In The Supreme Court of Bermuda

CIVIL JURISDICTION

2005: No. 394

BETWEEN:

EDWARD WARREN MING

Plaintiff

- and -

THE MINISTER FOR LABOUR, HOME AFFAIRS AND PUBLIC SAFETY

First Defendant

and

THE ATTORNEY GENERAL

Second Defendant

Date of Hearing: 22 June 2009
Date of Judgment: 17 July 2009

Richard Horseman of Wakefield Quin, for the Plaintiff; and
Martin Johnson of the Attorney General's Chambers for the Defendants.

JUDGMENT

1. This Judgment is given on the trial of the plaintiffs' action for damages for false imprisonment. The imprisonment of which he complains was pursuant to various committal orders made by a Magistrate in the Family Court in respect of the plaintiff's failure to pay maintenance for his two children. At the hearing the plaintiff's counsel made it plain that he did not pursue a remedy in Tort, and limited his claim to redress under the Constitution for breach of his rights under section 5 of that document.

2. Insofar as it is relevant, section 5 of the Constitution provides –

> **"Protection from arbitrary arrest or detention**
> 5. (1)No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases:
>
> (a). . .
>
> (b) in execution of the order of a court punishing him for contempt of that court or of another court or tribunal;
>
> (c) in execution of the order of a court made in order to secure the fulfilment of any obligation imposed upon him by law;
>
> . . .
>
> (4) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that other person."

The plaintiff also prays in aid section 15 of the Constitution, subsection (1) of which provides:

> **"Enforcement of fundamental rights**
> 15 (1) If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."

3. The claim for a Constitutional remedy was only added by amendment at trial, although the plaintiff had applied for such leave by summons of 6th May 2008, which I heard on 9th May 2008, when it was adjourned generally with a liberty to restore[1]. It was never restored, but the defendant's counsel did not object to the amendment at trial, perhaps because the plaintiff had always pleaded a breach of his Constitutional rights, albeit in a rather spare form[2].

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[1] According to my note, at that time I held –

> "As to the plaintiff's summons to amend, it plainly needs further consideration, but it is not bad in principle. I therefore adjourn it generally with a liberty to restore on two clear days' notice. It may be that the parties can agree, but if not it can come back before me for leave."

[2] The original pleading had simply alleged –

> "The Plaintiff will aver that in accordance with Section 5 of the Bermuda Constitution Order, the Plaintiff is entitled to compensation for the period of his unlawful incarceration of some thirteen (13) months."

4. The proceeding before me was the final trial of the matter, but neither side called any evidence, the parties proceeding on an understanding between counsel[3] that the matter should be heard and determined on the basis of the facts set out in a judgment of Ward CJ (as he then was) of 12th April 2002, which was given on the consolidated hearing of the plaintiff's appeals against his committal to prison[4]. One result of this was that the plaintiff, perhaps wisely, did not go into the witness box and submit himself to cross-examination.

5. From that judgment it appears that on or about 1st February 2000 the plaintiff was committed to prison for 90 days by a Magistrate, sitting in the Family Court. The committal was pursuant to section 17(3)(b) of the Affiliation Act 1976[5], which provided –

> "(3) If on appearing before the court the putative father then refuses or neglects to pay all arrears due together with the costs of the proceedings –
>
> (a) . . .
> (b) subject as hereinafter provided, the court may, in case of willful refusal to make payments under the order imprison him for a period not exceeding three months:
>
> Provided that he shall be entitled to be released from such imprisonment on payment of the arrears and of all costs and charges connected therewith."

Further similar orders were then made on four subsequent occasions, whilst the plaintiff was still incarcerated, and without releasing him from prison in between.

6. As to the background, the learned Chief Justice held:

> "The appellant is the father of two children namely Shaundrika Tacklyn who was born on the 3rd day of August 1984 and Nerah-Lynn Wilson who was born on the 25th day of October 1988.

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[3] There was some havering over this on the part of the Crown, but I think the matter was sufficiently clarified by an exchange at the end of the hearing. For the future, it is better to record such agreements in writing signed by both counsel and filed with the Court, to avoid uncertainty.

[4] See Supreme Court, Appellate Jurisdiction No. 104 and 105 of 2000. It should be noted that the respondents to those appeals were the two mothers of the children concerned, and the Crown was not a party to the appeals.

[5] That Act has now been repealed and replaced by the Children Amendment Act 2002, with effect from 19th January 2004.

"By Order dated the 31st day of August 1988 he was ordered to pay $50 per week towards the maintenance of Shaundrika, and by Order dated the 7th day of January 1999 he was ordered to pay $52 per week towards the maintenance of Nerah-Lynn.

"On the 1st day of February 2000 his payments were in arrears in the sum of $21,123.14 with respect to Shaundrika and $1,437.00 with respect to Nerah-Lynn. The appellant is among the most delinquent of fathers who pay maintenance through the Collecting Office of the Magistrates' Court.

"The learned Magistrate sitting in the Family Court committed the appellant to prison for a term of 90 days on the 1st day of February 2000. He re-committed him to prison for a second term of 90 days on the 24th day of April 2000. His arrears in the Tacklyn matter then stood at $21,623.14, an increase of $500 since 1st February 2000. On the 14th July 2000 he was committed to prison for the third time for a term of 90 days. His arrears were then $22,323.14. On 11th October 2000 when his arrears stood at $22,948.14 he was committed to prison for the fourth time for a term of 90 days. On the 5th January 2001 with his arrears at $23,523.14 he was committed to prison for a fifth time, without a break, for a term of 90 days.

"Against the final order the appellant has appealed.

"The learned Magistrate set out his reasons in detail. He said:

> *"This Respondent is so delinquent it is unbelievable. He has been given more chances than a lottery."*

"He reviewed the history of the matter, the promises made and broken, the appellant's moving from one job to another to avoid having his wages attached by his employers, his escaping from the bailiff. Some twenty-one Attachment of Earnings Orders were made, directed to twenty-one different employers, all to no avail.

"The Family Court expressed the view that the only way that monies could be collected from him for the support of his two children was to commit him to prison for 90 days with work release.

"The learned Magistrate continued:

> "*Despite his incarceration and the guarantee of a job whilst there (i.e. in prison), this respondent has steadfastly refused to work or pay. He has repeatedly and deliberately breached the prison rules. He has thereby continued to put the welfare of his children in jeopardy.*
>
> *He is arrogant and blatantly contemptuous of the court's order. . . . He stands above the rule of law. Despite his continuous failure to pay his child support he is able to afford a different lawyer on every appearance."*

"I may add that at the hearing of these appeals he did not even show the court the respect of appearing."

PROCEDURAL HISTORY

7. Mr. Ming was aggrieved by his treatment, and issued these proceedings by generally indorsed writ of 12th December 2005. For reasons best known to him he then issued subsequent proceedings on 6th June 2006, seeking damages personally from the learned Magistrate[6]. There was an immediate application to strike that out, and on 14th August 2007 Kawaley J did indeed strike it out, not on the grounds of judicial immunity *per se*, but on the basis of the 6 month limitation period provided for actions against 'Justices' by the Protection of Justices Act 1897.

8. The second action having been struck out, the plaintiff revived this one by letter of 21st January 2008. Counsel for the defendants took the view that that was not permissible, arguing that the issue of the second proceedings effectively discontinued the first, and applied by summons of 11th February 2008 to strike out this action on that and various other grounds. On 9th May 2008 I dismissed that application, considering that there had been no discontinuance of this action, and that the existence of a constitutional cause of action was sufficiently arguable to merit the matter going to trial.

9. There was also a question as to the proper parties. At trial, the plaintiff's counsel clarified that the action was brought against the Attorney General as representing the Crown, pursuant to section 14(1) of the Crown Proceedings Act 1966[7], and abandoned the action as against the first defendant. That was a sensible step, as the statement of claim never pleaded a discernible cause of action against that Minister in any event.

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[6] See Civil Jurisdiction, 2006 No. 173.

[7] Section 14(1) of the Crown Proceedings Act 19661 provides:
"14 (1) Proceedings against the Crown under this Act shall be instituted against the appropriate Minister in his style as such or, as the case may be, against the appropriate Government Board, in the corporate name of the Government Board, or if none of the Ministers or Government Boards is appropriate or the person instituting the proceedings has any reasonable doubt whether and if so which Minister or Government Board is appropriate, then against the Attorney-General in his title as such."
For confirmation that the Attorney General is indeed the appropriate defendant in such a case as this, see Maharaj v Attorney General of Trinidad and Tobago (No. 2) [1978] 2 All ER 670at 675J – 676A, per Lord Diplock.

THE LAW

10. The plaintiff relies heavily upon the decision of the Privy Council in Maharaj v Attorney General of Trinidad and Tobago (No. 2) [1978] 2 All ER 670. I take the law to have been decided by that case, and I have not been shown anything which overrules it. The judgment of the Court is set out authoritatively in the speech of Lord Diplock. Lord Hailsham dissented in an equally powerful speech, upon some of which the Crown seeks to rely. I do not think that that is open to them. There are competing public interests here, and conflicting legal principles, but that competition and conflict was authoritatively resolved by the decision of the majority. It is not now permissible for me in these proceedings to re-open those issues unless I could sufficiently distinguish the terms of the constitutional document which their Lordships were applying from those of our own Constitution, which I cannot do.

11. The facts of Maharaj were simple. Mr. Justice Maharaj was a judge of the High Court of Trinidad and Tobago. He committed a lawyer to prison for seven days for contempt of court, but failed to make plain to him the particulars of the specific nature of the contempt with which he was being charged. That was a failure to observe a fundamental rule of natural justice, namely that a person accused of an offence should be told what he is said to have done wrong plainly enough to allow him to put forward any excuse or explanation. The issue before the Privy Council was whether that constituted a breach of the contemnor's constitutional rights for which he was entitled to compensation. What the Privy Council held was that in certain rare cases the state was liable in damages to a person who had been wrongfully imprisoned by the order of a Judge, even though the Judge himself was not liable by reason of the long-established common law principles of judicial immunity. This liability does not extend to *prima facie* lawful orders which are later set aside on appeal by reason of judicial error, and so will not avail in the ordinary run of cases. However, when the liability arises it is *sui generis*, and is not a liability in Tort, and so is not excluded by statutory provisions of the sort found in section 3(5) of the Crown Proceedings Act 1966 (see above). These are obviously important principles, and I therefore think it appropriate to set out some of the key passages from Lord Diplock's speech to demonstrate both the foundation and the limitations of this cause of action.

12. The first principle is that the Supreme Court has jurisdiction under the Constitution to grant redress for contravention of a constitutional right resulting from something done by a Judge in his judicial capacity:

> "Their lordships can deal briefly with the question of jurisdiction. The notice of motion and the affidavit in support of the application for the conservatory order for the immediate release of the appellant pending the final hearing of his claim made it clear that he was, inter alia, invoking the original jurisdiction of the High Court under s 6(2)(a) to hear and determine an application on this behalf for redress for an alleged contravention of his right under s 1(a). . . . on the face of it the claim for redress for an alleged contravention of his constitutional rights under s 1(a) of the Constitution fell within the original jurisdiction of the High Court under s 6(2). This claim does not involve any appeal either on fact or on substantive law from the decision of Maharaj J that the appellant on 17th April 1975 was guilty of conduct that amounted to a contempt of court. What it does involve is an enquiry into whether the procedure adopted by the judge before committing the appellant to prison for contempt contravened a right, to which the appellant was entitled under s 1(a), not to be deprived of his liberty except by due process of law. Distasteful though the task may well appear to a fellow judge of equal rank, the Constitution places the responsibility for undertaking the enquiry fairly and squarely on the High Court."
> [Maharaj v Attorney General of Trinidad and Tobago (No. 2) [1978] 2 All ER 670 at 675D, per Lord Diplock.]

13. Second, the state is liable to provide that redress:

> "The order of Maharaj J committing the appellant to prison was made by him in the exercise of the judicial powers of the state; the arrest and detention of the appellant pursuant to the judge's order was effected by the executive arm of the state. So if his detention amounted to a contravention of his rights under s 1(a), it was a contravention by the state against which he was entitled to protection."
> [Ibid., at 677J]

> "In the second place, no change is involved in the rule that a judge cannot be made personally liable for what he has done when acting or purporting to act in a judicial capacity. The claim for redress under s 6(1) for what has been done by a judge is a claim against the state for what has been done in the exercise of the judicial power of the state. This is not vicarious liability: it is a liability of the state itself. It is not a liability in tort at all: it is a liability in the public law of the state, not of the judge himself, which has been newly created by s 6(1) and (2) of the Constitution."
> [Ibid., at 679H]

14. Third, where the contravention of the constitutional right was in the past, the only practicable form of redress is monetary compensation[8]:

> "What then was the nature of the 'redress' to which the appellant was entitled? Not being a term of legal art it must be understood as bearing its ordinary meaning, which in the Shorter Oxford Dictionary is given as: 'Reparation of , satisfaction or compensation for, a wrong sustained or the loss resulting from this.' At the time of the original notice of motion the appellant was still in prison. His right not to be deprived of his liberty except by due process of law was still being contravened; but by the time the case reached the Court of Appeal he had long ago served his seven days and had been released. The contravention was in the past; the only practicable form of redress was monetary compensation."
> [Ibid., at 679A]

15. Fourthly, the type of contravention which could give rise to a liability to make monetary redress is limited to where imprisonment results from an error in procedure which amounts to a failure to observe one of the fundamental rules of natural justice:

> "In the first place, no human right or fundamental freedom recognized by Chapter 1 of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. When there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by s 1(a), and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event."
> [Ibid., at 679F]

APPLICATION TO THE FACTS

16. The power to commit under section 17(3)(b) of the Affiliation Act 1976 is limited to cases of willful refusal to make payments under a maintenance order. According to the judgment of Ward CJ, the Family Court had expressed the view that the only way that the delinquent monies could be collected from the plaintiff was to commit him to prison "with

[8] This is not an issue here in view of subsection 5(4) of the Bermuda Constitution, which is set out in paragraph 2 above.

work release", but the plaintiff had refused that, hence his further committals. Ward CJ explained the practice of work release as follows –

> "A practice has developed for this type of order to be made where a respondent consents to the making of same, as it provides a respondent with the opportunity of leaving the prison compound daily, of engaging in gainful occupation outside of the prison walls, of earning money which is kept by the prison authorities and, on a respondent's return to court, is paid into the Collecting Office and credited in reduction of the arrears which led to the committal in the first place. This type of arrangement has been made between the Family Court and the Commissioner of Prisons as a practical response to a social problem of unpaid maintenance for dependants of respondents. Since its introduction the volume of arrears of maintenance has been reduced substantially.
>
> But it must be noted that there is no statutory framework in place to sanction the operation of the programme, and more importantly to compel unwilling respondents to participate in the programme."

I should add that the situation remains the same today, and there is still no effective legislative scheme for committal with work release.

17. Ward CJ then reviewed the law on "willful refusal", and concluded:

> "I am therefore compelled to the conclusion that under the present state of the law a respondent cannot be compelled to participate in the work-release programme. No doubt honourable respondents will participate as it provides them with an opportunity to work and at the same time provide the financial support for their children. I also find that failure to participate in the programme is not of itself evidence of willful refusal."

He then allowed the appeal, the inescapable conclusion being that he did so on the two grounds just recited, namely that a respondent could not be compelled to participate in the work release programme, and failure to participate voluntarily was not evidence of willful refusal, both of which conclusions being, if I may say so with respect, plainly right.

18. On that basis, this was a case where the learned Magistrate made an error of law. He based the repeat committals on a refusal to participate in the work release programme, when he was not justified in doing so. It was, therefore, what I may call the ordinary sort of

judicial error identified by Lord Diplock, for which the remedy was an appeal or, while the plaintiff was still in custody, an application for a writ of Habeas Corpus. It may indeed be that the effect of that error was to rob the Family Court of jurisdiction, and that may indeed have given rise to a personal liability on the part of the Magistrate under the old rules which, in the case of Justices, distinguished between acts within and without a Justice's jurisdiction, and confined personal liability to the latter[9]. It was that distinction which lay behind the award of damages against the Magistrates' Court in the English case of R v Manchester City Magistrates' Court ex parte Davies [1989] 1 All E. R. 90. But that distinction is not the one that the Privy Council makes in Maharaj for the purposes of establishing the state's liability for the acts of a judicial officer:

> " . . . and no mere irregularity in procedure is enough, *even though it goes to jurisdiction*; the error must amount to a failure to observe one of the fundamental rules of natural justice." [Emphasis added. For the full context see paragraph 15 above.]

19. Based on the judgment of Ward CJ, which constitutes the totality of the facts before me, I find no such failure to observe any of the fundamental rules of natural justice in this case. It is true that the statement of claim pleaded the grounds of appeal that were before Ward CJ, and that those grounds of appeal included at paragraph 3 –

> "That on the 11th day of October, 2000, the Appellant was denied the opportunity to make representations to the court and therefore the sentence was wrong in law;"

Such a denial would indeed have breached the fundamental rules of natural justice, but Ward CJ did not address that in his judgment[10], and I therefore have no proper means in these proceedings of saying whether that ground was made out or not.

20. Least it be said that the construction of constitutional rights should not be constrained, relying on the words of Lords Wilberforce in Minister of Home Affairs v Fisher [1980] AC

[9] There is a full and instructive discussion of these rules in the judgment of Kawaley J of 14th August 2007 striking out action 2006 No. 173.
[10] Paragraph 12 of the statement of claim also pleads that Ward CJ allowed all of the said grounds of appeal, but that is not correct on the face of the judgment, which is as I have explained it above.

319[11], the constraints in this case derive from the express words of Lord Diplock in a constitutional matter, and no doubt reflect the highly exceptional nature of this remedy.

OTHER ISSUES

21. The Crown sought to rely on subsection 3(5) of the Crown Proceedings Act 1966. Section 3 of that Act deals with the Crown's liability in Tort. Subsection 3(1) makes the Crown liable in Tort, *inter alia* for the acts of its servants or agents. Subsection 3(5) then provides –

> "(5) No proceedings shall lie against the Crown by virtue of this section in respect of any act by any person while discharging or purporting to discharge any responsibilities of a judicial nature which may be vested in him, or while discharging or purporting to discharge any responsibilities which may rest upon him in connection with the execution of any judicial process."

22. I have no doubt that that section would have debarred an action in Tort, and that was indeed the conclusion of the Privy Council in Maharaj (*supra*) at 675F:

> "The Crown was not vicariously liable in tort for anything done by Maharaj J while discharging or purporting to discharge any responsibilities of a judicial nature vested in him; nor for anything done by the police or prison officers who arrested and detained the appellant while discharging responsibilities which they had in connection with the execution of judicial process; s 4(6) of the State [formerly 'Crown'] Liability and Proceedings Act 1966 so provides."

However, in this case that issue no longer arises for determination, because the plaintiff, through his counsel, makes it clear that he does not pursue an action in Tort, but only seeks to maintain a constitutional cause of action. However, I also consider that that subsection is strictly limited by its terms to an action in Tort, and it has no application to a constitutional

[11] "A Constitution is a legal instrument giving rise, among other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences."

action, and that is implicit in the judgment in Maharaj itself. I would not, therefore, have non-suited the plaintiff on the basis of subsection 3(5) of the Crown Proceedings Act 1966.

23. The Crown also point the plaintiff's delay in bringing these proceedings, and say that I should decline relief on that ground. I do not think that any delay in getting his appeal on for hearing can be laid at the plaintiff's door, but the gap between the judgment of Ward CJ and the issue of these proceedings is considerable, being 3 years and 8 months. There is no evidence to explain or justify it. I think that Constitutional remedies should be pursued with dispatch. On the other hand it would be harsh to impose a shorter limitation period in respect of the Constitutional right than that which applies for the analogous common law Tort, which is six years. I would not, therefore, have held that the plaintiff's claim was debarred by his delay in bringing it.

24. There was no evidence led as to damages, and in particular nothing as to loss of earnings. That would not debar the plaintiff from a conventional award, but I have to say that, had I been wrong on the issue of liability, I would have been strongly minded to refuse damages in any event, or at least to make only a nominal award, given the plaintiff's extraordinarily contumelious behaviour as recorded in the extract from the judgment of Ward CJ set out above. I should also note that the failure to pay child support remains a real problem with which the judiciary has to grapple on a daily basis. We all see and know the difficulty at first hand, and it is hard to overstate the extent of the problem.

CONCLUSIONS

25. For the reasons given above, I dismiss this claim, the facts disclosing no cause of action.

Dated the XX day of July 2009

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Richard Ground
Chief Justice