[2011] UKPC 22
Privy Council Appeal No 0079 of 2010

JUDGMENT

Antonio Webster (Appellant) *v* The Attorney General of Trinidad & Tobago (Respondent)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Phillips
Lord Walker
Lord Wilson

JUDGMENT DELIVERED BY
Lord Wilson
ON

18 July 2011

Heard on 14 June 2011

Appellant	*Respondent*
Sir Fenton Ramsahoye SC Jodie Blackstock	Peter Knox QC
(Instructed by Bankside Commercial)	(Instructed by Charles Russell LLP)

LORD WILSON:

1. The appellant, Mr Webster, appeals, with the leave of the Court of Appeal of the Republic of Trinidad and Tobago, against its order dated 1 February 2010. By that order the court (P. Jamadar J.A., N. Bereaux J.A. and G. Smith J.A.) dismissed the appellant's appeal against an order made by Pemberton J. in the High Court dated 12 May 2009, by which she had struck out two paragraphs, namely two and four, of the prayer in his claim form and statement of case in an action brought against the Attorney General. In fact she had almost certainly intended also to strike out paragraph three; and, in dismissing the appeal, the Court of Appeal also struck out that paragraph.

2. In his claim, issued on 2 July 2008, the appellant complained that at about 2.30 pm on 27 November 2007 police officers attached to Morvant police station unlawfully arrested him and unlawfully detained him at the police station until almost 9.00 pm. He alleged that he approached the police station in order to report a shooting incident near his home; that an officer, smelling strongly of alcohol, grabbed his shirt and, with another officer, dragged him into the station; that they beat him for more than 20 minutes, in particular around his head, face and back; that they threw him into a cell, with other prisoners, of which the walls were covered with faeces; that at about 8.00 pm he was questioned; and that at 8.55 pm he was released without charge. He claimed damages and/or aggravated and/or exemplary damages for false imprisonment and, impliedly, also for assault and battery.

3. Sir Fenton Ramsahoye S.C., who appears on the appellant's behalf before the Board, is unable to state whether the nature of the Attorney General's defence had been notified to the appellant in pre-action correspondence. At all events it was made clear in the Defence, dated 9 October 2008. It was to the effect that the officers who were investigating the shooting incident saw the appellant outside the station; that, following caution, he agreed to accompany them into the station; that, with his consent, he was searched; that he was interviewed; that at about 8.30 pm he agreed to make a written statement; and that he thereupon left the station. According to the Defence, the appellant was never assaulted nor beaten; the officer was not intoxicated; the appellant was never under arrest so was at all times free to leave the station; and he was never placed in a cell.

4. Thus, probably from the outset of the proceedings and certainly from the date when the Defence was filed, this was – or should have been – a straightforward action at common law for damages for false imprisonment and assault and battery. The

action remains to be determined; and oral evidence will surely play a central role in its determination.

5. The complication arises from the claims, additional to the claim for damages in paragraph 1, which the appellant included in paragraphs 2, 3 and 4 of his claim form and his statement of case and which he has fought to preserve long after the filing of the Defence and with a tenacity well demonstrated by his bringing this second appeal before the Board.

6. The paragraphs are as follows:

> "2. A Declaration that the arrest and detention of the said Claimant was unconstitutional and illegal.
>
> 3. A Declaration that the Claimant was deprived of his right to be informed promptly and with sufficient particulars of the reason for his arrest.
>
> 4. A Declaration that the Claimant was deprived of the constitutional right to be informed of his right to communicate with, instruct and retain an Attorney at Law of his choice contrary to Section 5 of the Trinidad and Tobago Constitution."

All three of the declarations sought were reflective of the appellant's rights under the Constitution of 1976. Paragraph 2 reflected his "right … to … liberty … and the right not to be deprived thereof except by due process of law" enshrined in section 4(a) of Chapter One of the Constitution. Paragraph 3 reflected the right of "a person who has been arrested or detained … to be informed promptly and with sufficient particularity of the reason for his arrest or detention" enshrined in section 5(2)(c)(i) thereof. Paragraph 4 reflected the right of "a person who has been arrested or detained … to retain and instruct without delay a legal adviser of his own choice and to hold communication with him" enshrined in section 5(2)(c)(ii) thereof.

7. Before it turns to the central question whether the claims for declarations were rightly included in the appellant's claim for relief, the Board notes that their inclusion caused a considerable amount of procedural confusion.

8. Section 14 of the Constitution, also in Chapter One, provides:

> "(i) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion."

The appellant's claims for declarations were for redress under s.14.

9. Rule 56.1 of the Civil Proceedings Rules 1998, which came into force on 16 September 2005, provides as follows:

> "(1) This Part deals with applications-
>
> (a) …
>
> (b) by way of originating motion under s.14(1) of the Constitution;
>
> (c) for a declaration in which a party is the State, a court, a tribunal or any other public body; and
>
> …
>
> (2) In this Part such applications are referred to generally as "applications for an administrative order"."

Thus the claims for declarations were "applications for an administrative order" by virtue both of para 1(b) and 1(c).

10. Rule 56.7 of the Rules provides as follows:

> "(1) An application for an administrative order must be made by a fixed date claim identifying whether the application is-
>
> (a) …
> (b) under section 14(1) of the Constitution;
> (c) for a declaration; or

> (d) …
>
> (2) The claim form in an application under section 14(1) of the Constitution shall serve as the originating motion mentioned in that section and shall be headed "Originating Motion."

The effect of para 1(b) and (c) of the rule is clear: in that the appellant was seeking the declarations, his application had to be made by a "fixed date" claim. But Rule 8.1 makes the position clearer still. It provides as follows:

> "(4) Form 2 (fixed date claim) must be used
>
> …
>
> (c) whenever its use is required by a rule or practice direction; and
>
> (d) where by any enactment proceedings are to be commenced by originating summons or motion."

11. A fixed date claim, made in Form 2, is a claim in which the claim form itself identifies the date of the first hearing of the claim and for which judgment cannot be entered in default of appearance. But, when an application for an administration order is made by a fixed date claim, the rules make further requirements; see for example Rules 56.7(3), 56.7(8) and 56.8.

12. But the appellant made his claim in Form 1. He contends that he was correct to do so. He rightly asserts that the applications for administrative orders included in the claim did not represent the "only or main" relief sought in the claim – on any view the main relief sought was damages in tort – with the result that Rule 56.6, which there is no need to set out, did not govern the procedure to be adopted. But his assertion that, in circumstances in which his main claim was for damages in tort, it was correctly made in Form 1 is belied not only by the rules set out in [10] above but also by Rule 56.9, which provides as follows:

> "(1) The general rule is that, where permitted by the substantive law, the applicant may include a claim for any other relief or remedy that arises out of or is related or connected to the subject matter of an application for an administrative order.

(2) The court may, however, at any stage -

…

(b) direct that the whole application be dealt with as a claim and give appropriate directions under Parts 26 and 27; and…"

13. It is clear that the appellant was wrong to make his claim in Form 1. He should have made it in Form 2, as a fixed date claim, and have applied to the court under Rule 56.9(2)(b) for a direction that the whole application be dealt with as a claim and for directions for the filing of affidavits or witness statements, for the attendance of their makers for cross-examination if appropriate and for disclosure etc under Part 26. The Board does not accept the Attorney General's submission – which is not reflective of the treatment of the rule by the Court of Appeal – that Rule 56.9 applies only to claims *wrongly* made as a fixed date claim in Form 2.

14. But the appellant's error in that regard was, of itself, likely to be of no consequence. So far as material, Rule 26.8 provides as follows:

> "(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right."

Had it been appropriate for the claim for declarations to remain as part of the appellant's claim, Rule 26.8(3) would, albeit probably on terms as to costs, surely have rescued him from his error.

15. But was it appropriate for the claim for declarations to remain as part of the appellant's claim?

16. On any view the appellant is entitled to seek *findings* that three of his constitutional rights had been infringed. His primary assertion that he was deprived of his liberty otherwise than by due process of law raised the over-arching dispute of fact. His subsidiary assertions that he was deprived of his rights to be informed of the reason for his detention and to have access to legal advice raised no further disputed issue of fact: for it follows from the nature of the Defence that, were he to have been wrongly deprived of his liberty, those rights would also have been infringed. The appellant is entitled to seek such findings – and it might well prove to be in his

interests to do so - because he is claiming exemplary as well as aggravated damages for the torts and, as Lord Devlin said in *Rookes v Barnard* [1964] AC 1129, at 1226, "the first category [of an award of exemplary damages] is oppressive, arbitrary or unconstitutional action by the servants of the government". It is important to note, however, that "it would not be appropriate to make an award both by way of exemplary damages and for breach of constitutional rights": see *Takitota v The Attorney General of the Commonwealth of the Bahamas* [2009] UKPC 11, at [15].

17. In *Jaroo v The Attorney General of Trinidad and Tobago* [2002] UKPC 5, [2002] 1 AC 871, the police impounded a motor car which the claimant had purchased and they detained it for seven months on suspicion that it had been stolen. The claimant applied for relief by way of originating motion under s14(1) of the Constitution. The response of the police to the motion was that they were diligently proceeding with their enquiries and that, until they had completed them, they were entitled to continue to detain the car. The Board upheld the conclusion of the Court of Appeal that the motion under s.14(1) was an abuse of process. For the appropriate claim had been an action in detinue at common law. The Board reiterated, at [29], that:

> "The right to apply to the High Court which s.14(1) of the Constitution provides should be exercised only in exceptional circumstances where there is a parallel remedy."

And the Board added, at [35] and [36], that, even if the claim had suitably been initiated as one for constitutional relief, the response of the police to the motion should have led the claimant to amend his pleadings in order to pursue the common law remedy which had always been available to him.

18. The principles enunciated in *Jaroo* clearly suggest that it was wrong for the appellant to have included the prayers for constitutional relief within his claim and certainly wrong to have proceeded with them following service of the Defence. Sir Fenton, however, relies on the more recent decision of the Board in *The Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15, with which, he submits, the present case is on all fours. The claimant in that case had been the victim of egregious violence at the hands of the police. He framed his action as being solely for infringement of his constitutional rights and, in that he issued it prior to the coming into force of the Rules of 1998, he did so by way of originating motion. He claimed declarations that his rights had been infringed and damages. It swiftly became clear that the Attorney General disputed none of his factual allegations. It was not in dispute before the Board that the claimant had been entitled to initiate – and thereafter to pursue – his claim as being one for constitutional relief under s.14(1) of the Constitution. The Board's decision was to uphold the conclusion of the Court of Appeal that the vindicatory damages to which the claimant was entitled under the

subsection could exceed the level of compensatory damages comparable to that provided at common law in that it could include an additional element "needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches": [19].

19. What was the feature which entitled the claimant in *Ramanoop* not to make his claims in tort for assault, battery and false imprisonment and therein to claim exemplary damages including by reference to breaches of his constitutional rights? The Board's answer was that the police officer's conduct, which had been "quite appalling", had represented a shameful misuse of the coercive powers with which the state had endowed him: see [1], [21] and [25]. It is suggested that the Board's answer has made it difficult for advice to be given about the proper form of claim against the police in respect of unlawful violence. But the Board made clear, at [31], that it was not departing in any way from the guidance which it had given in *Jaroo*. Such remains the principal guidance. The facts in *Ramanoop* exemplify the exceptional circumstances to which in *Jaroo* the Board had made reference.

20. In the present case – and irrespective of the erroneous *procedure* which he adopted – the appellant, by his attorney, made two decisions about how to formulate his claim: one of them was right and the other was wrong. The right decision was primarily to formulate his claim, unlike the claim in *Ramanoop*, as being for damages in tort. The wrong decision was to include subsidiary claims for the three declarations: for they were redundant. Upon the filing of the Defence then, even on the assumption, in the appellant's favour, that he had hitherto been unaware of its likely content, it should have become even more obvious to him that the declarations had been wrongly included and that he should apply for permission to amend his claim form and his statement of case so as to delete them. Instead, once Pemberton J. had resolved to determine, as a preliminary issue, whether they had rightly been included, he argued in the affirmative; and indeed he appealed against her negative conclusion. Even at that stage, however, his then advocate came close to recognising the folly of the appeal. For, in his written submissions to the Court of Appeal, he wrote:

> "It is noteworthy that the Appellant sought no damages for the breach of his constitutional rights but same is pleaded in his grounds for … exemplary damages … The Court can therefore articulate and make a finding that the Appellant's constitutional rights were violated and factor this into the award of … exemplary Common Law damages. This cannot however be done in the absence of a declaration *or finding* that his constitutional rights were breached." (Italics supplied)

The advocate was correct to submit that, were the appellant to secure an award of exemplary damages reflective of breaches of his constitutional rights, the appellant

needed a finding that they had been broken. But the advocate was also correct to submit that a declaration to such effect would be *alternative* to such a finding and that there would be no additional need for it. So what was the point of the appeal to the Court of Appeal? What, more pertinently, has been the point of this further appeal to the Board?

21. The appeal will be dismissed and, subject to any contrary representations on his part made within 14 days of the delivery of this judgment, the appellant will be ordered to pay the Attorney General's costs of and incidental to the appeal.