.m. on the 18<sup>th</sup> July, 2012 which is the major newscast of the day”.

- [42] She states that the lead story of the evening was centred on the arrest of Mr Troupe, and it referred to the arrest of “another local government representative Mr Sylvan Reid, Councillor for the Salt Spring Division...” She adds that she was assigned to cover the Post Cabinet Press Briefing and states that journalists fielded questions “in order to get an update on the story of the arrest of Mr Troupe and the others earlier on the day”. She states further that it is customary for reporters to write the introduction to the news stories reported by them, but she could not recall if she wrote the introduction to the news story she reported on July 18, 2012.
- [43] In cross examination, she agreed that it is a matter of significance and importance to her that she prided her organization as being “hard-hitting” but that in the coverage of the matter relating to the Claimants she would say they were “comprehensive”.
- [44] When shown the visual image of Mr Reid in the news report, she said she was not able to say when the photograph was taken and explained that it was a file footage. She said by virtue of the report, five persons were arrested. She agreed that there was no visual likeness of the other persons presented in her report. She said that the real story was about Mr Troupe and Mr Reid, “elected representatives” and that at the time of publication she was not sure whether they were charged. She said the presentation of Mr Troupe handcuffed in the back of a police truck was “a fair and accurate representation of what was happening”.
- [45] She recalled that Damion Phillips “was the voice doing the story”, and said that he may not necessarily have been in Saint James at the time. She stated that the use of the term “target locked” was referring to the fact that operatives from specialized units within the Jamaica Constabulary Force had made an arrest pursuant to some investigations. She agreed that the phrase “embroiled in a scandal” were words of the reporter, and said “it sounded like” it referred to Mr Troupe. She also stated that in journalism, they are guided by certain rules of ethics and “we do not comment outside of what is reported within, say a matter in the court...”.

- [46] She said she viewed it as appropriate to present the statement by Supt Clunis before the Claimants were charged as “it gives some insight into the police’s investigations so it would have provided some context to the fact of the arrest...” She denied the suggestion that the report “in totality” focussed on sensationalism rather than facts. When it was further suggested to her that it would not be appropriate in circumstances where the men had not even been charged, she said, among other things, “even the government thought the issue was of such significance they invited the head of the Constabulary Force to be part of the press briefing to update the media core and the public...”
- [47] She agreed that the Commissioner’s statement and the media briefing “were fixed and attached to the arrest of Troupe and Reid” and denied that the presentation of the story by CVM was salacious and not intended to give a fair and balanced presentation of the facts.

### **Submissions**

- [48] At the end of the hearing, Counsel for the respective parties were requested to file written submissions which they did. On June 14, 2018 all Counsel attended court at which time they made oral submissions to augment the written submissions.
- [49] I must commend Counsel for all the parties for the wealth of authorities submitted to the court which greatly assisted in the preparation of this judgment. I will refrain from restating these submissions but will, where I find it necessary, make reference to some aspects of the submissions during the course of the judgment.

### **The Issues**

- [50] There is no dispute that early morning operations were carried on July 18, 2012 and that the Claimants and other persons were arrested. It is also not in dispute that there were statements made by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and there were broadcasts by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants along with publication of the statements made by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants arising from these operations.

[51] It therefore falls to be determined whether the statements and reports were capable of being defamatory of the Claimants, whether they were defamatory, whether the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants defence of justification can avail them and whether the reports of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were published or broadcast on an occasion of qualified privilege or as matters of fair comment on matters of public interest.

[52] There are also issues of whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are proper parties to the claim, whether the Claimants were falsely imprisoned and/or maliciously prosecuted and whether they are entitled to damages, including aggravated, exemplary and constitutional damages and, if so, the quantum of damages to be awarded. For completeness, I will also address the issue raised by the Claimants, that in the absence of evidence put forward by the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants, judgment should be entered against them and damages assessed.

[53] I will address the issue of whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are proper parties to the claim first.

**Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are proper parties to the claim**

[54] Section 3(1) of the **Crown Proceedings Act** provides as follows:

*“3-(1) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject-*

(a) *in respect of torts committed by its servant or agents;*

(b) *.....*

(c) *.....*

*Provided that proceedings shall lie against the Crown by virtue of paragraph (a) in respect of any act or omission of a servant or agent of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action in tort against that servant or agent or his estate.”*

[55] In the Jamaica Court of Appeal case of **The Attorney General v Gladstone Miller**, (unreported) Supreme Court Civil Appeal No 95/1997, judgment delivered May 24, 2000, Bingham JA, said at page 9:

*“The Crown Proceedings Act was passed into law in England in 1947. It was brought into operation in Jamaica on February 1, 1959. It made the Crown liable for the tortious acts of its servants or agents done in the course of their employment. In so doing it extended the principle of vicarious liability as between private persons falling into the category of master and servant or employer and employee ... Although claims in tort could still be brought against the Crown servant or employee alone, once it is established that he was acting within the course or scope of his employment, the proper defendant to be sued was the Attorney General, he being the official representative of the Crown by virtue of his office. A suit against the servant or employee alone therefore would be meaningless, as the Attorney General could enter appearance and take over the defence of the suit. It is in this vein that Section 13 (2) of the Crown Proceedings Act mandates that “Civil Proceedings against the Crown shall be instituted against the Attorney General.”*

[56] The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are servants or agents of the Crown, and the claim against them concerns a matter which occurred while they were “acting ... as members of the Jamaica Constabulary Force”. As servants of the Crown they are therefore not required to be joined as parties to the claim. The claim against the 1<sup>st</sup> Defendant, in particular, is for false imprisonment as well as malicious prosecution and for defamation. With respect to the 2<sup>nd</sup> Defendant, the claim is for defamation only, based on words uttered by him at the Press Briefing.

[57] As stated above, pursuant to the **Crown Proceedings Act**, the Crown is liable for all tortious acts committed by its servants or agents when acting as such (see s.3(1)(a)) and the Attorney General is the proper Defendant in civil proceedings brought against the Crown or its servants (see s.13(1)). The Crown’s liability for the tortious actions of its servants and or agents is however, not without limitations. The Crown is only liable for those actions committed in the course of the servant’s or agent’s employment.

[58] In the instant case, the statements of case reveal that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were acting in the course of their employment at the time the alleged tortious acts

were committed. At the initiation of a claim, however, and before a Defence is filed, a party may not be able to say, with any degree of certainty, what the other side's response, if any, will be. The Attorney General could have made the response of either admitting that the police officers were at the time acting as servants or agents of the Crown or denying the allegations, by stating that they were on a frolic of their own. In light of this uncertainty in response from the Defendants, it is not unreasonable nor is it unusual for the Claimants to initiate the claims in the manner they did, by naming the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as parties.

**[59]** Further, I note that there is a joint Defence filed on behalf of these Defendants and all three parties were represented during the proceedings. There would be no independent costs incurred by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. I cannot therefore agree with the submission, made on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, that there should be judgment in their favour against the Claimants, with costs, as they are not properly before the court.

**[60]** I believe it would be unconscionable for this court to grant judgment in their favour and award costs to them on the basis that the Attorney General is the proper Defendant to be sued in relation to acts committed by Crown's servants or agents, in the execution of their duties. If the Attorney General is held vicariously liable for the acts of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, being servants of the Crown, this would amount to an absurdity.

**Whether the court should proceed to assess damages against the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants for failure to file witness statements**

**[61]** It was submitted on behalf of the Claimants that the words uttered by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are defamatory and they have not contested it and "the effect of this concession is that the court has no need to apply thought as to whether the words are defamatory or not...no evidence having been given means that the court will proceed to assess the damages against the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants as no witness statements have been served by them ..."



[62] This submission is inconsistent with fundamental legal principles. The Claimants having filed their claims, were met with a defence by the Defendants. The Claimants have the burden of proving their case on a balance of probabilities and this is whether or not the Defendants opt to adduce any evidence. The rule remains “he who asserts must prove”.

**Whether the statements of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were defamatory, and whether the subsequent reports and journalistic comments by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were defamatory of the Claimants**

[63] A statement is defamatory if it tends to harm the reputation of another as to lower him or her in the estimation of right-thinking members of society, generally, or to deter third parties from associating or dealing with him; or cause people to shun him. (See **Sim v Stretch** [1936] 2 All ER 1237). In order to succeed in a claim for defamation, a claimant must satisfy the court that the words, by way of innuendo or otherwise were defamatory; the words referred to him and the words were published.

[64] It is well settled that the test to be applied in determining the meaning of words in a libel action is what the words would convey to the ordinary man. The court is therefore required to consider the statements from the perspective of how an ordinary, reasonable man hearing them, would interpret them. (See **Lewis v Daily Telegraph** [1964] AC 234, 258 (HL))

[65] The Claimants contend that the words complained of meant, and were understood to mean, *inter alia*, the following:

*“a) that the Claimant ...was involved in illegal activities linked to the Lottery Scam either directly or indirectly the said activities including the following: ...corruption; fraud; extortion; money laundering; murder; racketeering; ...*

*b) ... the Claimant was not fit to occupy the post...and used the post for illicit activities;*

*c) ... the Claimant used ill-gotten gains from Lottery Scam in campaigning and securing votes in his election as Councillor;*

*d) ...*

e) ...k)”

- [66] In their evidence in chief and in cross examination, the Claimants also sought to indicate what they say the words meant, and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants’ witnesses were questioned as to what they say the words complained of meant.
- [67] In determining what the ordinary and natural meanings of the words are, I accept the view that I do not need to have regard to evidence adduced by the parties as to how they were understood by them, or as to how they believe people understood the words to mean. It is my understanding that as a tribunal of fact, I must determine the sense in which the words would reasonably have been understood in light of generally known facts and meaning of words.
- [68] Lord Morris of Borth-y-Gest, in giving the decision of the Privy Council in **Jones v Skelton** [1963] 1 WLR 1362, noted that in deciding whether words are capable of being defamatory, the court will reject meanings which can only emerge as a product of some strained or forced or utterly unreasonable interpretation while in **Lewis, supra**, Lord Devlin said “It is the impression conveyed by the libel that has to be considered and not the meaning of each word under analysis ...”
- [69] If the court decides that the words are capable of a defamatory meaning, the court must determine whether an ordinary intelligent and unbiased person would understand them as words of disparagement and as allegation of dishonest and dishonourable conduct.
- [70] Lord Nicholls in the Privy Council decision of **Bonnick v Morris, the Gleaner Co. Ltd and Allen** [2002] UKPC 31, at paragraph 9 of the judgment, in giving an explanation of the approach to be taken in determining whether a statement is capable of bearing a defamatory meaning, said:

*“...as to meaning...The principles were conveniently summarised by Sir Thomas Bingham in **Skuse v Granada Television Ltd**....In short, the court should give the article the natural and ordinary meaning it would have conveyed to the ordinary reasonable reader... reading the article once. The ordinary, reasonable reader is not naïve, he can read between the lines, but he is not unduly suspicious or avid for scandal...He would not select*

*one bad meaning where other, non-defamatory meanings are available. The court must read the article as a whole, and eschew over-elaborate analysis and, also, too literal an approach. The intention of the publisher is not relevant...*

[71] I am mindful that it is a two-part test as explained by Bollers J, in **Ramsahoye v Peter Taylor and Co. Ltd** [1964] LRBG 329. At page 331 of the judgment he said:

*“In a trial with judge and jury, the judge’s function is to decide whether the words are capable of being defamatory. If he answers in the affirmative, it is then for the jury to decide whether they are defamatory in the circumstances of the particular case. Where trial is by judge alone as is almost invariably the case in Commonwealth Caribbean jurisdictions, the judge must perform both functions”*

[72] As a judge sitting without a jury in this matter, I heed the words of P. Williams J., (as she then was) in the case of **Percival Patterson v Cliff Hughes and Nationwide News Network Ltd.**, [2014] JMSC Civ 167, (unreported) judgment delivered October 30, 2014, where at paragraph 34, she states:

*“It is considered particularly important therefore that when sitting alone in matters such as this, the judge has to resist the urge of using the ‘judicial mode and manner’ in determining the meaning of the words used”.*

[73] I will therefore now examine the words complained of and note that there is no dispute between the parties in so far as the statements and publications are concerned.

[74] The following statement, made by the 1<sup>st</sup> Defendant, in his capacity as head of the Jamaica Constabulary Force Anti-Lottery Scam Task Force during the course of the operation was broadcast on the Prime Time News programme of the 3<sup>rd</sup> Defendant which was aired on July 18, 2012:

*“...what I can tell you is that we are guided by the Proceeds of Crime Act and from the intelligence that led us to the targeted locations, there is no question as to whether or not charges will be laid down the road, charges will be laid that I can tell you”*

[75] Prior to the presentation of this statement, the TVJ news reporter Michael Sharpe had indicated that the subject matter “has made headlines all day” and Sandy Shippy, the reporter who was on location of the operations in Montego Bay,

reported, among other things, that “Sylvan Reid was also detained”. I believe the introduction would lead any reasonable right thinking member of the Jamaican society, and not necessarily one avid for scandal, to pay great attention to the broadcast.

[76] Given their plain and ordinary meaning, these words, which I find to be assertions of fact, are imputing criminal action on the part of the Claimants. I note the emphasis on “charges will be laid”. I find that as the security forces specialized task forces were involved in an early morning raid at the homes of the two Claimants, this statement is capable of being defamatory in the mind of a reasonable man. The 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants admitted in their defence that the targeted locations” meant or included Mr Troupe’s Pitfour home where a raid was conducted. I accept the explanation of the statement as given by these Defendants and also accept that the Lottery Scam Task Force is in fact guided by the **Proceeds of Crime Act**.

[77] The search and seizure operation at the Claimants’ houses were part of ongoing investigations of the Claimants and others suspected of being involved in lottery scamming, items were seized from their homes and charges were laid against them. The ordinary and reasonable man is entitled to take into account the broadcasts in their entirety and the circumstances surrounding them and draw inferences from them.

[78] The 1<sup>st</sup> Defendant was making direct reference to the Claimants and I therefore find that the words are not only capable of being defamatory but are in fact defamatory of the Claimants. I am of the view that the general public may have been misled however, into believing that the charges against the Claimants would fall under the **Proceeds of Crime Act**.

[79] The statement complained of as made by the 2<sup>nd</sup> Defendant, the Commissioner of Police is as follows:

*“The anti-lottery task force was set up to deal with key actors... Once an individual attracts the attention of the task force, they are classified among the top-tier actors within the scamming operations”*

**[80]** This statement is merely a portion of what was said by the Commissioner of Police at the press briefing held at the Office of the Prime Minister and was in answer to questions about the operations carried out by the Anti Lottery Task Force. The statement was broadcast on the news programme News Watch 8, of CVM TV.

**[81]** As guided by the authorities, I must assess the statement as a whole and in the context of how they were broadcast. The Commissioner had continued as follows:

*“All our operations are conducted with the view to get evidence on which we can base successful prosecutions. So, the fact that it is an ongoing operation suggests that we are still in the process of evidence gathering. At the end of it all we will decide whether or not we have sufficient evidence on which to place individuals before the court and hopefully get successful prosecutions.”*

**[82]** I find that this statement taken as a whole, is capable of being defamatory. In the absence of evidence from the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants, I am unable to assess the depth of the investigations undertaken prior to the search and seizure operations on the day in question. I am of the view that the ordinary and reasonable man who is of ordinary intelligence could find the natural and ordinary meaning of the words as stated to be referring to criminality on the part of the Claimants. The words “key actors” and “top tier actors within the scamming operations”, when considered in the ordinary and natural sense, connote involvement in criminality.

**[83]** It is clear that the Claimants attracted the attention of the Task Force and at the time they were taken into custody they were classified as “top-tier actors”. The public would have been alerted to the fact that the men caught the attention of the task force having been part of their investigations related to lottery scamming.

**[84]** Although there is no direct reference to the Claimants, the reference to individuals who attract the attention of the task force in that context, is of a small group of persons that it is reasonable for either of the Claimants to assert that reference was to him. At the time of making the statement the Claimants were already in the

custody of the police. I find that the reasonable man would therefore attribute these statements to the Claimants. I believe that based on the context in which the words are stated, the natural and ordinary meaning of the words would lead the reasonable man to believe the Claimants were “top-tier actors” or “key players” in the lottery scam matter which was under investigation and that they would be charged for their involvement in the lottery scam and have their assets seized. I therefore find this statement to be defamatory.

**[85]** In the CVM Midday News programme aired on July 18, 2012, the following words were spoken by Fabia Phillips-Lawrence:

*“Two political representatives are among the latest to be caught in the lotto scam dragnet as the task force continues its sweep across sections of the western end of the island. Arrested are Michael Troupe the Deputy Mayor of Montego Bay who is also a Councillor for the Granville Division and his two sons, also in custody is Sylvan Reid, the People’s National Party representative for the Salt Spring Division...”*

**[86]** At the time of the publication of this statement, the Claimants were in the custody of the police. The statement also referred to the admitted fact that an illegal gun was found on the premises of Mr Troupe and that substantial amounts of money were taken from his premises. The news item identified the Claimants by name, and referred to the positions held by them.

**[87]** Giving those words their ordinary natural meaning, it appears to me that they are capable of being and are in fact defamatory. The use of the word “dragnet” in its natural and ordinary sense points to criminal activity. The average Jamaican would infer guilt on the part of the Claimants from the statement.

**[88]** In introducing the video recording containing statements of the 1<sup>st</sup> Defendant, the CVM Reporter, in News Watch 8 on July 18, 2012, announced:

*“...one superintendent is issuing a strong word of caution to other individuals in high places who may be associated directly or indirectly with the lottery scam”*

**[89]** The 1<sup>st</sup> Defendant said, *inter alia*,

*“...What I can tell you is where criminality exists I will be out there as long as I get the authority to go out there and storm it, I will do it. Politics has nothing to do with this, we do not think colour or partisan when we are going out there a deputy mayor, a Prime Minister, a Commissioner of Police is a member of society and my duly sworn duty is to deal with law and order, and criminality and wherever it exists I will be finding it and storming it”*

- [90]** The use of the words ‘other individuals in high places’, suggests that the Claimants are either directly or indirectly associated with the lottery scam. The words of the reporter which could be described as a comment, were made on the basis of known facts, which included the fact that the two Claimants had been held under circumstances where the police carried out a raid. At the time of reporting, there were allegations of the Claimants’ association with lottery scamming and the 1<sup>st</sup> Defendant identified “deputy mayor” and spoke to “criminality”. I therefore find that the words uttered by the 1<sup>st</sup> Defendant and the comment of the reporter were spoken of and concerned the Claimants.
- [91]** I also find the statement to be capable of being defamatory although the Commissioner appeared to have been making a general statement with which the populace could find comfort that all was being done to quell the lottery scamming, particularly in that section of the island. I note also that in cross examination, Mr Troupe agreed that when the security forces carry out operations, politics and colour should have nothing to do with it. However, I am also mindful that this statement distinctly highlighted the position ‘deputy mayor’ which is a direct reference to Mr Troupe, and although it denies the involvement of politics, in the context, it is only reasonable to find that it referred to the Claimants, being known political representatives.
- [92]** I cannot accept the 4<sup>th</sup> Defendant’s expressed view that the words were comments on known facts regarding ‘other’ individuals who may be associated directly or indirectly with either the lottery scam or with criminality or with both. I find that the words are capable of being defamatory and given their plain and ordinary meaning these words are imputing criminal action relating to lottery scamming on the part of the Claimants and are therefore defamatory of the Claimants.

- [93]** Notwithstanding the foregoing, I reject some of the inferences which the Claimants have averred in their statements of case. I am not of the belief that the ordinary person would have thought that the words meant they were directly or indirectly involved in murder or racketeering, for example. I am however satisfied that the words used by the Defendants were capable of at least some of the meanings which the Claimants pleaded and were in fact defamatory. It is my view that right thinking members of the Jamaican society would have concluded that the Claimants were involved in lottery scamming.
- [94]** When the television broadcasts are considered in the context in which they were made, and at the time they were broadcast, the only meaning that I believe could reasonably be ascribed to them is that the Claimants were involved in lottery scamming. There was nothing ambiguous about the broadcasts. Assertions of fact as well as comments were made by the reporters and in the case of the report by the CVM reporter Fabia Phillips-Lawrence the Claimants are named. The reasonable person viewing the newscasts who is 'not looking for controversy' and is 'neither unusually suspicious nor unusually naïve', would be of the view that the Claimants are involved in lottery scamming and would understand that the Claimants were arrested and would therefore surmise that there was a strong case against them, they having been taken from their homes, early in the morning, and items seized, some of which, admittedly, are used in lottery scamming. It is my view therefore that the broadcasts do not lend themselves to any non-defamatory meaning.
- [95]** The words in their natural and ordinary meanings were therefore defamatory of the Claimants because they have the effect of lowering them in the esteem of the public. The statements ascribe to them criminal conduct, in particular, involvement in lottery scamming.
- [96]** I therefore find that the Claimants have proved that the utterances of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the publication by the 3<sup>rd</sup> and 4<sup>th</sup> Defendant's as well as the comments and statements of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants' reporters would lower the



estimation of the Claimants in the eyes of right thinking people and are therefore defamatory.

- [97] Having determined that the statements made by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and broadcast by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, with their statements and comments, were capable of being defamatory and are defamatory, I will now examine the defences of justification and fair comment on a matter of public interest, raised on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants, and the defences of qualified privilege and fair comment raised by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants

### **Justification**

- [98] A claim for defamation cannot succeed if the statement complained of is true. The 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants have pleaded, *inter alia*, that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants uttered the words complained of, but that they are “justified in uttering the said words as they are true in substance and in fact ...”
- [99] In **Jasper Bernard v The Jamaica Observer**, (unreported), Supreme Court, CL2002B048, judgment delivered January 27, 2006, the court had this to say at paragraph 11, in relation to a plea of justification:

*“Justification is a plea that the defamatory words are true. Truth is a complete defence. To sustain such a plea, it is necessary to prove to the jury that the words were ‘true in substance and in fact’. Proof of the Defendant’s belief in the truth is not sufficient.”*

- [100] Part 69.3 of **the Civil Procedure Rules, 2002** provides that:

*“A defendant (or in the case of a counterclaim, the claimant) who alleges that*

*(a) in so far as the words complained of consist of statements of fact they are true in substance and in fact; and*

*(b) in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest; or*

*(c) pleads to like effect,*

*must give particulars stating –*

- (i) *which of the words are alleged to be statements of fact; and*
- (ii) *the facts and matters relied on in support of the allegation that the words are true.*

**[101]** The 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants have provided particulars in their statements of case in relation to the claim by Mr Troupe. They indicate, among other things, that “the Lottery Scam Task Force is guided by the Proceeds of Crime Act ..., several items were seized from the claimant’s home ... and forensic analysis on those items definitively point to the Claimant’s involvement in the lottery scam ... the Anti-Lottery task force was set up to deal with key players ... if ... an individual attracts the attention ... those individuals are classified among the top tier within the scamming operations”.

**[102]** In relation to the claim by Mr Reid, the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants “had a genuine belief that the Claimant was involved in lottery scamming” and in their particulars, state, *inter alia*, that “Lottery scamming has become a major crime in Jamaica and in particular in the parish of St James...”

**[103]** They have not shown on their pleadings, with sufficient particularity, which of the words complained of are statements of fact or on what they rely in support of their allegations that the words are true, save and except where they state that the “Lottery Scam Task Force is guided by the Proceeds of Crime Act” as was stated by the 1<sup>st</sup> Defendant.

**[104]** The gist of the particulars given by them is that the Claimants are involved in lottery scamming. Neither Claimant was charged for any offence related to lottery scamming or any offence under the Proceeds of Crime Act, for that matter. The particulars pleaded by the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants therefore do not support a finding that the words complained of are true and these Defendants have not provided any proof to satisfy the court that the defamatory words spoken by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are “true in substance and in fact”.

[105] In view of the foregoing the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants cannot avail themselves of the defence of justification.

### **Fair Comment**

[106] Section 8 of the **Defamation Act**, 1963 states as follows:

*“In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved”*

[107] Fair comment must be words which are stated as a comment on some fact. There must therefore be a statement with foundation of fact and then a comment given on that fact. The comment must be based on facts which are true and protected by privilege. If the facts on which the comments purport to be made are not proved to be true or published on an occasion of privilege, the defence of fair comment is not available.

[108] For the purposes of this defence, the Defendants need to show that the words complained of are comments and not statements of fact; that there is a basis of fact for the comments contained in the publication complained of and the comments are a matter of public interest.

[109] In relation to this defence, I find the dicta of Lord Denning in **London Artists Ltd v Littler** [1969] 2 QB 375 at 391 to be quite instructive. He said:

*“...In order to be fair, the commentator must get the basic facts right. The basic facts are those which go to the pith and substance of the matter: see **Cunningham-Howie v Dimbley** [1951] 1KB 360, 364. They are the facts on which the inferences are drawn – as distinct from the comments or inferences themselves. The commentator need not set out in his original article all the basic facts: see **Kemsley v Foot** [1952] AC 345, but he must get them right and be ready to prove them to be true.”*

[110] The authors of **Gatley on Libel and Slander**, 10<sup>th</sup> Edition, at paragraph 12.1, state the basis of the defence of fair comment to be that:

*“[t]here are matters on which the public has a legitimate interest or with which it is legitimately concerned and on such matters it is desirable that all should be able to comment freely, and even harshly, so long as they do so honestly and without malice”*

- [111] As to the public interest element in the case at bar, there is no dispute that the words ascribed to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants concerning the Claimants were on a matter of public interest.
- [112] It is also well established that the defence of fair comment is defeated if it is shown that the comment was actuated by malice and where a Defendant pleads fair comment (or qualified privilege) the burden of establishing malice is on the claimant and the claimant must plead same with supporting particulars. (See **Horrocks v Lowe** [1974] 2 WLR 282.)
- [113] In this case, the Claimants did not plead malice in relation to the statements ascribed to the Defendants in their statements of case save and except where, in their “particulars of unconstitutional action” they pleaded that the 1<sup>st</sup> Defendant “maliciously caused the Claimant to be exposed to media without cause and making statements about and concerning the Claimant that he either knew or ought to reasonably to have known was not true”. The Claimants also did not file a Reply to the plea of fair comment in the Defences, or to the Defences, generally. Even on the evidence led, there was no allegation of malice made or proved by the Claimants in relation to the offending statements.
- [114] There may be an implied joinder of issues on the averments in a defence, even if no reply is filed. The fact that there is a specific plea of fair comment, even in the absence of an averment on the part of the Claimants to negative the defence, I find it necessary to examine the nature of the words complained of to determine whether they constitute comment, as opposed to statements of fact, and if found to be comments, whether they can fairly be made on the facts to which they refer.
- [115] There may be words spoken which can constitute comment and are not expressions of opinion or assertions of fact and I accept the view that there is a

thin line between the published statements of fact and comment (See **The Jamaica Observer Limited v Dennis P. Chong** [2016] JMCA Civ 35).

- [116] The impugned words of the 1<sup>st</sup> Defendant, as broadcast by TVJ in its Prime Time News, in my estimation were factual statements as opposed to opinion or comments. Additionally, the words ascribed to Fabia Phillips-Lawrence, in the CVM midday news, in my view, can clearly be described as assertions of fact. I do not find that those words can reasonably be considered as comments. It has been shown by the evidence adduced that the Claimants were arrested and charged. I bear in mind however that the focus was on lottery scamming and that neither Claimant was charged with any offence related to lottery scamming. The words of the reporter in the CVM Newswatch Hour, I find to be comments made against the background of the statement made by the 1<sup>st</sup> Defendant.
- [117] Notwithstanding that the underlying matter was one of public interest, it is my view that TVJ and CVM had a duty to carry out reasonable investigations to ascertain whether they were true and although CVM was on the scene at Mr Troupe's premises, recording as it unfolded, they should have sought to verify the information prior to broadcasting, in relation to the specific allegations of criminal conduct of the Claimants, to provide themselves with some degree of protection.
- [118] No evidence was led by the Defendants to establish the truth of the words complained of and neither did they add any qualification to the effect that the men had been held on suspicion of being involved in lottery scamming. While I accept that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants are entitled to comment freely on matters of public interest, that right must be based on existing facts. Although there was no evidence of malice on the part of TVJ or CVM in their publications, even their defences refer to facts within the public domain and their broadcasts are understood as such.
- [119] Given the facts which would have been known by the Defendants at the time of the arrests and at the time of the broadcasts, as well as at the Press Briefing, it is my view that the words complained of cannot be regarded as fair comment. Fair

comment “does not extend to misstatements of facts however bona fide” (See **Gatley on Libel and Slander**). The facts stated were not proved to be true. The Defendants have therefore not shown that the defence of fair comment is open to them.

### **Qualified privilege**

[120] Lord Atkinson, in **Adam v Ward** [1971] A.C. 309, at 334, stated the position relating to qualified privilege as follows:

*“... a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes the communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.”*

[121] In assessing whether the Defendants can successfully rely on the defence of qualified privilege, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants having reported words uttered by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, I am mindful that it is settled law that mere repetition of a defamatory statement is not a defence and that each repetition constitutes a fresh publication.

[122] The defence of qualified privilege was discussed in the case of **Flood v Times Newspaper Ltd.** [2012] UKSC 11 where their lordships paid much attention to the principles to be applied when determining whether a publication is privileged, as articulated by the House of Lords in **Reynolds v Times Newspapers Ltd and others** [1999] 4 All ER 609.

[123] In **Reynolds**, Lord Nicholls expressed that the defence required a balance between two fundamental rights, freedom of expression and protection of reputation. At page 622d, of the judgment, his lordship recognized that:

*“Reputation is an integral and important part of the dignity of the individual...Once besmirched by an unfounded allegation..., a reputation can be damaged forever; especially if there is no opportunity to vindicate one’s reputation...For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive for the public good. It is in the*

*public interest that the reputation of public figures should not be debased falsely...*

[124] Lord Nicholls also expressed the view that the standard to be applied was similar to that required of responsible journalism, and he outlined some of the matters to be taken into consideration when determining if the defendant exercised the requisite journalistic skill and care. These include the seriousness of the allegations; the nature of the information and the extent to which the matter is of public concern; the source of the information; the steps taken to verify it; the status of the information; the urgency of the matter; whether comment was sought from the Claimant; whether the story had the gist of the claimant's side, the tone of the article and the circumstances of the publication, including timing.

[125] The case of **Jameel and Ors v Wall Street Journal Europe SPRL**, [2006] UKHL 44, which also examined and applied the case of **Reynolds**, outlines that in order to determine if a defence of qualified privilege can succeed it must be considered whether the subject matter was a matter of public interest, whether the inclusion of the defamatory statement was justifiable and whether steps taken to gather the information were responsible and fair. It was further expressed that the publisher is protected if he took such steps as a responsible journalist would take to ensure that what is published is accurate. Where it has been established that the published material is one of public interest, the test as to whether qualified privilege attaches is the test of responsible journalism.

[126] The test of responsible journalism had been explained by Lord Nicholls in the case of **Bonnick**, *supra*, at paragraph [23] thus:

*"...Responsible journalism was the point at which a fair balance is held between freedom of expression on matters of public concern and the reputation of individuals... It can be regarded as the price journalists pay for the privilege. If they are to have the benefit of the privilege, journalists must exercise due professional skill and care..."*

[127] A proper balance must therefore be struck between freedom of expression and the right of an individual to protect his reputation and as such it appears that in considering the question of qualified privilege, the issue of freedom of speech

becomes relevant. (See **Loutchansky v Times Newspapers Ltd.** [2002] 1 All ER 652.)

- [128] In determining whether the 3<sup>rd</sup> and 4<sup>th</sup> Defendants should be absolved from liability for having broadcast the statements which have been found to be defamatory of the Claimants, I will consider whether they have demonstrated that they took such steps as a reasonable journalist would have taken to ensure that the publication was accurate.
- [129] The serious allegations as would be understood by the reasonable television viewer are that the Claimants attracted the attention of the task force and were “caught in the lotto scam dragnet”. These were presented as facts by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and there is no indication as to what steps if any, were taken by them to get the Claimants’ account or that any comment was sought from the Claimants. In fact, the evidence is that no comment could be sought from the Claimants as they were in police custody. I cannot agree with the submission of Queen’s Counsel on behalf of the 4<sup>th</sup> Defendant when he indicates that the 4<sup>th</sup> Defendant, “without the benefit of Mr Troupe’s input, was able to present his side of the story”. The large crowd of persons boisterously advocating Mr Troupe’s innocence and their support for him cannot be said to have served the purpose of presenting his side of the story.
- [130] Further, there is no indication that even the very obvious step to verify what charges had been laid against the Claimants was undertaken. The tone of the publications in my view is not investigative and fell below the threshold expected of responsible journalism. The reasonable man would be convinced that the Claimants were involved in lottery scamming activities. This was a police operation conducted in the early hours of the morning in which the Claimants were taken from their homes in the full view of members of the public. The broadcasts were aired on TVJ at “prime time” as “breaking news” and on CVM on the midday news and the Newswatch Hour at 8 p.m.



- [131]** While I accept that it may have been difficult to interview the Claimants, as they were in police custody, I believe the public should have had the benefit of hearing their side, or, at the very least, their response to the proceedings. The broadcast by CVM included comments from persons present at the scene at Mr Troupe's premises, including the description of the arrest being described as "embarrassing" by some. It is clear that the publications did not contain the gist of the Claimants' side of the story.
- [132]** The Claimants expressed the view that the "clip" was not appropriate in the circumstances as it was hastily published, without due care. Miss Michelle Thomas, in cross examination, testified that CVM viewed it as appropriate to present the statement given by Supt Clunis to the public before charges were laid. She said, "It gives some insight into the police's investigations so it would have provided some context to the fact of the arrest". She however denied the suggestion that the report focused on sensationalism rather than facts and sought to emphasise that the fact that government invited the head of the Jamaica Constabulary Force on the same day, to a press briefing to update the media and the public about the operation, is proof that the matter was one of urgency. It is my view however, that this does not serve to prove urgency, but may well serve to show that the issues surrounded a matter of public interest and great national importance.
- [133]** Additionally, there is no evidence presented to show that there was any need for urgency in informing the public of this matter although it was submitted on behalf of the 3<sup>rd</sup> Defendant that the matter was urgent and "lit up the headlines nationally all day". I find that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were made aware of the raids being carried out and as such their representatives were early on the scene. I also find that their "urgency" in broadcasting and the presentation of the statements made by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant coupled with the actions of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants amount to "media sensationalism".

- [134]** There is no dispute that the subject matter was a matter of national public importance as it cannot be denied that the country had been suffering from major bouts of negative international press coverage touching and concerning the activities of criminal elements who were engaged in unlawful activities specifically designed to fleece persons overseas of their money. The statements of case of all the parties as well as the evidence presented, point to this. The impact of scamming was discussed in the 'Dan Rather Report' which was admitted in evidence. The Lottery Scam Task Force was established as a special unit of the Jamaica Constabulary Force to combat the issue and I find that based on the status of the Claimants, their reported involvement in lottery scamming would make the broadcast topical.
- [135]** Allegations of criminal conduct are serious and the fact that the Claimants are "elected representatives" in my view any allegation of criminal conduct on the part of such persons would be serious. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants had a duty to communicate information to the public at large and in their publication, the public was clearly misinformed as the Claimants were not charged for any offences related to lottery scamming. "No public interest is served by publishing misinformation".
- [136]** Evidence given on behalf of the 3<sup>rd</sup> Defendant, is that information came from the police and was being relayed by a senior officer who was the head of the Lottery Scam Task Force. The witness Mr Milton Walker, described the source of the information as "generally, ... a trusted source." Reporter Sandy Shippy was at the scene where one of the police operations was being carried out and she reported what was taking place as it unfolded. This was at about 5:30 a.m. I accept as true the evidence of Mr Troupe that the police called TVJ personnel, as well as sought to ensure that there was video recording of the operation.
- [137]** Mr Walker had disagreed, in cross examination, that little investigation was done about the circumstances before publication. He said "We reported on what the police did from a specialist task force charged with dealing with a major scourge in

the city of Montego Bay ... it also involved two public officials”. He later said “that’s not something we would do”, in response to the question as to whether they carried out any investigations before broadcasting the statements.

**[138]** When the reports of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants are examined in their entirety, the investigatory status of the information was indicated on more than one occasion. The midday report of CVM referred only to the arrest and detention of the Claimants. In cross-examination, the witness for the 3<sup>rd</sup> Defendant agreed that TVJ had knowledge that the investigations were incomplete, based on what the Commissioner of Police said at the press conference.

**[139]** The 3<sup>rd</sup> and 4<sup>th</sup> Defendants published actual events as they unfolded at the home of Mr Troupe and provided a clip of the visual likeness of Mr Reid when the information in relation to his arrest was being broadcast. The report of CVM distinctly states that the men were “caught in the lotto scam dragnet” and were arrested and that a “strong word of caution” was being issued to “other individuals in high places”. The broadcast by TVJ was in relation to “intelligence” having led the task force to “the targeted locations”. The 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants admitted that to have meant or included Mr Troupe’s Pitfour home. All of this, in my view, shows that the broadcasts were ‘sensationalist’ and I therefore agree with the submissions of Counsel for the Claimants in that regard.

**[140]** I find that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants did not observe the tenets of responsible journalism so as to be able to place reliance on the defence of ‘Reynolds privilege’. They have not shown that they carried out any, or any reasonable investigations to ascertain whether the statements made by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and reported by them were in fact true and neither was any evidence presented by them that they investigated whether the Claimants had committed offences related to lottery scamming. It was not sufficient in my view for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to focus solely on the fact that the subject-matter was one of great public interest when the words used by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, and the comments made by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, clearly accused the Claimants of criminality, in

particular, lottery scamming. I believe it is reasonable to assume that if the 3<sup>rd</sup> and 4<sup>th</sup> Defendants had carried out investigations they would have unearthed information which shows that the Claimants, although arrested, were not charged in relation to lottery scamming.

[141] Having examined this case as against the factors set out by Lord Nicholls in the case of **Reynolds**, I hasten to mention that guided by the Privy Council decision of **Seaga v Harper** [2008] UKPC 9, I am satisfied that these factors are not tests which the publication has to pass.

[142] Although the subject matter was clearly a matter of public interest there was no need for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to hastily broadcast it without first verifying the accuracy. The fact that a subject such as lottery scamming is a matter of public interest also, does not, in my view, automatically make the publication of that subject, in the public interest. (See Lord Hobhouse, in **Reynolds**, *supra*, at 658e)

[143] I conclude that in order for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to avail themselves of the defence of qualified privilege, they would have had to establish that they acted in accordance with the tenets of responsible journalism and that they had a duty to publish the words complained of in the public interest, and the public had an interest in receiving it. This in my view would have necessitated them putting forward in their statements of case and in the evidence presented, details of facts they intended to rely on to show that they acted in accordance with those tenets. Their failure to state any enquiries made to verify the truth of the publication also in my view, leads to a denial of privilege.

[144] I therefore agree with the submissions of Counsel for the Claimants that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants failed to satisfy the requirements of responsible journalism. I also agree that the presentation of the story by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants along with the editorial comments brought the Claimants into disrepute. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants cannot rely on the defence of qualified privilege as there is no duty to publish or broadcast charges of criminality to the public especially if they are not

properly investigated or even made the subject of sufficient enquiry and where the comments of the Claimants were not sought. The excuse that the Claimants were in custody in my view is not sufficient and only serves to show that no effort was made to get their side of the story.

[145] The publications were clearly false in so far as the ordinary television viewer having seen them would have been led to believe that the Claimants were arrested for involvement in lottery scamming. They were not substantiated and no steps were taken by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to verify or confirm the statements complained of before broadcasting them to the public.

[146] In the Jamaica Court of Appeal case of **CVM Television v Fabian Tewarie**, (unreported), Civil Appeal No 46/2003, judgment delivered 8 November 2006, Panton P, noted at page 7 of the judgment that:

*“...there is no duty to publish inaccuracies. There is certainly no duty to publish a story that gave false details... A [newspaper]...takes unto itself the duty of reporting facts and events. It may also provide commentaries but such commentaries must be on facts. It has no duty to report falsehoods and inaccuracies...freedom of expression does not allow one to injure another’s reputation.”*

[147] In view of all the foregoing, I do not find that the requirements of the defence have been made out by either the 3<sup>rd</sup> or 4<sup>th</sup> Defendants in the circumstances. I fail to see that they had to broadcast the police operation in the way they did, as “leading stories” while it is clear that the matter was still being investigated and they did not give the Claimants an opportunity to tell their side of the story.

[148] Facts as opposed to opinions are stated by the reporters and the Claimants are named, or where not named, are easily identifiable as the Claimants. The reasonable person would understand that the Claimants were arrested and would surmise that the case against them was very strong, they having been held at their respective homes in the early morning and items which could be used in lottery scamming taken from their homes. I therefore find that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants

lacked the requisite care in the circumstances and therefore cannot rely on the defence of fair comment or qualified privilege.

[149] In view of all the circumstances, when the statements made by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the broadcasts by TVJ and CVM are taken as a whole, they are defamatory as understood by the ordinary viewer. The utterances and broadcasts do not lend themselves to any non-defamatory meaning. Although the story is a matter of public interest, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants have not shown that they exercised the principles of responsible journalism so as to avail themselves of the defences of qualified privilege or fair comment. I find also that neither can the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants rely on the defence of fair comment, although it was submitted on their behalf that “although the defence of fair comment as set out in the **Reynolds** case initially thought to offer a viable defence to media houses, in the Privy Council decision of **Seaga v Harper**, it was decided that individuals could also benefit from this defence”.

[150] I therefore conclude that the circumstances of this case are such that the Defendants cannot place reliance on the defences proffered in order to avoid liability.

### **Whether the Claimants were falsely imprisoned and/or maliciously prosecuted by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**

#### **False Imprisonment**

[151] The learned authors of **Clerk and Lindsell on Torts**, 17<sup>th</sup> Edition, page 592, at paragraph 12-17, define false imprisonment as follows:

*“... complete deprivation of liberty for any time, however short, without lawful cause.”*

[152] According to Carey P (Ag.), in **Flemming v Myers and The Attorney General**, (1989) 26 JLR 525, at page 527C:

*“The action of false imprisonment arises where a person is detained against his will without legal justification. The legal justification may be pursuant to a valid warrant of arrest or where by statutory powers a police*

*officer is given the power to arrest in circumstances where he honestly and on reasonable grounds believes a crime has been committed ... it follows ineluctably that there can be no false imprisonment where there is a lawful arrest ..."*

[153] Forte JA, also in the case **Flemming**, *supra*, at page 534C, said as follows:

*"It is clear that in determining the reasonableness of time that elapses, the circumstances of each case must be the guiding principle; and that any unreasonable delay in taking an imprisoned person before the Court will result in liability for false imprisonment..."*

[154] Section 33 of the **Constabulary Force Act** requires that in order for a claim in tort, made against a member of the Jamaica Constabulary Force, to succeed, it must be proven by the Claimant that such tort was committed either with malice, or without reasonable or probable cause.

[155] The Claimants therefore have a duty to prove on a balance of probabilities that they were detained or arrested by a servant or agent of the Crown and were not able to move about freely and that this detention was either done maliciously or that the Crown servant did not have any reasonable or probable cause to arrest them.

[156] 'Reasonable and probable cause' has been defined by Hawkins J in **Hicks v Faulkner**, (1878) 8 QBD 167 at page 172, thus:

*"...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 ordinary 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."*

[157] In **Glinski v Mclver** [1962] 1 All ER 696, Lord Denning adopted the view that an officer need only be satisfied that there was a proper case to lay before the court. It was further explained that the honest belief required of the prosecutor is a belief, not that the accused is guilty as a matter of certainty, but that there is a proper case to lay before the court.

- [158] In the case of **The Attorney General v Glenville Murphy** [2010] JMCA Civ 50, the Court of Appeal upheld the view that, in relation to Section 13 of the **Constabulary Force Act** of Jamaica, the test of reasonableness is both objective and subjective in its element. The police must therefore not only have suspicion but must have reasonable grounds for forming that suspicion.
- [159] In relation to Mr Troupe, I find that his detention came about further to a search warrant (Exhibit 5) executed at his premises on the morning in question. The police officers needed only to ensure that there is reasonable cause for the prosecution. (See **Herniman v Smith** [1938] AC 305).
- [160] The facts upon which the 1<sup>st</sup> Defendant acted, being the search warrant in relation to an illegal firearm, were such that pointed to the possible guilt of Mr Troupe. I therefore agree with the submission made by Queen's Counsel on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants, that his was a case of a lawful arrest made on reasonable and probable cause. I find that although the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants failed to lead evidence at the trial, in cross examination, they discredited the evidence led by Mr Troupe that he was arrested without reasonable and probable cause.
- [161] Mr Reid, on the other hand, was detained for a period of seven days following the raid which took place at his house. There is no evidence from which this court can find that the police had any reasonable and probable cause to have detained him. The items taken from his home for which he was charged with the offence of unlawful possession, were telephones, laptops etc. These are common items that may be found in any household. It is my view that verification as to ownership of documents and electronic devices taken from Mr Reid's house could have been done. There is no evidence that any steps were taken, prior to the charges being laid, to determine the true ownership of the items and I accept the evidence of Mr Reid that no questions were asked by the police officers.



[162] Police Officers are required to have an honest belief of the guilt of a person accused, and this must be based on reasonable grounds. I do not believe at the time of the raid they were of the view that Mr Reid was in unlawful possession of the items. I am led to believe that having searched the property and having discovered a quantity of items which they deem to be questionable items, or items said to be used in lottery scamming, they merely found a charge that could be brought against him and pursued that avenue.

[163] The evidence of Mr Reid as to the circumstances surrounding his arrest are credible. The 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants did not lead any evidence capable of refuting the evidence of Mr Reid, or at all, that they had reasonable cause to detain Mr Reid for seven days before placing him before the court. The detention of Mr Reid was therefore unlawful.

[164] I find that Mr Reid, in addition to damage to his reputation resulting from the defamatory words of the Defendants, also suffered damage to his reputation as a result of being detained, arrested and charged for unlawful possession of property. Although he was later re-elected to his political post, I accept that it had an impact on his social interactions and interests.

### **Malicious Prosecution**

[165] In order for an action for malicious prosecution to succeed, the Claimant must prove on a balance of probabilities that the law was set in motion against him on a charge for a criminal offence; he was acquitted of the charge or it was otherwise determined in his favour; when the law was set in motion the prosecutor was actuated by malice or acted without reasonable or probable cause; and that he suffered damage as a result. (See **Wills v Voisin** [1963] 6 WIR 50)

[166] Both Claimants, in their statements of case, state that “the claimant was falsely and maliciously arrested and charged ...” Mr Reid alleges the absence of reasonable and probable cause and indicated that there was malice, while Mr Troupe referred only to malice.

[167] I accept on the evidence that the police, armed with a search warrant, went to Mr Troupe's home and in conducting a search unearthed a firearm and ammunition as well as money which was concealed. The search warrant was not linked to lottery scamming but to illegal possession of firearm for which both Mr Troupe and his son were charged. I find, on that basis, that they had reasonable and probable cause to have arrested him. Mr Troupe has not shown on a balance of probabilities that there was any malice on the part of the police.

[168] I find that the police officers, when they entered Mr Reid's premises, had no reasonable cause for so doing. Although they indicate in their defence that they entered the properties having obtained legitimate search warrants for both premises, on the evidence led, I find that there was no search warrant in respect of Mr Reid's premises.

[169] Having regard to the totality of the evidence, the court finds, on a balance of probabilities that the account of what took place on the morning of July 18, 2012 as given by Mr Reid is credible. The court also finds that at the time Mr Reid was arrested and charged the police had no reasonable or probable cause to ground the decision to do so and that the police officers acted with no malice in either of the circumstances. There was no illegitimate motive shown on their part.

[170] The law was set in motion, by a servant or agent of the Crown, against Mr Reid, for unlawful possession of property, a criminal offence. When the law was set in motion, the servant or agent of the crown acted without reasonable or probable cause. The charge of unlawful possession of property laid against Mr Reid was determined in his favour.

[171] In light of the foregoing, it is my considered view that Mr Reid has made out a case of false imprisonment and malicious prosecution against the 5<sup>th</sup> Defendant.

**Whether the Claimants should be compensated in damages, including aggravated, exemplary and constitutional damages, and if so, the quantum to be awarded**

## Damages

[172] The law presumes that some damage will flow from the invasion of one's right to reputation and a person is entitled to damages although he proves no actual damage. (See Bowen LJ in **Ratcliffe v Evans** [1892] 2 QB 524)

[173] Where a Claimant can prove that he has suffered actual economic loss as a result of defamation, the court will award such sums as he can prove, as special damages. In this regard, I note that Mr Troupe had pleaded that he suffered "identifiable losses" understood by the court to be special damages, which he claims are directly related to the broadcast of the defamatory words complained of. However, he presented no evidence from which this court could find that he was entitled to compensation for such loss.

[174] Various considerations are relevant to the amount of damages to be awarded in defamation cases. In **Sealy v First Caribbean National Bank** [2010] 75 WIR 102, Sir David Simmons CJ, at paragraph [60] stated the following:

*"... a court is entitled to have regard to the position and standing of the plaintiff in the nature, mode and extent of the publication, the presence or absence of an apology, the conduct of the defendant before, during and after the commencement of the action and the plaintiff's injured feelings, distress, embarrassment and humiliation"*

[175] Some of the relevant factors to be considered were stated by Sir Thomas Bingham MR in **John v MGN Ltd.** [1997] Q.B. 586 at 607 as follows:

*"The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of the publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a*

*case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place. It is well established that compensatory damages may and should compensate for additional injury caused to the plaintiff's feeling by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise..."*

- [176] It was submitted on behalf of the Claimants that in relation to damages for defamation, an award of \$60,000,000.00 should be made to Mr Troupe and an award of \$40,000,000.00 to Mr Reid "to reflect the egregious damage to both Claimants". On behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants, it was submitted that neither Claimant has proven that they have been defamed or suffered any damage to their reputation, or special damages. Queen's Counsel further stated that "for the issue of defamation, we submit the sum of ... \$1,500,000.00 is a reasonable sum for general damages".
- [177] On behalf of the 3<sup>rd</sup> Defendant, it was submitted that there was no evidence that the Claimants' reputation suffered, and, if damages are to be awarded, the court should award nominal damages, consequent on the fact that damage is presumed in libel cases. Counsel on behalf of the 4<sup>th</sup> Defendant, submitted that there was no evidence to substantiate any alleged loss, and in each case, each Claimant was "shown to have retained the status politically ...". It was also submitted that there is no evidence that the publication was the direct or indirect cause of any damage to their reputation or that there was any conduct on the part of the 4<sup>th</sup> Defendant that warrants an award of aggravated or exemplary damages.
- [178] I am not persuaded by the foregoing submissions of Counsel for the Defendants, as they relate to damages, generally. I would emphasize that in a case such as this, damages must be presumed as the defamatory words and broadcasts indicate involvement in the committal of serious criminal offences punishable by imprisonment and forfeiture of assets. I am also of the view that the sums suggested by Counsel for the Claimants and that suggested by Queen's Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants are at an extreme high and an extreme low.

[179] I have therefore considered the following cases for the purpose of comparison, in order to arrive at a sum which is reasonable and appropriate in each case:

- i. **Seaga v Harper**, *supra*, referenced by Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants, as well as the 4<sup>th</sup> Defendant. In this case, on appeal, the award was \$1,500,000.00, reduced from the sum of \$3,500,000.00 awarded at the trial;
- ii. **Joseph Matalon and Anor v Jamaica Observer Ltd.** [2014] JMSC Civ 127, delivered 15 August, 2014. The claimant Joseph Matalon was a prominent businessman, the other claimant had died before the matter came on for hearing. Counsel for Joseph Matalon had suggested that the case should attract \$50,000,000.00, but the court noted that “this case is at the low end of defamation awards. The allegations were serious but from all indication Joseph Matalon is none the worse” The court used the case of **Seaga** as the preferred guide and updated the figure using the then current CPI and made an award of \$4,379,310.34.
- iii. **Jamaica Observer Limited v Joseph Matalon**, [2019] JMCA Civ 38, delivered 18 November, 2019, where the award of \$4,379,310.34 was set aside and substituted with an award of \$10,200,000.00. The court opined that the trial judge was incorrect in his computation of damages, to ignore the aggravating factors present in that case, which were properly pleaded, as opposed to the case of **Seaga**. The Court of Appeal found that the unreduced amount of \$3,500,000.00 made in the **Seaga** case was the preferred basis from which to calculate the damages to be awarded to Matalon.
- iv. **Patterson**, *supra*, an award of \$12,000,000.00 was made in a case where the trial judge stated among other things, that “his persona must be taken into account”

[180] With reference to the cases of **Seaga** and **Matalon**, it was submitted on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants that the Claimants in the case at bar, “cannot be said to have garnered the popularity and reputation of the Claimants ... and as such relevant discounts must be applied”. In relation to the case of **Patterson**, Mr Braham, Queen’s Counsel, said that the “eminence in the local and international arena far exceeds that of the Claimants in the case at bar.”

[181] I find the words of Panton P, at paragraph 17 of the judgment in **The Jamaica Observer v Orville Mattis**, [2011] JMCA Civ 13, quite useful in considering the award to be made in this matter. Panton, P said, *inter alia*:

*“It takes years to build a good name and reputation. On the other hand, it takes only a few reckless lines in a newspaper to destroy or seriously damage that name or reputation. The damage usually remains for a good while. Section 22 of the Constitution gives a right to free speech, but it does not permit defamation of one’s good character. When such damage has been proven, adequate compensation should follow ...”*

[182] I also bear in mind the words of Harrison JA, in **The Gleaner Company and Dudley Stokes v Eric Abrahams**, (unreported), Court of Appeal, Jamaica, Civil Appeal No 70/1996, judgment delivered 31 July 2000, where, at page 61, he said, *inter alia*:

*“A man’s reputation is a valuable asset...A man’s integrity once tainted, is almost invariably lost forever...”*

[183] The evidence of Mr Troupe would seem to suggest that he suffered no loss of reputation as a result of the defamation. In cross examination, he stated that he was re-elected. I bear in mind however, that he has expressed that he was humiliated and embarrassed. In relation to Mr Reid, the evidence also suggests that he too did not suffer any loss of reputation and neither has his business or political and social life been affected. The evidence presented would suggest the Claimants are “none the worse” as a result of the defamatory statements made and published against them.

[184] Although the allegations are serious, and I find from the evidence that the publication of the offending words have not affected their standing in society, their political life or business, I can see no reason to believe they suffered no loss, or that any loss suffered as a result of the defamatory publications would be trifling. The anguish, humiliation and injury to one’s reputation are very personal and unique to the person defamed, and I accept that the Claimants were hurt and embarrassed as a result of the broadcast and as such are entitled to compensation for injury to their reputation.

[185] There is authority that in cases of this nature, the court will award general damages on the basis that the Claimant has suffered damage to his reputation and there is no need to prove actual damage, as damage will be presumed. Evidence of actual

loss could have been received if they were particularised in the statements of case, and I bear in mind that evidence of specific loss may be given in order to assist the court in assessing the general damages to be awarded. I also note that in **Rantzen v Mirror Group Newspaper (1986) Ltd.** [1994] QB 670, the court indicated that notwithstanding that after the libel the claimant continues to enjoy a good reputation, the award can still be substantial.

[186] Mr Troupe sought to give evidence of pecuniary loss and although he had pleaded certain “identifiable losses” these were not sufficiently particularised and there was no evidence presented to show that the broadcast had any adverse effect on his business resulting in pecuniary loss.

[187] Taking into account all the circumstances of the case, the impact of the defamatory statements on the Claimants, their hurt feelings and the impact on their standing in society as well-known elected representatives, as well as the nature of the media in which the defamatory statements were made, and the manner in which the statements were presented, I believe an award of \$11,000,000.00 is appropriate in the case of Mr Troupe and \$8,500,000.00 in the case of Mr Reid.

### **False Imprisonment re Mr Reid**

[188] The learned author of **McGregor on Damages**, 17<sup>th</sup> Edition, paragraph 37-007 has this to say in relation to false imprisonment:

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

[189] In assessing damages for false imprisonment, the period for purposes of computation, runs from the date of the unlawful detention to the date the Claimant is brought before the court.

- [190] Mr Reid was in the custody of the police for a period of seven days, from July 18, 2012 to July 25, 2012, when he was brought before the court and offered bail. Based on his evidence in relation to his position as a businessman as well as his involvement in the church and community activities, which I find to be true, he would suffer great embarrassment in the circumstances and damages would accrue to him as a result of being detained.
- [191] In assessing the damages, I have sought to compare the instant case with other cases (some of which have been cited by the parties) in which the court had to assess damages for false imprisonment. This is in keeping with the proposition by Morrison P in **John Crossfield v The Attorney General of Jamaica and Another** [2016] JMCA Civ. 40.
- [192] In **Crossfield's case**, an award of \$240,000.00 in the court below, was increased to \$600,000.00, on the basis that the award in the case of **Herwin Fearon v The Attorney General of Jamaica and another**, (unreported), Supreme Court, Suit No. CL1990/F046, judgment delivered March 31, 2005, (which was used as a benchmark) when updated, would have supported an award of \$130,000.00 per day for false imprisonment
- [193] In the case of **Cornel McKenzie v The Attorney General of Jamaica**, (unreported), Suit No. C.L.2002/M 022, judgment delivered June, 2003, the court awarded the sum of Seventeen Thousand dollars (\$17,000.00) per day, for twenty-six (26) days of false imprisonment amounting to Four Hundred and Forty-Two Thousand Dollars (\$442,000.00). When updated using the CPI 265.8 for October, it amounts to \$1,715,089.05. I am mindful of the fact that the award was influenced by the fact that the claimant was forced to sleep on the cold concrete during his period of incarceration, a factor for which no such evidence was provided in the instant case.
- [194] In **Clayton Tyndale v Cpl Orville Clarke and The Attorney General of Jamaica** [2017] JMCA Civ 41, an award of \$121,000.00 per day was made to the claimant,



a bus driver, who was arrested and detained for a period of thirty-five days, while in **Peter Badoo v Det Sgt. Ralph Grant v The Attorney General for Jamaica** [2017] JMSC Civ. 59, in which the case of **Clayton Tyndale** was considered, the court awarded \$250,000.00 for the first day and \$150,000.00 for each day thereafter. Badoo who was a Resort Property Manager was detained for twenty-three days before being taken to court.

[195] I take guidance from the case of **The Attorney General of Jamaica v Gary Hemans** [2015] JMCA Civ 63, where at paragraph [28] of the judgment, the Court of Appeal pointed out that although the court must seek to achieve uniformity in determining compensation in these types of cases, and therefore can have regard to comparable awards in previous cases, “the factual circumstances of each case must ultimately determine whether a mere indexation of previous awards will do justice to the case”.

[196] I will add that the cases cited to the court and the cases examined are but guides and the court in its judgment has to arrive at a figure which it considers fair in the circumstances. The court is of the view that a reasonable award for false imprisonment is \$1,050,000.00 and find that an award in that sum would be adequate compensation for the Claimant’s unlawful detention for seven days.

### **Malicious Prosecution**

[197] Mr Reid was subject to a prosecution which lasted approximately seven months. The evidence is that he was charged on July 18, 2012 and when the matter came on for trial on February 18, 2013, he was discharged as there was no evidence offered.

[198] Reliance was again placed on the case of **John Crossfield**, *supra*. In this case an award of \$500,000.00 made in the Supreme Court was increased to \$1,500,000.00 (in September 2009, CPI 146.3) in circumstances where the claimant attended court for over thirty dates and on March 6, 2001, no further evidence was offered and the proceedings were dismissed. Counsel pointed out

that Morrison P indicated, *inter alia*, that the protracted period over which the appellant was obliged to be before the court is an important factor in determining an appropriate award. I bear in mind also that the authorities place importance on injury to reputation as a component in damages for malicious prosecution.

[199] In **Keith Nelson v Sgt Gayle and The Attorney General of Jamaica**, (unreported), Suit No.CL1998/N 120, judgment delivered 20 April 2007, an award of \$400,000.00 was made where the claimant was kept before the court for a period of three months before he was acquitted of the charge, without the case being tried.

[200] Having examined the cases presented for comparison, I find the case of **Nelson** to be a useful guide. When the award made to him is updated, using the current CPI and augmented to account for the additional four months over which Mr Reid's prosecution lasted, I am of the view that an appropriate award to Mr Reid is \$2,450,000.00

### **Aggravated damages**

[201] Aggravated damages are awarded where a Defendant's actions are found to be so egregious as to cause greater injury to the Claimant, who would not be adequately compensated for his injuries if the award for damages was restricted to the basic award. This type of damage is compensatory and not punitive in nature.

[202] In the case **Thompson v Commissioner of Police of the Metropolis** [1997] 3 WLR 403, Lord Woolf M.R., in addressing the appropriateness of aggravated damages, at page 417, opined:

*"... Such damages can be awarded where there are aggravating features about the case which would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award. Aggravating features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in a high-handed,*

*insulting, malicious or oppressive manner either in relation to the arrest or imprisonment or in conducting the prosecution.”*

[203] Lord Diplock, in **Broome v Cassell & Co. Ltd.**, [1972] AC 1027, in discussing the difficulty in allocating compensatory damages between ordinary and aggravated damages, pointed out that harm which is caused to a person as a result of the publication of the libel often lies in what he thinks other people are thinking of him that in any actual change which is manifest by their attitude towards him.

[204] In the case of **The Attorney General of Jamaica v Gary Hemans** [2015] JMCA Civ 63, Williams JA (Ag.) (as she then was), at paragraph 22 of the judgment, said, *inter alia*:

*“...aggravated damages are to be awarded only where there was some feature in the behaviour of the appellant that required the respondent being additionally compensated beyond what he would have received for the assault, false imprisonment and malicious prosecution”*

[205] Bearing the above in mind, in addressing this head of damages, I am mindful not to double compensate the Claimants. I have already duly considered, and accepted as true, the belittlement, humiliation, hurt feelings and such other related injuries experienced by them for defamation. There were no other “aggravating features” averred for which I have not already addressed and awarded an appropriate compensation.

### **Exemplary damages**

[206] In relation to the Claimants’ claim for exemplary damages, the law is clear that exemplary damages, unlike aggravated damages, are punitive in intent. The aim is to punish or deter the Defendant’s conduct which could be deemed oppressive, arbitrary and unconstitutional or where 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. (See **Rookes v Barnard** [1964] AC 1129 at 1221)

[207] In the Privy Council case of **A v Bottrill** [2002] 3 WLR 1406, Lord Nicholls indicated that the court's jurisdiction to award exemplary damages should be extended to all cases where the behaviour of the Defendant satisfies the criterion of "outrageousness" which would normally involve intentional wrongdoing with the added element of "flagrancy" or "cynicism"

[208] In this case, the Claimants claim for exemplary damages is against all the defendants in relation to the claim for defamation and against the 1<sup>st</sup> Defendant in relation to the claim in respect of false imprisonment. Given the admitted facts, and the evidence presented, I find that there was no particular conduct which would attract an award of exemplary damages, save and except the conduct of the 1<sup>st</sup> Defendant as stated in the evidence of Mr Troupe, where he indicated that the 1<sup>st</sup> Defendant instructed a soldier "...mek the people dem see seh him ah scammer and ah drive this yah big car..." and directed a police officer to "...hand cuff the bouy", which have not been refuted. This has however been taken into consideration in the award of damages generally, and as such I find that it would not be appropriate to make any separate award for exemplary damages.

[209] I am therefore satisfied, based on the evidence, the submissions and the authorities, that the Claimants have not made out a case warranting an additional or separate award for aggravated or exemplary damages.

### **Constitutional Damages**

[210] It is settled law that a claimant who seeks an award of damages by way of constitutional redress, must show that there is no adequate remedy for that breach under any other law.

[211] In their respective Particulars of Claim, the Claimants have stated "Particulars of Unconstitutional Action of Leon Clunis", as follows:

*"Superintendent Leon Clunis conduct was oppressive, arbitrary and unconstitutional in that he abused his powers as a police officer when he:*

- i. *Maliciously caused the Claimant to be exposed to media while being hand cuffed in the back of a police vehicle without cause and making statements about and concerning the Claimant that he either knew or ought to have known was not true,*
- ii. *Maliciously caused the Claimant to be deprived of his right to the protection of the law contrary to section 13(a) of the Constitution,*
- iii. *Maliciously caused the Claimant to be deprived of his right to private and family life contrary to section 13(c) of the constitution,*
- iv. *Unlawfully arrested and detained the Claimant contrary to section 15 of the constitution and as a result of which he is entitled to compensation in the terms set out under section 15(4) of the said Constitution; and*
- v. *Was at all material times unlawfully detained and by being unlawfully detained he was deprived of his rights to freedom of movement contrary to section 16 of the Constitution.*

[212] There were no such Particulars stated in relation to the 2<sup>nd</sup> Defendant in either claim.

[213] In **Merson v Cartwright & Another**, [2005] UKPC 38, the Privy Council offered guidance in relation to the approach to an award of constitutional damages. At paragraph 18 of the judgment it states, *inter alia*,:

*“... If the case is one for an award of damages by way of constitutional redress (and their lordships would repeat that ‘constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course;) the purpose is to vindicate the right of the complainant, ... to carry on his ... life free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary.”*

[214] The Privy Council noted that there is often a likelihood of overlap between the legally recognised torts and the breaches of the claimant’s constitutional rights, and acknowledged that in some cases there may be a complete overlap.

[215] From the statements of case, it is evident that the actions of the 1<sup>st</sup> Defendant, as identified above, are repetitive of his actions under the other heads of damages,

which I have already addressed. I am of the view that neither Claimant has satisfactorily made out a claim against the 5<sup>th</sup> Defendant for the actions of the 1<sup>st</sup> Defendant, to take it out of the realm of the torts pleaded, to attract an additional award as constitutional relief.

**[216]** Additionally, I am of the view that I have adequately compensated the Claimants for the tortious actions of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants which have been pleaded and proved, therefore, in an effort to avoid double compensation, an additional award for constitutional damages will not be made.

### **Conclusion**

**[217]** The Claimants have shown on a balance of probabilities that the words and utterances complained of as spoken by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and broadcast by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants are defamatory of them. The Defendants have failed to show any justification for the words spoken or broadcast, they have not shown that the words complained of were fair comments on a matter of public interest, the statements were not based on correct facts and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants have failed in their duty to verify the authenticity of the information stated in their broadcasts.

**[218]** Additionally, Mr Reid has successfully made out a claim for false imprisonment and malicious prosecution against the 5<sup>th</sup> Defendant.

### **Disposition**

**[219]** Judgment for the Claimants against the Defendants for tort of defamation.

**[220]** Judgment for the Claimant Sylvan Reid against the 5<sup>th</sup> Defendant for False imprisonment and Malicious prosecution.

**[221]** Judgment for the 5<sup>th</sup> Defendant against the Claimant Michael Troupe in relation to the claim for false imprisonment and malicious prosecution with costs to be taxed, if not agreed, and to be paid by Mr Troupe.

**Award**

**[222]** Damages for defamation awarded to Mr Troupe in the sum of \$11,000,000.00.

Damages for defamation awarded to Mr Reid in the sum of \$8,500,000.00.

Damages for False Imprisonment awarded to Mr Reid against the 5<sup>th</sup> Defendant in the sum of \$ 1,050,000.00 with interest at 3% per annum from the date of service of the Claim Form to the date of judgment.

Damages for Malicious Prosecution awarded to Mr Reid as against the 5<sup>th</sup> Defendant in the sum of \$ 2,450,000.00 with interest at 3% per annum from the date of service of the Claim form to the date of judgment.

The Claimant, Mr Reid, is entitled to costs which are to be taxed if not agreed and are to be paid by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.

The Claimant Mr Troupe is entitled to costs which are to be taxed if not agreed and are to be paid by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

The 5<sup>th</sup> Defendant is entitled to costs to be taxed, if not agreed, and to be paid by Mr Troupe.