

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 85/83

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A. (AG.)

BETWEEN: THE ATTORNEY GENERAL - DEFENDANT/APPELLANT
A N D : CLINTON McFARLANE - SECOND DEFENDANT
A N D : ELAINE CHARLTON - PLAINTIFF/RESPONDENT

Mr. N. Fraser and Mr. Victor Dixon for the defendant/appellant.

Mr. W. B. Frankson, Q.C., and Mrs. M. Forte for the plaintiff/
respondent.

July 18, & 19; October 1, 1984;
and February 28, 1985

WRIGHT, J.A. (AG.):

This appeal is against judgment in favour of the plaintiff/
respondent whereby damages were awarded her as follows:

Special Damages - \$ 2,165.00 (with interest
at 6%).
False Imprisonment & Assault - 10,000.00.
Malicious Prosecution - 5,000.00.

The case, though arising out of fairly simple facts, generated
much interest not alone because of the conduct of the second
defendant but also because of the claimed relevance of the
Exchange Control Act. At the trial no evidence was adduced by
the Defence. Accordingly, the plaintiff/respondent's case is
uncontroverted.

She hails from Jamaica but has been resident in New York

since 1965. During the Thanksgiving week-end November, 1979 - she came to Jamaica on a short visit to see her ailing mother (who has since died). Her four sisters also resident in New York, saw her off at the airport in New York and gave her a total of U.S. \$420.00 against eventualities. It transpired that her mother was not ^{as} ill as was supposed so much so that she refused the money which the children had sent and advised that it be returned to them.

When the plaintiff/respondent checked in at the Immigration Desk on her outward journey she surrendered the duplicate of the Immigration Card which she had completed on her arrival. It is her evidence that this Card had no provision for the declaration of what money she was carrying and neither on arrival nor departure did the Immigration Officers ask her to make any such declaration. Indeed she was asked no question about money.

She entered the intransit area with a tote bag on her shoulder and her passport case in her hand with money to purchase liquor at the In-Bond Shop when, on responding to her name being called, she was confronted by the second defendant who said to her:

"Give me your Boarding Pass. How much money you carrying out of the country?"

Surprised, she asked "Who are you?" and by way of reply the second defendant waved something in his hand. She could not tell what it was. Next, he snatched the folder with her passport and the money she had in it. She told him she did not know how much money she had. He grabbed the tote bag off her shoulder and said "I am going to take you and search you."

Having ascertained at the Immigration Desk "who checked in Charlton" he retrieved the card she had handed in and proceeded with her to a room where he repeated his intention to

search her. Upon her protesting he fetched a female officer whom he instructed to search her. The latter refused. He then emptied the contents of her bag on a table. Upon seeing the money she had in the bag he enquired "Where you get this money?" and was given the account previously herein-related. Included in the money was a cheque for sixty-five cents and he asked "Why are you going out with a cheque?" She replied that it was for her sister. He then attempted to leave the room with her bag and when she protested he pushed her and thus evoked a promise to hit him with the chair if he did that again. Not unreasonably, having regard to the fact that she would miss her flight without her relatives knowing why, she requested to be allowed to call her family in New York. His response was that she was a prisoner and would not be allowed to make the call. Stating that she would know his name at Half-Way-Tree he left her in the room. She was nervous and hot. A female Immigration Officer opened the door and to another officer who then entered she related her plight and he allowed her to make the call but while she was being taken to the telephone the second defendant called out "Prisoner not allowed phone call." After the call she returned to the room where she remained for over three hours. The second defendant said an attorney would meet her at Half-Way-Tree. She was taken to Half-Way-Tree where she was met by an attorney and was bailed in the sum of \$3,000.00. The second defendant was agreeable to the grant of bail. She testified that "McFarlane did not tell me why I was being arrested" she did testify, however, that she had been told of charges of taking foreign currency out of the country.

The vigour displayed by McFarlane was followed by a grand anti-climax when the case came to Court at Half-Way-Tree. The charges were not pursued. Included was a charge for using

indecent language - she was dismissed and the money - a total of U.S. \$483.00 returned to her.

In the meantime her luggage had gone to New York and she was left without a change of clothes. She had to purchase clothes.

The testimony of the plaintiff/respondent as to what happened at the Norman Manley Airport received strong support from Donald Hyatt, the Immigration Officer who processed her for departure. It was he who allowed her to make the telephone call and it was from him that McFarlane recovered her Immigration Card. He testified that he did not ask her any questions about money because the Card had no provision for such questions. Since McFarlane took possession of the Card this officer has not seen it.

Having regard to the predictable consequence of the unsuccessful prosecution of the plaintiff/respondent it seems more than passing strange that the prosecution was abandoned without one word from the prosecutor.

During the course of the trial Mr. Fraser applied - rather late in the day - for Security for costs on the ground that the plaintiff/respondent resided outside the jurisdiction. The application was not countenanced. The failure of the learned trial judge to grant the application was made the subject matter of the first of the three Grounds of Appeal filed. However, this ground was abandoned but not without the comment of Mr. Frankson that by admitting that the plaintiff/respondent resides outside the jurisdiction the appellant corroborated the contention of the plaintiff/respondent that she was not amenable to sanctions aimed at Jamaican residents.

Ground 2 reads as follows:

"The Learned Trial judge erred in Law in holding that the arrest and prosecution of the plaintiff/defendant were effected without reasonable cause."

Mr. Fraser did not spend much time developing this Ground of Appeal. Citing Section 4(1) of the Exchange Control Act he submitted that it embraces all persons entering Jamaica, who, he contends are under a duty to declare all foreign currency brought into the Island so as to be able to take it out as foreign currency not earned in Jamaica. No person, he submitted is enabled to take foreign currency out of Jamaica without the permission of the Minister. Accordingly, the submission continues, the police who see anyone exporting money without such permission can arrest, search and prosecute such a person whether it be harsh or oppressive.

Without the Defence having at any stage of the proceedings adduced even one word of evidence by way of challenging the plaintiff/respondent's allegations it was not surprising that Mr. Fraser found himself severely circumscribed. But even so his submission tempted Mr. Frankson to take more than a cursory look at the Act. Inasmuch as the submissions were found to be enlightening and betrayed much effort on the part of Mr. Frankson no disrespect is intended by not reflecting those submissions in this judgment except for one which is worthy of note; for it is our opinion that the resolution of the question before us does not require a determination along the line of those submissions. Rather late in his contentions Mr. Frankson sought to underscore not just the unreasonableness of the arrest but its illegality by reliance on paragraph 2 (1) of Part II of the Fifth Schedule to the Act which states:

"No proceedings for an offence punishable under this Part shall be instituted except by or with the consent of the Director of Public Prosecutions. Provided that this sub-paragraph shall not prevent the issue or execution of a warrant for the arrest of any person in respect of such an offence, or remanding in custody or on bail of any person charged with such an offence."

Mr. Fraser's reply was that the prosecution had been conducted by the Deputy Director of Public Prosecutions and accordingly no fiat was needed. Like the submission the reply ignores the language and intendment of the Act, for it is not difficult to demonstrate the impossibility of obtaining the fiat of the Director of Public Prosecutions in advance where the arrest is without a warrant. This question was dealt with in the case of R. v. Nancy Sanchez-Burke (No. 2) (1977) 15 J.L.R. 168 in which Henry, J.A. delivering the judgment of the Court said at page 171:

"In our view the paragraph is primarily concerned with preventing oppressive indiscriminate prosecutions and to this end it contemplates that the advice and consent of the Director of Public Prosecutions be obtained at the earliest opportunity. The proviso should therefore be read with this primary objective in mind. In our view in those cases where the proviso applies the fiat of the Director of Public Prosecutions must be obtained within a reasonable time after the taking of such actions as the proviso exempts. What is reasonable time is a matter to be determined on the facts of each case. For the purpose of ascertaining whether the fiat has been obtained at the proper time it is desirable that it should be produced to the Court before the commencement of the trial. Where this is not done consideration will have to be given to whether any objection may properly be taken after the close of the Crown's case....."

From the history of this case it is obvious that this situation did not arise. Accordingly, the point though interesting is not relevant.

It seems to us that once a person in the position of the plaintiff/respondent has complied with such requirements as the appropriate authorities choose to bring to his/her attention as affecting such person then he/she should be free to assume that there are no other such requirements which have not been disclosed and to act accordingly.

The question before the learned trial judge, viz., whether the actions of McFarlane were without reasonable and probable cause, was essentially a question of fact. And it is difficult to see how, he could have come to any other conclusion than that to which he came. This Ground accordingly fails.

Ground 3 reads:

"The award to the Plaintiff in respect of general damage was excessive."

Apparently taking the view that the complaint embodied in this Ground is self-evident Mr. Fraser did no more than to call attention to the Ground leaving Mr. Frankson the task of justifying the award, if he could. Mr. Frankson submitted, without conceding, that, if the awards appear to be on the high side they are not so high as to warrant the intervention of the Court. The damages he submitted are not exemplary. The most that can be said is that they are aggravated damages reflecting the abhorrence and disapproval of the learned trial judge of what he justifiably felt was unnecessarily harsh and degrading conduct on the part of the police officer.

Without wishing to detract from that assessment of the police officer's conduct we take the view that, having regard to the period and nature of the imprisonment as well as the fact that she was spared the harassment of a trial in the Criminal Court an award of \$15,000.00 for General Damages does seem excessive. An award of \$10,000.00 equally divided between the two heads of damages is more in keeping with the justice of the case. The award for General Damages is accordingly varied.

On the question of costs we have decided with some reluctance that the appellant will have one-half the costs of appeal. In the result, therefore the plaintiff/respondent will have one-half the costs of appeal to be agreed or taxed.