COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION
2017/CLE/GEN/00825

BETWEEN

ROD ANDREW BETHEL

Plaintiff

AND

THE COMMISSIONER OF POLICE

First Defendant

THE ATTORNEY GENERAL

Second Defendant

Before:	**The Hon. Madam Justice G. Diane Stewart**
Appearances:	**Mrs. Tanya Wright for the Plaintiff** **Mr. Kirkland Mackey and Ms. Lukella Lindor for the First and Second Defendant**
Hearing Dates:	**16th January 2019, 17th January, 2019 25th January, 2019, 4th February 2019, 21st February, 2019, 28th February, 2019**

Judgment:

JUDGMENT

Civil Claim - Damages – Malicious Prosecution – Spite – Malice – Ill Will – Improper Motive – Right to a Fair Trial without delay – Article 20 (1) of the Constitution of The Bahamas – Breach – Right to Protection from deprivation of personal liberty - Compensatory Damages – Vindicatory Damages – Unlawful Arrest - False Imprisonment - Loss of use of vehicle – Loss of Reputation - Loss of Income – Loss of opportunity to sell/dispose of property – Loss of Property

1. By Amended Writ of Summons filed 17th July 2017 the Plaintiff, Mr. Rod A. Bethel **(the "Plaintiff")** sought exemplary and aggravated damages against the Commissioner of Police with responsibility of the Royal Bahamas Police Force **(the "First Defendant")** for the torts of unlawful arrest and false imprisonment and against the First Defendant and the Attorney General **(the "Second Defendant")** (collectively referred to as The Defendants") for the tort of malicious prosecution.

2. The Plaintiff also sought damages for breach of his constitutional rights as a result of the delay in his prosecution and for the loss of the use of his vehicle which was seized allegedly to obtain evidence as a result of the allegations of the virtual complainant, Ms. Tamara Kemp **(the "VC")** that he was present and did not nothing to stop Sgt. Sean Gibson **("Sgt. Gibson")** from sexually assaulting her outside of his

vehicle in which they were all travelling when they left a party to purchase cranberry juice.

3. The Plaintiff and Sgt. Gibson were both acquitted at the end of the criminal trial after Hilton J directed the jury to return a not guilty verdict after acceding to the Plaintiff and Sgt. Gibson's 'No Case to Answer' submissions **(the " Criminal Trial")**.

4. The Plaintiff claimed that the entry and search of his home and seizure of his vehicle on 15th November 2009 were unlawful, after obtaining a search warrant maliciously and without probable cause, for the offence of rape pursuant to s. 6 of the Sexual Offences and Domestic Violence Act 1991 **(the "Offence")**. He also claimed that he was unlawfully arrested by the First Defendant and falsely imprisoned for seventy two hours, then later charged with the offence on 9th December 2009 and between that date and his acquittal on 6th April 2017, the Defendants maliciously and without probable cause prosecuted him.

5. The Defendants, by their Defence raised a preliminary objection that the Plaintiff's claim for constitutional redress was an abuse of process and in violation of Article 28 (2) of the Constitution as other means of redress were available to the Plaintiff.

6. They denied that the police officers acted maliciously and without probable cause and pleaded that the police officers had reasonable cause to obtain a warrant for the arrest, entry and search of the Plaintiff's home based on a report made by the VC's mother on 15th November, 2009, who reported that the Plaintiff along with another man had raped her daughter.

7. The Defendants denied that the Plaintiff was detained for 72 hours and averred that the Plaintiff was only detained for forty eight hours, as his arrest only commenced at 6:45 a.m. when he was taken from his home to Elizabeth Estates Police Station and then to the Central Detective Unit on 15th November 2009 and ended on 17th November, 2009. They also denied that he was not charged upon his release and confirmed that he was released pending further investigation.

8. They maintained that a thorough and proper investigation was conducted which led to a reasonable belief in charging the Plaintiff and consequently caused a Voluntary Bill of Indictment to be made against him. They added that the Plaintiff was treated fairly with dignity throughout his arrest and detention and denied that the subsequent prosecution was either malicious or without probable cause.

PLAINTIFF'S EVIDENCE

9. The Plaintiff averred that on 9th December 2009, he along with Sgt. Gibson were charged in the Magistrate Court for the Offence. Thereafter, on 6th March 2017 the Criminal Trial commenced and upon a No Case to Answer submission made on his behalf, Hilton J directed the jury to acquit him. He further testified that at 7:00 a.m. on 15th November, 2009 officers along with Officer Collie of the First Defendant, without reasonable and probable cause attended his home at 5:00 a.m. with a search warrant that had been issued based on a complaint made against him with respect to the Offence.

10. He further averred that the search of his home and subsequent arrest was conducted by six uniformed police officers and also that there were two police vans present which contained fifteen to twenty members of the Flying Squad who were dressed in full combat uniform and armed with high powered weapons.

11. The Plaintiff stated that the Offence stemmed from a party which he, Sgt. Gibson and the VC attended along with other family members and friends during the evening of the 14th November 2009 and through to the early hours of 15th November 2009. The VC had consumed alcohol and smoked marijuana which caused her to pass out and lose control of her bowels and he and Sgt. Gibson had to assist her.

12. At the Criminal Trial the Plaintiff learnt that the VC along with her mother and her boyfriend attended the Wulff Road Police Station on the morning of 15th November 2009 and that the VC's Mother, who was not present during the alleged act made the complaint to the officers. He added that he was unaware of the details of the complaint, as they were not disclosed during the Criminal Trial and that the VC's Mother did not make a complaint against him. Accordingly, at the time the search was conducted on his home there was no formal complaint made against him by the VC.

13. The Plaintiff added that at about 12:15 p.m. on 15th November, 2009, only after the officers had searched his home, detained his vehicle and arrested him, did the VC make a complaint to a doctor at the Princess Margaret Hospital **("PMH").** By her complaint, the VC stated that she believed that she had been raped by a person, who was not the Plaintiff, whom she specifically named in her statement. However, she was uncertain whether the Offence did in fact happen.

14. While at PMH the VC had also spoken to an officer of the First Defendant but did not complete her statement until she returned to the Central Detective Unit and in that statement she also did not name the Plaintiff. Therefore, the officers knew that there was no complaint made against him by the VC when he was arrested and detained. They also knew that there was no complaint by the VC even after the Plaintiff stated that he did not rape her and despite this he was further detained for seventy two hours before being released.

15. When his vehicle was seized and searched by the Defendants, the Plaintiff was informed that it was as a result of an investigation but it was swabbed in connection with the Offence. At the trial and upon hearing the testimony of Sgt. Miller, he became aware that no further evidence had been taken from his car and that no further investigation was conducted which meant that the retention of his vehicle by the Defendants was unlawful and in breach of his constitutional right to protection from the deprivation of his property.

16. On 9th December, 2009, the day he and Sgt. Gibson were charged, the Defendants were in possession of the statements of the witnesses which had been taken from 17th November, 2009 and which never made a direct allegation against him. No further evidence was obtained or considered before charging him in December. The Plaintiff maintained that if there was a reasonable belief that he had committed the offence he would have been charged immediately and not released. On 7th December, 2009, ASP Marcel Hamilton-Sands, the lead investigator in his matter **("ASP Hamilton-Sands")** saw him at CDU and was surprised that he was being charged as that was not her recommendation to charge him.

17. The Plaintiff then stated that ASP Hamilton-Sands suggested that Sgt. Gibson should try to speak with the then Commissioner, Mr. Ellison Greenslade. The Plaintiff additionally stated that during his preliminary inquiry, the Defendants continuously requested adjournments as they were awaiting DNA results, even though no sample had been taken from him.

18. Under cross examination, the Plaintiff confirmed that in his interview he had stated that the VC, while in his vehicle, requested that he pull up so that she could smoke her backwood, to which he agreed. She then got out of the car with her cellular phone which she had been listening to, rested the phone on the top of the car and went to the front of the car and started to smoke. He continued that a few minutes later she started to look faint and then held her stomach as if she was going to vomit while she was leaning on the front side of the car. He further stated that it also appeared as if she was going to fall which caused Sgt. Gibson to get out of the car and helped her by catching her and taking her back to the car. She however, got back out of the car again as she had stated that she wanted to use the bathroom.

19. The Plaintiff continued that he got out of the car and noticed that she had urinated on herself and was mumbling and he remembered thinking to himself that she was really drunk and that thereafter she went and sat in the back seat of the car which prompted him to question whether or not she was alright. Both he and Sgt. Gibson then got into his vehicle and returned to the party where the VC got out of the car and walked back into the party on her own and that they followed her in to the party. The Plaintiff stated that he did recognize that his version of the events was inconsistent with those of Sgt. Gibson's and the VC's but stated that he was not under the influence of any alcohol at the time.

20. The Plaintiff further explained that he never provided a blood sample because the Defendants never again requested him to provide it. He confirmed that he did not have direct knowledge of whether or not the police officers contacted Sgt. Gibson

until after a formal complaint was made. The Plaintiff also confirmed that he knew the VC for quite some time and that she referred to him as her uncle and as such he assumed that she had a high regard for him. He added that he did have knowledge of members of the VC's family influence over senior members of the First Defendant with reference to this matter although there was no evidence of such influence before the Court.

21. Sgt. Gibson, in his evidence in chief, testified that he was charged along with the Plaintiff on 9th December, 2009 for the Offence and was subsequently acquitted on 6th April, 2017. Mr. Gibson stated that at the Criminal Trial he became aware that the VC, whom he had known for over twenty years, attended the Wulff Road Police Station with her mother and boyfriend on 15th November 2009 and that it was her mother who made the complaint to the police. On the 15th November 2009, he was contacted by his Supervisor Inspector who advised him that a complaint had been made against him, which resulted in his attending CDU for questioning without any police escort. Sgt. Gibson continued that while at CDU he volunteered to provide personal biological evidence along with the clothing he wore at the time of the alleged offence.

22. He was not placed under arrest and left the station without being charged. He was told that the complaint made no sense and was not going anywhere. Sgt. Gibson added that no search of his home was ever conducted and that on 17th November 2009 he was placed on administrative leave. As a police officer for over nineteen years it was not protocol for the lead investigator to release a suspect if at the time of the release there was sufficient evidence to justify a charge and if a matter was still under active investigation it would be usual for the investigators to release the suspect after forty eight to seventy two hours and then promptly, re-arrest the suspect while in the vicinity of the precincts to ensure the suspect's lawful continued arrest or detention. Accordingly, the release of the Plaintiff would only have occurred if the lead detective did not have any reasonable belief that he had committed the offence.

23. Sgt. Gibson further stated that despite numerous requests made during the Criminal Trial, the Defendants failed to disclose the contents of any report made against him. At trial, the VC, the VC's Mother and the VC's Boyfriend confirmed that the VC did not make any written or verbal complaint and had never even entered the premises of the station. He confirmed that the complaint was made by VC's Mother who was not at the alleged scene of the incident. Sgt. Gibson added that it was only discovered during the Criminal Trial that the 17th November 2009 was the last time an investigation was conducted in the matter and that there were no interviews from persons who attended the party the night in question. Therefore, the only evidence which existed was the statements taken but there was no evidence of the search.

24. There was no examination or collection of the clothing of the VC nor was a urine sample collected. Sgt. Gibson further testified that at the Criminal Trial the Defendants denied that they had possession of the pair of shoes he provided and it was revealed that the only investigation conducted was the testing of a DNA sample which showed no evidence that he had raped the VC. The forensic officer had also

confirmed that her opinions and analysis were based on the information given to her by police. Sgt. Gibson also corroborated the Plaintiff's chronology of events leading up to the trial.

25. The DNA report biologically excluded him from any connection with the VC, a fact which was known by the Defendants from 2010 and 2012 which they suppressed until they were forced to produce it and that such knowledge gave the Defendants ample opportunity to discontinue the proceedings against him. He further added that the Plaintiff would not have been prosecuted if he had not been his co-accused as there was absolutely no evidence against him in connection with the alleged offence. He confirmed the Plaintiff's testimony that on 7th December, 2009 they were both told by ASP Hamilton-Sands that the whole thing was not making any sense and that she was surprised when she found out that charges were being proffered against them.

26. Sgt. Gibson confirmed the Plaintiff's evidence that ASP Hamilton-Sands along with two other officers advised him that they should both speak to the then Commissioner, Ellison Greenslade as the matter was out of their hands. In compliance with the advice given, he contacted the office of the Commissioner but met with Asst. Commissioner Raymond Gibson who informed him that things would have been different if he had come to him much earlier. Thereafter sometime in October 2010 both he and the Plaintiff were served with a Voluntary Bill of Indictment.

27. Sgt. Gibson testified that during the Criminal Trial, the prosecution initially subpoenaed ASP Hamilton-Sands to give evidence however, they instead relied on the evidence previously admitted because she was medically unfit to attend. Sgt Gibson stated that he was aware that ASP Hamilton-Sands had previously suffered a stroke but that she was still employed with the police force. He additionally stated that he saw ASP Hamilton-Sands in a public setting and that she had informed him that she was never called to give her evidence and that she added that it was her belief that the VC was not truthful in her statement.

28. During cross examination, Sgt. Gibson stated that he could not agree with the contents of the Record of Interview presented at the Criminal Trial because he was not aware that this document had been completed for him. He confirmed that the investigating officers did have custody of his boxers which had seminal items on them because he was the one who brought them to him.

29. He further stated that as a part of the Criminal Records Office which is a subsidiary of CDU he would work in concert with other investigating officers on criminal matters and that he had been a part of investigations during which an accused would be released after forty eight hours in custody if there was insufficient evidence against him to proffer any charges. Alternatively, if there was sufficient evidence to charge an accused they would not be released as they would be charged and brought before the Court. He further testified that he did not state that he smoked marijuana in his record of interview which he did not sign and that he was never shown a copy of one and only became aware that one existed during the Criminal Trial.

30. Mr. Richard Boodle, Attorney for the Plaintiff in the Criminal Trial (**"Mr. Boodle"**), by his evidence in chief, confirmed the Plaintiff's acquittal after making the no case to answer submission. Mr. Boodle stated that after a cursory review of the Second Defendant's evidence it was patently clear to him that they did not have any evidence which would cause a jury to convict the Plaintiff as there was no allegation of rape nor was there sufficient evidence to cause reasonable suspicion to be had that the Plaintiff had committed an offence. He added that the Second Defendant continuously refused to disclose the complaint of the VC's Mother which would have been essential to the proceedings and also believed that such report did not exist.

31. Mr. Boodle additionally stated that if in fact it did exist it would highlight the fact that the search warrant was based on a third party report who did not have direct knowledge of the alleged offence. He confirmed that the Defendants could not produce the police form which accompanied a complaint made by a victim of an alleged sexual assault and additionally, the VC, the VC's Mother and the VC's Boyfriend did not recall being given anything from the Wulff Road Police Station to take with them to the hospital.

32. He also confirmed that it was usual for the lead investigator to release a suspect from custody if at the time of the release there was insufficient evidence to justify a charge, particularly with the indictable offence of rape. Further, if the forty eight to seventy two hours had expired the suspect would be released and then rearrested in the vicinity of the precincts to ensure his/her lawful continued arrest or detention. Mr. Boodle stated that he believed that the Plaintiff would not have been released if the lead detective had any reasonable belief that he/she had committed the offence complained of. Mr. Boodle confirmed that while ASP Hamilton-Sands was subpoenaed she was not called as a witness due to an illness and further confirmed that despite experiencing a stroke he believed that she was still employed by the First Defendant.

33. He also confirmed that there was no further investigation conducted after 17th November 2009, that no party attendees were interviewed and that the crime scene investigations were confined to finding evidence which matched the VC's statements and excluded searches or inquiries into evidence given by the Plaintiff and Sgt. Gibson. Mr. Boodle also confirmed that the VC's clothing was not examined or collected, there was no urine test, no examination of Sgt. Gibson's shoes which he had provided and that he was aware that the DNA analysis of Sgt. Gibson did not support the allegations made against him.

34. During cross examination Mr. Boodle testified that while he did not have a medical degree he had a medical diploma in nursing and thus had some medical knowledge. He added that he was aware that the VC had made a record of interview with the police and in that document she stated that she informed her boyfriend that she believed that they had raped her. He confirmed that in his witness statement he had stated that he was unsure whether or not the police officers were being directed by family members of the VC who may have had some influence over senior members of the police force or some other influence as it was clear that it was not the VC pursuing the matter.

DEFENDANTS' EVIDENCE

35. ASP Hamilton-Sands, in her evidence in chief, testified that on Sunday, 15th November 2009 while on duty at CDU at about 1:00 p.m., she received certain information with reference to the Offence. She stated that she later saw and spoke to the alleged VC who gave her additional information. She further stated that she was given additional information from WPC 2902 Khalfani, W/D Sgt. 1743 Miller and D/Sgt. Collie.

36. She averred that about 3:05 on the same date, while she was still on duty at CDU, Sgt. Gibson came into CDU and she informed him of the complaint made against him and cautioned him. He denied any involvement and when he was interviewed he did not reply as he stated that he did not wish to make a statement and subsequently declined to sign the statement.

37. Asp Hamilton-Sands further averred that the she had received certain information from Insp. Cooper at 9:08 p.m. that evening which caused her to interview the Plaintiff at CDU in the presence of W/DC 2902 Khalfani and cautioned him. She said that the Plaintiff informed her that he was at the party with Sgt. Gibson when they ran out of cranberry juice and so the VC went along with him and Sgt. Gibson to purchase more juice but denied that either of them had had sexual intercourse with her.

38. ASP Hamilton-Sands added that the Plaintiff declined to give a written statement. However, she made notes on a Record of Interview Form. She went on to say that he had also refused to give intimate samples. ASP Hamilton-Sands stated that on Tuesday, 17th November 2009, Insp. Cooper again gave her certain information and both suspects were later released pending further investigation.

39. Thereafter, on Monday, 7th December, 2009 at 12:45 p.m., she saw and spoke with Sgt. Gibson in the presence of his attorney and charged him with rape contrary to section 6A of the Sexual Offences and Domestic Violence Amendment Act, 2008 to which he made no reply.

40. Under cross examination, she testified that there was no difference between a person who was in custody and a person who was assisting the Police with an investigation but there was a difference between a person who was under arrest from a person assisting with an investigation. ASP Hamilton Sands explained that a person who assisted with an investigation would provide the police with information. She further stated that police officers had an obligation towards both a person making a complaint and a person against whom a complaint was made. She also stated that the primary goal of an investigation was to gather evidence which may lead to either a conviction or the release of a subject.

41. ASP Hamilton-Sands additionally stated that if evidence was found which would have exonerated an accused individual the police would also have a duty to the accused and would release the individual if they had evidence to support the exoneration. She further stated that there were no instances where she personally

did not consider that there was enough evidence to charge an individual but the person was charged any way and if she saw the need to charge an individual then she would submit the file to the office of the Attorney General and that an officer with a higher rank could review her recommendation to charge or not to charge an individual.

42. She stated that she was on duty the day the Plaintiff was arrested and that at 1:00 p.m. he was not at CDU but was there at some point during her shift. She had received the information that he was under arrest. She stated that Sgt. Gibson came in by himself, that the VC was not at CDU at that time and that she never saw the written complaint made by the VC at the Wulff Road Police Station nor during the course of the investigation. She added that she only knew that an investigation had begun when Sgt. Gibson came in. She saw the VC later during the day after she had returned from the hospital with Officer 2902 Khalfani who released the doctor's information and gave her the rape kit and the report.

43. She stated that she was not certain if Officer Khalfani interviewed the VC. After being directed to the hospital forms completed by the VC, ASP Hamilton-Sands confirmed that in the comment section the doctor stated that the patient had claimed that she was sexually assaulted by an adult male known to her while another male known to her looked on, a document she would have reviewed in 2009. She was then directed to the Victim and Medical History and Assault information where the doctor again wrote that the patient claimed that she was in the vehicle with two men known to her, one who raped her while the other one watched. She admitted that she did not make a record of her conversation with the VC.

44. She added that by 3:00 p.m. she had reviewed the evidence from the doctor, spoke with the VC and Officer Khalfani and did not have sufficient evidence that the Plaintiff had sexual intercourse with the VC nor took any active steps by words or actions to instigate the Offence. She did not know whether Officer Miller who received the rape kit, the VC's clothes and phone was present at the search of the home of the Plaintiff and that she had tried to find the crime scene but could not recall if she ever found it. She was aware that the VC had been smoking marijuana and that she had passed out that evening.

45. ASP Hamilton-Sands continued that after she had received the information from Officer Khalfani she did not issue a search warrant for Sgt. Gibson's home nor for his arrest and that she never called him. As lead investigator she would be responsible for requesting a search warrant for the Plaintiff's home which she did on 15th November 2009 after she had received all of the information from Officer Khalfani which stated that he did not rape the VC. She further stated that she did not request that the Plaintiff be arrested for the offence of rape but became aware at around 9:08 p.m. that he had been arrested for the offence when he was brought into police custody. ASP Hamilton-Sands added that after her conversation with Sgt. Gibson she could not recall whether that caused her to form a belief that the Plaintiff had sexual intercourse with the VC.

46. ASP Hamilton-Sands additionally testified that she did not have any influence over the release of the Plaintiff's vehicle after it was ordered to be examined nor did she know the length of time it was held. She confirmed that it would be the supervisor in charge of CDU who would order the vehicle's release. She was responsible for directing that the DNA and forensic tests be conducted, which would be carried out by the forensic lab. ASP Hamilton-Sands added that she did not always receive copies of the results of those tests and that it would depend on the length of time it took to receive those reports which could sometimes be months or years. In the Plaintiff's case she could not recall whether she received any results and that if there were results they should be sent to the lead investigator.

47. She had no knowledge of a DNA sample being re-tested after it had previously been tested. She did not recall if Sgt. Gibson was held overnight and she could not recall the additional information that she received from Officer Collie. ASP Hamilton-Sands confirmed that she had received statements from some witnesses other than police officers during the investigation but was not sure whether they were received prior to 17th November 2009. She added that she charged Sgt. Gibson on 7th December 2009 and thereafter she did not speak to the VC nor conduct any further interviews with any of the witnesses including the Plaintiff and Sgt. Gibson nor ordered any further examination of samples from the Plaintiff's vehicle.

48. She did not recommend the Plaintiff be charged and she did not recall telling them that they should not have been charged. She denied telling Sgt. Gibson that she was not called to return to court. ASP Hamilton-Sands confirmed that she did not have an honest belief that the Plaintiff raped the VC. She stated that they may have been directed that they should be charged. She denied compiling a statement based on pieces of various statements provided to her or that Sgt. Gibson did not tell her that he smoked.

49. On re-examination, ASP Hamilton-Sands confirmed that if Sgt. Gibson was in custody that that information would be recorded on the detention record in the case file. She stated that she had the VC's witness statement at the time of the Plaintiff's arrest. She added that Inspector Solomon Cash was present during her interview with Sgt. Gibson and that Sgt. Gibson refused to sign the witness statement after the interview. She added that she stopped her report at pending and when she had received more information she continued her report on the same paper which she stated was a normal practice, without changing the date.

50. Detective Sergeant Larry Collie **("Sgt. Collie")**, testified that at 5:50 a.m on 15th November 2019 he received information that the Plaintiff was wanted with respect to the Offence due to a complaint by the VC which caused a search warrant to be prepared and resulted in him along with several other officers going to the Plaintiff's home and executing the search warrant. Sgt. Collie stated that thereafter he arrested and cautioned the suspect at his home which resulted in the confiscation of two of the Plaintiff's denim pants and one brown and white striped shirt.

51. The Plaintiff denied any involvement in the offence. Sgt. Collie also testified that the Plaintiff's vehicle was processed, photographed and towed and that a cellular phone

was observed on the back right side of the rear car glass near the back trunk, which the Plaintiff acknowledged was the virtual complainant's phone but denied the charges made against him by her. He lastly stated that the Plaintiff was then transported to the Elizabeth Estates Police Station and booked.

52. During cross examination, he testified that once an officer received information and the nature of the offence along with the location of the place and name of the suspect a search warrant would be prepared and signed by a Justice of the Peace or a Magistrate in order to receive or gather exhibits with respect to the investigation of the offence. He stated that in his capacity as a Sergeant/Supervisor at CDU he was in a position to prepare the search warrant. Stg. Collie further stated that if an officer preparing a search warrant was not a supervisor or higher ranking officer then the individual would have to seek authorization to prepare one. He confirmed that he prepared the search warrant for the Plaintiff but he could not recall which Justice of the Peace signed the search warrant because of the lapse of time.

53. He continued that around 5:50 a.m. he received information from an officer who was involved in the investigation of the Plaintiff's matter but could not recall the name of the officer who provided the information and that it could have been a Senior Officer or a Junior Officer. He added that the Plaintiff's vehicle was at the Plaintiff's home at the time the search warrant was executed and that it was taken to the Criminal Records Office's parking lot to be further processed by the crime officer but he did not recall when it was released to the Plaintiff.

54. Sgt. Collie confirmed that the person who gave him the information on the Plaintiff's residence knew the location. He also confirmed that a search warrant was not prepared for Sgt. Gibson but he could not provide any additional information regarding the investigation of Sgt. Gibson as other officers were involved. He further stated that he would usually make a note of who the request came from but he could not confirm where the note was, and that when he left the police force he did not hand over any notes made because they were his personal notes which he kept. Sgt. Collie continued that at the Criminal Trial he testified that once the warrant was executed he had no further interest in the matter.

55. Sgt. Collie further testified that after a search warrant was executed, he would return to CDU and hand over any exhibits, the suspect, and the search warrant to the investigating officer. He stated that the officer in whose name the warrant was made had to be present during its execution. Accordingly, as the warrant issued for the Plaintiff was in his name, he executed it. He confirmed that a team of officers accompanied him to execute the search warrant on the Plaintiff's home, including Inspector Smith and Corporal McQueen who were two of the officers out of the estimated ten from the Criminal Records Office.

56. He added that there was one car with four officers from the Flying Squad who also attended the Plaintiff's home. He stated that no weapons were drawn and that their presence was necessary and usual, whenever a search warrant was executed, because there was always a sense of danger of the unknown. He confirmed that even though the Plaintiff did not leave his home voluntarily, he did not resist. There

were no weapons found at his home nor in his vehicle and that the Flying Squad remained at the Plaintiff's home the entire time until he was escorted out of his home in their presence.

57. Sgt. Collie further testified that there were no sirens used as the officers were not in marked police vehicles. or in uniform but they bore arms. He added that they all stayed at the Plaintiff's home for thirty to thirty five minutes. Sgt. Collie stated that he identified himself to the Plaintiff when he arrived at his home and informed him of the complaint made by the VC. He was accompanied by another officer who was armed. The Plaintiff was removed from his home in handcuffs. He along with the crime scene officers and Woman Sergeant Miler assisted with the search of the Plaintiff's home.

58. The officers of the Flying Squad assisted with escorting the Plaintiff's vehicle and the suspect to the Elizabeth Police Station before they returned to CDU. He explained that the entire process took about thirty to thirty five minutes as they were back at CDU by 7:00 a.m. He further explained that the Plaintiff was only at the Elizabeth Estates Police Station for about two to five minutes while the detention record was written up and then taken to CDU. He accepted that the Flying Squad was not needed because of the lack of any danger or harm which resulted from the execution of the search warrant. He denied that the deployment of the Flying Squad was done to embarrass and humiliate the Plaintiff.

59. He further stated that when information was presented to him he would inquire where the complaint came from, who made the complaint and how much evidence was gathered at the time of the request for the warrant. In the Plaintiff's case, the complaint was made by the VC on 15th November 2009 early in the morning but he could not confirm the exact time that it was filed. He could not recall the nature of the complaint or if there was any evidence nor could he recall if a statement was given but he acted on information given. He received no documentation at all.

60. Sgt. Collie further stated that he knew the Plaintiff through his former employment but did not know him personally. Prior to executing the search warrant he did not know where the Plaintiff lived. He stated that the purpose of the search warrant was to look for clothing items and any exhibits that would have been related to the offence along with any scientific evidence, either in the Plaintiff's home or vehicle. He stated that it was usual for a police officer to invite a suspect in for questioning however, where there were allegations of rape it was his practice to prepare and execute a search warrant. He added that while it was not the norm of the police force, every officer used his/her discretion based on the information before them.

61. Reserve Sergeant Antoinette Hall **("Sgt. Hall")** testified that the VC and her mother were directed to go to CDU and thereafter she along with the crew of CSIS Cpl. 1934 (sic) accompanied the victim to the Accident and Emergency Section of the hospital. Sgt. Hall stated that the virtual complainant informed her that she left the party with Sgt. Gibson and the Plaintiff in his car to get cranberry juice. She sat in the back and Sgt. Gibson sat in the front. The VC continued that the Plaintiff stopped the vehicle a short distance from the party and Sgt. Gibson proceeded to have sexual intercourse

with her on the hood of the car .She was unsure whether a condom was used or not. The Plaintiff also had sexual intercourse with her and that she had left her cell phone in the Plaintiff's car.

62. During cross examination, Sgt. Hall stated that she did not recall the exact date of the matter but recalled the incident. She went on to say that when she arrived at CDU the VC was there but subsequently left with her and her mother to go to the hospital. She also stated that she could be mistaken as to who took the VC to the hospital and that there were no documents or notes provided ahead of the statement being taken from the VC. She continued that at the hospital she would have gone into the examination room with the VC but could not recall whether any other officers were there and if so who they were. Sgt. Hall further stated that she took the formal statement from the VC at the hospital where it was signed by the victim and was handed over to the investigating officer.

63. Sgt. Hall stated that she was not present when the VC told the doctor that she was sexually assaulted by an adult male known to her while another male also known to her looked on.

ISSUES

64. The issues for determination are:

62.1 Whether the Plaintiff was unlawfully arrested and if so what remedy is available to him?

62.2 Whether the Plaintiff was falsely imprisoned and if so what remedy is available to him?

62.3 Whether the Defendants maliciously prosecuted the Plaintiff and if so what remedy is available to him?

62.4 Whether the Plaintiff's constitutional rights were infringed?

UNLAWFUL ARREST

65. The first issue to be determined is whether the Plaintiff's arrest from his home was unlawful. The Plaintiff claimed that he was unlawfully arrested. He relied on **Christie v Leachinsky [1947] A.C. 573** and stated that unlawful arrest and false imprisonment result from the act of depriving a person of his liberty for any time, however short, without lawful cause. He argued that that there had to have been reasonable grounds to suspect that the offence had been committed. He submitted that because the complaint had been made by the VC's mother and not the VC herself at the time of his arrest, there was no sufficient evidence justifying the Defendants depriving him of his liberty.

66. He submitted that:

- The name of the officer to whom the alleged complaint was made was not disclosed and the Defendants did not called this officer as a witness;
- The report of the alleged complaint was not been produced despite repeated requests both at the criminal trial and in this action;
- The Court ordered the report to be disclosed but it was not;
- The statement allegedly given by the VC's mother would be the only basis for the Defendants initially arresting the Plaintiff; and
- The Defendants' failure to disclose the report, if it even existed, underscores the Plaintiff's argument of abuse and improper purpose.

67. In support of these submissions he relied on **Alistaire Manzano v The Attorney General of Trinidad and Tobago Civil Appeal No. 151 of 2011** where A. Mendonca J.A. stated,

> **"It is to be noted that the statement allegedly recorded from the supervisor has not been put before this Court. Neither has there been any explanation given for its absence. Further, without explanation, Constable Adams has referred to the supervisor on no less than three occasions without stating his or her name. Certainly if a statement was recorded from the supervisor such a statement ought to be before the court so that the court may have a clearer picture of the information which was in the possession of the complainant. At the very least, the name of the supervisor should have been disclosed. The Court therefore places no reliance on the evidence of Constable Adams in this respect."**

68. The Court of Appeal in **Alistaire Manzano** ruled that it was not possible to conclude Constable Adams had an honest belief since he did not have the very evidence that he said was required.

69. The Defendants contended that Officer Collie, the arresting officer, acted with reasonable and probable cause when he arrested and charged the Plaintiff with the offence as it was only until the investigation was conducted and interviews were carried out that an honest belief was formed that the Plaintiff had committed the Offence.

70. To determine whether or not an arrest was unlawful, it must be proven that the arresting officer reasonably suspected an individual of committing an offence. The test is not whether the arresting officer acted with reasonable and probable cause.

71. In my recent decision of **Kevin Renaldo Collie v. The Attorney General SC 916 of 2017**, I set out the test for unlawful arrest I repeat it here:-

> **"46.....an arrest is unlawful if:-**
> **46.1 the arresting officer has not sufficiently satisfied himself that a suspect is responsible for the commission of an offence and therefore arrests a suspect without reasonable suspicion; and/or**
> **46.2 the arresting officer does not inform the suspect of the reason for his arrest as soon as practicable."**

The test is a simple but practical test and is partly subjective and partly objective.

> **"44.....the test for reasonable suspicion is a simple but practical one and relates entirely to what is in the mind of the arresting officer at the time of the arrest. It is partly subjective, because the arresting officer must have formed a genuine suspicion in his own mind that the Plaintiff has been concerned with the act he is accused of. It is also partly objective, because there must also be reasonable grounds for the suspicion formed which goes no further than what was in the mind of the arresting officer at the time of the arrest."**

72. The Plaintiff contends that his arrest was unlawful as its genesis was based on a complaint by the VC's mother and not the VC herself. At the time of the arrest and imprisonment the VC had not made a statement to the police officers. Sgt. Collie's stated that he received information at 5:50 a.m. on 15th November, 2009 which led him to prepare a search warrant for the Plaintiff's home. He added that he could not recall which Justice of the Peace signed the warrant. The Defendants did not provide any evidence of the search warrant nor could Sgt. Collie recall who gave him the information and whether or not that officer was a junior officer or a senior officer. He did not identify ASP Hamilton-Sands as, the lead investigating officer giving him the information which would have caused him to prepare and execute the search warrant.

73. More importantly is it realistic to believe that he received information at 5:50 a.m. and was able to prepare a search warrant and have the same signed by a Justice of the Peace before the officers arrived at the Plaintiff's home at 7:00 a.m.? This is not realistic and it is more than likely that the search warrant was improper. Additionally there was no written statement made by the VC's mother nor was there even a complaint made by the VC at the time therefore there is no way that he could have reasonably suspected that the Plaintiff had committed the offence.

74. ASP Hamilton-Sands testified that she was the lead investigator dealing with the complaint. On the afternoon of the 15th November, 2009 after she reviewed the evidence taken by the doctor from the VC, had a discussion with the VC and had spoken to another officer who had accompanied the VC to the hospital, she stated that she did not have sufficient evidence that the Plaintiff had sexual intercourse with the VC. Therefore she did not cause a search warrant to be issued for the Plaintiff's home and could not have issued the search warrant used by Sgt. Collie as she was not in possession of the information at the time the Plaintiff's home was searched and the Plaintiff was arrested.

75. Sgt. Collie was unable to produce any evidence in support of his claim that the information he received was reliable and sufficient to enable him to form an honest belief that the Plaintiff was guilty of the offence. Moreover, it is clear that the information he received did not and could not emanate from ASP Hamilton-Sands, the lead investigator, as she had testified that based on the evidence before her she did not reasonably suspect that the Plaintiff was guilty of the Offence. Sgt. Collie's evidence, as to the belief that he had reasonable and probable cause, is not to be believed.

76. In the circumstances, I find that the Plaintiff's arrest was unlawful.

FALSE IMPRISONMENT

77. An unlawful arrest is a false imprisonment as held in **Kevin Renaldo Collie (supra)** adopting **Gilford Lloyd v Chief Superintendent Cunningham and others [2017] 2 BHS J. No. 76** in which Charles J stated: -

> **"38 The principle was explained by Deyalsingh J in Bostien v Kirpalani's Ltd (1979) High Court of Trinidad and Tobago, No. 861 [unreported], per Deyalsingh J: see page 13 in this way:**
>
> > **"It is clear from the authorities that to constitute false imprisonment there must be restraint of liberty....a taking control over of possession of the plaintiff or control of his will. The restraint of liberty is the gist of the tort. Such restraint need not be by force or actual physical compulsion. It is enough if pressure of any sort is present which reasonably leads the plaintiff to believe that he is not free to leave, or if the circumstances are such that the reasonable inference is that the plaintiff was under restraint evn if the plaintiff was himself unaware of such restraint. There must in all cases be an intention by the defendant to exercise control over the plaintiff movements or over his will, and it mater not what means are utilized to give effect to this intention...."**
>
> **39 False imprisonment as a form of trespass to the person is actionable per se. In Murray v Ministry of Defence [1988] 1 W.L.R. 692 at 703-704 overruling Herring v Boyle[1834] 1 C.M. & R. 377, Lord Griffiths stated that "the law attaches supreme importance to the liberty of the individual and if he suffers a wrongful interference with that liberty it should remain actionable ever without proof of special damage.**
>
> **40 No doubt, an unlawful arrest is a false imprisonment, and if the requirements of the law as to making it clear to the arrested person that he is under lawful restraint, or informing him promptly of the grounds of his arrest, or taking him before the appropriate authorities within a reasonable time are not complied with, an arrest which might otherwise have been justified will be unlawful and ground an action for false imprisonment."**

78. As I have found that the Plaintiff's arrest was unlawful, I also find that subsequently he was falsely imprisoned. At no point during his subsequent detention did the lead investigator form an honest belief based on the evidence available that would have caused charges to be laid against the Plaintiff. ASP Hamilton-Sands testified that she knew this information by 3:00 p.m. on the 15th November 2009, therefore as soon as this information was secured the Plaintiff should have been released.

79. Sgt. Collie confirmed that the Plaintiff was handcuffed while being unlawfully taken out of his home where he lived with his partner. He was restrained in a police car while he was transported to the Elizabeth Estates Police Station and he was unlawfully detained until the 17th November 2009. All of these facts support the tort of the false imprisonment of the Plaintiff by the Defendants.

MALICIOUS PROSECUTION

80. The third issue to be decided is whether or not the prosecution against the Plaintiff was malicious.

81. The Plaintiff contended that there was no reasonable and probable cause for the Defendants to charge him with the offence of rape under s. 6 of the Sexual Offences and Domestic Violence Act as they knew that there was no good ground for the charge to be made, because at the time he was charged the evidence available was insufficient for a case fit to be tried. He relied on the test established by Lord Diplock in **Dallison v Caffery [1964] 3 WLR 385** at pg. 402,

> **"The Test whether there is a reasonable and probable cause for the arrest or prosecution is an objective one, namely whether a reasonable man, assumed to know the law and possessed of the information which in fact was possessed by the Defendants would believe there was a reasonable and probable cause."**

82. The Plaintiff further submitted that malice, not only meant spite or will but could also be an improper motive and that the proper motive for a prosecution is a desire to secure justice. Also, it is enough to show an absence of proper motive as opposed to affirmatively establishing spite or ill-will or some other improper motive.

83. The Plaintiff maintained that ASP Hamilton Sands released him on the 17th November 2009 and that she verbally confirmed to the Plaintiff's co-accused that she did not honestly believe that the VC believed that the Plaintiff was guilty of the Offence. A senior officer in the office of the Commissioner indicated that if the Plaintiff's co-accused had spoken to them sooner they may have been able to avoid prosecution, and finally that no further investigation was conducted after the Plaintiff was released except for forensic DNA analysis which could not connect the Plaintiff to the offence as he had not provided intimate samples.

84. An action for malicious prosecution is the oldest and most developed action for abuse of a legal procedure. He relied on **W/con 2305 Sweeting and The Commissioner of Police SCCivApp No. 50 of 2009** in which John JA stated,

> **".....there is ample authority that in a proper case malicious prosecution may be inferred from want of reasonable and proper cause....Malice in this connection does not necessarily connote spite or ill-will....it is sufficient if the Defendants are shown to have used the machinery of the Courts for an improper purpose"**

85. He maintained that the Defendants failed on all four of the limbs required to constitute reasonable and probable cause as held by Hawkins J in **Hicks v Faulkner (1878) 8 QBD 167, 1717** and approved in **Herman v. Smith (1938) A,C, 305, 316.** The four limbs as set out by Hawkins J are as follows:

> **"There must be: first, an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; thirdly, such secondly-mentioned belief must be based upon reasonable grounds; by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to (1) 10 Q. B. 252. (1878) 8**

Q.B.D. 167 Page 172 believe; fourthly, the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused."

86. The Plaintiff further submitted that the Defendants knew that there was no good ground for the charge to be made and relied on **Glinski v. McIver (1962) AC 726** where Lord Radcliffe held : -

> **"The ultimate question is not so much whether there is a reasonable or probable cause in fact as whether the prosecutor, in launching his charge, was motivated by what presented itself to him as a reasonable and probable cause. Hence, if he did not believe there was one, he must have been in the wrong.....On the other hand I take it to be equally settled law that the mere benefit in the truth of his charge does not protect an unsuccessful prosecutor, given, of course, malice, if the circumstances before him would not have led "an ordinary" prudent "and cautious man" to conclude that the person charged was properly guilty of the offence."**

87. The Plaintiff submitted that the Defendants, at the time he was charged, had no written statement which made an allegation of rape against him and in fact the VC stated that she did not know if he had committed the offence.

88. The Plaintiff submitted that the prosecution was based on material which was unfit to be tried and relied on **Coudrat v Commissoner of Her Majesty's Revenue and Customs (2005) EWCA Civ 616** .

89. The Plaintiffs further relied on **Alistaire Manzano** where A. Mendonca J.A. stated,

> **"It is to be noted that the statement allegedly recorded from the supervisor has not been put before this Court. Neither has there been any explanation given for its absence. Further, without explanation, Constable Adams has referred to the supervisor on no less than three occasions without stating his or her name. Certainly if a statement was recorded from the supervisor such a statement ought to be before the court so that the court may have a clearer picture of the information which was in the possession of the complainant. At the very least, the name of the supervisor should have been disclosed. The court therefore places no reliance on the evidence of Constable Adams in this respect."**

That Court held that because Constable Adams did not have the evidence he relied on it was not possible to conclude that he had an honest belief.

90. The Plaintiff submitted that based on the evidence adduced by him which the Defendants did not deny his evidence should be accepted as proven. He relied on **Brett Wilson LLP v Person(s) Unknown, Responsible for the Operation and Publication of the website www.solicitorsfromhelluk.com** whereby Warby J stated that the court could proceed on the basis of the Claimant's unchallenged particulars of claim and that there was no need to adduce evidence or for findings of fact to be made in cases where the Defendant did not dispute the Claimant's allegation.

91. The Plaintiff submitted that the Defendants could not say who requested the warrant, could not recall which Justice of the Peace signed the warrant and the VC had not made any statement before the warrant was issued, nor was he given anything in writing to confirm the physical address of the Plaintiff. The information received by Sgt. Collie was that the Plaintiff was involved with another person in the

matter before CDU and that he was advised that the VC had made the complaint and so he determined that there was probable cause without seeing the statement from the VC. He did inquire if there was any evidence but did not recall if there was any. Consequently, the warrant was issued based on false or erroneous information.

92. Sgt. Collie also testified that the Flying Squad is used when there is imminent threat and where armed backup is needed. There is no evidence of any threat of harm, The Plaintiff submitted that despite the age of the investigation, Officer Collie should have been able to recall who requested the search warrant especially since he stated that he took his notes with him when he left the force. Additionally, Hilton J, at the Criminal Trial, compelled the Defendants to produce the report allegedly made by the VC's mother which was never produced only a CDU record of complaint. Again, I find that the evidence of Sgt. Collie on the facts surrounding the issuing and the execution of the warrant is not to be believed.

93. The Plaintiffs submitted that the Defendants tried to rely on the inconsistent statements made by the Plaintiff, the VC and Sgt. Gibson as proof of reasonable cause to hold the Plaintiff for seventy two hours however the only inconsistency was that the VC did not smoke marijuana.

94. Sgt. Hall's statement that she did not recall the date of the incident was significant because the date of an offence was one of the most quintessential facts of an investigation. She remembered other details such as who was present and even conceded that she may have been mistaken.

95. The Plaintiff relies on the evidence of ASP Hamilton-Sands the Defendant's witness, who testified that she requested the warrant for the arrest of the Plaintiff only after the VC had come from the hospital and was at CDU; hours after the search of the Plaintiff's home and seizure of his vehicle She also did not believe that there was evidence that the Plaintiff had sexual intercourse with the VC and she did not recommend that the Plaintiff be charged with the Offence. Further, she did not know who caused him to be charged and that she did not charge him.

96. The Plaintiff additionally submitted that the police report was inconsistent as Sgt. Gibson was not in custody on 17th November 2009 and his date of charge was 9th December 2009 and not 7th December 2009. The Plaintiff further submitted that the various discrepancies show that the report was constructed in order to meet the mandate to enable the Defendants to proffer charges and that it was completed after 9th December 2009 since it made reference to charging Sgt. Gibson which occurred on 9th December.

97. The Defendants submitted that the Plaintiff's witnesses also gave conflicting evidence filled with discrepancies and as a result they were not credible or believable. They added that the police officers would have taken those inconsistencies into consideration in determining the truthfulness of the Plaintiff's co-accused. One such inconsistency was that the Plaintiff testified that he never physically touched the VC whereas Sgt. Gibson testified that both he and the Plaintiff assisted the VC to the back seat and that he and the Plaintiff moved the VC several times between the front and the back seat and tapped her on her face several times.

98. The Defendants argued that the burden rested on the Plaintiff to prove that the Defendants did not have reasonable and probable cause and that the Plaintiff did not adduce any evidence from which malice against the First Defendant may be inferred. They relied on a number of authorities as set out below, commencing with **Stapeley v. Annets and Another [1970] WLR 20** in which Lord Denning M.R. stated:

> **"To this argument I think the simple answer is this: in an action for malicious prosecution the burden is on the plaintiff to prove malice and absence of real and probable cause. If the defendant denies it, it is not the practice to require the defendant to give particulars of his denial."**

Lord Denning M.R., in that decision, relied on **Weinberger v. Inglis [1918] 1 Ch. 133** where Astbury J at p. 137 stated:

> **"As a general rule the court never orders a defendant to give particulars of facts and matters which the plaintiff has to prove in order to succeed, and this is especially the case where the defendant has confined himself to putting the plaintiff to the proof of allegations in the statement of claim, the onus of establishing which lies upon him."**

99. **Hicks v Faulkner (1878) 8 QB 167** in which Hawkins J at pg. 175 stated,

> **"Want of reasonable cause is for the judge alone to determine, upon the facts found, for the jury, who, even if they should think there was want of probable cause, might nevertheless think that the defendant acted honestly and without ill-will, or any other motive or desire than to do what he bona fide believed to be right in the interest of justice-in which case they ought not, in my opinion, to find the existence of malice."**

100. Additionally, **Corea v. Pieris (1907) D.C., Kurunegala, 2,740 which relied on Abrath v N. Eastern By, Co. (1883) 11 Q.B.D. 455 and 11; Brown v. Hawkes (1891) 2 Q.B. 718 and Cox v. English, Scottish and Australian Bank Ltd. (1905) A.C. 168** where Wood Renton J stated,

> **"It is hopeless to contend now, after the decision in the case of Abrath v. N. Eastern By, Co. that it is not incumbent upon the plaintiff in an action for malicious prosecution to prove malice as well as want of reasonable and probable cause. The absence of reasonable and probable cause may be so glaring as to give rise to a presumption of malice. But malice is a distinct and necessary element in the constitution of the cause of action with which we have here to deal; and mere recklessness will not establish it (see Brown v. Hawkes). In this connection I desire to add that I do not think that either Moss v. Wilson or the judgment under review in any way altered the pre-existing law as to the burden of proof in actions for malicious prosecution. These judgments only decide that there rests on the plaintiff the eventual burden of making out every element (malice included) which the law requires him to plead. Cox v. English, Scottish and Australian Bank, Ltd., is no authority for dispensing with proof of malice in an action for malicious prosecution. On the contrary, it expressly adopts the passage in Abrath v. N. Eastern By. Co., in which that necessity is affirmed."**

101. Based on these authorities the Defendants submitted that the Plaintiff did not adduce any evidence which inferred malice by the First Defendant due to a lack of reasonable and probable cause and adopted Lord Toulson's discussion on malice in **Juman v The Attorney General of Trinidad and Tobago [2017] UKPC 3** where he stated: -

> **"17. The question of malice therefore does not arise, but the Board would reject the appellant's attempt to treat the first respondent's alleged failure to carry out sufficient investigation before charging the appellant as amounting or equivalent to malice; or similarly the attempt to treat "recklessness" as tantamount to malice. "Reckless" is a word**

which can bear a variety of meanings in different contexts. It is not a suitable yardstick for the element of malice in malicious prosecution.

18. The essence of malice was described in the leading judgment in Willers v Joyce at para 55:

> "As applied to malicious prosecution, it requires the claimant to prove that the defendant deliberately misused the process of the court. The most obvious case is where the claimant can prove that defendant brought the proceedings in the knowledge that they were without foundation.....But the authorities show that there may be other instances of abuse. A person, for example, may be indifferent whether the allegation is supportable and may bring the proceedings, not for the bona fide purpose of trying that issue, but to secure some extraneous benefit to which he had no colour of a right. The critical feature which has to be proved is that the proceedings instituted by the defendant were not a bona fide use of the court's process."

19. A failure to take steps which it would be elementary for a reasonable person to take before instituting proceedings might in some circumstances serve evidentially as a pointer towards deliberate misuse of the court's process, but sloppiness of itself is very different from malice. In the present case there was no cause to doubt that the first respondents believed, right or wrongly, that there were sufficient grounds to prosecute, of that the object of charging the appellant was to place the matter before the magistrate for the court to decide the question of her guilt; and there was no suggestion that he had any ulterior improper motive. Even if the court had decided that objectively the first respondent lacked reasonable and probable cause to prosecute the appellant, there was no basis to hold that he acted without malice."

102. The Defendants also relied on **W/Con 2305 Sweeting, The Commissioner of Police, The Attorney General v. Atisha Tinker & Omar McPhee SCCiv App No. 50 of 2009** where John JA stated,

> "13. In reviewing the evidence the learned judge found that the second respondent McPhee admitted under cross-examination that there was a car with broken glass nearby.
>
> The learned judge also made a finding that McPhee admitted that the Police officers found an extra ash tray and a CD player under the driver's seat. Additionally, both McPhee and Tinker were discovered in the vicinity of a vehicle that was recently broken into. Those matters when taken together were sufficient to evoke reasonable suspicion in the mind of the "ordinary" prudent and "cautious" man let alone a police officer"
>
> 15. At paragraph 47 of her judgment the trial judge stated as follows:
>
> "I have no doubt the plaintiffs have discharged the onus in respect of element (1). Further, the dismissal of the charges, albeit for want of prosecution, is sufficient to satisfy element (4) as there need not be an acquittal on the merits it is sufficient that there has been no judicial determination of the person's guilt.
>
> Such a finding can only be described as a grave error since the only element satisfied on the evidence was that the prosecution ended in the Respondents' favour. The officers must be taken to have had an honest belief in the guilt of the Respondents having regard to all the prevailing circumstances."
>
> .....
>
> 17. The reasoning of the trial judge at paragraph 57 is, in my view, equally flawed. This is what she said:
>
> > "When a person embarks upon a prosecution with no evidence or with evidence on which no reasonable jury could convict, then whatever his state of mind, this is strong evidence that he had no reasonable and probable cause. One expects the prosecutor to gather the evidence, apply his mind to it and with the benefit of such legal advice as may be appropriate, determine, whether the prosecution is justified."
>
> The issue is whether the police officer at the time he made the arrest honestly and reasonably believed in his case. In this case there was ample evidence for the police to have honestly and reasonably believed that an offence had been

committed. While malice may be inferred from the circumstances of a case, in the instant matter, there was not a scintilla of evidence from which malice could have been inferred."

103. They maintained that any prudent and cautious person placed in the position of the Defendants would have acted and done as the Defendants did by proffering charges for rape. They added that it would have been unreasonable not to do so.

104. Finally they relied on **Sean Foster v D/SGT Anton Rahming, The Commissioner of Police, The Attorney General, PUB/CON/00028** in which Barnett CJ (as he then was) stated:

> **"Whilst I accept that the absences of evidence or probable cause may lead to the inference of malice, it does not inexorably follow that there was malice. The Plaintiff has adduced absolutely no evidence that the prosecution of the case against the Plaintiff was in fact actuated by malice or that its primary purpose was other than the carrying of the law into effect. In my judgment, the evidence shows that the police and the prosecutors did not consider the plaintiff to have been telling the truth and honestly believed that he was involved with the other occupants in the car."**

At para. 16 he quoted Isaacs J's dictum on malice,

> **"As to malice the Plaintiff must prove that the Defendants had an improper purpose or a motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice" as put by Alderson B in Stevens v Midland Counties Rly Co. (1854) 156 ER 480."**

105. Consequently, the Defendants contend that each witness gave honest, credible and consistent evidence in the SC Criminal Trial and that based on the investigations conducted any prudent and cautious person placed in the position of the Defendants would have acted and done as the Defendants did and charged the Plaintiff and it would have been unreasonable not to do so. The Defendants submitted that the Plaintiff did not discharge his burden of proof and as a result his claim should fail.

DECISION

106. Halsbury's Laws of England, Volume 97 at para. 716 defines what is a malicious prosecution.

> **"9. WRONGFUL USE OF PROCESS**
>
> **716. What is a malicious prosecution?**
>
> **A malicious prosecution is an abuse of the process of the court by wrongfully setting the law in motion on a criminal charge. To be actionable as a tort the process must have been without reasonable and probable cause, must have been instituted or carried on maliciously and must have terminated in the claimant's** favour. The claimant must also prove damage."

107. The burden is on the Plaintiff to prove that the Defendants abused the legal processes available to them and wrongfully prosecuted the Plaintiff unsuccessfully. As this is a civil trial the standard of proof is based on a balance of probabilities rather than the criminal standard of beyond a reasonable doubt. The Plaintiff must be able to show that the Defendants did not have reasonable or probable cause to

initiate and carry out the prosecution and that the prosecution was used for an improper purpose.

108. John JA, in **W/CON 2305 Sweeting et al v Atisha Tinker et al SCCivApp No. 50 of 2009** set out the Court of Appeal's position on malicious prosecution,

> "The Legal Position as it relates to ground one
> 6. The action for malicious prosecution is the oldest and most fully developed of the actions for the abuse of legal procedure. It is a matter to be proved by he who alleges it.....the respondents, but there is ample authority that in a proper case it may be inferred from want of reasonable and probable cause. Malice in this connection does not necessarily connote spite or ill-will. It is sufficient if the appellants are shown to have used the machinery of the courts for an improper purpose, as for example to conduct a fishing expedition against a person against whom no reasonable ground of suspicion is entertained. (See Clerk and Lindsell on Torts 16th Edition.)
> What amounts to 'reasonable and probable cause'
> 7. The statement of Hawkins J in Hicks v Faulkner (1878) 8 Q.B.D. 167, 1717 and approved in the House in Hemiman v Smith (1938) A.C. 305, 316 made with reference to malicious prosecution can be adopted for present purposes.
>
> "That brings me to the consideration of what is reasonable and probable cause.
>
> Now I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. There must be first, an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; thirdly, such secondly-mentioned belief must be based upon reasonable grounds; by this I mean such grounds as would lead any fairly cautious man in the defendant's situation to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as amounts to reasonable ground for belief in the guilt of the accused."
>
> 8. In Glinski v McIver [1962] AC 726, Lord Denning put it this way when he said at page 762:
>
> "Did he honestly believe that the accused was guilty? Or, as I would prefer, did he know there was no good ground for the charge he made?....But these cases must be carefully watched as to see that there really is some evidence from his conduct that he knew it was a groundless charge. It must always be remembered that, if a charge is genuine the mere fact that the prosecutor had made an unfair use of it will not take away his protection. It may show malice, but it does not raise any inference of a belief that there was no reasonable or probable cause."
>
> 9. In delivering his speech Lord Radcliffe said at page 753:
>
> "The action for malicious prosecution is by now a well-trodden path. I take it to be settled law that is the defendant can be shown to have initiated the prosecution without himself holding an honest belief in the truth of the charge (I must, of course, refine on this phrase later) he cannot be said to have acted upon reasonable and probable cause. The connection between the two ideas is not very close at first sight, for one would supposed that there might well exist reasonable and probable cause in the objective sense, what one might call a good case, irrespective of the

state of the prosecutor's own mind or his personal attitude towards the validity of the case. The answer is, I think, that the ultimate question is not so much whether there is a reasonable or probable cause in fact as whether the prosecutor, in launching his charge, was motivated by what presented itself to him as a reasonable and probable cause. Hence, if he did not believe that there was one, he must have been in the wrong.

On the other hand, I take it to be equally well settled that mere belief in the truth of his charge does not protect an unsuccessful prosecution, give, of course, malice, if the circumstances before him would not have led 'an ordinarily' prudent 'and cautious man' to conclude that the person charged was properly guilty of the offence."

109. The Privy Council in **Trevor Williamson (Appellant) v The Attorney General of Trinidad and Tobago (Respondent) [2014] UKPC 29** set out the criteria for making out a claim for malicious prosecution,

> 11. In order to make out a claim for malicious prosecution, it must be shown, among other things, that the prosecutor lacked reasonable and probable cause for the prosecution and that he was actuated by malice. These particular elements constitute significant challenge by way of proof. It has to be shown that there was no reasonable or probable cause for the launch of the proceedings. This requires the proof of a negative proposition, normally among the most difficult of evidential requirements. Secondly, malice must be established. A good working definition of what is required for proof of malice in the criminal context is to be found in A v NSW [2007] HCA 10; 230 CLR 500, at para 91:
>
> > Page 4 "What is clear is that, to constitute malice, the dominant purpose of the prosecutor must be a purpose other than the proper invocation of the criminal law - an 'illegitimate or oblique motive'. That improper purpose must be the sole or dominant purpose actuating the prosecutor"
>
> 12. An improper and wrongful motive lies at the heart of the tort, therefore It must be the driving force behind the prosecution. In other words, it has to be shown that the prosecutor's motives is for a purpose other than bringing a person to justice: Stevens v Midland Counties Railway Company (1854) 10 Exch 352, 356 per Alderson B and Gibbs v Rea [1998] AC 786, 797D. The wrongful motive involves an intention to manipulate or abuse the legal system Crawford Adjusters Ltd (Cayman) v Sagicor General Insurance (Cayman) Ltd [2013] UKPC 17, [2014] AC 366 at para 101, Gregory v Portsmouth City Council [2000] 1 AC; 426C; Proulx v Quebec [2001] 3 SCR 9. Proving malice is a "high hurdle" for the claimant to pass: Crawford Adjusters para 72a per Lord Wilson.
> 13. Malice can be inferred from a lack of reasonable and probable cause – Brown v Hawkes [1891] 2 QB 718, 723. But a finding of malice is always dependent on the facts of the individual case. It is for the tribunal of fact to make the finding according to its assessment of the evidence.
> 14. On the question of reasonable and probable cause, or the lack of it, a prosecutor must have 'an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed': Hicks v Faulkner (1878) 8 QBD 167, 171 per Hawkins J, approved by the House of Lords in Herniman v Smith [1938] AC 305, 316 per Lord Atkin. The honest belief required of the prosecutor is a belief not that the accused is guilty as a matter of certainty, but that there is a proper case to lay before the court: Glinski v McIver [1962] AC 726, 758 per Lord Denning."

110. The Defendants submit that not because the VC only identified Sgt. Gibson as the man who had sexual intercourse with her, were the officers prevented from arresting and subsequently charging the Plaintiff, because at one point the accused also identified the Plaintiff in participating in the sexual assault. They rely on the principle

of joint enterprise which states that it makes no difference who carried out the actual offence because if it is attached to both individuals then both would be liable.

111. The Plaintiff submits that the Defendants' decision to continue to raise the issue of joint enterprise, despite unsuccessfully arguing the same in the criminal prosecution, bolsters the Plaintiff's claim that the Defendants held no honest belief in the guilt of the Plaintiff.

112. Reasonable and probable cause is an honest belief in the guilt of an accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances if true, would reasonably lead to any ordinarily prudent and cautious man to come to the conclusion that the accused was guilty of the alleged crime. The onus is on the Plaintiff to prove whether or not the Defendants had an honest belief founded upon reasonable and probable cause in reliance on all of the circumstances surrounding his arrest and subsequent prosecution. In **Sweeting**, the authority of Hicks v Faulkner provided a breakdown of how the Courts should conclude whether there was an honest belief that would lead to reasonable and probable cause being formed. I consider it prudent to examine the facts of the Plaintiff's case under each head:

106.1 **An honest belief of the Defendants in the guilt of the Plaintiff**

ASP Hamilton-Sands, the lead investigator for the First Defendant testified that she did not recommend anything about the Plaintiff at all and that she did not recall stating that the Plaintiff along with his co-accused should have been charged. She added that she did not request that he be arrested. She further testified that the police had a duty to release an individual if it was considered that there was insufficient evidence. The VC's Statement dated 15th November, 2019 at page 5 stated that she did not know if the Plaintiff had sexual intercourse with her. Additionally, the Plaintiff was asked for a DNA sample but said he would have to think about it and after he was charged the Defendants never took a DNA test from the Plaintiff.

The First Defendant, by section 34 of the Police Force Act, 2009 can seek a Magistrate's authorization to take intimate samples from a person if they can satisfy the Magistrate that they have reasonable grounds for suspecting the involvement of the person in an indictable offence which could confirm or disprove his involvement. Section 34 states,

> **"(1) Except as provided by this section, no police officer may take an intimate sample from a person without the appropriate consent**
> **(2) Consent to the taking of an intimate sample must be given in writing.**
> **(3) A medical practitioner may on the direction of a police officer, take an intimate sample from a person without the appropriate consent if authorised by a Magistrate.**
> **(4) A Magistrate may only give or authorization under subsection (3) if he has reasonable grounds for –**
> > **(a) suspecting the involvement of the person from whom the sample is to be taken in an indictable offence; and**
> > **(b) believing that the sample will tend to confirm or disprove his involvement.**
> **(5) A Magistrate shall give an authorization in writing.**
> **(6) Where –**
> > **(a) an authorization has been given; and**

(b) it is proposed that an intimate sample shall be taken in pursuance of the authorization,
The police officer shall inform the person from whom the sample is to be taken of the –
(i) giving of the authorization; and
(ii) grounds for giving it."

If the First Defendant had reasonable grounds to suspect that the Plaintiff did in fact commit the Offence and had the intention of seriously prosecuting the Plaintiff for the Offence it would have been prudent for an intimate sample to be collected from him in order to support or disprove their suspicions of his involvement. This however, was not done and the fact that he did not provide a DNA sample cannot be used as evidence of his guilt.

106.2 **The Defendants belief must be based on an honest conviction of the existence of the circumstances which led them to their conclusion**

ASP Hamilton-Sands also testified that after speaking with the VC and Officer Khalfani and reviewing the evidence from the doctor she did not have sufficient evidence that would cause her to believe that the Plaintiff had sexual intercourse with the VC nor facilitated the Offence by words or actions. She additionally stated that she did try to find the crime scene but could not recall if she did or if she attended it. In the Royal Bahamas Police Force's 'Report of Examination By Medical Practitioner' at Part 2, the VC informed Officer Khalfani that while she was assaulted by one male, the other male present looked on.

The VC stated that she was only sexually assaulted by one man as confirmed by the evidence of the Plaintiff, however, the events surrounding the Offence changed throughout the numerous documents that appeared to be drafted and signed by officers of the First Defendants. The report that was addressed to the Director of the Police Forensic Lab dated 15th November, 2009 and signed by D.Sgt 1743 Miller, a Scene of Crime Technician of the Crime Scene Unit and stated that the VC was "raped by two men one who is known to her as Sean Gibson and the other as Rod Bethel".

Additionally, by letter addressed to the Director of Forensics dated 17th November 2009 and signed by W/DC 343 Armbrister of the CDU, which accompanied a urine sample, it stated that "She reported that both men had sexual intercourse with her against her will." In another letter addressed to the Director of Forensics and dated 15th November 2009, D/Cpl. 2722 Demetria Farquharson Capron, a Crime Scene Technician of the Crime Scene Investigation Unit also stated that the VC reported that both men had sexual intercourse with her against her will. . Likewise, the letter to the Director of Forensics dated 17th November, 2009 and signed by Chief Inspector Cleophas Anthony Cooper of the Homicide Section of CDU again stated the same.

The criminal trial revealed that the initial complaint to the First Defendant was made by the VC's Mother who allegedly claimed that both men had sexually assaulted the VC. However, the VC, while she initially stated that she was unsure if the Plaintiff had sexual intercourse with her, subsequently stated that only the Plaintiff's co-

accused had sexual intercourse with her on two separate occasions. Based on the VC's statement it was impossible for the officers to form an honest belief that the Plaintiff did in fact have sexual intercourse with the VC. Additionally, the Plaintiff was initially arrested based on the complaint made by the VC's Mother who was not present at the time of the Offence.

Therefore, it was incompetent of the officers to state that the VC was raped by both the Plaintiff and his co-accused in the aforementioned letters and was unsafe for the officers to recommend to the Second Defendant that the Plaintiff should have been charged. The question that comes to mind is why was this investigation pursued and continued by other officers of the First Defendant if its lead investigator assigned to the matter released the Plaintiff without charging him based on the information made available to her at the time? Additionally, why was he then recommended to be charged based on that same information? Sgt. Gibson testified that the Plaintiff would not have been charged if he was not his co-accused however, he does not go any further with that sentiment.

106.3 The Defendants belief must be based upon reasonable grounds

The Plaintiff was charged with rape contrary to s. 6(A) of the Sexual Offences and Domestic Violence Act. This section states,

> "6. Any person who —
> (a) commits rape;
> (b) .....
> (c) .....
> is guilty of an offence and liable to imprisonment for life."

Sections 3 and 4 of the Act defines Rape and Sexual Intercourse as,

> "3. Rape is the act of any person not under fourteen years of age having sexual intercourse with another person who is not his spouse —
> (a) without the consent of that other person;
> (b) without consent which has been extorted by threats or fear of bodily harm; (c) with consent obtained by personating the spouse of that other person; or
> (d) with consent obtained by false and fraudulent representations as to the nature and quality of the act.
> 4. For the purposes of this Act, "sexual intercourse" includes —
> (a) sexual connection occasioned by any degree of penetration of the vagina of any person or anus of any person, or by the stimulation of the vulva of any person or anus of any person, by or with —
> (i) any part of the body of another person; or
> (ii) any object used by another person, except where the penetration or stimulation is carried out for proper medical purposes; and
> (b) sexual connection occasioned by the introduction of any part of the penis of any person into the mouth of another person, and any reference in this Act to the act of having sexual intercourse includes a reference to any stage or continuation of that act."

The Defendants contended that it did not matter who carried out the actual act of rape as the fact that the Plaintiff was present prevented him from having a defence against the Offence. In support of this contention the Defendants relied on **R v. Rahman and Others (Appellants) (on Appeal from the Court of Appeal)**

(Criminal Division) [2008] UKHL which cited a portion of the judgment delivered by Sir Robin Cooke in the case of **Chan Wing-Siu v The Queen [1985] AC 168, 175**,

> **".....a person acting in concert with the primary offender may become a party to the crime, whether or not present at the time of its commission, by activities variously described as aiding, abetting, counseling, inciting or procuring it. In the typical case in that class, the same or the same type of offence is actually intended by all the parties acting in concert."**

The Plaintiff in turn relied on the ruling of Hilton J in **Regina v Sean Gibson and Rod Bethel Cri/VBI/51a/6 2010**. At para. 16 of that judgment he stated,

> **"With regard to the accused Rod Bethel I find that there is no sufficient evidence to connect him to this charge of rape. There was no evidence whatsoever of any common design as it relates to Rape of Tamara Kemp or of any inferential agreement to rape Tamara Kemp. Nor was there any evidence of Rod Bethel being a part of a joint criminal enterprise with Sean Gibson to rape Tamara Kemp."**

The Plaintiff submitted that at all material times the Defendants were aware that there must be evidence that the Plaintiff either aided, abetted, counselled, procured or encouraged an alleged crime. On that note they further relied on Regina v Sean Gibson where at para. 13 Hilton J stated,

> **"The Law regarding parties jointly charged "being concerned together" is that if there is one person who commits the crime/act then, for another to be liable jointly with him, that person must be shown to have assisted him that is to say aided, abetted, counselled, procured or encouraged the crime.**
>
> **A person who is present abetting the principal when the crime is committed is liable equally with the principal even if he takes no part in the actual perpetration of the crime. However, mere presence at the commission of the crime is not enough to create criminal liability; some encouragement or assistance must have been given to the principal either before or at the time of the crime with the intention of furthering its commission"**

The Defendants' submissions on joint enterprise failed at the SC Criminal Trial yet they still sought to use this argument as justification for the reason they prosecuted and continued to prosecute the Plaintiff. If there was disagreement with Hilton J's ruling the proper avenue for the Defendants was by way of appeal however, this was not done. As Hilton J stated in his judgment, the evidence that the Defendants were privy to could not cause an honest belief to be formed that the Plaintiff procured or encouraged the alleged crime. More importantly Hilton J acquitted Sgt. Gibson which further weakens the Defendants arguments. There was no evidence led of any assistance or encouragement by the Plaintiff in the perpetration of the offence.

106.4 **the circumstances so believed and relied on by the accuser must be such as amounts to reasonable ground for belief in the guilt of the accused**

From 15th November 2009 to January 2012 the Second Defendant had in their possession the statements of the VC, the Plaintiff's Record of Interview, his co-accused's Record of Interview, the statement of the ASP Hamilton-Sands along with the reports directed to the Forensic Lab. The VC's statements contradict the reports of the officers sent to the Forensic Lab as the VC herself stated that she was unsure that the Plaintiff had sexual intercourse with her and then further stated that only the Plaintiff's co-accused had sexual intercourse with her while the Plaintiff stood by.

113. The additional hurdle which the Plaintiff has to overcome is whether the fact of malice existed. As stated in Sweeting, an improper motive can be a motive that does not coincide with the proper administration of justice which should be a prosecutor's main concern. A prosecutor should not be concerned with the number of guilty verdicts received but should however be concerned with ensuring that an accused is afforded a fair hearing in conformity with the legal principles relevant to the case before him. After all, all attorneys are tasked with upholding, protecting and preserving the laws which have been put in place whether it is to defend the Crown itself or to defend an individual's rights.

114. Based on the evidence before the Second Defendant, it should have been clear that there was a discrepancy between the VC's statements and the letters of the officers. This should have pre-empted further investigation however, a further investigation was not conducted and based on the evidence before Hilton J, he acceded to the Defence's request for a No Case Submission and directed the jury to acquit both the Plaintiff and his co-accused and consequently the joint enterprise submission failed.

115. As previously mentioned the civil standard of proof is 'balance of probabilities'. After a review of the facts and evidence before me and after considering the elements prescribed in Hicks v Faulkner, I find that the Plaintiff has discharged the burden of proving that the Defendants maliciously prosecuted him as there was not sufficient evidence to support the allegations made against him. The Second Defendant did not discharge their duty to the administration of justice which was to ensure that they could prove beyond a reasonable doubt that the Plaintiff was guilty of the Offence. Instead from 2012 to 2017 they failed to properly manage the case against the Plaintiff and maintained a prosecution that they should have known would and could not be successful.

DAMAGES

Unlawful Arrest and False Imprisonment

116. The Plaintiff sought damages in the amount of $25,000.00 for the Plaintiff's unlawful imprisonment and contended that to assess whether damages should be awarded under this head it must be proven that there was injury to the Plaintiff's liberty and injury to the Plaintiff's feelings.

117. The Plaintiff was unlawfully arrested on 15th November 2009 at about 7:15 a.m. and thereafter he was falsely imprisoned by the First Defendant until 7:00 p.m. on 17th November 2009, a period of 72 hours. In **Kevin Renaldo Collie v The Attorney General**, I awarded the Plaintiff $35,000.00 as damages for his unlawful arrest and false imprisonment for a period of thirty-two hours. As I stated in that case there is no set formula provided for the calculation of damages however the existing precedents act as a guide for the amount that should be awarded. Each case has to be determined on its own facts. In the present case, the Plaintiff was unlawfully arrested and detained forty hours more than Collie. In the circumstances, damages are assessed and awarded at $60,000.00

Malicious Prosecution

118. The Plaintiff submitted that in order for a Court to consider whether or not an applicant could be awarded damages for malicious prosecution, the following must be proved,

> **"That the law was set in motion against him on a charge for a criminal offence by the Defendant;**
> **That he was acquitted of the charge or that the proceedings were otherwise determined in his favor;**
> **That in instituting and continuing the prosecution the Defendant did so without reasonable and probable cause;**
> **That the Defendant was actuated by malice;**

119. He relies on **Hayes v Ventter 2004 3 SA 200 (T) 208B,** a case decided in the South African Court of Appeal, in which Malan AJA stated that malicious prosecution consisted in the wrongful and intentional assault on the dignity of a person including his or her good name and privacy. He also relied on **Inasua Everald Ellis v The Attorney General and Ransford Fraser SCC No. 37/01** where an award of $2,000,000.00 was made in circumstances where the claimant had been charged with offences against the Larceny Act and had been to Court on thirty three occasions before being acquitted. The award was for both malicious prosecution and aggravated damages.

120. The Defendants contended that the Plaintiff's case was not a case which warranted aggravated or exemplary damages being awarded as the purpose of such damages was punitive in nature and was only permissible in the three cases pronounced in **Rookes v Barnard [1964] AC 1129** being:

> **"Oppressive, arbitrary or unconstitutional actions by the servants of government;**
> **Where the defendant's conduct was 'calculated' to make a profit for himself, or**
> **Where a statute expressly authorizes the same."**

121. They added that an unsuccessful plea by the Defendant that the Plaintiff was guilty of the Offence should not lead to an aggravation of damages unless it could be shown that the Defendant made the charge mala fide as was held in **Warwick v Foulkes (1844) 12 M & W. 507**. In addition they added that exemplary awards were made for wanton tortious conduct which did not apply to the Plaintiff's case. The Defendants contended that the Plaintiff's claim should be dismissed with costs to the Defendants as the Plaintiff's arrest was lawful and based on reasonable suspicion and the subsequent prosecution was carried on without malice.

122. According to **Halsbury's Law of England at para. 733**, the following damages must be shown in order for a court to award damages for malicious prosecution,

> **"733. Damage needs to be shown for malicious prosecution claim to succeed.**
> **To support a claim for damages for malicious prosecution, one of three heads of damage must be shown. The damage may be:**
> **(1) damage to a person's fame, as where the matter of which he is accused is scandalous; or**

(2) damage done to the person, as where his life, limb or liberty is endangered; or

(3) damage to his property, as where he is put to the expense of acquitting himself of the crime with which he is charged.

The claimant must show that any damage to fame suffered was a necessary and natural consequence of the charge itself, and as regard the second head of damage, that actual loss of liberty was suffered. Once one of these heads of damage is proved, damages are at large and may include compensation for loss of reputation and injured feelings"

123. In **Terrence Calix v Attorney General of Trinidad and Tobago [2013] UKPC 15**, Lord Kerr discussed the considerations to be taken into account when a person has suffered malicious prosecution for the offence of rape. Beginning at para. 9 he stated,

"9.....Before he was arrested and charged with these offences, Mr Calix had never been convicted of a criminal offence. Being prosecuted for the extremely serious offence of rape was a substantial matter. It is something that, for a man of good character, must rank highly in terms of reputational damage.

10.....It hardly needs to be said that someone who suffers a severe adverse personal reaction to such damage may be awarded greater compensation than others who are more stoical about or indifferent to the affront of the slur. But that does not mean that the person of more robust personality should be denied appropriate relief. It simply means that compensation should be adjusted to take account of the anguish that the reputational damage occasions.

14..... As the Board said in *Amin v Bannerjee* [1947] AC 322, 331:

-16..... Considering the judge's assessment of damage to reputation as a whole, the Board has concluded that his failure to advert directly to the fact that the appellant had a good character and that the malicious prosecution was in respect of a very serious offence led him to underestimate the significance of this aspect of the appellant's claim. As the authors of Clayton and Tomlinson on *Civil Actions against the Police,* 3rd ed (2004), observe at para 14-064:

"The seriousness of the offence for which the claimant was prosecuted should be considered. The more serious the offence, the greater the damage to the claimant's reputation. Thus, for example, accusations such as dishonesty or sexual misconduct will cause more damage than accusations of minor public order offences or assaults. A money figure should be placed on this 'reputation damage'. The award should be increased if the prosecution received wide publicity." and "The claimant's reputation should then be considered. If he is of good character then the 'loss of reputation' sum should not be reduced. If, on the other hand, he has previous convictions then there will be reductions in his 'loss of reputation' damages."

124. From 2009 to 2017, a period of eight years, the Plaintiff was shunned by his family, friends and peers due to being charged with the Offence. He lost his job and was unable to find similar employment. When he did find a job in his line of work it was short lived as he was terminated due to the pending charges against him. Moreover, he had no previous convictions.

125. In **Barr v. Tynes - [2001] BHS J. No. 37**, Zacca P confirmed the principle that a Plaintiff could recover damages to his property where he is put to the expense of acquitting himself of the crime with which he is charged. At para. 21 of the judgement he stated,

".....In a claim for malicious prosecution, it is established that a plaintiff can recover the costs incurred in defending the criminal action. Berry v. British transport Commission [1962] 1 Q.B. 306."

126. In **Merson v. Cartwright - [1994] BHS J. No. 54**, Sawyer J, after being satisfied that the Plaintiff was charged by the Defendants without reasonable and probable cause, with ill-motive and was subsequently acquitted, awarded the Plaintiff $90,000 for the tort of malicious prosecution. In making this award she considered the case of **Tynes v Barr** in which the Plaintiff was awarded $150,000 for malicious prosecution however, reducing the amount because the Defendants did not act as egregiously as the Defendants in Tynes v. Barr. This Plaintiff was charged without any reasonable and probable cause and subsequently acquitted.

127. Upon his initial arrest on 15th November 2009 he was released without charge based on the same evidence used against him when he was charged on 7th December 2009 and when his trial was commenced on March 2017. As previously stated the Plaintiff was shunned by his family, friends and peers as a result of being charged with the Offence which hung over his head for eight years. The Offence is a serious offence and must be considered to have brought severe reputational damage to the Plaintiff as evidenced by his inability to find employment similar to that of which he was accustomed. The malice however, was not as blatant in the Plaintiff's case as compared to the aforementioned authorities.

128. In the circumstances damages for malicious prosecution are awarded to the Plaintiff and assessed at $697,000. The breakdown of this sum is as follows:

$600,000 – Loss of Income for the eight year period between the charges being laid against the Plaintiff and the Plaintiff being acquitted. This figure is based on the Plaintiff's uncontroverted pleading that he earned $75,000 per annum, and due to the fact that his reputation was damaged to the extent that he was terminated from his employment and was subsequently unable to find employment because of the charge;
$10,000 – Legal fees for the Plaintiff's attorney in the Criminal Trial;
$12,000 – Loss of opportunity to sell the property situate in Whale Point Estates, Eleuthera which, according to the conveyance provided, was purchased by the Plaintiff for the value represented. The Plaintiff was unable to sell the property as the documents were being held to secure his release on bail prior to the completion of the Criminal Trial.;
$75,000 – Damage to Reputation

CONSTITUTIONAL RELIEF

Detinue

129. The Plaintiff submitted that Detinue was not an adequate parallel remedy to a claim for constitutional relief under Article 28 (2) of the Constitution. The Plaintiff relied on the case of **Coalition to Protect Clifton Bay and another v. The Hon. Frederick A. Mitchell MP (Minister of Foreign Affairs and Immigration) and others 2016/PUB/con/00016** Bahamas Supreme Court, Public Law Division specifically paras. 247, 250 and 252 where Charles J stated,

"247. It is well established that the right to apply to the Supreme Court pursuant to Article 28 of the Constitution should be exercised only in exceptional cases where there is a parallel remedy.....
250.The mere existence of an alternative remedy does not automatically warrant excluding constitutional proceedings under the proviso to Article 28(2). The crux is their adequacy (Emphasis mine). The power to decline jurisdiction arises only where the alternative means of redress is considered to be adequate. In this regard, the Courts have offered some guidelines in assessing the requirement of adequacy. One of these is that where there is a parallel remedy, constitutional relief is only appropriate where some additional "feature" presents itself. The additional feature could be the arbitrary use of state power – as where an off-duty policeman brutalized the claimant for what was a private dispute between the claimant and the policemen's friend: Attorney General of Trinidad and Tobago v Ramanoop [2005] UKPC 2005, or where a lawful visitor to the Bahamas was imprisoned for eight years without charge: Takitota v AG. Another additional feature is where there are breaches of multiple rights, for example, in Belfonte v Attorney General [1968] W.I.R. 416 (CA TT). Belfonte had been imprisoned for non-payment of a fine, even though his mother had in fact paid the fine by cheque which became lost in the police bureaucracy. During his imprisonment, the applicant's locks were cut and he was forced to eat meat in violation of his religious practices. On these facts an alternative remedy was held to be inadequate given that he had endured multiple breaches, spanning from tortious imprisonment. 251. In the present case, the Applicants claim a multiplicity of relief for statements made by two Cabinet Ministers in and outside of Parliament. While an action in defamation may arise for utterances outside of Parliament, this Court found that parliamentary privilege does not apply to statements made in Parliament where the constitutional rights of a person have been trampled upon and therefore, the appropriate remedy is to be found in the Constitution. 252. Consequently, I find that the bringing of this constitutional motion is not an abuse of the process as no parallel adequate remedy is available to the Applicants."

130. The Plaintiff also relied on **Durity v Attorney-General of Trinidad and Tobago [2003] UKPC** in which the Privy Council held that there was no limitation prescribed by the Constitution that prevented a citizen from seeking constitutional relief against the Crown at a certain time.

131. The Defendants submit that the Plaintiff's claim for constitutional relief for his motor vehicle which was allegedly held by the police for six months could not be maintained as the Plaintiff himself had admitted that the vehicle was returned to him in 2009 and as a result the claim was statute barred because it was outside of the limitation period. They added that the constitutional motion was an attempt to circumvent the Limitation Act.

132. I am satisfied that the claim regarding the Plaintiff's motor vehicle could have been prosecuted under the tort of detinue which has a six year limitation period. Therefore, I am not persuaded that constitutional relief would be the appropriate remedy and his claim under the tort of detinue would be statute barred.

Deprivation of Liberty

133. The Defendants contended that a person's right to liberty under Article 19 of the Constitution was not an absolute right and was extinguished where there was a reasonable suspicion that the person has or is about to commit a criminal offence.

134. They also contended that this was not a case for the Supreme Court to invoke its powers under Article 28 of the Constitution to hear a constitutional motion as there was an adequate remedy available to the Plaintiff. Article 28 of the Constitution states,

> **"28. (1) If any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of this Constitution 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 Supreme Court for redress."**

135. The Defendants relied on **Bain-Thompson v The Commissioner of Police [2017] BHS J No. 88** in which Charles J stated:

> **"18 The second category of cases is illustrated by Jaroo. The appellant filed a constitutional motion seeking relief for infringement of certain of his rights. The Privy Council held that a parallel remedy was available to the appellant to enable him to enforce his right to the return of the vehicle. He could have pursued an action for delivery in detinue. The Privy Council reverberated its salutary warning that the right to apply to the High Court under the Constitution should be exercised only in exceptional circumstances where there is a parallel remedy."**

136. The Plaintiff has been awarded damages for unlawful arrest and false imprisonment. Such acts deprived him of his freedom. Therefore it is unlawful to award a separate sum for constitutional damages for deprivation of his liberty unless it is proven that the conduct of the Defendants was outside of the scope of the torts. No such proof was provided. Accordingly, I will not accede to the Plaintiff's request for constitutional damages for deprivation of liberty.

Delay

137. The Plaintiff submitted that his constitutional right to a hearing within a reasonable time as protected by Article 20 of the Constitution was breached as he was charged on 9th December 2009 and not tried until 6th March 2017 and as a result he should be compensated. He relied on **Barker v. Wingo (1992) 407 US 514**, in which it was held that one had to look at the length of the delay, the reasons given by the prosecution to justify delay, the responsibility of the accused for asserting his rights and the prejudice to the accused. Powell, J stated,

> **"By deliberately elevating to the status of a constitutional imperative the right to a trial within a reasonable time, a right which already existed at Common Law, the framers of the Constitution ascribed significance to this right that too often is underappreciated in not misunderstood."**

138. He also relied on **Tamara Merson v Drexel Cartwright [2005] UKPC 38** in which the Privy Council stated,

> **"[18] These principles apply, in their Lordships' opinion, to claims for constitutional redress under the comparable provisions of the Bahamian constitution. If the case is one for an award of damages by way of constitutional redress – and their Lordships would repeat that "constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course" (para 25 in Ramanoop) – "the nature of the damages awarded may be compensatory but should always be vindicatory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount."**

139. He added that on assessment the remedy had to be just and appropriate and the purpose of damages were to publically vindicate the right and not to punish the State or its officials. The Plaintiff also submitted that the quantum should be guided by the seriousness of the breach, the impact of the breach on the claimant, and the seriousness of the state misconduct. He additionally submitted that the award had to be sufficiently meaningful to respect a serious response to the breach and the objectives of compensation, upholding the constitutional values and deterring further breaches.

140. The Defendants contended that the Plaintiff's case did not warrant aggravated or exemplary damages being awarded as they were punitive in nature and were made for wonton and tortious conduct and accordingly was only permissible in cases which were oppressive, arbitrary or unconstitutional actions by the servants of the Government, where it was found that the defendant's conduct was 'calculated' to make a profit for himself, or where a statute expressly authorized the same. They further contended that there should be no damages awarded for delay as the delay was not unreasonable and not wholly on the part of the Defendants.

141. In respect of the Plaintiff's claim for damages for the delay of prosecution, the Defendants submitted that the delay was not wholly on the part of the Defendants and in any event the delay was not unreasonable. They relied on **Bell v DPP [1985] AC 937** in that regard in which it was held that the following criteria should be considered when assessing a delay, (1) the length of delay, (2) the reasons given by the prosecution to justify the delay, (3) the responsibility of the accused for asserting his rights and (4) the prejudice to the accused.

142. The Defendants submitted that the Plaintiff admitted that the first inquiry he made regarding his matter was around February 2013 and one must also consider delays by the court and the recusal of one judge whereby the matter had to be transferred to another judge.

143. The Defendants added that the Plaintiff's assertion that his rights pursuant to Article 20 of the Constitution were breached is also disallowed under Article 28 of the Constitution.

144. The Plaintiff's co-accused Sgt. Gibson, before another Court, also sought relief for the Defendant's breach of his constitutional right pursuant to Article 20 (1) of the Constitution (supra) which affords the Plaintiff a fair hearing within a reasonable time by an independent and impartial court. Article 20 (1) states,

> **20. (1) If any person is charged with a criminal offence, then, unless the charge is** withdrawn, the case shall be afforded a fair hearing within a reasonable time by an **independent and impartial court established by law."**

145. In **Gibson v. The Attorney General - [2018] 1 BHS J. No. 100**, Hilton J awarded Sgt. Gibson $25,000.00 as a result of his finding in an earlier ruling that the Defendants had breached his constitutional right to have a fair hearing within a reasonable time pursuant to Article 20. Hilton J stated,

"38.....In this case the Applicant was arrested on 9th November 2009 and his trial commenced in March 2017 and was completed on 20th April 2017.

The Bahamas Legislature in matters relating to bail has enacted that a "Reasonable Time" for the purposes of trial in the Supreme Court is 3 years. Section 4 (2A) of the Bail Act (as amended) specifies:

> "Without Limiting the extent of a reasonable time, a period of three years from the date of arrest or detention of the person charged shall be deemed to be reasonable time."

39 In interpreting this section, President of the Court of Appeal, Dame Allen in the case of Hepburn v. The Attorney General S.C.Cr. App. No. 276 of 2014 stated at para. 22 and 23 as follows:

> "22. The Applicant no doubt relies on the definition of what is a reasonable time in section 4 (2A) to show that the trial date of 19th June 2017 would make the time which will elapse from the time of his arrest to that date about three years.
>
> 23. However, when one considers the authorities and indeed the wording of section 4 (2A), it is clear that what is a reasonable time must be determined on a case by case basis and without regard to hard and fast rules of mathematical formulae. Consequently, the deeming provision of section 4 (2A) must be construed as a marker and not a limitation of what is a reasonable time, and the court must still consider whether, in all the circumstances, the time which has elapsed or will elapse, between arrest and trial, is reasonable."

40 On the facts relevant in this case it is clear that the police and prosecution authorities were in possession of all of the evidence necessary for trial by January 2012 and as such the trial could and should have occurred no later than December 2012; a period of three years and one month post the arrest of the Applicant.

Bearing in mind the need for order and good governance, a person in the Applicant's position (being a Police Sargeant) it should have been obvious to the Respondent that his trial should be dealt with as soon as was practicable.

41 I find that the appropriate period of delay for which compensation should be awarded is from 1st December 2012 to 1st April 2017 (a period of 4 years and 4 months).

42 I am of the view that the Applicant should be compensated for this breach by being awarded both a compensatory award and a vindicatory award and that the compensatory award should include all discernible losses the Applicant would have suffered and include any amount for aggravation if warranted.

58 In the present case I have determined that the breach of the Applicant's right to trial within a reasonable time should be calculated from 1st December 2012 to 1st April 2017 (four years and four months).
59 In my discretion I find that a vindicatory award for this breach should be $25,000.00...."

146. Sgt. Gibson was the Plaintiff's co-accused in the Criminal Trial. The Plaintiff was charged on 9th December, 2009. His preliminary inquiry was adjourned due to numerous requests by the Defendants as they were awaiting DNA results. On or about December 2010 a Voluntary Bill of Indictment was drawn up against the Plaintiff and his matter was transferred to the Supreme Court and his trial commenced on the 6th March 2017 and continued on the 6th April, 2017when the court ruled that there was insufficient evidence to connect him to the Offence and that there was no evidence whatsoever of any common design as it related to the Offence or of any inferential agreement to participate in the Offence nor any evidence of the Plaintiff being a part of a joint criminal enterprise with Sgt. Gibson to carry out the Offence. Hilton J withdrew the case against the Plaintiff from the jury and directed the jury to return a verdict of Not Guilty.

147. The Defendants were in possession of all of the evidence necessary for trial by January 2012 and as Hilton J indicated the trial could and should have occurred no later than December 2012. In the Plaintiff's case I have determined that the breach of the Plaintiff's right to trial within a reasonable time should be calculated from 1st December 2012 to 1st March 2017 (4 years and 3 months). I therefore adopt the calculation of time formulated by Hilton J and find that the Plaintiff's right to trial within a reasonable time was breached and order that damages are assessed and awarded at $10,000.00 as a vindicatory award to the Plaintiff.

148. I noted that Hilton J's award included both a compensatory award and vindicatory award for all losses Sgt. Gibson incurred during the time the prosecution was being held against him. In the current circumstances I have already awarded the Plaintiff compensatory damages for loss of reputation, loss of opportunity and loss of property as a result of the malicious prosecution, therefore I am legally barred from duplicating awards.

149. I have found that the Plaintiff was unlawfully arrested, falsely imprisoned, maliciously prosecuted and his constitutional rights were breached. The Plaintiff is awarded a total sum of $767,000.00 representing damages for the aforementioned torts and constitutional breaches.

150. Costs of this action are awarded to the Plaintiff to be taxed if not agreed. I will hear the parties on the question of interest.

Dated this 19th day of March, 2021

G. Diane Stewart
Justice