

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

**FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

CLAIM NO. SKBHCV2018/0108

**IN THE MATTER of Section 5(1),
5(1)(e), 5(3)(a) and (b), 5(4), 5(5), 5(6)
and Section 7 of the Constitution of
Saint Christopher and Nevis**

And

**IN THE MATTER of an Application for
Declaratory and Compensatory relief
by GAVIN BROWNE pursuant to
Section 18(1) and (2) of the
Constitution of Saint Christopher and
Nevis**

BETWEEN:

GAVIN BROWNE

Claimant

and

THE ATTORNEY GENERAL OF SAINT CHRISTOPHER AND NEVIS

Defendant

Appearances:

Ms. Natasha Grey for the Claimant

Mrs. Eshe Hendricson Johnson with Ms. Nishama Rattan Mack for the Defendant

2019: April 5

ORAL JUDGMENT

[1] **VENTOSE, J.:** The Claimant was charged on 25 January 2015 for the offence of murder of Alfred Basil Phipps. At the Preliminary Inquiry, the witness to whom the

Claimant allegedly confessed the murder of Alfred Phipps did not attend court to give evidence. Consequently, the magistrate dismissed the charge against the Claimant on 26 September 2016 on the basis that a prima facie case had not been made out by the prosecution.

[2] The Claimant filed on 9 February 2018 an application by way of originating motion with sworn affidavit seeking compensatory and declaratory relief against the Defendant as follows:

1. A Declaration that his arrest and detention for a period of one (1) year, eight (8) months and three (3) days without speedy trial was unreasonable.
2. A Declaration that his detention and/or arrest for a period of one (1) year, eight (8) months and three (3) days violated his Constitutional right to personal liberty and was in contravention of the provisions of Section 5(1), 5(1)(e), 5(3)(a) & (b), 5(4), 5(5), 5(6) and Section 7 of the Constitution of St. Christopher and Nevis.
3. An Order that he is entitled to compensatory relief and damages for the unconstitutional deprivation of his liberty.
4. Exemplary Damages
5. Aggravated Damages
6. Interest pursuant to Section 27 of the Eastern Caribbean Supreme Court Act 1975 (No. 17 of 1975)
7. Such further or other relief as may be just; and
8. Costs.

[3] The length of delay from arrest and charge to the conclusion of the Preliminary Inquiry was one (1) year eight (8) months and three (3) days. The Claimant avers that his arrest was unlawful and without good cause. The three issues that arise for determination are: (1) whether there was reasonable and probable cause for the Claimant's arrest and charge for murder; (2) whether the delay of 1 year and 8 months and 3 days without trial was unreasonable; and (3) whether there was a breach of section 7 of the Constitution in respect of the conditions in which the Claimant was detained at Her Majesty's Prison.

Reasonable and Probable cause for Arrest

- [4] Sergeant Kashina Burke, the lead investigator into the murder of Alfred Phipps, avers that the Claimant was lawfully arrested and charged for murder on 25 January 2015 based on the evidence that the police had in their possession. Sergeant Burke also avers that the officers found a red head tie at the scene of the crime and that the body of Alfred Phipps was found in White Gate. Sergeant Burke states that the police had reasonable grounds to suspect that the Claimant had committed the murder based on a sworn statement from Ms. Leshana Fyfield that the Claimant confessed to her that he and someone else killed a man, and that he dropped his red head tie by the man who was killed. Sergeant Burke avers that the Claimant's DNA was found on the red head tie that was found on the scene of the crime, and that phone records from LIME indicated that a call was made to Ms. Fyfield at the time she indicated in her sworn statement that the Claimant had called her and confessed to having killed a man. As stated earlier, Ms. Fyfield did not attend court to give evidence so the magistrate dismissed the case on the basis that no prima facie case was made out.
- [5] The State received the results of the DNA test from the laboratory and the phone records from LIME long after the Claimant's arrest on 25 January 2015. The DNA evidence found at the crime scene no doubt had to be tested and the evidence of Sergeant Burke was that this was done and sent by DNA Labs International to Superintendent Ancil Alexander and Corporal Movelle Whattley on 22 June 2015. In relation to the phone records from LIME, these were sent from the Manager Regional Fraud of LIME to the Director of Public Prosecutions (the "DPP") on 17 June 2015. At trial, Sergeant Burke accepted that the DNA evidence could not have formed any part of the reasons for the Claimant's arrest on 25 January 2015, as stated in her affidavit evidence. The same would also apply to the phone records received from LIME, which were received long after the Claimant was charged for murder. When the Claimant was charged for murder on 25 January 2015, the police officer had the sworn statement of Ms. Fyfield that the Claimant had confessed to her that he had participated in the murder of one man. In that statement, Ms. Fyfield stated further that the Claimant informed her: (1) of location where the alleged murder took place, namely, White Gate; and (2) that he dropped

the red head tie that he was wearing at the scene of the alleged murder. Sergeant Burke gave evidence at trial that: (1) a red head tie was found on the scene of the murder; and (2) the location where the body of the deceased was found was indeed White Gate. This is the information that the police had at the time of the Claimant's charge for murder on 25 January 2015.

[6] In **Glasgow v Attorney General of Saint Christopher and Nevis** (Claim No. SKBHCV2016/0115 dated 25 March 2019), the following legal principles were distilled from the explanation of the law found in **Davis v Attorney General of Saint Christopher and Nevis** (SKBHCV 2013/0220 dated 30 June 2014) and applied by this court in **Browne v Attorney General of Saint Christopher and Nevis** (Claim No. SKBHCV2016/0074 dated 19 November 2018). First, the police have the right to detain and or arrest anyone upon reasonable and probable cause that the person has committed or is about to commit an offence. Second, the test of whether there is reasonable and probable cause is both subjective and objective, namely, the perceived facts must be such as to allow the reasonable third person and actually cause the officer in question to suspect that the person has committed or is about to commit a crime. Third, reasonable suspicion can be founded on either admissible or inadmissible evidence that must be shown to have actually existed and was reasonable in the circumstances. Fourth, when it comes to the basis for the preferment of a criminal charge, it must be made clear that no criminal charge can be laid against anyone unless the police ground their suspicion that the person has committed that offence on admissible evidence. Fifth, where the police intend to detain a person without charge for the full 72 hours, some evidence must be presented to justify why the full 72 hours had to be employed.

[7] Consequently, based on the evidence given by Sergeant Burke above, these known facts would allow the reasonable third person and did actually cause the officer in question to suspect that the Claimant had committed the murder of Alfred Phipps and the reasonable suspicion that the police had was founded on admissible evidence that actually existed and was reasonable in the

circumstances. In **Glasgow**, this court stated that the fact that at the preliminary inquiry the Crown's eye witness distanced himself from his sworn statement made to the police did not undermine the question of whether the police officer had reasonable and probable cause at the time of detention and charge to believe the claimant had committed the crime in question.

- [8] Similarly here, the fact that Ms. Fyfield did not attend court to give evidence with the result that the case was dismissed by the magistrate does not affect the reasonable and probable cause that the officer had at the time of the Claimant's arrest on 25 January 2015. Consequently, there is no contravention of section 5(1)(f) of the Constitution of Saint Christopher and Nevis which provides that a person shall not be deprived of his or her personal liberty save as may be authorised by law in any of the following cases, that is to say, upon reasonable suspicion of his or her having committed, or about to commit, a criminal offence under any law.

Unreasonable Delay before Trial

- [9] The Claimant was: arrested on 23 January 2015, charged with the offence of murder on 25 January 2015 and brought before the magistrate on 26 January 2015. The Claimant's evidence in his affidavit in support of his application by way of originating motion states clearly that he was brought before the magistrate within 72 hours of being detained by the police. This complies with the requirement of section 5(3) of the Constitution which provides that any person who is arrested or detained: (a) for the purpose of bringing him or her before a court in execution of the order of a court; or (b) upon reasonable suspicion of his or her having committed, or being about to commit, a criminal offence under any law and who is not released, shall be brought before a court without undue delay and in any case not later than seventy-two hours after his or her arrest or detention. I, therefore, fail to understand why Counsel for the Claimant sought to argue in submissions filed that the Claimant "was charged on **26th January 2015** and was not taken to before the Magistrate until the **27th January 2015** which would have been more

than 72 hours after the Claimant's arrest" (emphasis added) contrary to section 5(3) of the Constitution.

[10] The Claimant does not state in his affidavit in support of his application by way of originating motion that the *delay* of 1 year and 8 months before he was tried was *unreasonable* and, therefore, unconstitutional. The Claimant avers that his arrest and/or incarceration for the time period was "**unreasonable based on the fact that the Prosecution did not have enough evidence for a prima facie case to be made out** against me at the Magistrate's Court and any information they had was not enough to ground the charge of murder" (emphasis added). The Claimant also avers that his arrest and/or incarceration for the time period "violated [his] constitutional right to personal liberty and was in contravention of [his] rights as a citizen of St. Kitts and Nevis". Not once does the Claimant aver that the *delay* of 1 year and 8 months before he was tried was *unreasonable* and therefore unconstitutional. However, I accept that this is what in substance his application by way of origination motion relates to and clearly this was how the Respondent understood it, as full submissions were filed by both parties on the question of whether the time period within which the Claimant was detained before trial was unreasonable.

[11] Counsel for the Claimant argues that, first, the right to a fair trial within a reasonable time is enshrined in the Constitution of Saint Christopher and Nevis and that the Constitution has ascribed a certain level of significance to this right; and second, this is not just merely a right at common law but one that is embedded in the Constitution. Counsel submits that the Claimant's view is that this delay of 1 year and 8 months "was a considerable amount of time and was therefore not reasonable". In addressing this issue, I have taken into account: (1) the nature of the charge that was one of murder; (2) the length of the delay; (3) the lack of any prejudice to the Claimant as a result of the delay; and (4) the reasons for the delay. In submissions filed, the Defendant sought impermissibly to provide the reasons for the delay, which were not in evidence before the court, so they can form no part of the assessment of this issue. As this court has stated previously,

one of the reasons that may be given to justify delay is where “a significant time for investigation and preparation of the case for trial” is required (**Browne** at [10]). The DNA results were sent to the police on 22 June 2015 and the phone records from LIME were sent to the DPP on 17 June 2015.

[12] In any event, the Defendant cannot rely on these documents to justify any delay in this case since they were received as early as June 2015, a mere five months after the Claimant was charged with murder. The preliminary inquiry commenced on 11 July 2016, 13 months after these documents were received by the State. No doubt there are resource constraints on the State and that must always be taken into account in these matters. However, I note that the State did not provide any explanation for the delay of these additional several months or for the many adjournments that it requested and received in the Magistrate’s Court. While that is regretted, one of the considerations I must take into account is the length of the delay, which in this case is 18 months. In **Browne**, the time period was also 18 months, which this court found was not unreasonable. However, in **Browne**, none of the parties filed any evidence as to the reasons for the delay. However, in this case, the Claimant has provided unchallenged evidence that the State requested adjournments on at least 7 occasions when the matter came on for consideration before the magistrate. No reasons why these adjournments were sought by the State are in evidence before this court. The Preliminary Inquiry started on 11 July 2016 and ended on 26 September 2016 when the magistrate dismissed the matter because the prosecution did not establish a prima facie case against the Claimant.

[13] Having considered all the evidence and circumstances of this case, I am of the view that the delay in this case was unreasonable such that there was a breach of section 5(5) of the Constitution which provides that if any person arrested or detained as mentioned in subsection (3)(b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him or her, he or she shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he or she appears at a later date for trial or for proceedings preliminary

to trial, and such conditions may include bail so long as it is not excessive. The Claimant is, therefore, entitled to compensation pursuant to section 5(6) of the Constitution.

- [14] The State, through the police officers and the office of the DPP, is again reminded of its obligation to respect the fundamental rights and freedoms of accused persons, particularly the right to protection of the right to personal liberty guaranteed under section 5 of the Constitution of Saint Christopher and Nevis. This court reminded the State of its obligation in relation to section 5(5) in **Browne** where this court stated that:

[32]. Similarly here, the court must be minded to approach this issue in the context of the local justice system. However, local conditions cannot trump the fundamental rights or freedoms enshrined in the Constitution. Unreasonable delay before trial cannot become so commonplace that it is accepted as orthodoxy contrary to the provisions in the Constitution. The constitutional rights guaranteed by section 5(5) (or even section 10(1)) will become a thing writ in water if those conditions become the norm and constitutional infringements go unchecked.

- [15] In relation to compensation to be awarded under section 5(6) of the Constitution, this court stated in **Browne** that:

[80]. In the end, it is a matter of judicial discretion based on what the trial judge believes to be justified in compensating the applicant for the constitutional infringements. In *Davis*, the trial judge determined that the sum of EC\$500.00 per day was appropriate and to ensure consistency in the determination of such awards for wrongful deprivation of liberty in contravention of section 5 of the Constitution, I would also use the sum of EC\$500.00 per day for the reasons stated by Ramdhani J (Ag.) in *Davis*.

- [16] The Claimant spent a total of 533 days in Her Majesty's Prison until he was finally tried on 11 July 2016 when the Preliminary Inquiry started. Consequently, he is entitled to damages in the sum of \$500.00 per day for 533 days totaling \$266,500.00.

Protection from Inhuman Treatment

- [17] In **Browne**, this court stated that “[t]o contravene section 7 of the Constitution, the conditions of the prison must be such that severe bodily or mental pain is inflicted

on the prisoner, or the prisoner is subject to conditions that are brutal, barbarous or conditions that would tend to humiliate or debase him". The affidavit evidence of the Claimant in this case does not, like the evidence of the claimants in **Browne, Glasgow** and **Crossley and Thomas** (Claim No. SKBHCV2018/0261/0262 dated 5 April 2019), reach the threshold required for a contravention of section 7 of the Constitution of Saint Christopher and Nevis.

Disposition

[18] For the reasons explained above, I make the following orders:

- (1) A Declaration is granted that section 5(5) of the Constitution was contravened when the Claimant was detained for 533 days without trial.
- (2) A Declaration is granted that section 5(3) of the Constitution was not contravened because the Claimant was arrested and detained upon reasonable suspicion of his having committed the criminal offence of murder.
- (3) A Declaration is granted that section 7 of the Constitution was not contravened because of the conditions in which the Claimant was detained at Her Majesty's Prison.
- (4) The Claimant is awarded compensatory damages for breach of his constitutional right to personal liberty in the sum of EC\$266,500.00.
- (5) The Claimant is awarded prescribed costs together with interest at the rate of 6% on the judgment sum from the date of judgment until the said sum is fully paid.

Eddy D. Ventose
High Court Judge

By the Court

Registrar