[2020] JMCA Civ 60

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 40/2017

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS P WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA

BETWEEN	**ATTORNEY GENERAL OF JAMAICA**	**1ST APPELLANT**
	CORPORAL ORVILLE CLARKE	**2ND APPELLANT**
AND	**CLAYON TYNDALE**	**RESPONDENT**

Miss Christine McNeil instructed by the Director of State Proceedings for the appellant

Mr Andrew Irving for the respondent

3, 4 June 2019 and 20 November 2020

PHILLIPS JA

[1] I have read in draft the judgment of my sister Edwards JA. I agree with her reasoning and conclusion and have nothing further to add.

P WILLIAMS JA

[2] I too have read the draft judgment of my sister Edwards JA and agree with her reasoning and conclusion.

EDWARDS JA

Introduction

[3] This is an appeal brought by The Attorney-General of Jamaica ("first appellant") against the decision of Jackson-Haisley J ("the judge") to include in her calculations for the award of compensation to Clayton Tyndale ("the respondent") for false imprisonment, a period of five days in detention after the respondent was taken before the court and offered bail.

[4] The circumstances leading to the respondent's claim against the appellant in the court below are relatively unusual, and the appeal against the judge's decision, itself, raises a rather narrow but important point.

[5] The respondent, who is a bus driver, was charged for the offence of rape and was on bail. His girlfriend was the surety for his release on bail. She subsequently made a report to the police that she wished to be released from her recognizance, as the respondent was not adhering to the conditions of his bail, namely, to report to the Duhaney Park Police Station and to attend court.

[6] As a result of her report, Corporal Clarke (the second appellant") took the respondent into custody on 23 September 2014 at the Pechon Street Bus Park. It was alleged that the arrest of the respondent took place in the presence of approximately 15 passengers who were on the bus he was driving at the time and other members of the public who were in the bus park. The bus was unloaded and the respondent was instructed to drive to the Darling Street Police Station. He alleged that he felt

embarrassed, distressed and humiliated by this. At the police station he saw his girlfriend and, in his presence and hearing, she repeated her allegations that he had not been attending court or reporting to the Duhaney Park Police Station as required by the condition of his bail. The respondent denied these allegations and told the police that her report was false and resulted from a disagreement between them. He complained that the second appellant did not investigate the allegations made against him to determine if they were true.

[7] The respondent was placed in the lock-ups at the Darling Street Police Station and was later transferred to the Hunts Bay Police Station lock-up. He was not taken before the court until 23 October 2014, where his girlfriend was released as his surety and he was re-offered bail with a requirement for a new surety and new bonds. He was bailed with surety five days later on 28 October 2014.

[8] The respondent subsequently filed a claim in the Supreme Court of Jamaica against the appellants seeking damages for false imprisonment, aggravated and/or exemplary damages, interest and costs. In his claim, he averred that he was, maliciously and without reasonable cause, falsely imprisoned and deprived of his liberty from 23 September 2014 to 28 October 2014. He relied on the provisions in section 19 of the Bail Act which sets out the procedure to be followed when a surety wishes to be released from recognizance. He averred that the provisions of the section were not adhered to and as a result his arrest and detention was unlawful.

[9] The appellants filed a defence to the claim limited to quantum, thus conceding that the arrest of the respondent by the second appellant was unlawful. A judgment on admission was subsequently entered in favour of the respondent and a date was set for an assessment of damages hearing to be held. The assessment of damages was heard by the judge, at the end of which she made the following orders:

> "I. General Damages awarded to the claimant in the sum of $4,235,000.00 with interest at a rate of 3% per annum from 16th December, 2014 to 24th March 2017;
>
> II. Special Damages awarded to the Claimant in the sum of $80,000.00 with interest at a rate of 3% per annum from 23rd September, 2014 to 24 March 2017;
>
> III. No award is made for Aggravated Damages or for Exemplary Damages; and
>
> IV. Cost to the claimant to be agreed or taxed."

[10] This appeal relates to the calculation of the number of days in detention forming the basis of the award made in paragraph I of her orders. The respondent filed a counter-notice of appeal challenging the value of the award for general damages as being inordinately low.

The impugned decision and order

[11] There is no complaint that the judge did not apply the proper principles in the assessment of damages. In her analysis of the evidence and the submissions made to her, the judge correctly noted that "[t]he purpose of the assessment of damages is to arrive at a figure that will provide adequate compensation to the Claimant for the

damage, loss or injury suffered". She cited a passage from Lord Blackburn's dictum in **Livingstone v Rawyards Coal Co** (1880) 5 App Cas 25 as supporting this view.

[12] In making the assessment she relied on principles set out in the cases including **Maxwell Russell v The Attorney General of Jamaica and anor** (unreported), Supreme Court, Jamaica, Suit No CL No 2006 HCV 4024, judgment delivered on 18 January 2008, and went on to state that:

> "Mangatal J in **Maxwell Russell** case went on to highlight the dicta of Lord Woolf M.R. in **Thompson v Commissioner of Police of the Metropolis** 1998 QB 498, where he pointed out that damages for false imprisonment, i.e. for loss of liberty, and damages for malicious prosecution, are compensation for something which is akin to pain and suffering. Mangatal J used the formula recommended by Lord Woolf MR and awarded damages for the first 24 hours and thereafter at a progressively reducing scale."

[13] The judge then stated that she would not make an award for the initial shock because the claimant had already spent time in custody in relation to the rape charge. In respect to the number of days for which compensation should be awarded she relied on the decision of F Williams J (as he then was) in **Conrad Gregory Thompson v Attorney General of Jamaica** (unreported), Supreme Court, Jamaica, Claim No 2008 HCV 02530, judgment delivered on 31 May 2011, and concluded that the five days that it took the respondent to take up his bail should be included in the calculation of the awards. The judge cited the following passage from the judgment of F Williams J regarding the consequences of the claimant's inability to take up his bail:

> "In the court's view the false imprisonment and the malicious prosecution in this regard are inextricably intertwined. If he has [sic] not been detained and then prosecuted on a false charge, he would likely have continued to enjoy his liberty. The defendant must be held responsible for all the consequences of that detention, malicious prosecution and the resultant false imprisonment. In the court's view the claimant must be compensated for all the days he remained in custody."

[14] Jackson-Haisley J then went on to hold that:

> "In the circumstances, I find that but for the False Imprisonment that took place on September 23, 2014 this Claimant would not have been in custody for that period of time and so I am prepared to make an award for the 35 days."

[15] In calculating the general damages, the learned judge held inter alia that:

> "I find that [an] award of $121,000.00 per day to be appropriate. The award should be the same for each day incarcerated. This amounts to $4,235,000.00 representing General Damages for False Imprisonment."

The grounds of appeal

[16] The appellants filed notice and grounds of appeal in this court on 5 May 2017.

The grounds of appeal filed were as follows:

> "i. The Learned Judge erred in law by failing to appreciate that the claimant could only recover damages for the period of his imprisonment prior to the date and time he was remanded arising from his inability to meet his bail, per **Lock v [Ashton]** [1848] 12 QB 871 and **Diamond v Minter** (1941) 1 KB 656 among others.
>
> ii. The learned judge erred in law when she relied on the dicta of F Williams, J (Ag.) in Claim No. 2008 HCV 02530 – **Conrad Gregory Thompson v Attorney General for Jamaica** delivered May 31, 2011.

> iii. Consequently, the sum awarded for False Imprisonment, to include the time when he was remanded by the court, is excessive and ought to be reduced."

[17] The appellants sought the following orders based on the grounds of appeal filed:

> "(i) That the appeal be allowed and the orders of the Honourable Mrs Justice Jackson-Haisley (Ag.) delivered on March 24, 2017 be set aside; and
>
> (ii) That the award for False Imprisonment be set aside and reduced to accurately reflect the proper time frame of the Claimant's imprisonment."

Submissions

The appellants' submissions

[18] Counsel Miss Christine McNeil argued on behalf of the appellants that the grounds of appeal are rooted in a single issue, that is:

> "Whether the respondent who was initially falsely imprisoned, was entitled to damages for false imprisonment, as found by the learned trial judge, for the further period he remained in detention after the court made an order granting him bail, with surety."

[19] Counsel contended that the applicable principle is that where a person is arrested and taken into custody and that person is subsequently taken before the court and is remanded in custody by an order of the court, that continued detention and imprisonment is made lawful by the fact that it was done on a judicial order, even if the initial detention was unlawful. The detention by or at the instance of the police, thereafter ceases, and if it was indeed an unlawful detention then that unlawfulness also ceases. In short, this means that the period of false imprisonment ceases at the time the judicial order is made.

[20] Counsel further submitted that once the respondent appeared before the court and was re-offered bail by the Parish Court Judge, the false imprisonment by the second appellant came to an end. Counsel also submitted that in the instant case, where the respondent was re-offered bail with a surety, this was an independent act on the part of the Parish Court Judge and, as such, it brought the false imprisonment to an end.

[21] Counsel submitted that, in failing to apply this principle, the judge erred in relation to the number of days for which compensation should be awarded to the respondent. As a result, counsel said, she also erred in relying on the decision of **Conrad Gregory Thompson v The Attorney General** where the claimant was offered bail on being brought to court and the assessment judge, F Williams J, held that the chain of causation had not been broken. The claimant in that case was accordingly awarded damages for an additional period of six days when he was unable to take up his bail.

[22] Counsel submitted further that, in the light of the applicable principles, the respondent's claim for damages for false imprisonment should have been measured in terms of the days leading up to his court appearance and his admittance to bail. Counsel cited the cases of **Denise Keane-Madden v The Attorney General of Jamaica and Corporal T Webster-Lawrence** [2014] JMSC Civ 23, and **John Crossfield v The Attorney General of Jamaica and Corporal Ethel Hamilton**

(unreported), Supreme Court, Jamaica, Claim No CL E 219 of 2001, judgment delivered on 10 September 2009 at paragraph 29.

[23] Counsel asked this court to note that in **John Crossfield** the judge at first instance relied on the decisions in **Diamond v Minter and others** [1941] 1 KB 656 and the statement of Lord Hobhouse in **R v Governor of Brockhill Prison ex parte Evans (No 2)** [1998] 4 All ER 993. Counsel also noted that in **John Crossfield v The Attorney General of Jamaica and Corporal Ethel Halliman** [2016] JMCA Civ 40, this court referred to the trial judge's statement of this principle at first instance, with approval.

[24] Counsel submitted that the period of unlawful detention in that case was calculated as four days, as after being put before the court on 6 May 1996, that appellant was remanded by the court and, his remand being held to be pursuant to a judicial order, his entitlement to damages was limited to the four days before the judicial remand.

[25] Counsel also relied on Lord Hobhouse's statement in **R v Governor of Brockhill Prison, ex parte Evans (No 2)** where he said "[a] period of detention will in principle be lawful if it is carried out pursuant to a Court Order ...". Counsel suggested that if the dictum of Lord Hobhouse had been brought to F Williams J's attention in **Conrad Gregory Thompson**, his decision in that case would probably have been different.

[26] In support of her submissions, counsel cited the decision in **Delroy Thompson v The Attorney General of Jamaica and Detective Douglas Taylor** [2016] JMSC

Civ 78, a decision by K Anderson J where the claimant was granted bail on 16 September 2005 but did not take up the bail offer until 22 September 2005. K Anderson J held that the unlawful detention ended once the claimant had been brought before the court and granted bail by the judge.

[27] Counsel submitted that in the instant case, the respondent's further detention pending his taking up the offer of bail, being pursuant to an order of the court, was lawful. The judge, therefore, erred in taking into account the five days which the respondent was in custody thereafter, in assessing the award of damages.

The respondent's submission

[28] Counsel for the respondent, Mr Andrew Irving, submitted that an appellate court may only adjust a trial judge's award on an assessment of damages where it is satisfied that "the judge has acted upon a wrong principle of law". He referred the court to the cases **Flint v Lovell** [1934] All ER 200 and **John Crossfield v Attorney General of Jamaica and anor** [2016] JMCA Civ 40.

[29] Counsel contended that the issue is whether the grant of bail by the Resident Magistrate (now Parish Court Judge) was the cause of the respondent's continued detention for a further five days from 23 October 2014, it being pursuant to a judicial order. Counsel submitted that the decisions in **Lock v Ashton** and **Diamond v Minter** are distinguishable on the basis that, in the instant case, the court did not remand the respondent into custody but offered him bail. Counsel also submitted that **Denese Keane-Madden v The Attorney General of Jamaica and another** and **John**

Crossfield are also distinguishable as the claimants in those cases were remanded in custody. Counsel argued that the action of the court in the instant case, did not continue the damage to the respondent started by the unlawful detention by the second appellant.

[30] Counsel asked this court to note that the basis for the principle that a person could not claim damages for any period that he was lawfully in custody by judicial order after an unlawful detention was set out in the case of **Harnett v Bond** [1925] AC 669. In that case the plaintiff had been detained as a lunatic in a house licensed for the reception of lunatics. The plaintiff was released and subsequently wrongfully detained by the Commissioner in Lunacy and he was returned to various institutions for lunacy after being assessed by the manager. It was held that the subsequent detention of the plaintiff was not the consequence of the Commissioner's wrongful acts. The Commissioner was not liable for the retaking and confinement of the plaintiff because the acts of the manager was a novus actus interveniens sufficient to break the chain of causation.

[31] The respondent also relied on the decision of F Williams J in **Conrad Gregory Thompson v The Attorney General of Jamaica**. Counsel submitted that the sole issue, therefore, is whether there was an intervening act of a third party which broke the chain of causation.

[32] Counsel maintained that in the instant case the action of the Parish Court Judge in offering bail was not an intervening act sufficient to break the chain of causation.

Counsel argued that the action of a third party does not break the chain of causation and make the subsequent damage too remote, if it did not continue the damage.

[33] It was further argued that the Parish Court Judge's action in granting bail did not cause the respondent to be in detention for a further five days but instead, it was the respondent's inability to take up the bail which caused him to remain in custody, which was not a judicial act. Furthermore, he said, after bail had been offered, the act of admitting to bail becomes ministerial only.

[34] Counsel also pointed out that the dictum attributed to Lord Hobhouse in **R v Governor of Brockhill Prison** actually came from a decision of the European Court of Human Rights in **Benham v UK** (1996) 22 EHRR 293 and was concerned with the interpretation of the rules governing the calculation of the allowance for time spent in custody and had no relevance to the issues to be decided in this appeal.

[35] Counsel argued that the Privy Council case of **Terrence Calix v The Attorney General of Trinidad and Tobago** [2013] UKPC 15 was more relevant to this appeal. In that case bail had been offered but the claimant did not take up the bail and spent an additional 115 days in custody. The Trinidad and Tobago Court of Appeal held that the grant of bail interposed a judicial act between the prosecution and the continued detention of the claimant. This argument, counsel submitted, was rejected by the Privy Council on appeal from the decision of the Court of Appeal and is the same argument being relied on by the appellants in this case. According to counsel, the Board held that the claimant's failure to take up a grant of bail is not a judicial act and the claimant

was, therefore, able to recover compensation for his loss of liberty for the period for which he was unable to take up his bail offer. Counsel contended that, in principle, the failure to take up the offer of bail was not a judicial act which became the cause of the respondent's detention.

[36] Counsel argued that but for the false imprisonment of the respondent by the second appellant, he would not have been in custody for 35 days. Therefore, counsel maintained, the additional period of five days which it took for the respondent to take up bail was a direct consequence of the illegal and unlawful actions of the second appellant and the respondent ought to be compensated for those days.

Analysis

[37] I agree with both counsel that the sole issue to be determined by this court, as raised in the grounds of appeal, is whether the judge was correct to order that the appellant be compensated for the period that he was in custody awaiting his release on bail, after the surety had been released by the court.

[38] The first appellant, rightfully so, did not seek to defend the claim below, in so far as it related to liability for the unlawful detention. The appellants, however, contend in this appeal, that the respondent should only be compensated for 30 days in unlawful detention. Counsel for the appellant argued that the five days he spent in custody awaiting his release on bail cannot be attributed to the second appellant as it was the result of a judicial act. The question is whether the appellants are correct. For the reasons I will give below, I take the view that they are.

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

[40] In **Diamond v Minter** the plaintiff was arrested and taken into custody as he was mistaken for someone else. He was later taken before the Chief Magistrate who remanded him in custody. On his second appearance before the Chief Magistrate it was discovered he was not the person being sought and he was immediately released. He brought an action for damages for false imprisonment against three Metropolitan police officers. Cassels, J who heard the case held at page 663 of his judgment that:

> "... The fact remains that in arresting the plaintiff the two defendants, Miller and Campbell, arrested the wrong man, and that in detaining the plaintiff at Bow Street police station, Inspector Minter detained the wrong man. The plaintiff has therefore been wrongfully arrested and falsely imprisoned. Can the defendants escape liability? **I think that the periods of detention which I have to consider are the period during which the plaintiff was in the custody of the two defendants, Miller and Campbell, and the period during which he was he was detained at the Bow Street police station before he went into the court. What happened after that, with regard to his being remanded in custody, was the result of a judicial act by the learned Chief Magistrate, and no liability can attach to the police officers for that** ..." (Emphasis added)

[41] Cassels J in concluding at page 674 went on to state that:

> "The question of damages therefore arises. I do not award damages for the plaintiff's detention in Brixton Prison, for that, as I have said, was the result of a judicial decision. The breaking of the chain of causation was dealt with by Scrutton L.J. In **Harnett v Bond** [[1924] 2 K.B. 517, 563], where the Lord Justice said 'But it appears to me that when there comes in the chain the act of a person who is bound by law to decide a matter judicially and independently, the consequences of his decision are too remote from the original wrong which gave him a chance to decide'."

[42] Cassels J did not refer to **Lock v Ashton** as authority for his proposition at page 663 but relied on **Harnett v Bond** for his proposition that the chain of causation is broken by an independent judicial act.

[43] **Harnett v Bond** was decided in the House of Lords. It was not a case involving the unlawful actions of police officers but involved the detention of an individual in a lunatic asylum and was an action for false imprisonment. It was sought to have the persons responsible for the plaintiff's original confinement liable to pay damages for his continued confinement over a period of nine years. At page 682 of the judgment (as reported at [1925] AC 669), Viscount Cave in dealing with the varying confinement of the appellant and the plaintiffs entitlement to damages said this:

> "... But those damages must, on the authorities, be confined to such as were the direct consequence of the wrong committed; and to hold that the detention of the appellant at the offices for a few hours was the direct cause, not only of his being retaken and conveyed to Malling Place, but also of his being confined in that and other houses until October, 1921, appears to me to be impossible. **Dr. Bond could not and did not direct or authorize Dr. Adams to retake the appellant or to confine him at Malling place; the retaking and confinement were the independent acts of Dr. Adams, and each of them was a novus actus interveniens sufficient to break the chain of**

> **causation. Further, the confinement of the appellant could not have continued during nine years without repeated examination and recertification by the proper authorities; and for the consequences of those events Dr. Bond cannot on any intelligible principle be held to be responsible.**" (Emphasis added)

[44] Dr Bond was, therefore, only liable for the period in which he confined the plaintiff for him to be taken away by Dr Adams. The confinement by Dr Adams was held to be protected by the Lunacy Act as he was authorized to retake the plaintiff, who had been confined under a lawful reception order and was on probationary release, back into confinement. The order granting the probationary leave of absence authorised the manager of the licensed house to retake the plaintiff into confinement at any time before the probationary period expired, if his mental condition required it. Dr Adams was the manager and exercised his authority under the release order. He was therefore not liable for false imprisonment at all.

[45] The case of **Lock v Ashton** was also not cited in the House of Lords in **Harnett v Bond** but the Law Lords determined the issue on the basis of causation and whether the independent actions of the various individuals who dealt with the plaintiff was sufficient novus actus interveniens to break the chain of causation.

[46] **R v Governor of Brockhill Prison ex parte Evans (No 2)** was a case of false imprisonment brought against the governor of prisons, where, because of a mistake in the calculation of her release date, the plaintiff was detained for a longer period than was lawful. The case is useful, in the sense that the basis for the immunity for judicial actions is discussed and was stated at page 1008 as follows:

> "Counsel for the appellant accepts that where a court sentences a person to imprisonment but exceeds its powers, either because it has no power to send that person to detention or because the period of detention imposed exceeds the statutory maximum, **the person has no action for false imprisonment because there is lawful justification for the detention, namely the court order ...**" (Emphasis added)

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

[48] In **John Crossfield**, B Morrison J (Ag) (as he then was), at first instance, in dealing with a case of false imprisonment, applied the principle as stated in **Diamond v Minter** and in **Lock v Ashton** without mentioning the latter case. Referring to the period spent in custody by the claimant, after being remanded by a judge, B Morrison J (Ag) said that "seeing that he was remanded pursuant to a judicial order his entitlement to damages is curtailed to and limited to that period as described above, that is four days". He also relied on the authority of **R v Governor of Brockhill ex parte Evans** for the proposition that until the judicial order is set aside the imprisonment is not tortious.

[49] This brings me now to two judgments of the Supreme Court cited to this court in this appeal which, in my view, are inconsistent with each other. The first is **Delroy Thompson v The Attorney General and Detective Douglas Taylor**. In that case

the claimant was a ramp attendant at the Norman Manley International Airport when he was arrested and prosecuted for drug offences. The claimant had been detained on 10 September 2005 and kept in the custody of the police until the 16 September 2005 when he was taken to then Resident Magistrate Court for the Corporate Area (now Parish Court). On that date he was offered bail by the Parish Court Judge but did not take up the bail offer until 22 September 2005. K Anderson J having heard evidence in the case held that "[o]nce he was taken by the arresting officer, before the court, the claimant was no longer, unlawfully detained. His unlawful detention by an agent/servant of the Crown, came to an end, once he had been brought before a court of law".

[50] K Anderson J relied on definitive statements made in Clerk and Lindsell on Torts [2010], 20th edition at paragraph 15.42 where it was stated that:

> "…if a party is arrested without a warrant and taken before a magistrate, who thereupon remands him, he must seek his remedy for the first imprisonment in an action of trespass and for the imprisonment on remand, in an action for malicious prosecution."

[51] K Anderson J purported to apply **Lock v Ashton**; **Diamond v Minter** and **Donovan McMorris v Maurice Bryan** [2015] JMSC Civ 203 at paragraph [26]. He took the view that the claimant could not recover compensation for false imprisonment for the period during which he was "remanded by the court, arising from his inability to meet his bail".

[52] That decision by K Anderson J, however, is to be contrasted with the decision of F Williams J in **Conrad Gregory Thompson**. In the latter case, F Williams J, having considered the defendant's contention that the consequences of the inability of the claimant to take up the bail offered to him after he was taken to court to answer the charges made against him by the police, should not be borne by him, stated that:

> "The court finds itself unable to agree with this last submission. In the court's view the false imprisonment and the malicious prosecution in this regard are inextricably intertwined. If he had not been detained and then prosecuted on a false charge, he would likely have continued to enjoy his liberty. The defendant must be held responsible for all the consequences of that detention, malicious prosecution and the resultant false imprisonment. In the court's view, the claimant must be compensated for all the days he remained in custody ..."

[53] F Williams J cited no authority for this proposition and the appellant argued before this court that F Williams J erred and probably would have decided differently if he had been presented with the authorities now being relied on. That case was decided in 2011 but it was not considered by K Anderson J in his decision in 2016.

[54] The judge in the instant case relied on this decision of F Williams J in making her award. The respondent, however, in submitting that the judge's decision was the correct one, cited the Privy Council's decision in **Terrence Calix v Attorney General of Trinidad and Tobago**. This case was decided before **Delroy Thompson** but was not considered by K Anderson J either.

[55] **Terrence Calix** was a case of malicious prosecution. It involved no claim for false imprisonment. The appellant in a case of mistaken identity was apprehended,

arrested and charged for robbery and rape. He was brought before the magistrates' court and remanded in custody. He was first tried summarily for the charge of robbery but the identification evidence was so poor that a submission of no case to answer was upheld. He was, thereafter, tried for rape on the same evidence with unsurprisingly, the same results. It appears that for some of the period for which he was in detention he had been offered bail but did not take it up. The appellant appealed the award made to him as compensation at first instance on the grounds that it was inordinately low. One of the issues the Court of Appeal of Trinidad and Tobago had to decide was "whether a person who is incarcerated, although granted bail, can receive an award of damages in malicious prosecution under the head of endangerment of liberty". The Court of Appeal determined that the grant of bail by the magistrate which was not accessed by the appellant was sufficient to disentitle him to an award. The Court of Appeal took the view that the grant of bail interposed a judicial act which then became the cause of the appellant's continued detention.

[56] On appeal to the Privy Council, the Board pointed out that the intervention of a judicial act as a novus actus interveniens was applicable to false imprisonment only and not to malicious prosecution. With regard to the approach of the court at first instance, the Board pointed out that the trial judge had dealt with the point as one of a failure of the appellant to mitigate his loss, as he failed to take steps to secure his release. The Board disagreed with this approach because failure to mitigate loss was not pleaded, it had not been put to the appellant and there was no evidence to support such an

assertion. Therefore, the Board found it was not open to the judge to make such an adverse finding against the appellant.

[57] With regard to the position taken by the Court of Appeal, as said before the Board pointed out that a judicial act precluded liability only in a case of false imprisonment. The Board was at pains to point out that the avowed basis on which the respondent sought to deprive the appellant of compensation for loss of liberty was his failure to take up a grant of bail and that the failure to take up the grant of bail was not a judicial act. It also pointed out that the respondent had not sought to uphold the Court of Appeal's conclusion that the grant of bail was a judicial act which became the cause of the appellant's detention. In my view, therefore, the Board made no pronouncement on that specific pronouncement by the Court of Appeal, the point not having been pursued by the respondent. At paragraph 23 the Board said that:

> "The respondent did not seek to uphold the Court of Appeal's conclusion that the grant of bail was a judicial act which became the cause of the appellant's detention. A claimant's failure to take up a grant of bail (which is the avowed basis on which the appellant should not recover compensation for loss of liberty) is not a 'judicial act'. **In any event, although a judicial act precludes liability in false imprisonment, it does not relieve the prosecutor of liability in malicious prosecution**: the prosecutor remains liable for the damage caused by his setting the prosecution in motion – see Lock v Ashton (1848) 12 QB 871 (116 ER 1097) ..." (Emphasis added)

[58] It is clear, therefore, that the issue of whether the offer of bail by a judge to a person previously detained is a judicial act which can operate as a novus actus interveniens in a case of false imprisonment was not definitively decided by the Privy

Council in the case of **Terrence Callix**. Therefore, the reliance by the respondent on this case as authority that the offer of bail, being a judicial act, cannot break the chain of causation is misconceived. The question is one which remains open, at least at the appellate level. This is an issue which requires argument on the specific facts and issue, and would involve an examination of the principles of bail and the various relevant provisions of the Bail Act and, perhaps, issues of policy. K Anderson J for instance was of the view that, for each appearance where the defendant appeared in court and did not take up his bail, he was remanded by the judge until the bail offer was taken up or until the next date. There may or may not be some force in that approach.

[59] In **Harnett v Bond** at page 689 the House of Lords noted that Dr Bond had no power or authority over Dr Adams and once the plaintiff was returned to the place of his lock down at West Malling the duties regarding his custody devolved on Dr Adams alone. From the time Dr Bond handed over to Dr Adams and he assumed control over the plaintiff Dr Bond's responsibility ended. That is an argument which, by analogy, could be made in the proper case of false imprisonment where a person previously detained is brought to court, offered bail with a surety and the offer is not taken up. It could be argued that the police have no authority or control over a judge and once a defendant has been brought to court, the police have no further control over what becomes of his liberty or any judicial action that may be taken with respect to him. A judge who considers whether to exercise a discretion to grant bail, in what sum the bail bond should be and whether or not a surety is to be provided, exercises an independent judicial discretion unrelated to the act of the police in effecting an arrest,

and therefore, carries out an independent judicial act. The question whether that act can be viewed as a break in the chain of causation is one of fact, law and policy and must be fully argued in an appropriate case.

[60] Fortunately, that is not the issue in this case. This case falls to be decided on a much narrower and less controversial basis. Therefore, it is not the appropriate case in which to make that determination. This instant case is distinguishable from the authorities discussed above including the Privy Council decision in **Terrence Calix** because it falls to be determined largely on the basis of the effect of section 19 of the Bail Act and the Parish Court Judge's powers under those provisions.

[61] The respondent was lawfully on bail with a surety at the time he was taken into custody by the second appellant. Counsel for the respondent is correct that section 19 of the Bail Act is relevant to this case and to the sole issue for determination by this court. The law provides, for a surety, who so wishes, to be released from the obligation under the recognizance entered into. This, however, has to be done in accordance with section 19 of the Bail Act. That section provides as follows:

> "19 - (1) A surety shall be released from obligation under recognizance entered into by him, in the following circumstances-
>
> (a) **where the Court grants such release on an application made in accordance with subsection (2)**;
>
> (b) where the Court makes no order or a *nolle prosequi* is entered in relation to the defendant who provided the surety;

(c) where the matter in respect of which the surety was provided is adjourned sine die or dismissed, as the case may be;

(d) where the defendant concerned is acquitted or convicted, as the case may be.

(2) **A surety who wishes to be released from his obligations under a recognizance -**

(a) shall apply in writing for such release to the Court by which such recognizance was taken; and

(b) may attend before that Court for the hearing of such application.

(3) Where a surety is released, the defendant concerned-

(a) shall forthwith be notified of such release; and

(b) may be taken into custody until he provides other surety or sureties;" (Emphasis added)

[62] In this case the surety, who was the respondent's girlfriend at the time, wished to be released from her recognizance but the procedure provided in section 19 for her release to be granted was not followed. She, instead, made a report to the police resulting in the respondent being taken into custody by the second appellant. This also was not in adherence to the provisions of the Bail Act, more specifically section 16(3)(c). That section provides for a surety to notify the police, in writing, that the person bailed is unlikely to surrender to custody and for that reason wishes to be relieved of her obligation as surety. In such as case the police officer may arrest the person without a warrant but must bring that person before the court within 24 hours or at least at the next sitting of the court. The respondent was in custody from 23

September 2014 to 23 October 2014 before being taken to court, at which time the Parish Court Judge made an order for the surety to be released from the recognizance entered into by her. This order was endorsed on the information charging the respondent with rape and duly signed by the Parish Court Judge.

[63] What then was the position of the appellant at the moment his surety was released from her recognizance? The Parish Court Judge clearly took the view that he needed to provide another surety for his release on bail. In making that determination she clearly decided that he had to be remanded in custody until a new surety was provided. The Parish Court Judge therefore offered the respondent bail with surety in the same sum and on the same terms as before. He was, therefore, to use the language of section 19(3)(b) of the Bail Act "taken into custody" until his obligation to provide a new surety was fulfilled. On the provision of the new surety he was released on bail. All this was in keeping with section 19 of the Bail Act.

[64] Although the respondent was on bail when he was unlawfully detained by the police based on a report by the surety, it does not take away from the fact that a surety is entitled to apply to be released. Therefore, on 23 October when the surety appeared before the court and was released from her recognizance by the judge in accordance with section 19 of the Bail Act, the respondent was at that point, by operation of law and subject to the discretion of the judge pursuant subsection (3)(b), "taken back" into custody. The application to be released from her recognizance made by the surety and the grant of that release were actions independent of the action of the second appellant

and would have occurred on that date or any date set by the Parish Court Judge even if the respondent had not been taken into custody by the second appellant.

[65] To illustrate the point let us for a moment consider what would have been the position if the respondent had not been in the custody of the second appellant when the application to be released was made by his surety. The surety having applied to be released, the law mandates that the respondent would have to be notified of her release. It also provides that he may be taken into custody until he provides another surety. So having been informed that he no longer has a surety, he would be required to turn himself into court and provide a new surety. If he had no alternative surety, he was subject to being remanded until he provided one. This remand of the respondent until he finds a new surety after the release of the previous one is, therefore, entirely independent of anything the second appellant had done previously.

[66] The act by the Parish Court Judge of releasing the surety on her application and remanding the respondent until he was able to provide a new surety was an independent and intervening judicial act, done pursuant to the Bail Act, for which the appellants cannot be held responsible. As a result, the appellants were not responsible for the five days it took the respondent to find a new surety.

[67] The judge was, therefore, wrong to rely on and apply the case of **Conrad Gregory Thompson,** which involved an entirely different set of circumstances, to make an award for 35 days. The appeal has merit and the number of days should

accordingly be reduced to 30 days for false imprisonment. This would result in the award for false imprisonment being reduced to $3,630,000.00.

The counter notice of appeal

[68] The respondent was aggrieved by the quantum of damages awarded by the judge and filed a notice of counter notice of appeal on 9 May 2017 and an amended counter notice on 8 May 2018. However, for ease of reference I will continue to refer to the parties as before; that is, as the appellants and respondent.

[69] The single ground in the amended counter-notice of appeal states that:

> "(a) The award made by the Learned Trial Judge of $4,235,000.00 ($121,000.00 per day) for False Imprisonment is inordinately low and unreasonable having regard to recent awards made by the court for similar cases."

[70] The respondent sought the following orders on the counter notice:

> "(a) The award for False Imprisonment be increased to between $6,000,000.00 to $7,000,000.00
>
> (b) The costs of this Appeal and the cost below be awarded to the Respondent/Claimant.
>
> (c) There be such further or other relief as may be just."

Submissions on the counter notice of appeal

Respondent's submissions

[71] Counsel argued that whilst the trial judge had correctly considered the relevant cases and the usual award for false imprisonment in these cases, she nevertheless awarded a sum far below the sum awarded in those cases. The trial judge, it was submitted, misapprehended the facts and made a wholly erroneous estimate of the damage to which the respondent is entitled. In making these submissions counsel conceded that the appellate court may be reluctant on principle to interfere with the judge's award of damages but argued that the award in this case was so inordinately low, that this court ought to interfere.

[72] Counsel cited McGregor on Damages 16th Edition where it was noted that the principal heads of damages in a false imprisonment claim were "...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 status". Counsel submitted, therefore, that the heads of damages for false imprisonment which are to be considered for compensation are:

a. Loss of liberty

b. Injury to feelings

c. Physical injury

d. Illness or discomfort resulting from the detention

e. Injury to reputation and

f. Pecuniary loss not too remote

[73] Counsel conceded that the sum awarded for false imprisonment is at the judge's discretion and is calculated using comparable awards and adjusting them using the Consumer Price Index. Reliance was placed on **The Attorney General of Jamaica v Glenville Murphy** [2010] JMCA Civ 50.

[74] Counsel argued that, in examining the relevant cases cited by the respondent, the judge misapprehended the circumstances of the respondent's arrest and detention, when she distinguished the case of **Herwin Fearon v The Attorney General of Jamaica and Constable Brown** (unreported), Supreme Court, Jamaica Suit No CL 1990/F-o46, Judgment delivered 31 March 2005. Counsel pointed to evidence led at the assessment hearing about the filthy state of the holding cells at the Hunts Bay Police Station. He also pointed to the evidence heard by the judge of the presence of rats, cockroaches and other insects in the cells and the fact that the respondent had to sleep standing up due to overcrowding in the cells. Counsel submitted that the respondent's case, even though it was more similar to **Herwin Fearon's** case, was made worse by the fact that, unlike Mr Fearon's detention which was initially lawful, the respondent's was unlawful from the start.

[75] Counsel argued further that the police acted maliciously, in that although section 19 of the Bail Act was brought to the police's attention, they still kept the appellant in custody and when the reason for the surety's report was brought to the second

appellant's attention, he was dismissive. In addition, he said, there is no indication that the judge took this, and the fact that no investigation was carried out by the police, into consideration. He also submitted that the judge failed to take account of the fact that officers at the Darling Street Police Station had acted maliciously in misleading the police at Hunts Bay Police Station that the respondent's bail had been revoked in order to ensure his detention at that station.

[76] The respondent referred to the cases cited to the judge and argued that the award should be increased to between $6,000,000.00 and $7,000,000.00 for general damages for false imprisonment based on a daily rate of between $171,400.00 to $200,000.00 for the 35 days. Counsel submitted that the instant case was similar to **John Crossfield** in that the respondent suffered serious injury to feelings and discomfort resulting from detention and the injury to reputation was the same.

[77] Counsel also maintained that the injury to feelings, discomfort resulting from detention and injury to reputation were also similar to that in the consolidated case of **Jervis Blake et al v The Attorney General of Jamaica** [2016] JMSC Civ 159. It was also submitted that the **Herwin Fearon** case bears the most similarity to the instant case, although this case is more serious and that the sums cited above would bring the respondent's case more in line with that decision.

Appellants' submissions

[78] Counsel for the appellants submitted that the complaint contained in the counter notice of appeal was unfounded. Counsel pointed out that all the cases cited by counsel

for the respondent were considered by the judge in making the award. Counsel argued that the judge in finding that the injuries in the cases cited were more severe than the respondent's correctly distinguished **Herwin Fearon.**

[79] Counsel submitted further that the judge demonstrated no misunderstanding of the law or evidence, neither did she act upon any wrong principle of law and cannot be shown to be plainly wrong in her approach. Accordingly, said counsel, the award made by the judge should not be interfered with, as taking everything into account, it was not inordinately low.

Analysis

[80] The single issue raised by this counter notice of appeal is whether in all the circumstances of the respondent's case, the award of damages for his false imprisonment made by the judge was inordinately low.

[81] An appellate court may review and adjust a trial judge's assessment of damages where it is satisfied that the judge has acted upon a wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of the court, a wholly erroneous estimate of the damage to which the plaintiff is entitled.

[82] The test to be applied when an appellate court in reviewing an award of damages is that stated in **Flint v Lovell** where Greer LJ said:

> "... I think it right to say that this court will be disinclined to reverse the finding of a trial judge as to the amount of

> damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

[83] In the **Attorney General v Glenville Murphy** at paragraph [23] the court held that:

> "An appellate court is disinclined to interfere with an award made by a trial judge. The court will however intervene if it is of the view that the award is too low or excessive- see **Flint v Lovell** [1935] 1 KB 354 and **Davis v Powell Duffryn Associated Colleries Ltd** [1942] AC 601."

[84] In the instant case the judge considered the respondent's evidence of what occurred and how it affected him at paragraphs, [7], [8] and [9] of her judgment. She then considered the submissions of both counsel and the cases relied on. The judge rejected the cases cited to her by the appellant and accepted those cited by the respondent as more relevant. She considered the authorities of **John Crossfield**, **Jervis Blake et al** and **Herwin Fearon** and found that the circumstances in those cases caused greater injury. At paragraph [23] of her judgment she said:

> "I have considered all the cases to which I have been referred as well as the submissions advanced. The cases relied on by the Defendants do not seem to reflect the prevailing trend in relation to awards for False Imprisonment as seen in cases like the **John Crossfield** case and the consolidated cases of **Claudette Hamilton** and **Jervis Blake**. I find the cases submitted by the Claimant useful although I am of the view that the injuries sustained in

> those cases were more severe. The **Herwin Fearon** case for example, although similar, was made worse by virtue of the fact that the Claimant was pushed to the Police Station, in the busy town of May Pen, which was some 150 metres away and by the fact that he had to sit on the concrete floor during the period of his detention."

[85] In relation to **John Crossfield** the judge stated:

> "... It is noted that the circumstances of the imprisonment of Mr Crossfield were more severe than in the instant case. In particular Mr Crossfield spoke about being handcuffed in his uniform he being a police [sic] officer and indicated that he even developed skin fungus and chicken pox. I accept that Mr Tyndale suffered some embarrassment, having been arrested at his place of work. However, I find Mr Crossfield's injuries to be worse than that complained of by Mr Tyndale, which was made worse by virtue of the fact that he was a security officer. Therefore, I am of the view that Mr Crossfield's injury is about twice as severe as that of Mr Tyndale."

[86] In relation to the **John Crossfield** case he received $150,000.00 which when updated amounts to $241,558.44 per day. Having found that Mr Crossfield injuries were twice as severe as the respondent's she awarded the respondent $121,000.00 per day for each day of his false imprisonment.

[87] Counsel contends that the respondent's case was more in keeping with **Herwin Fearon's** case but it was more serious. The judge did not find the respondent's case more serious and I can see no basis on which to fault her analysis. It seems to me that the only similarity between the two cases is that they were both bus drivers who were remanded in cells which were less than ideal. Whilst both were remanded under similar conditions in the cells, Mr Fearon had not previously been charged, remanded and out on bail when he was arrested and dragged through the streets of May Pen, in the

parish of Clarendon, to the police station. At the time he was a well-known bus driver in the town.

[88] In the instant case the respondent could not recover for any initial shock of being locked up, having already been in custody on the charge of rape and had been out on bail. Neither, in those circumstances, could he prima facie recover for any injury to reputation, or feelings. Although he said he was embarrassed because he was arrested in front of his passengers, he gave no evidence of any injury to reputation. Unlike Mr Fearon, although the respondent's bus was emptied of its passengers, the respondent was allowed to drive the bus under his own steam to the police station. It is unclear from the evidence whether the passengers even knew why the bus was unloaded outside of the usual routine traffic violation.

[89] In making an award all the heads of damages may be considered even though only one single award is made (see **Murphy** at paragraph [21]). Malice is not a head of damages for false imprisonment and a claimant may recover damages even in the absence of malice or fault. Therefore, the complaint by the respondent that the judge, in making the award, failed to take account of the fact that the second appellant acted with malice, is without merit.

[90] Unlike **John Crossfield** and **Claudette Hamilton v the Attorney General of Jamaica** (one of the cases consolidated with **Jervis Blake et al**) there were no physical injuries to the respondent. Mr Crossfield was a security guard who was locked up in his uniform and, although he was taken to court, bail was opposed on several

occasions. He was constantly abused by other inmates. As a result of his prolonged detention he developed a skin fungus and chicken pox. He also suffered from nausea. Because of his incarceration, his wife, a police constable, was disrespected and accused of associating with a "druggist". He was threatened with death for being an informer. He was further traumatized by the fact that the incident was published in a daily newspaper. In the case of Ms Claudette Hamilton, she developed wheezing and chest pains whilst in custody. None of these factors present themselves in the respondent's case.

[91] The judge clearly expressed her reasons for finding the instant case less serious than the cases relied on by the respondent. I can find no flaw in her assessment of the evidence. Based on her reasoning it cannot be said that she acted on any wrong principle or that she erred in her estimate of the award to be made. Neither can it be said that, in the circumstances of this case, the award of damages for false imprisonment was inordinately low.

[92] The counter notice of appeal therefore fails.

Disposition

[93] The respondent having been in custody for five additional days before taking up his bail, as a consequence of a successful application by his surety for release from her recognizance and the requirement to provide a new surety, the judge erred in granting damages for false imprisonment for those five days. I would, therefore, allow the appeal and set aside order I of the orders of Jackson-Haisley J, and substitute therefor

an order that general damages be awarded to the respondent for 30 in the sum of $3,630,000.00.

[94] There being no basis upon which I could otherwise find that the judge acted upon some wrong principle of law in making the award she did or that the award as it stands is inordinately low, the counter appeal must necessarily fail.

PHILLIPS JA

ORDER

(1) The appeal is allowed.

(2) The judgment of Jackson-Haisley J is varied as follows:

(i) General damages awarded to the claimant in the sum of $3,630,000.00 with interest at a rate of 3% per annum from 16 December 2014 to 24 March 2017;

(3) Costs of the appeal and the counter-notice of appeal to the appellants to be agreed or taxed.