

IN THE FULL COURT OF THE SUPREME COURT OF
JUDICATURE OF GUYANA
APPELLATE JURISDICTION

2019-HC-DEM-CIV-FCA-106

BETWEEN:

In the matter of the Constitution of the Co-
Operative Republic of Guyana

In the matter of an application for redress under
Article 153 of the Constitution for
contravention of the Applicant's fundamental
rights guaranteed by Articles 40 and 139, 141,
142 and 143 of the Constitution.

EON STEPHENS

Appellant

-and-

1. LESLIE JAMES, COMMISSIONER OF
POLICE

2. POLICE SERGEANT SERABO

3. ATTORNEY GENERAL OF GUYANA

Respondents
(Jointly and Severally)

The Honourable Justices Navindra A. Singh and Simone Morris-Ramlal, Puisne
Judges

Mr. Timothy Jonas for the Appellant

Mr. Nigel Hawke, Solicitor General of Guyana for the Respondents

Delivered August 12th 2020

DECISION

BACKGROUND

The Appellant was arrested by members of the Guyana Police Force [GPF],
including the Second Named Respondent [SNR], on December 11th 2018 at 9:30

hrs at his home, without a warrant directing such arrest, and taken to the Criminal Investigation Department [CID] headquarters.

At the CID headquarters his cellular phone was taken from his possession by the SNR and he was detained there until 22:00 hrs, at which time he was transported to the Sparendam Police Station lockups and further detained until 11:00 hrs on December 12th 2018.

The Appellant was then transported to his residence in Meadowbrook Gardens, Georgetown by members of the GPF, including the SNR, and his residence was searched by the said members of the GPF without either a warrant permitting such search or his consent to conduct such search.

At the conclusion of the search the Appellant's laptop computer was removed from his residence by the said members of the GPF and the Appellant was transported back to the CID headquarters and further detained.

The Appellant was released from police custody on the evening of December 12th 2018 on bail.

On December 14th 2018 members of the GPF took possession of the Appellant's Republic of Guyana passport.

The laptop computer and the cellular phone that the members of the GPF had taken possession of, were returned to the Appellant in January 2019.

The Appellant alleges that he was subsequently further detained for two hours on March 1st 2019 by the SNR at the CID headquarters. The SNR denies this allegation.

The Appellant then instituted High Court Action 2019-HC-DEM-CIV-FDA-602 against the Respondents on April 10th 2019 challenging, *inter alia*, the constitutionality of his arrest, his subsequent detention, the search of his residence and the seizure of his cellular phone and laptop computer.

The Respondents filed an Affidavit in Defence on May 30th 2019, sworn to by the SNR and thereafter the Action was heard by Justice Damone Younge who on October 7th 2019 ruled that the search of the Appellant's residence and the seizure of the Appellant's laptop computer were unlawful and unconstitutional and awarded the Appellant the sum of \$500,000.00 for breach of his constitutional rights.

The Appellant herein appeals the quantum of damages awarded.

Justice Younge also found that 1) the Appellant's arrest was lawful, 2) the Appellant's detention was lawful, 3) the seizure of the Appellant's cellular phone was lawful and 4) the retention by the Police of the Appellant's passport was lawful.

The Appellant herein appeals these findings.

ISSUE I

Was the Appellant's arrest unlawful and in breach of the provisions of the Constitution and Laws of Guyana.

FACTS

In addition to the facts aforementioned, the following contentions are relevant to this issue.

The SNR contends that he had reasonable grounds for believing that the Appellant had committed a serious offence, to wit, conspiracy to commit a felony, to wit, obtaining money by false pretence contrary to **section 33 of the Criminal Law (Offences) Act; Chapter 8:01** based on reports made by three persons, namely, Melissa Himraj, Alexis Daniels and Bhagmati Mohan.

The SNR avers in the Affidavit in Defence that he informed the Appellant that an investigation was being conducted that he conspired with the California Brooks University to obtain money from the three persons for online courses knowing that the University did not exist.

The SNR's belief formed from these reports is the sole basis upon which the SNR arrested the Appellant according to the Affidavit in Defence attested to by the SNR.

LAW

Article 139 (1) of the Constitution of Guyana provides;

“No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say ... (e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the laws of Guyana.”

Article 141 (1) of the Constitution of Guyana provides;

“No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.”

Section 16 (1) of the Police Act; CAP 16:01 of the Laws of Guyana provides;

“It shall be lawful for any member of the force to arrest without warrant -

(a) any person who commits in his view an offence punishable either upon indictment or upon summary conviction; or

(b) any person whom any other person charges with having committed a felony or misdemeanour; or

(c) any person whom any other person -

(i) suspects of having committed a felony or misdemeanour, or

(ii) charges with having committed an offence punishable on summary conviction, if such other person is willing to accompany the member of the Force effecting the arrest to the police station and to enter into a recognisance to prosecute such charge; or

(d) any person whom such member of the Force finds disturbing the public peace; or

(e) any person whom he has good cause to suspect of having committed or being about to commit any felony, misdemeanour or breach of the peace; or

(f) any person whom he finds between the hours of eight o’ clock in the evening and five o’ clock in the morning lying or loitering in a highway, yard or other place and not able to give a satisfactory account of himself.”

Section 20 (1) of the Police Act; CAP 16:01 provides;

“When a person is arrested without a warrant he shall be taken before a magistrate as soon as practicable after he is taken into custody:

Provided that any member of the Force for the time being in charge of a police station may enquire into the case and -

(a) except when the case appears to such member of the Force to be of a serious nature, may release such person upon his entering into a recognisance, with or without sureties, for a reasonable amount to appear before a magistrate at the time, date and place mentioned in the recognisance; or

(b) if it appears to such member of the Force that such enquiry cannot be completed forthwith, he may release such person upon his entering into a recognisance, with or without sureties, for a reasonable amount, to appear at such police station and at such times as are mentioned in the recognisance, unless he previously receives notice in writing from the officer in charge of the police station that his attendance is not required and any such bond may be enforced as if it were a recognisance conditional for the appearance of the said person before a magistrate.”

Ghani v Jones [1970] 1 QB 693 @ 709 per Lord Denning MR;

“The lawfulness of the conduct of the police must be judged at the time, and not by what happens afterwards.”

Dumbell v Roberts [1944] 1 All E.R. 326 @ 329 per Scott LJ;

“The power possessed by constables to arrest without warrant ... provided always that they have reasonable grounds for their suspicion is a valuable protection to the community ...”

and @ 332 per Goddard LJ;

“In giving this power of arrest Parliament obviously contemplated that it was only to be used if it was necessary to ensure the suspect being brought to court. If his

name and address could be ascertained the police could proceed by summons, which is the proper course to take in the case of misdemeanours or summary offences unless, where there is power to arrest, there is reason to believe a summons would not be effectual.”

R v Alexander [1989] 3 NZLR 395

ANALYSIS

Clearly the SNR is contending that the arrest of the Appellant was lawful under **section 16 (1) of the Police Act** in that he had good cause to suspect that the Appellant had committed a felony.

“Good cause to suspect” is the same standard as “reasonable suspicion” and what amounts to reasonable suspicion in a given case is a matter of law for the Court to determine based on the facts and circumstances that existed at the time of the arrest.

Reasonable suspicion is a legal standard permitting the police to make warrantless arrests and is more than a rudimentary and unparticularised suspicion.

It must be based on specific and articulable facts, taken together with rational inferences from those facts, associated with the specific individual who is the subject of the arrest.

Moreover, when the facts purported to be relied upon by the arresting officer comes from others, then it must be established that such information comes to him in such a way that justifies him giving it credit.

The test as to whether the arresting officer had reasonable suspicion for effecting an arrest is therefore twofold, requiring the arresting officer to have formed an

honest and unaffected suspicion in his own mind but also that a reasonable man would have also reached the same decision based upon the information available.

Reasonable suspicion is evaluated by determining whether the reasonable man, put in the same circumstances as the arresting officer, could reasonably suspect a person has been, is, or is about to be engaged in criminal activity; it depends upon the totality of circumstances, and can result from a combination of particular facts, even if each fact is individually innocuous.

In this regard, it is essential that the Court be apprised of all of the facts that the SNR would have considered in determining that he had good cause to suspect that the Appellant had committed a felony at the time that he effected the arrest.

In the Affidavit in Defence filed by the Respondents, the Court is simply provided with a hearsay narrative by the SNR of acts of the Appellant that apparently caused him to have reasonable suspicion that the Appellant had conspired with another to commit the offence of obtaining by false pretences.

The actual statements that SNR purportedly relied upon were not produced as evidence before the Court and therefore the Court was not in a position to determine whether, as a matter of law, the SNR could have had a reasonable suspicion that the Appellant had committed a felony.

Notwithstanding this, should the Court even consider the SNR's averments as to what the statements disclosed, it would appear that the events that caused him to have reasonable suspicion that the Appellant had committed a felony are;

- I. that the Appellant recommended a course from the California Brooks University to his colleagues, and
- II. that the Appellant had requested the receipts of payment to the University for the course from one of his colleagues, namely, Melissa Himraj.

Accepting these facts to be true, the SNR clearly did not have in his possession at the time of arrest, any evidence of anyone obtaining anything by false pretences and certainly no evidence that the Appellant had conspired with anyone to commit such offence or any offence.

It is noted that though the SNR averred that part of the allegation he put to the Appellant is that he [the Appellant] knew that the University did not exist [paragraph 23 of the Affidavit in Defence], yet at no time does he produce any evidence to establish this allegation.

On this issue the trial Judge stated;

“Having carefully reviewed the Respondents’ Affidavit of Defence, this court formed the view that it sufficiently establishes that they had reasonable grounds for believing that the Applicant had committed a criminal offence. This Court accepts that the Applicant was arrested consequent upon reports made by several persons alleging a fraud had been committed on them involving the Applicant. From the evidence of the Respondents, it is easy to draw the inference that the Respondents, at the time of the Applicant’s arrest, had good cause to suspect that he had committed a felony.”

Unfortunately the trial Judge did not point to the “*evidence of the Respondents*” that made it easy for her to draw the inference that the Respondents, or at least the SNR, had good cause to suspect that the Appellant had committed a felony.

It is noteworthy that the SNR believes that the offence of obtaining by false pretences is a felony, a contention accepted by the trial Judge, when the offence is in fact a misdemeanour as per **section 194 of the Criminal Law (Offences) Act; CAP 8:01** of the laws of Guyana.

The trial Judge accepted the Respondents’ assertion that several persons had made reports alleging a fraud had been committed upon them involving the Appellant and she further accepted that the arrest was consequent upon those reports.

Whether the facts reported by those persons contained the necessary legal elements amounting to “a fraud”, which to begin with is quite vague, is a matter of law for the Court to determine upon an actual analysis of those reports and not for the Respondents or any of them to determine.

Needless to say the only facts that the Respondents are entitled to rely on to establish that the SNR had good cause to suspect that the Appellant had committed a felony were those that existed at the time of arrest [**Ghani v Jones**] and therefore all of the documents referred to in the Affidavit of Defence obtained some time after the arrest is irrelevant to the this Claim.

Further, it is pellucid from **Section 20 (1) of the Police Act** that the objective of arresting a person is to charge that person and take them before a Magistrate, a position supported by Goddard LJ in **Dumbell v Roberts**.

In interpreting **section 316 (5) of the Crimes Act** of New Zealand which provides “*Every person who is arrested on a charge of any offence shall be brought before a Court, as soon as possible, to be dealt with according to law.*”, the Court of Appeal in **R v Alexander** held that s 316(5) requires an arrested person to be brought before a court as soon as is reasonably possible. The Court further held that the provision does not preclude questioning about the offence for which the person has been arrested or about other offences. However, the arrested person must not be detained any longer than is reasonably necessary to enable him or her to be brought before a court. Delay in bringing an arrested person before the court due to questioning is prohibited.

Based on the evidence before the Court, though the Respondents contend that the after the Appellant was released from custody on bail he was required to report on his bail, although the SNR did not state what reporting arrangement was put in place, nevertheless, the police were clearly unconcerned that the Appellant was not reporting to the police station for months after he was released.

This, coupled with the fact that at least up to the time of the filing of the FDA he had not been charged, leads to the inescapable conclusion that the police had no proper or lawful reason to arrest the Appellant on December 11th 2018.

The law does not permit the police to arrest a person purely for questioning and according to the Affidavit in Defence sworn to by the SNR, the Appellant was informed of the offence that he was alleged to have committed at the time of arrest. Logically, this ought to mean, in the normal course of things, that the police were

in possession of sufficient evidence to charge the Appellant with the said offence, however, this was clearly not the case.

CONCLUSION

The Respondents failed to produce evidence to the trial Court showing that the SNR could have had reasonable suspicion that the Appellant had committed a crime thereby permitting him to effect a warrantless arrest.

ISSUE II

Was the Appellant's detention by the SNR and members of the GPF in breach of the provisions of the Constitution of Guyana.

FACTS & LAW

As hereinbefore stated.

ANALYSIS

It follows that if the Appellant's arrest was unlawful and unconstitutional and the basis for that arrest forms the basis for his detention then his detention must be in breach of the Constitution.

In fact **Section 20 (1)(b) of the Police Act** makes it clear that, assuming he was properly arrested without a warrant, if the investigation could not be completed **forthwith** he must be released on bail.

By definition **forthwith** means as soon as can be reasonably done. It implies immediacy, with no excuses for delay.

No reason has been advanced for detaining the Appellant for the time that he was detained, especially being detained overnight in the lockups.

CONCLUSION

The Appellant's detention was in breach of his constitutional rights.

ISSUE III

Was the seizure of the Appellant's cellular phone lawful.

FACTS

As hereinbefore stated.

LAW

Article 143 (1) of the Constitution of Guyana provides;

“Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.”

ANALYSIS

The Respondents must demonstrate to the Court that they had reasonable suspicion that the Appellant had committed a felony or misdemeanour in order to justify the taking of an article from him.

Even if a person was not arrested or charged, the police must have reasonable grounds for believing that a serious offence has been committed before they can seize any article in that person's possession.

Since the Respondents failed to demonstrate to the Court that the SNR could have had reasonable suspicion that the Appellant had committed a crime thereby

permitting him to effect a warrantless arrest, it follows, logically, that the SNR could not have lawfully taken the Appellant's cellular phone from him.

CONCLUSION

The seizure of the Appellant's cellular phone by the SNR was unlawful.

ISSUE IV

Was the retention by the police of the Appellant's passport lawful.

FACTS

As hereinbefore stated.

Additionally, the Respondents stated that the Appellant's passport was held as a condition of his bail for release from police custody. This is not disputed by the Appellant.

ANALYSIS

Since the Appellant's arrest and detention were unlawful, then the holding of the passport as a condition of bail for such unlawful arrest and detention is clearly unlawful.

Further, the Respondents' contention that the passport is the property of the Government of Guyana and can be withdrawn at any time can only be described a vacuous.

The Respondents have produced no evidence or even contended that the Government of Guyana and/ or the Chief Immigration Officer has issued any order recalling or revoking the Appellant's passport.

The Appellant was lawfully issued the passport and based on the evidence the right to retain possession of the passport and use the passport has not been terminated.

CONCLUSION

The retention by the police of the Appellant's passport was and is lawful.

I find that the quantum of damages [\$500,000.00] awarded to the Appellant for the search of his home and the seizure of his laptop computer to be unreasonable and insufficient in the circumstances of this case.

The SNR and members of the Police Force acted in a high handed and irrational manner in what was more in the nature of an attack than an investigation.

In the circumstances the Court allows the Appeal and grants the following Orders prayed for in the Notice of Appeal ;

Paragraphs (i) through (x), (1), (2), (3), (4) and (10).

With respect to paragraph (5) the sum of \$500,000.00.

With respect to paragraph (6) the sum of \$1,500,000.00.

With respect to paragraph (7) the sum of \$500,000.00.

With respect to paragraph (8) the sum of \$500,000.00.

With respect to paragraph (9) the sum of \$500,000.00.

together with interests on the said sums at the rate of 6% per annum from April 10th 2019 to August 12th 2020 and 4% per annum thereafter until fully paid.

The Court awards costs to the Appellant against the Respondents in the sum of \$500,000.00.

Justice N. A. Singh