

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
(Sub-Registry, San Fernando)

No. S-48 of 2001

IN THE MATTER OF THE CONSTITUTION
OF TRINIDAD AND TOBAGO

And

IN THE MATTER OF THE GUARANTEES OF FUNDAMENTAL
HUMAN RIGHTS AND FREEDOMS PART 1 OF THE SAID
CONSTITUTION

And

IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL
HUMAN RIGHTS AND FREEDOMS PURSUANT TO SECTION
14 OF THE CONSTITUTION AND ORDER 55 OF THE
RULES OF THE SUPREME COURT

Between

ALPHIE SUBIAH

Applicant

And

**THE ATTORNEY GENERAL
OF TRINIDAD AND TOBAGO**

Respondent

Before the Honourable Mr. Justice J. Tam

Appearances:

Mr. H. R. M. Seunath, S.C., leading Mr. A. Ramlogan for the applicant

Ms. J. Balkaran for the respondent

Reasons for the Decision

This action was commenced by an Originating Motion filed on January 15, 2001, pursuant to section 14 of the Constitution. The applicant's claim is for the following relief:

- (a) A declaration that his arrest and/or detention and/or imprisonment on May 4, 2000, was unconstitutional and illegal;
- (b) A declaration that the handcuffing of the applicant on May 4, 2000, was unconstitutional and illegal;
- (c) A declaration that the refusal and/or omission of the police to inform him upon his arrest and/or detention of his right to retain and instruct without delay a legal advisor of his choice and to hold communication with him was unconstitutional and illegal;
- (d) A declaration that the failure and/or omission of the police to inform him of his right to communicate with a friend or relative by way of a telephone call and/or to allow him to make such phone call was unconstitutional and illegal;
- (e) Further, an order that damages (including aggravated and/or exemplary damages) and/or compensation be paid by the State to the applicant in respect of the said contravention of his fundamental rights;
- (f) Alternatively, an order that the damages and/or compensation including aggravated and/or exemplary damages be assessed by the Master of the Supreme Court and be paid to him;
- (g) Such further orders, writs and directions as may be necessary to enforce his guaranteed rights;
- (h) Such further or other relief as the nature of the case may require;
- (i) Interest at such rate and for such period as may be just on the sum awarded to the applicant; and
- (j) Costs.

The grounds of the application are stated in the Motion to be -

- (1) That the arrest and/or detention of the applicant on May 4, 2000, was unconstitutional and illegal and in contravention of sections 4(a) and 4 (b) of the Constitution;

- (2) That on May 4, 2000, at around 9:45 a.m. the applicant was arrested by Police Constable Stoute-Khan for allegedly using obscene and/or abusive language and taken to the Besson Street Police Station where he was detained into police custody until 2:10 p.m. when he was handcuffed and taken before the Port-of-Spain Magistrates' Court;
- (3) That the applicant was charged with the following offences:
 - (a) Abusive language;
 - (b) Resisting arrest; and
 - (c) Damaging the property of the government, namely, the shirt of Constable Stoute Khan.

These charges were fabricated by PC Stoute-Khan to justify the unlawful arrest and/or detention of the applicant and were dismissed by her Worship Ms. A. Ryan on November 6, 2000;

- (4) The applicant on being arrested and/or detained, nor at anytime thereafter, was not informed of the reasons for his arrest and/or detention, nor of his right to hold communication with his Attorney-at-law, friend or relative, nor of his right to a telephone call which said omissions amount to a contravention of section 5 (2) (c) and 5 (2) (h) of the Constitution;
- (5) The State had no authority to arrest and/or detain and/or imprison the applicant in the circumstances;
- (6) The handcuffing of the applicant was contrary to law in the circumstances; and
- (7) The State contravened the fundamental rights of the applicant as guaranteed to him under section 4 (a) and 4 (b) of the constitution and as further and better particularized in section 5.

On January 15, 2001, the applicant filed the following 7 affidavits in support of the Motion :

- (1) the affidavit of Alphie Subiah (comprising of 46 paragraphs and exhibits);

- (2) the affidavit of Dr. Dhiyan Mahabir (comprising of 5 paragraphs and an exhibit);
- (3) the affidavit of Dr. Celia Ramcharan (comprising of 4 paragraphs and an exhibit);
- (4) the joint affidavit of Dolton Blackman and Caswald Sandiford (comprising of 9 paragraphs);
- (5) the affidavit of Ramdeo Surujbally (comprising of 8 paragraphs);
- (6) the affidavit of Anderson Salazar (comprising of 5 paragraphs); and
- (7) the affidavit of Mano Churkoo (comprising of 15 paragraphs).

Although having previously sought and obtained leave to file affidavits in opposition, the respondent chose to file no affidavit and, in effect, the facts outlined in the 7 affidavits on behalf of the applicant were left unchallenged and were not disputed.

The history of the matter showed that in anticipation of a hearing on March 5, 2001, the respondent's attorneys wrote a letter (dated March 1, 2001) to the Assistant Registrar to inform the Court of difficulty being experienced by the respondent in obtaining information and instructions and to indicate at the same time that an application would be made at the hearing to adjourn the case "to obtain full instructions." The motion came before this Court on March 5 as scheduled and the respondent sought and obtained time in which to file and serve an affidavit in opposition. By that order, the respondent was directed to file and serve an affidavit in opposition by 4 pm. on March 20, 2001. However, by that date and time the respondent had failed to file an affidavit and chose instead (on March 22, 2001, when the matter next came before the Court) to consent to an order for judgment in favour of the applicant and in terms of paragraphs (a) (b) and (f) of the motion. The parties could not, however, agree fully on the issue of costs and requested the Court to adjudicate as to whether or not the applicant should be allowed costs for the retention of Senior Counsel. Counsel for the respondent indicated that the matter of costs being allowed for the retention of Junior Counsel was not an issue between the parties and that the sole issue was whether, in addition, costs fit for Senior Counsel should be allowed.

Counsel for the Respondent submitted that the case was one of “a very simple Constitutional matter” and she went so far as to describe it as “the usual Constitutional matter”. She submitted that no complex issue of fact or law was involved and that the matter could very ably have been dealt with by a Junior Counsel alone. She also pointed to the fact that the respondent had chosen to enter a consent order on the issue of liability.

On the other hand, Counsel for the applicant submitted that the question to be asked by the Court was whether it was reasonable for the applicant to retain a Senior Counsel to do his Constitutional matter. He pointed out that he did not consider the issues of fact involved in the motion to be simple since, if contested, the several matters raised in the applicant’s several affidavits could have led to the Court having to decide upon several issues of fact, and that that factor could, by itself, have complicated the case. He further submitted that, up until the date when the respondent chose to agree to the consent order, the applicant had been entitled to treat the case as being heavily contested, especially because of the respondent’s having earlier obtained leave for the filing of an affidavit in opposition. He accepted that the law involved in the case was fairly settled but that, nevertheless, it was reasonable in all the circumstances for the applicant to retain the services of Senior Counsel.

Neither party cited any authority for their respective submissions. However, the Court was not unmindful of the learning in Vol. I of the Supreme Court Practice 1995, Order 62/A2/9, under the rubric “*Leading Counsel and the Two Counsel rule*”, where it is stated at page 1103 as follows:

“Evans J. sitting with assessors in open court on reviews of taxation examined the question of two counsel in some depth in Juby v. London Fire and Civil Defence Authority and Saunders v. Essex County Council, April 24, 1990 (unrep.). Evans J. first listed the most likely factors affecting the decision whether or not to instruct a leader; they include:

- (a) *the nature of the case, including in accident cases,*
 - (i) *the nature and severity of the plaintiff’s injury;*
 - (ii) *the likely duration of the trial;*

- (iii) *difficult questions regarding the quantum of damages, including medical evidence and questions of law;*
- (iv) *difficult questions of fact, including expert engineering evidence, or issues as to causation;*
- (b) *its importance for the client;*
- (c) *the amount of damages likely to be recovered;*
- (d) *the general importance of the case, e.g. as affecting other cases;*
- (e) *any particular requirements of the case, e.g. the need for legal advice, or for special expertise, e.g. examining or cross examining witnesses; and*
- (f) *other reasons why an experienced and senior advocate may be required.”*

And at page 1104 :

“A balance has to be struck between the advantages of the more efficient presentation of the client’s case and the extra expense involved in instructing leading counsel, or two counsel rather than one...”

*With regard to the instruction of leading counsel **the correct question is not whether the case was well within the capabilities of junior counsel but rather whether or not it was reasonable to instruct leading counsel** (following *R. v. Dudley Magistrate’s Court, exp. Power City Stores Ltd. [1990] 140 New L.J., 361*).”*

Although the factors outlined by Evans, J. appear to be matters that a litigant and his advisors ought to consider in deciding whether or not to retain a Senior Counsel in a particular matter, this Court saw no reason why these factors should be excluded from the matters to be considered by the Court in the exercise of its discretion whether or not to award costs fit for Senior Counsel. In particular, the last cited passage appeared to come down heavily on the side of the applicant, in that, the appropriate question for the Court was not whether the case was well within the capabilities of Junior Counsel, but rather, whether or not it was reasonable to instruct Senior Counsel as well. The true test then was that of reasonableness. This was supported by the dictum of Farwell, J. in the case of **In re W. T. Potts. Ex parte Epstein v. The Trustee and the Bankrupt** (1935) 1 Ch. 334 at pages 339-340 where he states that –

“The truth of the matter is that each case must depend upon its own facts, and in order to see whether the employment of leading counsel is justified or not, one has to consider the whole of the facts, remembering always that leading counsel may be a luxury for which an opponent, or the estate of a bankrupt, should not be made to pay,

and that, on the other hand, in some cases the employment of leading counsel may be a proper precaution to take, in order to ensure that the case of the person in question may be fully and properly presented to the Court, and the Court may have every assistance possible in a difficult case in arriving at a proper conclusion.”

This theme of reasonableness runs through the length and breadth of the law. In the case of **R. v. Dudley Magistrates’ Court** (*supra.*), it was said that –

“the test of whether leading counsel’s fees should be allowed ... is whether the defendant acted reasonably in employing leading Counsel and not whether the case could have been conducted adequately by a senior solicitor or junior Counsel.”

In the affidavits before the Court, the applicant went into great detail in outlining the several factual allegations which led to his arrest and detention, as well as matters incidental to and arising therefrom. The Court had beforehand taken the opportunity to become familiar with the contents of the applicant’s lengthy affidavit and its exhibits, as well as the contents of the 6 other supporting affidavits. The Court accepted the submission of Counsel for the applicant that until the date when the consent order was recorded, the applicant and his legal advisers were entitled to believe that the motion would be heavily contested. The respondent’s attorney had, after all, previously requested time in which to obtain fuller instructions and to file an opposing affidavit. The Court agreed with Counsel for the applicant that a contested matter could very likely have involved adjudication upon several factual issues thereby leading to complexity in the case. In addition, the Court was not satisfied that all of the law involved in the case was necessarily straightforward or settled, since among the relief being sought by the applicant was a claim for aggravated and/or exemplary damages, the latter especially then being an area of uncertainty in the public law arena.

In addition, the Court took into consideration the fact that the respondent did not contest the facts set out in the affidavits and that what was contained in them must therefore be taken to be correct. Thus, the station in life of the applicant himself was that he was a man of some 30 years or more experience in the field of public transport. He was the public transport coordinator with responsibility for the entire country. He was now in his 50s. He had been publicly humiliated and paraded

through the streets of Port-of-Spain like a common criminal and fraudulently and/or maliciously charged with false offences. His previous record was impeccable. Had the charges not been dismissed, he could have found himself with a criminal record to add to his name. The entire experience was traumatic and he appeared to have received medical attention as a result.

In all the circumstances, the Court considered that the applicant had acted reasonably in retaining Senior Counsel and allowed costs fit for both Senior and Junior Counsel. Indeed, the involvement of Senior Counsel may very well have been the major factor that led to the respondent's compromise of the motion and the recording of the consent order that eventually determined the respondent's liability on the motion.

Dated this 9th day of May, 2003.

Joseph Tam
Judge.