

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 93/04

**BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.**

BETWEEN: THE ATTORNEY GENERAL APPELLANT

AND: DERRICK PINNOCK DEFENDANT

Miss Nicola Brown, instructed by the Director of State Proceedings, for the Appellant.

Barrington Frankson, instructed by Gaynair and Fraser, for the Respondent.

July 10, 11 and November 10, 2006

PANTON, J.A.

1. This is an appeal by the Attorney General from an award of \$1.5 Million general damages plus Five Hundred Thousand Dollars (\$500,000.00) for exemplary and aggravated damages made on May 13, 2004, by Donald McIntosh, J. Nine years ago, the respondent was assaulted, arrested and imprisoned for over twenty-four hours by members of the Jamaica Constabulary Force, Island Constabulary Force and the Jamaica

Defence Force who purported to have been acting in execution of their duties. The respondent was not informed of the reason for the events which saw him being seized from his house and carted to a cell at the Old Harbour Police Station where his dignity and pride were affronted.

2. During the assault, the respondent was punched in the right eye. This punch has had a devastating effect on him as it has been necessary for him to have extensive medical treatment, including surgery. Notwithstanding the treatment, the respondent has had to be content with limited vision in the eye – he can only see movements and shadows.

3. At the hearing before us, the grounds of appeal were amended by deleting ground b (iii). The remaining grounds are:

“(a) that the award for general damages is an excessive and erroneous estimate of the damages to which the respondent is entitled and in arriving at this award, the trial judge relied on or was guided by an authority which was distinguishable and had far more aggravating circumstances;

(b) the award for aggravated and exemplary damages was an excessive and erroneous estimate of the damages to which the respondent is entitled as –

- (i) the trial judge failed to take into consideration that aggravated damages are moderate in nature;
- (ii) the trial judge erred in awarding exemplary damages as the evidence adduced at the trial did not warrant such an award being made. There was no evidence to substantiate a finding that the policemen conspired to protect the perpetrators and this finding was an important factor which the learned trial judge took into consideration when the award was being determined.”

4. The following orders are now being sought:

- “(i) reduction of the award of \$1.5 million to \$700,000;
- (ii) no award for exemplary damages, but instead an award of \$150,000 for aggravated damages;
- (iii) alternatively the combined award of aggravated and exemplary damages be reduced from \$500,000 to \$150,000.”

5. In respect of that part of ground b (ii) which alleges that there was no evidence to substantiate a finding that the policemen conspired to protect the perpetrators, it is difficult to conceive why this should be regarded as an issue. The fact is that the respondent was assaulted and imprisoned without charge by agents of the state. These persons were easily identifiable and

could have been easily identified if the state wished to know their identities. There must have been a record at the Old Harbour police station of the officer or officers who were on duty, and who received the respondent into the lock-up there. Such a person or persons would have made a record of the identity of the officer or officers who handed over the respondent into their custody. The fact that this information has not been forthcoming even to the Attorney General is an indication of the lack of accountability to the state of these agents and their supervisors.

6. We find no favour with Miss Brown's submission that, based on the various cases decided in the Supreme Court, the amount awarded as general damages was excessive. She suggested that the learned judge, in making his award, had relied on the unreported Supreme Court judgment **Pat Bellinfanti v National Housing Trust and Others** (C.L. 1993/B 361 – delivered on February 3, 1997). This suggestion is based on a misconception as the record does not disclose any such reliance. However, it has to be remembered that a judge is not bound to make an award on the basis of only those cases cited to him. Furthermore, it goes without saying that the Court of Appeal, while giving due regard and respect to awards made by the judges of the Supreme Court, is not bound by such awards or

their perceived pattern. The important point to be noted is that an award will not be disturbed by this Court unless it is either inordinately high or inordinately low, or there is a breach of some other principle of law.

7. In the instant case, the assault on the respondent resulted in, among other things, the limiting of the respondent's vision in the right eye. That was the position at the time of the trial, seven years after the incident. Four years earlier, the respondent's vision had been assessed as 2/200. There was a macular scar and vitreous haemorrhage in the eye. Surgical intervention could not help to regain the lost vision. Laser photo-coagulation was applied in 1997 to the macular region to arrest the haemorrhage and seal the torn retinal hole. In 1998, it was felt that the respondent might have benefited from vitreo retinal surgery. However, on November 6, 2000, when examined, surgery was not recommended due to poor visual potential. Dr. B. L. Shirkey was of the opinion that "surgical intervention could not help regain his lost vision". The respondent cannot watch television for more than fifteen minutes at a time, and there is a thick cloud over his eyes. In the circumstances, we see nothing excessive about the award of \$1.5 million to cover the pain and suffering, and loss of amenities suffered by him.

8. In respect of the award of \$500,000.00 as aggravated and exemplary damages, it has to be noted that the respondent had claimed aggravated damages as an alternative to the claim for exemplary damages. Miss Brown complained firstly that the judge erred in awarding damages for both as the legal principles and the factual circumstances which determine whether an award should be made under both heads of damages are different. There is merit in this complaint to the extent that the respondent had claimed aggravated damages as an alternative to exemplary damages. In making an award for both sets of damages, the learned judge was making an award that was not sought. The evidence smacks of arbitrary, oppressive and unconstitutional action and an award of exemplary damages is appropriate. In view of the misconception in the making of the double award, the amount has to be reduced. Accordingly, it is reduced to Two Hundred Thousand Dollars (\$200,000.00).

Cooke, J.A.

I agree.

Harris, J.A.

I agree.

ORDER:**PANTON, J.A.**

The appeal is allowed in part. Damages awarded as exemplary damages reduced to \$200,000.00. There will be no order as to costs.