IN THE EASTERN CARIBBEAN SUPREME COURT

HIGH COURT OF JUSTICE

FEDERATION OF ST. CHRISTOPHER AND NEVIS

ST CHRISTOPHER CIRCUIT

(CIVIL)

CLAIM NO. SKBHCV2007/0309

BETWEEN:

REGINALD CLENDON HAYES THOMAS	***Claimant***
And	
THE ATTORNEY GENERAL OF ST. KITTS AND NEVIS	***1st Defendant***
JOSEPHINE MALLALIEU MAGISTRATE DISTRICT "B"	***2nd Defendant***

Appearances:
Mr. Patrick Patterson and Mr. Chesley Hamilton *for the Claimant*
Mr. Arudranauth Gossai Crown Counsel *for the Defendants*

2008: May 23, July 31

DECISION ON PRELIMINARY OBJECTION

[1] **BELLE J.:** On 1st May 2007 the Claimant was arrested by Police in St. Kitts without a warrant. He was subsequently charged on 2nd May with four summary offences and served summons to appear at the Magistrate's Court for District "B" on 22nd May 2008 to answer the charges. These charges arose from an argument between the Claimant and the Honourable Mr. Timothy Harris a Minister of the Government of the Federation of Saint Kitts and Nevis. The Claimant appeared on 22nd May and was tried and convicted for the four offences.

[2] The facts stated in the Statement of Case are not challenged at this time and I rely on them. The Statement of Case indicates that on 22nd May the Claimant had asked for an adjournment to present his plea in mitigation but the 2nd Defendant insisted on pursuing a sentencing hearing on the same day of the conviction. The Claimant made his plea in mitigation and followed this with an apology. Following this the 2nd Defendant did not immediately sentence the Claimant but proceeded to remand him in custody for one week pending sentence. As a result of this order the Claimant was imprisoned for one week.

[3] In his Statement of Claim the Claimant contended that the Defendant had no jurisdiction to order the Claimant be detained in custody for one week pending

sentence under the Small Charges Act. He also alleged that as a consequence of this order he was deprived of the opportunity of immediately appealing his conviction and sentence to the Court of Appeal and consequently the right to be released pending the suspension of any sentence. According to the Claimant he had been forced to suffer imprisonment in respect of the conviction for offences and charges which were variously (a) unconstitutional, (b) duplicitous, (c) could not lawfully or properly attract a sentence of imprisonment.

[4] On an Application for Habeas Corpus, heard in the High Court on May 29th 2007 the Claimant was released from custody. At 2.00 pm of that same day the Claimant appeared before the 2nd Defendant for sentencing and was placed on a two year bond of $3000.00 to keep the peace and be of good behaviour. The Claimant therefore claimed that the detention was in breach of several provisions of the constitution including breaches of his fundamental rights not to be deprived of his personal liberty nor freedom of movement save as authorized by law among other things. He consequently claimed that he had suffered pain and injury, loss and damage, harm to his reputation, financial loss in that he was unable to pursue his occupation, substantial mental anguish and humiliation and he was put to the expense of defending himself.

[5] Counsel for the Applicant Attorney General argues that the entire claim in this matter should be struck out because it is an incorrect and incurable originating process, and secondly he claims that the court should hold that to the extent there may be some claim under the constitution it should not be entertained and the court should apply the proviso in the constitution which permits it to decline to hear the matter. Counsel relied on a number of authorities. Among the authorities were the decision of the Privy Council in **Khemrajh Harrikissoon v Attorney General** (1969) 31 WIR 348 and **Attorney General of Grenada v Aban (Selwyn)** (1995) 48 WIR 111. According to these decisions the value of the right to apply for constitutional redress under section 6 of the Constitution would be diminished if it were allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action.

[6] Counsel for the Applicant also argued that the Part 56 of the CPR constituted a bar to a claim for redress under the constitution other than by the procedure set out therein. Firstly counsel argued that the claim must be by Fixed Date Claim in Form 2. This is mandatory, he argued, because Part 8.1 (5) of the CPR 2000 stated that Form 2 must be used:
(c) whenever its use is required by a rule or practice direction; and (d) where by any enactment proceedings are required to be commenced by originating summons or motion.

[7] Counsel also relied heavily on the decision **Re Blake** (1994) 47 WIR 174 where it was held at page 175 para. A-C as follows:

> *" So far as the originating summons purported to be an application for a declaration of an infringement of the appellant's fundamental rights and freedoms, the originating summons was irregular and liable to be set aside as an ex parte summons was not the correct means of instituting proceedings for redress of constitutional rights*

under rules 3 and 8 of the supreme Court (Constitutional Redress-St Christopher, Nevis and Anguilla) Rules 1968 (having effect under the 1983 Constitution)...."

[8] Counsel for the Applicant also referred to the case of **Homer Richardson v The Attorney General of Anguilla** which he submitted provided guidance on Part 56 of the Rules. In this case Bruce-Lyle J is reported to have stated at page 4 para 4and 5 that-

"It is my view from a review or analysis of these sections of Part 56 of CPR 2000, that the Claimant has a mandatory duty to provide certain information as is specified in the relevant subsections of Part 56. The word "must" imposes or connotes an imperative duty on the Claimant. I cannot interpret the word "must" any other way."

[9] Finally Counsel for the Applicant referred to my decision in **Elsroy Dorset v Dwyer Astaphan and others** (2007) where I stated at page 3 para. 6 of the Judgment:

" I should first say that striking out a statement of case is available and appropriate where pleadings disclose no cause of action, or defence, are frivolous and vexatious and an abuse of process or actions are commenced by way of an originating process which is incurably wrong."

[10] The Applicant following the latter decision submitted that the Claimant in the action had commenced the action by a process which was incurable wrong and it ought to be struck out against the Defendants. Finally Counsel argued that alternatively if the action was not struck out he would rely on section 18 (2) of the Constitution which provides:

"(a) The High Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1); and may make such declarations and orders; issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 17 (inclusive)

Provided that the High Court may decline to exercise its powers under the subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available under any other law."

[11] Counsel referred to the authorities **Khemrajh Harrikissoon v Attorney General** (1979) 31 WIR 348 , **Attorney General of Grenada v Aban (Selwyn)** (1995) 48 WIR 111; **Lucas v Jack and Another** [2000] 5 LRC 415 **Thakur Persad v Attorney General** (2002) 59 WIR 519 and my own decision in **Premier League Limited v The Attorney General** (2006) unreported. The principles enunciated in these decisions are well established and need not be repeated here in detail. But it in any event they are fully accepted and embraced by the Claimant's counsel. It is therefore common ground that for the Claimant to remove himself from seeking an ordinary common law redress and to invoke the special constitutional rights to redress under section 18 he has to show something more than a mere grievance emanating from the ordinary common law torts.

[12] It is apropos to note that the Claimant's argument is that adequate means of redress do exist in the law of tort, but that on the matter of damages any award should be based on the fact that there was a contravention of the constitution. But he is not using that jurisdiction of the court to seek redress.

[13] I am thankful to counsel for the Applicant for his research in this matter but it is my view that it has not taken his argument very far. The main reason for this is that the authorities referred to by counsel all deal with matters in which the respective claimants approached the court seeking the court's jurisdiction under the relevant sections of the constitution and or for prerogative orders, now called administrative orders. What the cases say is that there is a special originating procedure for bringing constitutional matters and actions for administrative orders before the court. But the cases do not say that a Claimant cannot bring an action in tort before the court and in so doing claim that the wrong done was not only a tort but also a breach of the constitution and thus any award of damages should take this into account. In my view authorities which focus on the correct way to bring a constitutional or administrative action do not necessarily shed light on an action in tort which claims aggravated damages because the tort was also a breach of the constitution.

[14] Indeed the Part 56 of the CPR 2000 refers to actions for relief under the Constitution of any Member States or Territory as applications for an administrative action. Part 56.6 provides for situations in which the court, in matters brought as common law actions can direct that the matter proceed as an application for an administrative order under those rules and give the necessary directions to permit the claim to proceed.

[15] Counsel on the Court's instruction sought further clarity of the issue of "constitutional redress." Some assistance was gleaned in that regard from the decisions of Her Majesty' Privy Council in **Ramish Lawrence Maharaj v The Attorney General** (1978) 30 WIR 310 In that Case Lord Diplock traversed the relevant facts and shed light on the meaning of the word redress in this context. This is what he said:

> *"What then was the nature of the 'redress' to which the appellant was entitled? Not being a term of legal art it must be understood as bearing its ordinary meaning, which in the Shorter Oxford Dictionary is given as 'Reparation of, satisfaction or compensation for, a wrong sustained or the loss resulting from this' . At the time of the original notice of motion the appellant was still in prison. His right to be deprived of this liberty except by due process of law was still being contravened; but by the time the case reached the Court of Appeal he had long ago served his seven days and had been released. The contravention was in the past; the only practicable form of redress was monetary compensation"*

[16] In **Attorney General of Trinidad and Tobago v Ramanoop** [2006] 1 AC 328, a more recent decision of the Privy Council Lord Nicholls of Birkenhead stated that where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. In general there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be

adequate. Lord Nicholls found it necessary to point out that the jurisdiction created in the Trinidad and Tobago Constitution to protect citizens against misuse of state power is separate and additional to other remedial jurisdictions of the court. At para 18 of **Ramanoop**, Lord Nicholls said that when exercising its constitutional jurisdiction the court is concerned to uphold, or to vindicate, the constitutional right. In para. 19 he referred to the word "redress" in section 14(1) of the Constitution of Trinidad and Tobago.

[17] In Privy Council Appeal No 29 of 2007 **Angela Inniss v Attorney General of Saint Christopher and Nevis** the Board per Lord Hope of Craighead observed that the same word is used in section 18(1) of the Constitution of St Christopher and Nevis to describe the relief that may be given for a contravention of any of the fundamental rights or freedoms in chapter II. He said that it was apt to encompass an award to reflect the sense of public outrage, emphasise the gravity of the breach and deter further breaches. Although such an award was likely in financial terms to cover much the same ground as an award by way of punishment in the sense of retribution, punishment in that sense was not its object. The expressions "punitive damages" or "exemplary damages" were therefore best avoided.

[18] What is left to be determined is whether the Statement of Case in this matter reveals sufficient reason for invoking the constitutional jurisdiction, or whether a determination was made at the outset that because of the nature of the allegations made, the Fixed Date Claim Form application for constitutional redress would not have been adequate for the purpose of traversing the pleadings and taking other procedural steps on the way to a full trial of the facts and law. By taking the alternative route the Claimant may also be conceding that there is no special feature involved in the case to justify constitutional redress.

[19] I have no difficulty in holding that based on the authorities presented and the facts alleged in the Statement of Case, the Claimant's Statement of Case should not be struck out. The Claimant has not claimed that there are any special circumstances that bring the case into the category where Constitutional redress would be appropriate. Indeed the Claimant's references to the constitution are not intended to invoke constitutional redress but legal redress, with reference to the constitutional breach being an indication of the gravity of the wrongs done to the Claimant. The style of claim may be confusing and inelegant but in the circumstances the claim would be treated as a tort claim against the state. The issue of the kind of damages to be awarded only arises if the Claimant establishes liability.

[20] Counsel for the Defendant also argued that the Claim against the Defendant was baseless as it was an action against a judge and such an action could not be brought. However my understanding of the authorities on this matter including **Maharaj** is that the act of a judicial officer is an act of the state and is not based on vicarious liability. The state would therefore be liable for acts of a judicial officer if found to be unlawful or unconstitutional. The judicial officer would bear no personal liability in such cases.

[21] However perusal of the Magistrate's Code of Procedure Cap 46 reveals that section 19 contemplates the possibility of an action being brought against any Magistrate for any act done by him (her) in the execution of his duty as such Magistrate. The

section says that the such action "shall be in the nature of an action on the case as for tort; and in the plaint it shall be expressly alleged that such act was done maliciously, and without reasonable and probable cause." Paragraph 13 of the Statement of Claim states that the Defendant without giving any reason maliciously and without reasonable or probable cause or justification ordered that the Claimant be detained at Her Majesty's Prison for one week pending sentence. It would therefore appear that the Claimant has properly grounded his suit against the Second Defendant who is an agent of the state and therefore is properly represented by the Attorney General who appears for the state in the matter. Based on this conclusion and those earlier stated I find that the action is properly brought.

[22] I hold that the action is one as in tort, to use the language of the statute, including an allegation of false imprisonment which would be an unlawful tort, and would also be considered unconstitutional. It is not a claim for compensation for breach of the Constitution only. The claim relies on the otherwise available means of redress referred to by Lord Nicholls in **Ramanoop**. In this case liability would be based on the action in tort being proved. Accordingly I hold that the reference to a breach of the Constitution is only relevant to any consideration of damages.

[23] At this stage I find that it would be a breach of the overriding objective to strike out the Claimant's claim. This court will not force the Claimant to resort to the constitutional jurisdiction where there is no need to do so. I therefore dismiss the application *in limine* and award costs to the Claimant to be assessed in accordance with Part 65 of the CPR 2000.

FRANCIS H. V. BELLE
High Court Judge

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