**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 141/2010**

**APPLICATION NO 197/2012**

**BEFORE: THE HON MRS JUSTICE HARRIS JA**
**THE HON MR JUSTICE DUKHARAN JA**
**THE HON MISS JUSTICE PHILLIPS JA**

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| **BETWEEN** | **DARRION BROWN** | **APPLICANT** |
| **AND** | **THE ATTORNEY GENERAL OF JAMAICA** | **1ST RESPONDENT** |
| **AND** | **SPECIAL CORPORAL #154 PAUL THOMPSON** | **2ND RESPONDENT** |
| **AND** | **SPECIAL CORPORAL # 96 MIGUEL LYLE** | **3RD RESPONDENT** |
| **AND** | **DETECTIVE CORPORAL JOSEPH WILSON** | **4th RESPONDENT** |

**Mrs Jacqueline Samuels-Brown QC and Miss Roxann Mars instructed by Knight Junor Samuels for the applicant**

**Miss Lisa White and Dale Austin instructed by the Director of State Proceedings for the respondents**

**27 and 28 September 2012 and 2 July 2013**

**HARRIS JA**

[1] I have read in draft the judgment of my sister Phillips JA. I agree with her reasoning and conclusion and have nothing to add.

**DUKHARAN JA**

[2] I too have read in draft the judgment of Phillips JA and agree with her reasoning and conclusion.

**PHILLIPS JA**

[3] This is an application for leave to adduce as fresh evidence on appeal evidence from the personnel at the Kingston Public Hospital relative to the condition in which the applicant was kept while there, with particular reference to his being handcuffed throughout his entire hospitalization, and on his discharge being escorted by police officers to Central Police Station.

[4] The appeal is from the decision of Brooks J (as he then was), who on 17 November 2010 dismissed a claim brought by the applicant for damages for assault, battery, false imprisonment and malicious prosecution with costs to the respondents to be taxed if not agreed.

[5] In the application to adduce fresh evidence, the applicant relied on four grounds, namely that the evidence: had not been available before; was relevant to the issues to be disposed of in the case; came from an independent source and was prima facie

credible; and was particularised in the affidavit of Roxann Mars which had been filed in support of the application.

[6] Roxann Mars in her affidavit sworn to on 25 September in support of the application indicated that as one of the attorneys having conduct of the case, her knowledge of the matters had been obtained from perusal of the files in possession of the firm and from their appearance on behalf of the applicant. She stated that the firm had requested and obtained a medical report from the Kingston Public Hospital written by Dr Morgan and dated 15 November 2005. However, she said, due to her knowledge of a policy at hospitals in Jamaica that medical files are not normally made available to patients or their representatives, she had not had sight of the medical file and further that no application had been made for the production of the medical file pertaining to the applicant.

[7] She indicated in spite of that, in paragraph 6 of her affidavit:

> "6. However, we have now had sight of the medical file and are aware that all of the nurse's notes confirm that while on the wards at the hospital the Appellant herein was handcuffed and that ultimately when he was released from the hospital he was 'accompanied by security officers for Central Police Lock up'."

The nurse's notes were duly exhibited.

[8] Miss Mars pointed out that on perusal of the record of appeal the evidence revealed that only the 4th respondent acknowledged that the applicant had been charged, and he had stated that the applicant had thereupon been offered bail in his own surety. Additionally, his witness statement averred that the applicant had never

been placed in custody at the Central Police Station Lock up. In fact, she stated that it was on that basis that the respondents' case as presented below was that the applicant had never been taken to the police station, had never been incarcerated and had been granted bail while in the hospital.

[9] It was her contention that these issues were of importance to the trial judge as he had asked questions of the applicant pertaining to his incarceration and release. She maintained therefore that the material extracted from the file which had not been available, but which was now to hand was of "crucial significance to the issues, inter alia, of credibility and measure of damages". She therefore applied, "in the interest of justice that the said material be admitted in evidence and or by subpoena the maker'[s] of the file if they are available".

**The proceedings below**

[10] The claim by the applicant against the respondents, as stated in the claim form, was for damages and aggravated damages for assault, battery, false imprisonment, and malicious prosecution arising out of an incident which occurred along Princess and Beckford Streets in the parish of Kingston on 20 September 2004, whereby the applicant sustained serious injury, caused by the 2nd, 3rd and 4th respondents. The applicant was subsequently arrested and charged for offences, which prosecution he claimed was terminated in his favour.

[11] In the particulars of claim the applicant stated that while he was at the intersection of Princess and Beckford streets, the respondents, who are all members of

the Island Special Constabulary Force (ISCF), acting on behalf of the 1st respondent had acted jointly and severally, negligently and/or maliciously and without reasonable and probable cause. The applicant claimed that they had beaten him all over his body and shot him, causing him to be admitted to hospital and subsequently losing his right eye. The particulars of negligence of the respondents and of the injuries suffered by him were set out. The report of Dr Morgan was attached in support of the injuries claimed. The applicant claimed special damages in respect of his lost income and for transportation. The applicant also claimed that the respondents acting jointly and severally maliciously and without reasonable and probable cause, imprisoned him at the Central Lockup and then took him to the Resident Magistrate's Court, where he was granted bail in his own surety. They subsequently prosecuted him, and the prosecution was terminated in his favour. The applicant claimed that the respondents were actuated by malevolence and spite, and had humiliated him and subjected him to ridicule and contempt in public. The injury received as a result of this conduct, he claimed, was therefore aggravated.

[12] The applicant claimed that he was entitled to exemplary and aggravated damages on the basis of the "cruelty and great violence" which had been meted out to him. He also specifically pleaded:

> "(ii) The second, third and fourth defendants having wrongly assaulted the Claimant imprisoned and thereafter charged the Claimant maliciously causing him to be handcuffed to his bed and treated as a prisoner for twenty-two days at the Kingston Public Hospital and thereafter to be in the Central Lockups for twenty nine (29) days."

[13] A defence was filed on behalf of the 1st respondent. While it was admitted that the respondents were members of the ISCF and that the 1st respondent was sued as the person elected by law to be named as a party in all suits instituted against servants of the Crown, the 1st respondent denied any negligence on the part of the 2nd and 3rd respondents. It was pleaded that the 2nd and 3rd respondents were on duty at the said intersection when they observed the applicant with a knife in his hand, behaving erratically so that persons were running away from him in different directions. Although being told to drop the knife, the 1st respondent pleaded, the applicant continued to approach the 2nd and 3rd respondents menacingly slashing at the 2nd respondent, who pulled his baton to ward him off, but the applicant eventually stabbed the 2nd respondent in the arm with the knife, whereupon the 3rd respondent discharged his firearm once at the applicant hitting him in the face. As a consequence, the 1st respondent denied any liability for any loss and injury which the applicant may have suffered.

[14] The 1st respondent further denied that the applicant had been detained at the Central Police Station Lockup and said that he had been held under police guard at the Kingston Public Hospital where he had been admitted. He was later taken to the Resident Magistrate's Court on charges of unlawful wounding, being armed with an offensive weapon, assault at common law, and malicious destruction of property. The 1st respondent did not admit that the charges had been terminated in favour of the applicant and denied that any of the acts of the respondents had been done

maliciously or without reasonable and probable cause. The 1st respondent specifically denied that the applicant would have been entitled to any damages aggravated, exemplary or otherwise.

[15] The applicant and the 2nd, 3rd, and 4th respondents all filed witness statements in the matter, and save and except in respect of the 4th respondent, at the hearing before Brooks J the witness statements were all tendered in evidence and the affiants were cross-examined on the same.

[16] The witness statements in the main conformed with the pleadings. The main tension between the parties was the applicant's claim that he was about his lawful business when the 2nd and 3rd respondents accosted him, searched him and took from his waist a knife which he used in his gardening work. The respondents said that he had a long kitchen knife in his possession which he swung at the officers and had not responded to their specific instructions to "drop the weapon".

[17] When the 4th respondent was to give evidence counsel for the respondents informed the court that his evidence was very crucial in the claim for malicious prosecution and false imprisonment, but unfortunately her instructions were that he had undergone surgery in respect of the amputation of some toes, some time in the previous week, but counsel had only been given that information very recently. She had endeavored to obtain a medical report from the Kingston Public Hospital but that had not been forthcoming, and she was therefore not in a position to inform the court when he would be available to give evidence in the case. Counsel requested an

adjournment which was granted for the following day. On the following day, however, counsel informed the court that she had not been able to contact the 4th respondent, although he had been discharged from the hospital, and she had not been able to obtain a report from the hospital, so as no further information was available for submission to the court, an application to adjourn the matter part-heard in the circumstances, was refused by the judge.

[18] The witness statement of the 4th respondent had been placed in the bundle relating to this application which was before the court. Counsel for the respondents objected to the witness statement being put before the court as it had not been tendered into evidence in the proceedings below. Counsel for the applicant responded that if it were considered inappropriate to do so then an apology was offered forthwith to the court. In the circumstances, and bearing in mind the application which was before the court, we decided it was relevant and proper for the court to have sight of it.

[19] In the 4th respondent's witness statement he had deposed that having received information that a man had been shot and injured along Princess Street by a special constable and had been taken to the Kingston Public Hospital, he went to the hospital, saw both the 2nd and 3rd respondents there, and he noticed that the 2nd respondent was bleeding from his right arm. He stated that he saw the applicant in a room being treated by doctors, with blood running from his face. He said that he told the applicant the reports he had received from the 2nd and 3rd respondents and the applicant did not respond. He instructed the 3rd respondent to obtain treatment for his injury, and then

caused the applicant, then the accused, to be placed under police guard. He charged him, he said, with the offences pleaded herein. Of importance however, is that he stated that the applicant was given bail in his own surety at the Kingston Public Hospital "because of his condition", and the matter, he said, was placed before the Resident Magistrate's Court and "later disposed of by Mr Martin Gayle". He averred that the applicant was never placed in custody at the Central Police Station Lockup.

**The decision of Brooks J**

[20] The learned trial judge gave his judgment on 17 November 2010. He recounted the evidence of the applicant and indicated certain statements made by him in his evidence with which he had concern but stated that other than those specific utterances, the applicant had not been shaken in cross-examination. He canvassed the evidence of the constables as well and stated that both officers had also been unshaken in cross-examination. He noted that there had been some discrepancies between their testimonies and he set them out. Having stated that the burden of proof was on the applicant to prove his case, and that the standard of proof was on a balance of probabilities, he stated:

> "I find that Mr. Brown's evidence and his demeanor in cross-examination was not sufficiently convincing for me to find that on a balance of probability [sic], he did not have an open knife and did not attack the police officer.
>
> He was not an impressing [sic] witness. Despite his testimony on cross-examination, it does seem that Mr. Brown has some mental challenges. Exhibit one indicates that when he was taken to the hospital on [sic] the incident, he was irritable and restraints were required. The onus is on

> him to show that the police officers acted maliciously or without reasonable and probable cause. Despite the discrepancies in the case or [sic] the defence and the handicapped [sic] that it suffered from the absence of the Corporal, who was the investigating officer, there is sufficient evidence to show that A. Corporal Thompson and Corporal Lyle made a report to Corporal Wilson. B, Corporal Wilson was the investigating officer who had conduct of the case and therefore the prosecutor. C, Corporal Wilson took or received statements from these officers, collected Corporal Thompson's shirt, allegedly slit by Mr. Brown. D, Corporal Wilson has charged Mr. Brown with at least the unlawful wounding of Corporal Thompson and being in position [sic] of an offensive weapon. E, that Corporal Wilson was not present at the time of the incident, but was acting on information received when he detained and charged Mr. Brown.
>
> On this evidence, I find that Mr. Brown has failed to show that Corporal Wilson acted unreasonabl[y], or maliciously, or without probable cause. First, detaining Mr. Brown and prosecuting him before the Resident Magistrate's Court."

[21] The learned judge did not accept counsel for the applicant's argument that the failure of the officers to prosecute the case demonstrated proof of malice on the part of the prosecution, although he admitted that it had raised concerns. But, he said that it was not too farfetched, as there was evidence that the officers had not been asked to attend court and after they had left the applicant at the hospital, they had had nothing further to do with him. The learned judge indicated that he did accept, however, that the fact that the case was adjourned sine die was a termination in favour of the applicant. He concluded that the applicant had "failed to show on a balance of probability [sic] that he was wrongly detained or what the prosecution had laid against him was done maliciously or without reasonable and probable cause".

**The appeal**

[22] Notice and grounds of appeal were duly filed on 29 November 2010. When the appeal came up for hearing the application to adduce fresh evidence was also before the court. Counsel agreed that the appeal would await the determination of the application. There are 12 grounds of appeal. I have set them out below. Bearing in mind that the appeal is yet to be heard, I intend to deal with the application within the principles which guide such an application, but against the backdrop of the issues which were in the case below and which are on appeal, in order to assess whether the order as asked for, should be granted. However, I do not intend to canvass, review and/or comment on the merit of the issues on appeal at this stage.

[23] **Grounds of appeal**

> "i. That the learned trial judge's finding that the claimant had failed to prove his case on a balance of probability [sic] that they acted without reasonable [sic] probable cause cannot be supported having regard to the evidence led at the trial.
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> ii. The Learned Trial Judge erred in failing to make a finding as to whether or not the claimant was assaulted.
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> iii. The Learned Trial Judge erred in finding that the Defendant acted without malice and with reasonable and probable cause in arresting and charging the Claimant.
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> iv. That the learned trial judge erred in not finding that the claimant was unreasonably detained and/or in the alternative that he failed to recognized [sic] that even if it was found that the initial arrest was reasonable, the

inordinate delay in taking him before the Resident Magistrate amounted to false imprisonment.

v. The Learned Trial Judge erred in that he did not take into account that no statements were ever taken from any eye witnesses to support the Defendants' alleged story of the claimant wielding a 'one and a half foot' kitchen knife in a threatening manner.

vi. The Learned Trial Judge erred in that he did not take into account that the Defendants failed to show that they made any enquiries of the claimant of what he was doing with a knife.

vii. The Learned trial judge erred in that he failed to take into account that the respondents/Defendants provided no evidence to support their defence that:
   a. The claimant had a knife
   b. The claimant wounded any officer
   c. The claimant slit any officer's shirt

viii. The Learned trial judge erred in that he failed to take into account that even after the arrest of the Claimant, the Defendant failed in all the circumstances to carry out any or any significant investigation in order to prove a case against the Claimant. The judge erred in finding that malice cannot be demonstrated by the failure to prosecute.

ix. Further the Honourable Judge erred in that he ruled that the Claimant failed to satisfy the requisite standard of proof because he was unable to positively state what day he was released from hospital he failed to establish that he was falsely imprisoned.

x. Further the Honourable Judge erred when he ruled that the Claimant, who now has only one eye as a result of the shooting by the respondents/defendants, did not satisfy the claim for aggravated and/or exemplary damages.

xi. That the claimant is entitled to special damages; general damages for the loss of his eye and pain and suffering; damages for false imprisonment, malicious prosecution and assault and therefore the judge erred in not considering damages.

xii. The claimant is entitled [sic] exemplary damages because of the oppressive, arbitrary and unconstitutional actions by the servants of the government, i.e. the respondents/defendants."

**Submissions on application to adduce fresh evidence**

[24] Counsel for the applicant submitted that Miss Mars in her affidavit had sought to explain why the evidence was not available before and also the importance of the evidence in respect of the appeal, as the evidence relates to the fact that the applicant was handcuffed and his feet had also been restrained throughout the period that he was in the hospital. The evidence, counsel argued, would also show the period of his restraint and where he had been taken on his discharge. This evidence, she submitted, would assist the court in the final disposition of the appeal. Counsel submitted that with regard to the policy referred to in the affidavit of Miss Mars, no useful purpose would have been served by the applicant requesting the documents, if such a policy existed and was known, as the documents would not have been produced. On inquiry from the court as to whether "the policy" which appeared to have guided the actions of counsel in respect of obtaining the documents sought to be adduced, had changed, counsel responded curiously that the fact that the documents were now available, without explanation as to how they had been obtained, ought not to detain the court

as the provenance of the records of the hospital, at this stage of the proceedings, was not a pre-condition in respect of their admission She referred to and relied on **King v The Queen** [1969] 1 AC 304. Counsel submitted that illegally obtained evidence is still admissible in the courts in Jamaica. Counsel therefore concluded that the application to adduce fresh evidence on appeal had complied with the first limb of **Ladd v Marshall** [1954] 3 All ER 745 as the nurse's notes, she maintained, could not have been obtained with reasonable diligence. She argued further that the remaining two limbs of the celebrated case, as to whether the evidence could have influenced the outcome of the case and was credible, had also been readily satisfied.

[25] Counsel for the respondents strenuously opposed the application. She contended that the real issue before the court below was credibility which was a matter for the learned trial judge and not for the Court of Appeal. She referred to the principles laid down in **Ladd v Marshall** and relied on them, submitting that the proposed evidence did not meet the criteria set out therein, and that admission of the evidence would not affect the outcome of the appeal, in that the applicant would not succeed, nor obtain an order for a retrial. She submitted further that the medical records sought to be adduced would have been created contemporaneously with the incident, the subject of the action, and having been in existence from then, could not be considered new. Counsel further contended that the records could have been obtained either before the litigation commenced or by way of specific disclosure after the claim had been filed. Counsel commented on the fact that the applicant had not deposed to an affidavit himself explaining his lack of industry relative to obtaining the records, but had

obtained a medical report which had been submitted from the inception of the suit. The report, she submitted, must have been based on the said information that the applicant was by the application endeavouring to produce, which would have therefore pre-dated the report, and which indicated that he was familiar with the process of obtaining medical information from the Kingston Public Hospital. It was her further contention that no sufficient evidence had been produced by way of explanation to satisfy the court that the records were not available at the material time.

[26] Counsel submitted that the "policy" that Miss Mars had referred to in her affidavit, was pure speculation, and the fact that the documents had been obtained subsequently, underscores that point. Counsel referred to and relied on a case out of this court, **Rose Hall Development Limited v Minkah Mudada Hananot** [2010] JMCA App 26. Counsel reminded the court that in the United Kingdom their rules had been amended to permit the court a discretion in relation to the admission of fresh evidence and so the overriding objective became relevant to that exercise, but as there was no such equivalent provision in the Civil Procedure Rules (CPR) in Jamaica, the principles as laid down in **Ladd v Marshall** had not been displaced.

[27] With regard to the second and third limbs of **Ladd v Marshall**, counsel relied on the principles enunciated in **Peter Flemming v Detective Corporal Myers and the Attorney General** (1989) 26 JLR 525 relative to the ingredients necessary to prove the cause of action of false imprisonment. Counsel endeavoured to show that there was evidence before the court with regard to that cause, and the learned judge had enquired into and treated with the issue of the handcuffs and had not accepted it or

had not considered it material. Counsel submitted that the applicant would not be able to, even if the evidence sought to be adduced was tendered, overcome the hurdle of section 33 of the Constabulary Force Act and the fact that the learned judge did not find the applicant "an impressing witness".

[28] Counsel also raised what she referred to as some "evidential difficulties". She submitted that the applicant was not the maker of the evidence sought to be adduced, so it was hearsay, and would not be admitted for the truth of its content. The medical records could not be admitted, she submitted, without several other evidential steps being made which could not be undertaken at this stage of the proceedings. Additionally, exhibit 1 in the case (Dr Morgan's medical report), showed that the applicant had to be restrained to be treated, so she suggested that his being restrained during the time of his treatment proved nothing more than that he was a difficult patient who "had to be restrained continuously". Counsel also submitted that a note on the medical records indicating where the applicant was being taken subsequent to his release from the hospital, was insufficient for the truth of its contents, and the production of entries of the station diaries at the Central Police Station Lockup, would be necessary to confirm the applicant's incarceration for any particular period.

[29] Counsel for the applicant in reply, submitted that the facts in **Rose Hall Development Limited** were distinguishable from the instant case in that there was a concession that the satellite images had been available at the trial, but no good reasons had been advanced for not producing or obtaining the said available evidence. The concession, she argued, was decisive of the matter. Counsel submitted

further on the principles arising from the Court of Appeal case in England, **Hertfordshire Investments Limited v Bubb and Another** [2000] 1 WLR 2318, that the court does not consider that it is still under the straight jacket of **Ladd v Marshall**, with the necessity to satisfy "special grounds", for although the principles still apply, they do so with more elasticity, she submitted, applying the overriding objective. One must, she argued, strike a balance between the determination of the litigation process and the interests of justice.

[30] With regard to the technical evidential difficulties posited by counsel for the respondents, counsel submitted that the provisions of the Evidence (Amendment) Act would address those issues and concerns and would be relevant, if the application succeeded, when the court dealt with the admissibility and review of the evidence.

[31] Counsel for the respondents was given leave to respond to the submissions by counsel for the applicant on **Hertfordshire Investments Limited**, as it had been referred to in counsel's reply. Counsel specifically pointed out the difference between the UK Civil Procedure Rules as they existed before and after their amendment, and submitted that **Hertfordshire Investments Limited** was applicable to the rules as amended which import the exercise of the court's discretion and the application of the overriding objective as the phrase "except on special grounds", which existed previously in the UK rules, has been removed. However, counsel submitted, the English courts still consider the principles of **Ladd v Marshall** applicable and the criteria enunciated therein have considerable weight in the courts. The principles, she argued, instruct how the court should exercise its discretion when considering an application to

adduce fresh evidence and, she stated, when one of the limbs is not met, that could form the basis for a refusal of the application. Counsel therefore submitted that "whereas **Hertfordshire** is instructive in the UK context in respect of the current CPR 52, it is neither highly persuasive nor binding in the Jamaican context".

**Discussion and Analysis**

[32] The well-known principles to be applied when fresh evidence is sought to be introduced are enunciated with great clarity in the oft cited speech of Denning LJ in **Ladd v Marshall** and are as follows:

> "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."

[33] This statement, made by Denning LJ, was addressing the submissions of counsel in the case, that the fresh evidence to be given by Mrs Marshall was very important, and should either be received by the Court of Appeal or there should be a new trial, so that the matter could be fully investigated. This submission was made on the basis that Mrs Marshall had indicated that the evidence that she had given in the court below had been untrue. In those circumstances Denning LJ said the principles as set out above must be applied, as evidence of a person who has said, "I told a lie, but nevertheless I

now want to tell the truth," ought not to satisfy the third condition, as "A confessed liar cannot usually be accepted as credible." Denning LJ stated further that it would only be if a witness were bribed or coerced into telling a lie, or had made an important mistake at the trial, and was later anxious to tell the truth or to correct the mistake, and the evidence was such that it would be believed, that that would be ground for a new trial.

[34] In **George Beckford v Gloria Cumper** (1987) 24 JLR 470 the evidence sought to be adduced consisted of information obtained from the inspection of a Cadastral Plan, which inspection had been carried out after the appeal on the substantive issue had been heard, which, as stated by Carberry JA who gave the judgment of the court, was a fairly unique experience for the court at the time. He indicated that:

> "[Cadastral maps] are repositories of information as to land titles and surveyed plans and the like, and are valuable as showing which proprietors are neighbours and indicate roughly how their lands relate to each other. A litigant anxious to establish a root of title or to trace land dealings in the area would normally and reasonably ask to inspect the Cadastral maps and follow up any information gleaned from them."

As a consequence he concluded that "in the circumstances the evidence sought to be tendered was evidence that could with reasonable diligence have been obtained for use at the trial". The first limb of **Ladd v Marshall** (which was accepted by this court from then as the leading case on the issue of "fresh evidence") would therefore not have been satisfied.

[35] But in that case, counsel had argued that once the Court of Appeal had been presented with evidence before delivery of the judgment, which was likely to affect its judgment, it was the duty of the court to receive and consider it. However, the court was of the view that that approach might seek to give the second and third rule in **Ladd v Marshall** priority over the first, and in circumstances where the Cadastral Plan had been readily available from the Island Record Office. Carberry JA was clear, however, that the first rule had been emphasised in all the cases and he set out a few where that statement had been made over 100 years ago. He stated at page 474 of the judgment:

> "Thus in ***Shedden v Patrick*** (1869) L.R. 1 Sc. & Di v 470 at 545, Lord Chelmsford said:
>
> 'It is an invariable rule in all the Courts, and one founded upon the clearest principles of reason and justice, that if evidence which either was in the possession of the parties at the same time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting of a new trial.
>
> If this were permitted, it is obvious that parties might endeavor to obtain the determination of their case upon the least amount of evidence, reserving the right, if they failed to have the case retried upon additional evidence which was all the time within their power.'
>
> In the same case Lord Colonsay said at page 548:
>
> 'The law does not consider the mere discovery of a document, or the mere discovery of a fact, to be a matter *noviter veniens ad notitam*, as giving a right to a new trial. It must be a matter not only that was not, in point of fact, before known to the party, but which the party could not by

> reasonable inquiry, such as he ought to have made, have put himself in possession of.'
>
> In *Nash v Rochford Rural District Council* (1917) 1 K.B. 384 Scrutton LJ, after citing the passage above from Lord Chelmsford, said at page 393:
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> 'I take the reason of it to be that in the interests of the State litigation should come to an end at some time or the other; and if you are to allow parties who have been beaten in a case to come to the Court and say 'Now let us have another try; we have found some more evidence', you will never finish litigation, and you will give great scope to the concoction of evidence.'
>
> He added at p 395:
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> '. . . I am not satisfied that by reasonable diligence the plaintiff could not have found this evidence before; and I am not satisfied that when he found it he used reasonable diligence to make it clear that he wanted to upset a finding of the jury which had been obtained in the action.'

As indicated, the application to adduce the Cadastral Plan as fresh evidence was refused.

[36] In **Rose Hall Development Limited** this court yet again endorsed the principles laid down in **Ladd v Marshall**. In **Rose Hall Development Limited**, the fresh evidence was in the form of satellite images purchased from the National Land Agency, Spacial Innovision and GeoOrbis, collected between 1991 and 2003. Counsel for the applicant conceded that the images were all available at the time of trial, and further accepted that had the diligence shown subsequent to the trial been undertaken previously, the images would have been obtained. Counsel relied on recent authority to support the argument that the courts are no longer constrained within "a straight

jacket" of the rules expressed in **Ladd v Marshall** as had been the case previously, and submitted that the admission of fresh evidence must be considered in the light of the overriding objective of the CPR. The application, however, was refused, as the applicant was unable to satisfy the first limb of **Ladd v Marshall**. As stated by Panton P, "No good reason has been advanced for the delay in sourcing and presenting this available evidence."

[37] The approach with regard to the exercise of the discretion of the court utilizing the overriding objective has arisen subsequent to the amendment of the English Civil Procedure Rules (introduced by the Civil Procedure (Amendment) Rules 2000). RSC Order 59, rule 10(2) provided that in a case of an appeal from a judgment after trial:

> "no such further evidence (other than evidence as to matters which have occurred after the date of trial or hearing) shall be admitted *except on special grounds."*

Rule 52 11(2) of the English Civil Procedure Rules (as amended) now provides:

> "Unless it orders otherwise, the appeal court will not receive -
>
> (a) Oral evidence; or
> (b) Evidence which was not before the lower court."

The special grounds mentioned in the earlier unamended rule had come to be known as the rules in **Ladd v Marshall**.

[38] **Mostyn Neil Hamilton v Mohamed Al Fayed** [2000] EWCA Civ 3012, pursuant to the transitional provisions of the said English rule 52, was a case governed

by the previous rule, and Lord Phillips MR in delivering the judgment of the court made this statement in relation to the changed rule:

> "...We consider that under the new, as under the old procedure special grounds must be shown to justify the introduction of fresh evidence on appeal. In a case such as this, which is governed by the transitional provisions, we do not consider that we are placed in the straightjacket of previous authority when considering whether such special grounds have been demonstrated. That question must be considered in the light of the overriding objective of the new CPR. The old cases will, nonetheless remain powerful persuasive authority, for they illustrate the attempts of the courts to strike a fair balance between the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right result. That task is one which accords with the overriding objective. In adopting this approach we are following the guidance to be found in the judgment of May L.J in **Hickey v Marks** (6 July 2000), of Morritt V-C in **Banks v Cox** (17 July 2000) and of Hale L.J. in **Hertfordshire Investments Ltd v Bubb** [2000] 1 WLR 2318."

The Master of the Rolls referred to the test for introducing fresh evidence laid down in **Ladd v Marshall** and made this statement in paragraph 13 of the judgment:

> "These principles have been followed by the Court of Appeal for nearly half a century and are in no way in conflict with the overriding objective. In particular it will not normally be in the interests of justice to reopen a concluded trial in order to introduce fresh evidence unless that evidence will probably influence the result."

[39] In **Banks and Another v Cox and Others** [2000] EWCA Civ 5565 Morritt LJ in the Court of Appeal, when reviewing the amended rule, commented that the introduction of fresh evidence still required the permission of the court, but it was no

longer necessary to show "special grounds". The discretion of the court under the new rules must, however, be exercised in accordance with the overriding objective. He made it clear however that:

> "In my view the principles reflected in the rules in **Ladd v Marshall** remain relevant to any application for permission to rely on further evidence, not as rules but as matters which must necessarily be considered in an exercise of the discretion whether or not to permit an applicant to rely on evidence not before the Court below. As May LJ with whom Forbes and I agree, said in **Hickey v Marks** (Court of Appeal 6th July 2000) unreported:
>
> 'The principle for the future will be that, since the Civil Procedure Rules are a new procedural code, the former body of authority [sic] will not apply, although of course the intrinsic persuasiveness of all relevant considerations, including, if they arise, those which were considered persuasive under the former procedure, will be capable of contributing to a just result.'"

And he concluded that "… the principles remain the same but the Court is freed from the straitjacket of so-called rules."

[40] Hale LJ in delivering the judgment of the court in **Hertfordshire Investments Limited** endorsed the principles in **Ladd v Marshall** and the statements set out above in **Banks v Cox** and **Hickey v Marks** with respect to the approach of the court under the amended English rules regarding the admission of fresh evidence on appeal. The court in overturning on appeal the ruling of the judge in the court below that evidence of the correct licence in lieu of the one tendered by mistake, could be admitted even though the correct one could have been produced with reasonable diligence at the trial, stated:

> "…. it cannot be a simple balancing exercise as the judge in this case seemed to think. He had to approach it on the basis that strong grounds were required. The **Ladd v Marshall** criteria are principles rather than rules but, nevertheless, they should be looked at with considerable care and in this particular case, of course, the first of those principles was not fulfilled: The evidence could clearly have been available readily at trial."

[41] The upshot of all of this is, in my view, that on an application in Jamaica, to adduce fresh evidence on appeal, whether one refers to the criteria as special grounds or rules or principles, **Ladd v Marshall** must be considered and applied. The criteria stated therein are not in any way in conflict with either the overriding objective or the interests of justice. But, in any event, there is no corresponding amendment, to that which exists in England, in the CPR in Jamaica.

[42] The evidence sought to be adduced in the appeal, is made up of different entries every day throughout the day with reference to the applicant's condition and the treatment meted out to him whilst in the Kingston Public Hospital. The document is entitled "Nurses' Notes" with different handwritings being utilized at different times in the day. The record commences on 20 September 2004, at 2:20 pm, with the notation that "D.B. admitted to ward… He came to ward on stretcher accompanied by porters and police officers…." There is a reference each day to the fact that he was handcuffed to the bed or to the bed rail. There is mention that he was being guarded by officers. There is a note that, "patient left for apex in police custody". He later returned, and on another occasion he left the ward in a wheelchair for the eye clinic accompanied by porters and police officers, and later returned to the ward. The nurses' notes having

commenced on 20 September 2004, contain entries for every day until 12 October 2004 at 12:30pm where there is a notation which reads as follows:

> "Patient left ward accompanied by security officers for Central Police Lockup…"

[43] This would show, on the face of it, that the applicant was at the hospital for the period 20 September 2004 to 12 October 2004. This evidence would be somewhat consistent with the applicant's testimony that he had been handcuffed to the hospital bed for 19 days but inconsistent with his evidence that he was taken from the hospital to go to court in handcuffs and returned to the hospital. It would also be inconsistent with the witness statement of the 4th respondent, which was not tendered in evidence, that he was given bail in his own surety at the Kingston Public Hospital. It does not appear to be helpful to either party with regard to whether he was actually incarcerated at the Central Police Station Lockup, and when exactly he was placed before the courts. The evidence, therefore if admitted, appears to address the finding of the court in relation to the false imprisonment claim and accordingly, grounds of appeal iv, ix, xi and xii.

[44] The law with respect to false imprisonment has been stated with great clarity in **Peter Flemming v Detective Corporal Myers and The Attorney General**. Carey P (Ag) (as he then was), at page 530 d of his judgment, said:

> "In my respectful view, an action for false imprisonment may lie where a person is held in custody for an unreasonable period after arrest without either being taken before a Justice of the Peace or before a Resident Magistrate....

> Where the person arrested is released, upon proof of his innocence or for lack of sufficient evidence before being taken to court no wrong is done to him. Where however he is kept longer than he should, it is the protracted detention which constitutes the wrong, the 'injuria'. This abuse of authority makes the detention illegal ab initio…"

And later at page 530h

> ".. The onus of proving the absence of legal justification would be on the applicant but once he showed that the period of detention was unduly lengthy or unexplained, an evidential burden was cast on or shifted to the defendants to show that the period was reasonable. I would hold that the period of thirteen days before the applicant was placed before the court was unreasonable and accordingly the applicant's claim for false imprisonment succeeds and he is entitled to damages thereon."

[45] In the instant case the learned judge in the court below has made no specific finding in respect of the length of time that the applicant was held in the hospital, or whether he was handcuffed for the entire period and/or whether that detention was unreasonable in all the circumstances. He merely found that the applicant had not proved on a balance of probabilities that he had been wrongly detained. The question therefore as to whether the applicant was in hospital for 19 days, having been handcuffed and under police guard, remains an unanswered issue. Additionally, pursuant to the dictum of Carey P (Ag), if the detention was unreasonably lengthy, the burden would shift to the respondents to justify the period of restraint, and if that is not done, the imprisonment would be false ab initio. So, even if there was reasonable and probable cause for the arrest of the applicant at the time when the arrest was effected,

if there was subsequent inordinate delay, that could result in liability on behalf of the 1st respondent for false imprisonment.

[46] As I understand it, the question in respect of malicious prosecution is different. The applicant must show that the 4th respondent in prosecuting him acted without reasonable and probable cause. It is the act of prosecution which is relevant. So unless the applicant's case was that the charges had been laid as a result of the inordinate delay which had occurred subsequent to his arrest, I am at the moment unable to see how the fresh evidence could be applicable to that aspect of the claim and or appeal.

**Applying Ladd v Marshall**

[47] As indicated above, with regard to the second and third limbs of **Ladd v Marshall**, the evidence sought to be introduced is in relation to the period that the applicant was handcuffed to the bed or bed rail in the hospital. In my view, this evidence if believed, is capable of influencing the outcome of the appeal in respect of the claim for false imprisonment. Additionally, the nurses' notes were made, it would appear, by persons who administered medical care to the applicant while he was in the hospital. On the face of it there would be no interest to serve, no good reason to either prevaricate or to tell lies. The evidence therefore, once admissible, would appear to be credible.

[48] With regard to the first limb, Miss Mars in her affidavit indicated that she thought that there was a policy "at hospitals in Jamaica" which precluded access to patient dockets and information. She has not, however, indicated how she came to that

understanding. She has not indicated whether such a policy ever existed, whether it existed at the material time at that particular hospital and the specific terms of the alleged policy. She certainly did not state that she had ever made a request to the Kingston Public Hospital to be provided with information pertaining to the manner in which the applicant had been held at that institution, with particular regard to his being restrained by handcuffs, and/or under police guard. There was no indication of any attempt to obtain this information with the assistance of the court, either before action, or subsequently by way of specific discovery.

[49] I agree with counsel for the respondent that the nurses' notes would have been made contemporaneously with the applicant's treatment at the hospital and, so would have existed from September or October 2004. Also, as counsel submitted, which I must say has merit, there was evidence at the trial (exhibit one) namely the medical report, which the applicant had obtained and filed with the originating documents in the action, and which would have been produced based on the information relating to the treatment that the applicant had received in the institution. This could have suggest that information relative to the manner of his detention at the hospital while being treated there, could have been obtained perhaps with very little effort. To the contrary, however, no effort appeared to have been made to obtain the same at all.

[50] I am cognizant of the fact that the applicant may have been somewhat handicapped at the trial, as the investigating officer did not give sworn testimony and so no evidence could have been adduced from him by way of cross-examination with regard to whether the applicant had been held under police guard at the hospital

and/or through production of the station diaries, whether he had been incarcerated at the Central Police Station Lockup for days, and when, and from what location he had been taken to attend court. I am also mindful of the fact that there was no indication beforehand that the 4th respondent would not be testifying (see paragraph [17] herein), so the applicant would have been taken completely by surprise. Also, as stated in rule 29.8(3) of the CPR, if a party has filed and served a witness statement but does not intend to call that witness at the trial or to put that statement in as hearsay evidence, the only recourse provided by the rules is that the other party may put the witness statement in as hearsay evidence. That, however, in the circumstances of this case was not a viable option. But the applicant was not without other courses of action. The station diaries, for instance, even at that stage, could have been subpoenaed or obtained through discovery.

[51] In any event, it is trite law that he who asserts must prove, so the applicant ought not to have been relying on evidence to have been adduced through the witnesses for the defence to prove his case. He had pleaded false imprisonment as a cause of action and was asking the court to award damages in relation thereto, and so he would have been required to prove the length of time and the manner of such incarceration, particularly as he was claiming, inter alia, aggravated damages.

[52] In my view, the nurses' notes could have been obtained for use at the trial with reasonable diligence. The applicant cannot sit back and when the case is lost, say there is more evidence that I can produce at this stage on appeal. As all the authorities say, there must be an end to litigation. I am fortified in this view, by the fact that the

nurses' notes have been readily produced without any explanation whatsoever, as to how this was achieved at this late stage of the proceedings. The applicant therefore cannot succeed on this first limb of **Ladd v Marshall**, and the application to adduce the nurses' notes as fresh evidence must fail.

[53] I would therefore refuse the application with costs to the respondents to be taxed if not agreed.

**HARRIS JA**

**ORDER**

Application refused. Costs to the respondents to be taxed if not agreed.