IN THE COURT OF APPEAL OF BELIZE AD 2020

CIVIL APPEAL NO 24 OF 2018

BRHEA BOWEN Appellant

v

(1) **ATTORNEY GENERAL OF BELIZE**
(2) **D/CPL. 275 ADRIAN LOPEZ** Respondents

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BEFORE

The Hon Sir Manuel Sosa	President
The Hon Madam Justice Minnet Hafiz Bertram	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal

A Sylvestre for the appellant.
B Williams, Crown Counsel for the respondents.

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22 October 2019 and 3 November 2020

SIR MANUEL SOSA P

[1] I am of opinion that this appeal should be dismissed. I have read the judgment of Ducille JA, in draft, and concur in the reasons for judgment given and, save to the extent indicated below, the orders proposed therein. With regard to the costs order, I am unable to agree that, not having heard the parties on costs, it is appropriate to make an order which immediately takes effect as a final order. In my respectful opinion, the costs order should be provisional in the first instance and only become a final order if no party applies for a different order. I consider that the parties should be given 10 days from the date of their receipt of this judgment in electronic form within which to make such application, by letter to the Registrar copied to all other parties. I further consider that it should be ordered that, in the event of such an application, (a) each party should have 7 days from

the date of such application within which to file and deliver to the other parties his or its written submissions on costs and (b) such application should be determined on the basis of the written submissions filed and delivered as ordered.

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SIR MANUEL SOSA P

HAFIZ BERTRAM JA

[2] I had the opportunity of reading the draft judgment of Ducille JA and I agree that the appeal should be dismissed for the reasons given in the judgment. I agree to the orders proposed therein."

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HAFIZ BERTRAM JA

DUCILLE JA

[3] This is an appeal of the 27th September, 2018, decision of Madam Justice Shona Griffith wherein she determined that (i) the Appellant's arrest on the 6th July, 2012, was a breach of the Appellant's right to the protection against unlawful deprivation of liberty under section 5(1)(e) of the Constitution of Belize; (ii) the Appellant is entitled to damages in the sum of $10,000.00 for the said breach; (iii) Costs in the sum of $5,000.00.

[4] The material background facts were ably summarized by the learned trial judge at paragraphs 3 and 4 of her judgment. They are as follows:

> "(3) … in July, 2012, [the Appellant] was 14 years old and resided with her mother at Lacroix Boulevard, Belize City. On Friday 6th July, 2012, armed with a search warrant, the Gang Suppression Unit of the Belize Police Department carried out a search of the premises and recovered 3 shotgun cartridges. The [Appellant's] mother had been about to leave the premises when the police came to search and she was arrested and taken to the police station. Warrants of arrest were issued for the [Appellant] as well as for her brother, in whose name the search warrant was issued, but whom according to the [Appellant], did not reside at the premises. The [Appellant] had not been home when the search was carried out-she was at a summer camp out of city in Burrell Boom from the 3rd July, 2012. Upon her return to the city on the evening of 6th July, the [Appellant] learnt of the warrant for her arrest, and accompanied by her elder sister, turned herself in at the police station whereupon she was arrested and charged with possession of ammunition contrary to the Firearms Act. The 6th July being a Friday, the [Appellant] was detained at the police station until Monday 9th July, 2012 when she was arraigned at the Magistrate's Court Belize

City, on the charge of possession of ammunition. The [Appellant] pleaded not guilty to the charge.

(4) At the Magistrate's Court the [Appellant] was denied bail pursuant to the Crime Control and Criminal Justice Act and kept on remand at a youth hostel for the next 70 days. She was then granted bail by the Supreme Court in September 2012 and after 4 years of adjourned hearings, the charge was dismissed on the 16th September, 2016 following a successful no case submission at trial. In her affidavit, the [Appellant] details her traumatic experience being held on remand at the police station in deplorable and unsanitary conditions from Friday night to Monday morning; and thereafter for approximately 2 months at the youth hostel, in conditions she considered akin to imprisonment. In September, 2012 the [Appellant] returned to school however she was obliged to attend court at the various adjourned hearings for the next four years whist she was in school, including the period April to June, 2015 when she sat CXC examinations. The [Appellant] alleges that upon graduating high school in June, 2015 she was unable to secure gainful employment due to the existing charge for firearm possession that remained pending and that her employment

challenges continued even after the dismissal of the charges. She alleges on a whole that her physical and psychological well-being were severely affected by the charge, detention and delay in bringing the prosecution to an end."

[5] The Appellant contends that in light of the facts set out above the learned judge was wrong; amongst other things, to only award the Appellant the sum of $10,000.00 as damages for the breach of the Appellant's constitutional rights. The Appellant contended below and on appeal that the appropriate award of damages was $40,000.00.

[6] After a detailed and thorough consideration of the law underpinning the grant of damages in claims for breaches of constitutional rights the learned judge succinctly set out her reasons for determining that $10,000.00 was an appropriate in the circumstances before her. At paragraphs 34-39 she opined as follows:

> *"34. … The question is how to determine the appropriate quantum of damages that should be awarded to the Claimant where, as pointed out by Counsel for the Defendants, there is no pecuniary measure such as loss of earnings upon which to base the award.*
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> *35. The Court prefers to briefly examine a few authorities to frame the basis upon [which] sic the award is going to be made. The cases of Subiah v Attorney-General of Trinidad and Tobago;*

Attorney-General for Trinidad and Tobago v Ramanoop and Merson v Cartwright all concerned damages awarded for breaches of constitutional right to protection from unlawful deprivation of liberty. Within the context of the respective cases, substantial awards of damages were made accompanied by or including additional awards arising out of appalling and contumely conduct on the part of the Executive (via their agents). It is considered, that the fact of the substantial amounts awarded in these cases should be viewed within the corresponding circumstance of behavior on the part of the Executive, which is a factor that is absent in this case. In this case, the [Appellant's] detention arose out of the misapplication of legislation on what can be considered a widespread basis. Alrick Smith et al v Attorney General is one such example of the blind reliance on section 6A, but this instance was saved (for all but one of the five claimants) by the circumstances therein which gave rise to reasonable suspicion. The point nonetheless is that the Court views the absence of any mal fides or improper motives towards the Claimant as a relevant factor affecting its consideration of the award.

36. Additionally, the Court agrees with Counsel for the Crown that a legal challenge to the Claimant's arrest was available to her from the inception of her arrest and detention. The continuance of the legal proceedings until they were dismissed in September, 2016, did not preclude the availability of a constitutional challenge to the legitimacy of the Claimant's arrest. Albeit that the Court did not find the delay in bringing the Constitutional claim to be a bar, it is nonetheless considered a relevant factor in the quantum of damages to be awarded to the [Appellant]. In relation to the remand of the [Appellant] for two months, the Court notes that regardless of whether the Magistrate was obliged to remand the [Appellant] or could have released the [Appellant] on bail for exceptional reasons, at all material times during the [Appellant's] detention she was entitled to apply for and to be released on bail by the Supreme Court. On the one hand therefore, the Court considers that the length of detention of the [Appellant] as a minor of 14 years should not be an aggravating factor as there was a legal mechanism available to the [Appellant] to secure her release earlier.

37. On the other hand, the Court bears in mind the words of Lord Griffiths in Murray v Ministry of Defennce that because any

trespass is actionable per se, the issue is not one of causation of a wrongful detention, but the fact of the unlawful restraint of liberty. In this regard, the Court is also mindful as stated in Stellato v Ministry of Justice, that the nature of bail is as such, that no order for release of a person on bail can detract from an underlying detention that was wrongful. The Court has therefore narrowed the consideration of the award of damages according to three factors expressed in the following manner:-

> *(i) The arrest was made pursuant to the exercise of powers under a statute and albeit the provisions were improperly applied, the arrest and detention were not borne out of improper motives or mal fides towards the [Appellant] – unlike the circumstances in both Subiah and Ramanoop. Further, the particular section of the legislation has been repealed since 2014 which must be positively regarded as an attempt by the Government to remedy situations of injustice which were being created by the improper application of section 6A.*

(ii) Although not found to constitute a discretionary bar to the proceedings the question of delay (four years) must be factored into the award of damages, as the constitutional challenge was available to the [Appellant] from the inception of her arrest as well as during the continuance of the proceedings. The state of the law together with the particular circumstances of the case could have seen the challenge mounted at the earliest stage of the proceedings. This delay is considered to be a limiting factor on the quantum of damages that ought to be awarded.

(iii) The length of the detention is not viewed as an aggravating factor as the [Appellant] was not precluded from applying for bail from the Supreme Court. This view notwithstanding, the Court is careful to state that the fact of the [Appellant's] detention is accepted as actionable per se, and the experience detailed by the

[Appellant] is to be accounted for in determining the quantum of damages.

38. *With respect to the factors relevant to the [Appellant], the first is the [Appellant's] age as a minor at 14 years. This is considered a major factor that would have aggravated the effects of the detention on the [Appellant]. The Court accepts that such effects would have included a significant degree of emotional trauma and distress visited upon the [Appellant] from the fact of the detention alone, coupled with the physical conditions detailed of the police station lock up and thereafter the institutional environment in which she was placed whilst on remand. Such distress and trauma acknowledged by Saunders PCCJ in Lucas & Carillo v Chief Education Officer et al, to be legitimately taken into account in quantifying damages for breach of a constitutional right. Further, there seemed to have been no responsiveness from the State to facilitate a 14 year old minor sitting in detention without access to resources to immediately apply as she was entitled to, for bail. No comparative authority was presented to the Court regarding quantum but in the first instance, the numerical approach suggested by Counsel for the [Appellant] of multiplying a value by the number of days in detention is not considered suitable.*

39. *Additionally, it is not considered that there is much utility to be had from looking at awards of other cases involving adults or awards in relation to breaches of other constitutional rights. It is considered however, that with reference to the limiting factors discussed at paragraph 37 above, the award will be at the lower end of the scale; but in light of the harsh consequences of detention visited upon the [Appellant] as a minor – particularly the distress, trauma, and stain of being thrust into the criminal justice system, the award must be of some significance. Of those two sides of the coin however, the Court places greater weight on the limiting factors as the actions of the state in arresting her were carried out with the intention of a lawful exercise of power of arrest. It is the case however that the Court has found albeit so intended, the exercise of the power of arrest and detention which ensured, were not lawful based upon the particular circumstances of this case. The closest parallel found is the aware of $5, 000.00 to claimant Brooks in* Alrick Smith et al. *Given the [Appellant's] age and the fact that this is a constitutional claim, the award must be higher in this case. The sum of ten thousand dollars ($10,000.00) is considered appropriate*

within the circumstances of the claim and the [Appellant] is of course entitled to her costs."

[7] A single ground of Appeal was lodged by way of an Amended Notice of Appeal filed on the 17th April, 2019. That ground reads as follows;

"1. The learned Madam Justice Griffith, in awarding the sum of Ten Thousand ($10,000.00) Dollars as damages for the breach of the Appellant's section 5(1)(e) constitutional right erred:

(i) In concluding that there was a subsisting *proviso* to section 16 of the Crime Control and Criminal Justice Act, at the time of the Appellant's arraignment which gave the arraigning magistrate the discretion to have granted bail to the Appellant …

(ii) In further concluding that the Appellant had a facility to apply to bail to the Supreme Court … and failing to give sufficient weight to

the fact that (a) the Appellant was a minor at the time (b) the Appellant's guardian/mother was also incarcerated at the time, and (c) the Appellant's family minimal financial means …

(iii) To properly take account of the emotional and traumatic effect of the breach on the Appellant as disclosed in her unchallenged evidence …

(iv) In concluding that "it was not a matter of the state of the law why she [the Appellant] was there [in custody] because the provisions enabling her access to bail as she was entitled to were there. It was a question of her ability to make use of them" and failing to take account of the whole circumstances of the Appellant's detention."

[8] With no disrespect to the industry of Counsel for the Appellant a mere cursory reading of the learned trial judge's decision clearly establishes that sub-points (ii) - (iv) must fail. After a detailed consideration of the case law presented to her the learned judge set out clearly at paragraphs 38 and 39 the factors she considered when coming to her conclusion, the weight she gave the same and the reason for that decision. She was clearly cognizant of the age of the Appellant and the harsh conditions of the Appellant's incarceration and expressly stated that for these reasons the award ought to be a substantial one. The learned trial judge then in turn balanced the aforementioned aggravating factors against what she described as limiting factors and then clearly and succinctly states the reasons why she afforded the limiting factors the weight that she did.

[9] The majority of the Appellant's written submissions canvass the development of the *Crime Control and Criminal Justice Act* and whether the learned judge was correct to conclude in her oral decision that the Magistrate's Court had the ability to grant the Appellant's bail. Unfortunately, not much turns on this point on appeal. The learned trial judge in her written ruling clearly states at paragraphs 36 that while it is unclear whether the Magistrate's Court had the jurisdiction to grant bail, it was always open to the Appellant to apply to the Supreme Court for the same. In light of this a challenge to her oral decision is unfounded.

[10] It must be remembered that the grant of damages for a breach of a constitutional right is a discretionary one. As the learned judge clearly opined a claimant is not entitled to damages as of right and the basket of remedies available to a claimant range from a

declaration that the claimant's right was breached to monetary compensation for the same. At all times the awarding judge is performing a balancing act between the rights of the individual and those of the state.

[11] As opined by Morrison, JA in *Attorney General v Bennet et al Civil Appeal Nos. 48, 49 and 50 of 2011* quoting the Privy Council in *Calix v Attorney General of Trinidad and Tobago [2013] UKPC 15*, *" … [i]t is well settled that before an appellate court will interfere with an award of damages it will require to be satisfied that the trial judge erred in principle or made an award so inordinately low or so unwarrantedly high that it cannot be permitted to stand…".* The learned trial judge provided clear and cogent reasons to substantiate the manner in which she exercised her discretion. At each stage she provided relevant case law to support her view and succinctly distinguished cases placed before her that she chose not to rely upon. No error in principle was identified, neither in my view can the award made be said to be so inordinately low or so unwarrantedly high that it cannot be permitted to stand.

[12] In the premises I propose the following Orders (1) that the appeal be dismissed and the 27th September, 2018, decision of the learned trial judge stands and (2) that each party bear its own costs of appeal.

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DUCILLE JA