J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 49/73

BEFORE: THE HON. MR. JUSTICE ROBINSON P.
THE HON. MR. JUSTICE WATKINS J.A.
THE HON. MR. JUSTICE MELVILLE J.A. (Ag.)

Between A.G. KANE (TRADING AS KANE SECURITY SERVICE) Plaintiff/Appellant

AND

WILBROS LIMITED Defendant/Respondent

Dr. Lloyd Barnett & David Murray for Plaintiff/Appellant

J. Leo Rhynie for Defendant/Respondent

June 13, 14, 15, 1977

MELVILLE J.A. (Ag.)

At the conclusion of the hearing of the appeal in this matter we dismissed the appeal, subject to a slight variation in the amount awarded. We promised to put our reasons in writing and this I now proceed to do.

The plaintiff claimed the sum of $1,064.00 the balance owing by the defendant for security services rendered at the defendants' premises. Judgment was entered for the plaintiff for that amount which the defendant admitted was owing. There was no appeal from that order.

Arising out of the negligent performance of the contract the defendant counter-claimed for the amount of $17,000.00 for the loss of six motor truck tyres and rims from a tractor head and for loss of use of the vehicle during the period it took to replace the rims and tyres. This appeal was brought against the award of the amount of $11,100.00 to the defendant on the counter-claim.

At the trial a Mr. Wilson who had been employed to the defendants as a foreman was one of the witnesses called on their behalf. Briefly the case advanced by the defendants on the counter-claim was that on the 15th May 1970, the defendants through their

managing director - a Mr. Williams - agreed with the plaintiff for the latter to provide security services for the defendants' premises at Dunrobin Avenue in the parish of St, Andrew from 4 p.m. of one day until 8 a.m. of the next day every day of the week. It was agreed that the plaintiff's guard would attend at the defendants' premises every day at 4 p.m. to ensure that by about 5 p.m. all the employees had left the premises without any of the defendants' goods. At 5 p.m., after the employees had left, Mr. Wilson would take the guard around the premises which were completely enclosed to ensure that things were in order. Thereafter he would hand the keys of the front gate to the guard who was then left in charge of the premises. By 8 a.m. of the next day Mr. Wilson who was usually the first to arrive at work would repeat the inspection routine along with the guard after which the gate keys would be returned to Mr. Wilson and the guard relieved. These arrangements continued until the events which gave rise to the counter claim.

Apart from the evidence of routine described above, Mr. Wilson also testified that on the 15th of May 1970, on the instructions of Mr. Williams he had gone withthe guard, who had accompanied the plaintiff to the premises, to show him around the premises. Mr. Wilson's evidence continued that on Sunday the 27th September 1970 after the usual routine he left the premises along with a Mr. Gabbidon leaving the guard at the premises. When he returned the next morning, the guard was absent and the keys which would normally have been handed to him were found in the guard house which was inside the premises by the gate. The tractor head which he had serviced on the Saturday and left intact on the Sunday was now jacked up - by a jack which was not the property of the defendant - and six wheels complete with their rims were missing. Three sheets of zinc were torn away from the back fence which opened unto an open lot. That fence had been intact when he left on the Sunday.

Other evidence established that each of these tyres weighed upwards of 300 lbs. and required two men using a special lug

tool to 'crack' the nuts holding the wheels to the tractor head. When each nut was 'cracked' it made a sound like the discharge of a .38 revolver and it would take four men at least two hours to remove all six tyres. The premises were well lit and from the guard house the tractor head, as also the spot from which the zinc sheets had been removed, were in plain view. A telephone was available to the guard so that calls could be made to Mr. Williams in case of emergency. No such call was received by Mr. Williams during the relevant period.

Whilst not denying the routine inspection and delivery of the keys outlined above, it was the contention of the plaintiff through his guard - a Mr. Burton - that Mr. Wilson took no part in the inspection and handing-over of the keys. That routine was always with a guard employed to the defendants. Mr. Burton was the plaintiff's guard who had been attending at the Defendants' premises for about a week before September 27, 1970. His version of what happened on the evening of September 27, was that when he arrived at the premises at about 4 O'clock neither Mr. Wilson nor the defendants' guard from whom he usually got the keys, was present. Indeed none of the defendants' employees were on the premises, but he got the keys from an employee who was standing outside by the gate and who seemed to have disappered shortly after in a car. According to Mr. Burton the tractor head was then jacked up with tools scattered all around it and the wheels missing. His assumption was that the defendants' employees had been working on the tractor head and had safely put away the tyres. He, however, made a telephone call to Mr. Bright - the plaintiff's supervisor - who visited the premises at about 5 p.m. Mr. Bright confirmed that the tyres were then missing but he did not notice the condition of the fence at the back at that time. The next morning, however, Mr. Bright did notice that zinc sheets had been removed from that fence. As far as Mr. Burton was concerned the fence at the back was intact and seemed to have remained so even up to the time when he returned the gate keys to

the defendants' guard on the morning of September 28.

The learned trial judge rejected the plaintiff's contentions holding that the plaintiff's guard had failed to take reasonable care of the defendant's goodswhich were under his control, as it clearly appeared that the guard had either absented himself or was himself a party to the removal of the tyres. No arguments were addressed to this Court against those findings. The substantial ground argued was a notice of motion for leave to adduce fresh evidence. At the trial evidence was heard in the matter on July 23, 24, 25, 27, 1973, when judgment was reserved. Oral judgment was delivered on October 26, 1973 and reduced to writing on or about April 30, 1974. Notice and grounds of appeal had been filed on or about December 6, 1973.

In the notice of motion, leave was sought to adduce, in addition to the evidence in the Court below, the evidence of District Constable Vincent Murray, Special woman Constable Mary Boothe, Detective Inspector Isadore D. Hibbert, Detective Assistant Superintendent Lynford Sweetland and the plaintiff Ashton George Kane. It may not be remiss to mention at this stage that no affidavit was forth coming from Miss/Mrs. Boothe or Mr. Sweetland. Of the affidavits filed that of Mr. Murray formed the main plinth of the argument adduced before us. He deponed on April 22, 1976 as follows:-

1. "I reside and have my true place of abode at No. 20 Central Road, Kingston 10 in the Parish of Saint Andrew and I am a District Constable attached to the Half Way Tree Police Station in the Parish of Saint Andrew.

2. On Sunday the 24th day of February, 1974, I was in a bar at White River in the Parish of Saint Ann, on my own business, when I overheard a conversation between some men who were drinking in the bar.

3. One of the men, whom I later learned to be George Wilson, said during the aforesaid conversation that he had given false evidence recently in Kingston in the case of Kane v Wilbros Limited and through him his boss, one Mr. Williams of Wilbros Limited had won the case and he, Wilson, had got paid for it.

4. On Monday the 4th day of March 1974, on the Instructions of Lynford Sweetland, then Detective Inspector in charge of crime, Half Way Tree, to whom I had reported the said conversation of 24th February, 1974, I returned accompanied by Special woman Constable Mary Boothe to White River to the home of George Wilson. He was at home.

5. I called him, identified myself to him and asked him if he remembered a case that was tried in Kingston between Kane Security Service and Wilbros Limited. Wilson answered that he did remember such a case.

6. I asked him if the evidence he gave in court in the case was true and he replied that the whole thing was a fabrication due to the fact that his boss, Mr. Williams did not want to pay the money that he owed.

7. Wilson later showed me some papers which he said had been prepared and given to him by Mr. Williams so that he Wilson could study them with a view to reciting their contents as part of his evidence in court.

8. I then asked him if those papers were what he went by when giving his evidence in court. He replied that they were and that he had been paid Six hundred and Fifty Dollars ($650.00) plus hotel fees in Kingston by Mr. Williams for giving evidence. I took a statement from him which he signed.

9. Wilson told me that the reason why he went to court and gave evidence for Wilbros was because he wanted the money to help out his business, but now his conscience was pricking him.

10. On Tuesday the 5th day of March, 1974, I took the aforesaid statement to the aforesaid Lynford Sweetland and he read it."

In a further affidavit dated June 30, 1976 the statement referred to in paragraph 8 was exhibited.

Mr. Hibbert's affidavit disclosed that he was the police officer who investigated the loss of the tyres from the defendants' premises. In the course of his investigations he interviewed Mr. Wilson and on April 1, 1975 he accompanied Mr. Murray and the plaintiff to White River in the parish of St. Ann, where Mr. Murray pointed out the said Mr. Wilson sitting on a pavement of a shop. The plaintiff's affidavit was confined to the impossibility of discovering the facts deponed to by Mr. Murray and to the visit to White River on April 1, 1975. On May 21, 1976 Mr. Wilson deponed as follows:-

2. " "I crave leave to refer to the Affidavit of Vincent Murray sworn on the 22nd day of April, 1976 and the Affidavits of Isadore Hibbert and Ashton George Kane both sworn on the 26th day of April, 1976 and filed herein.

3. It is not true to say that on Sunday the 24th day of February, 1974 I was in a bar at White River drinking with other men. It has been my custom for many years to work on Sundays and to the best of my recollection I was at work in Ocho Rios on Sunday the 24th of February, 1974.

4. The facts set forth at paragraph 3 of the aforesaid Affidavit of Vincent Murray are false. I have at no time given false evidence on behalf of Wilbros Limited in this cause nor was I paid by Wilbros Limited to give evidence and I have at no time stated to anyone that I had given false evidence in the case of Kane against Wilbros Limited nor have I stated that through me my former boss, Mr. Williams, won the action subject of his appeal.

5. The facts as stated at paragraphs 5 to 10 inclusive of the aforesaid Affidavit of Vincent Murray are to my own knowledge false. At sometime in or about February, 1974 I recall being visited by a person who identified himself to me as a member of the Constabulary Force but who was in plain clothes. The gentleman who visited me told me that he was making investigations into a case between Kane and Wilbros in which I had given evidence and he asked me if I had any papers in relation to the matter. I told him that I believed that I had in my possession a statement or statements which I had given to the lawyers for Wilbros Limited and at his request I looked for and showed to him a statement which I had in my possession in relation to the case.

6. I have never told anyone that I was paid $650.00 plus hotel fees for giving evidence in this cause. The only benefit which I derived from giving evidence in this cause was the payment of my luncheon expenses during the course of the trial by Mr. Joe Williams and these luncheon expenses did not amount in all to more than $20.00. At no time during the course of the trial did I stay in a hotel in Kingston or elsewhere. In fact, because I could not leave my business unattended, it was necessary for me to journey to Ocho Rios each afternoon during the course of the trial and return to Kingston on the following morning. So as to enable me to do so Wilbros Limited provided me with transportation between Ocho Rios and Kingston for the week of the trial.

7. I have no knowledge of the facts stated at paragraph 5 of the Affidavit of Isadore Hibbert sworn on the 26th day of April, 1976 and filed herein and have no recollection of sitting on the pavement of any shop at White River during April, 1975."

In this welter of contradictions it was said - faintly I think - that there was fraud here. No more need be said than

that the purported facts here fell far short of those alleged in Hip Foong Hong v H. Neotia & Co. (1918) A.C. 888. At all events "fraud must be both alleged and proved" (Lord Buckmaster at p. 894). Here no such evidence was forthcoming.

Secondly it was said that the facts deponed to by Mr. Murray showed that the witness Mr. Wilson, had admitted (a) that he had been bribed into giving false evidence at the trial and (b) that he was not present at the defendants' premises on the Sunday. Admittedly, so ran the argument, these matters were not positive evidence in support of the plaintiff's case but rather important areas in the defendants' case which would be brought into question and in particular the credit of Mr. Wilson would be seriously undermined.

> "In order to justify the reception of fresh evidence or a new trial three conditions must be fulfilled; first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible."
> per Denning L.J. in Ladd v Marshall (1954) 3 All E.R. 745, 748.

It was common ground that the three conditions enumerated above had to be satisfued before this Court would receive the fresh evidence. There was however a further qualification. Where, as was admittedly the fact in this case, the fresh evidence does not relate directly to an issue, but was merely evidence as to the credibility of an important witness, this Court will apply a stricter test. In Meek v Flemming (1961) 3 W.L.R. 532, Holroyd Pearce L.J. stated the test thus at p. 538:-

> "It will only allow its admission (if ever) where 'the evidence is of such a nature and the circumstances of the case are such that no reasonable jury could be expected to act upon the evidence of the witness whose character had been called in question ..... or where the Court is satisfied that the additional evidence must have led a reasonable jury to a different conclusion from that actually arrived at in the case'...."

Turning to the factual situation as it existed in this case, there can be no doubt - although Mr. Leo Rhynie contended to the contrary - that this fresh evidence was unobtainable at the trial, for until Mr. Wilson made his alleged confession it would be well nigh impossible to discover its falsity. Oral judgment was delivered from as far back as October 26, 1973 and the alleged fresh evidence did not come to light until February 24, 1974.

Was the fresh evidence sought to be adduced apparently credible? From as far back as May 31, 1976 when Mr. Wilson's affidavit was filed it should have been apparent that Mr. Murray's allegations were being seriously challenged. Paragraph 2 of Mr. Murray's affidavit clearly showed that other persons were present when the remorse-filled Mr. Wilson was unburdening his conscience, yet nothing was put before this Court to indicate that even an attempt had been made to find corroboration of Mr. Murray's allegations. Even more startling are the events of March 4, 1974. By then, Mr. Sweetland, a senior police officer, must have been aware, if Mr. Murray's allegations were worthy of belief, that Mr. Wilson had more likely than not committed a criminal offence against the Perjury Act and also attempted to pervert the course of justice. What then was the purpose of Mr. Murray's trip on March 4? It could only be to obtain evidence of the commission of some criminal offence or the other. According to Mr. Murray he did get a statement in writing from Mr. Wilson and was shown the 'prepared papers' (see paragraph 7 of Mr. Murray's affidavit). Those 'prepared papers' would undoubtedly provide cogent evidence of the machinations of Mr. Wilson; so in the same way that the statement was taken why were not these papers taken; or at least some explanation for their absence offered? Why was Special woman Constable Boothe accompanying Mr. Murray? It could only be to give supporting evidence in case Mr. Murray's quest was successful. I need only repeat that nothing was put before this

Court from Miss/Mrs Boothe. From the affidavits of Mr. Hibbert and the plaintiff it was plain that they along with Mr. Murray had visited the district of White River on April 1, 1974 for Mr. Hibbert to be satisfied that the man he saw on the piazza was the same Mr. Wilson he had interviewed when investigating the loss of the tyres: for the plaintiff to be satisfied that it was the same man who had given evidence on behalf of the defendants and for Mr. Murray to be satisfied that it was the same man who had been speaking in the bar on the 24th of February 1974. It cannot be doubted that on that day, April 1, 1974 Mr. Murray was fully aware of what Mr. Wilson had said; that Mr. Hibbert, as an experienced police officer, ought also to have had the same knowledge. Yet what did these two officers do? They simply looked at the man and apparently not one word was said to him. Can one help asking, "were these officers interested in furthering the interest of the plaintiff or the administration of justice?" If the latter, why no inquiries of Mr. Wilson to see if Mr. Murray's allegations could be substantiated with a view to bringing criminal proceedings against Mr. Wilson?

Again when it is remembered that a District Constable's duties are usually circumscribed one cannot help wondering how a district constable could have been entrusted with this difficult task of obtaining evidence of the commission of perjury and/or perverting the course of justice, offences which are infrequently committed in this country. He is really a householder who is made a part-time police officer with no formal training in police work. Indeed his duty is to report any crime in his district to the constabulary station to which he is attached - see section 6 of the Constables (District) Act - and then investigations are made by a regular member of the constabulary force, usually a member of the Criminal Investigation Department. In these circumstances it was impossible to understand the conduct of these two police officers, especially

that of Mr. Hibbert when they allegedly saw Mr. Wilson on April 1, 1974. Unlike the situation that existed in Roe v Robert McGregor & Sons Ltd. (1968) 2 All E.R. 636, here the primary facts deponed to by Mr. Murray have been directly controverted by Mr. Wilson. Looking at all the circumstances in this case I was of the view that the plaintiff had failed to establish that the proposed evidence was such that it could presumably be believed.

If that conclusion was wrong then the next question was, would the proposed evidence probably have an important influence on the result of the case? and also the further question, was it such that no reasonable jury could be expected thereafter to act upon Mr. Wilson's testimony having regard to all the circumstances? When this statement that Mr. Murray allegely took from Mr. Wilson was compared with Mr. Wilson's testimony at the trial the inconsistencies that emerged were that Mr. Wilson was not responsible for the 'changing of the guard', he never visited the defendants' premises on Sunday the 27th of September and he didn't know that anything was missing. If the allegations of bribery and giving false evidence are added it could well be that Mr. Wilson's testimony may not have been believed, but Mr. Wilson's evidence apart, there was other evidence which was accepted and which clearly established the cuase of action. Apart from his not seeing the guard on the morning of September 28, Mr. Wilson's evidence was corroborated in every material particular by either Mr. Gabbidon or Mr. Williams or was common ground between the parties. Accordingly, the plaintiff must also fail under this head for:-

> "When a litigant has obtained a judgment in a Court of justice, ..., he is by law entitled not to be deprived of that judgment without very solid grounds; ....."
> (Brown v Dean (1910) A.C. 373 at 374)

For the reasons stated above the motion to adduce fresh evidence was refused. The only matter argued thereafter was that the damages awarded were manifestly excessive. Once it was conceded -as Mr. Murray did concede- that the damages awarded flowed

naturally from the breach of contract there was no ground on which this Court could interfere with the award. There was ample evidence to support the findings of the learned trial judge. Except that there should have been a further deduction of the amount of $25 per day ($1,600.00) in all) from the sum awarded for loss of use there was no reason to interfere with the award. Accordingly the appeal was dismissed.

J.A. (Ag)