IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. C011 OF 1981

BETWEEN	JOSCELYN CAMPBELL	PLAINTIFF
AND	DETECTIVE CONSTABLE RUPERT FERQUSON	
AND	THE ATTORNEY GENERAL FOR JAMAICA	DEFENDANTS

Mr. W. Bentley Brown for Plaintiff

Mr. Neville Fraser of the Director of State Proceedings for Defendants

Heard: 1st April 1982 and 2nd April 1982.

Delivered: 12th November 1982.

J U D G M E N T

Theobalds J:

The Plaintiff is the Proprietor of Campbell's Esso Service Station at Temple Hall in the parish of St. Andrew where he also resides. He sues by Writ of Summons dated 4th day of February 1980 to recover damages for False Imprisonment, Malicious Prosecution, Detinue and Conversion of goods. The First Defendant is a Detective Constable at the material time attached to Half Way Tree Police Station. By his Statement of Claim the Plaintiff alleges that "on or about the 3rd day of January 1980 at Temple Hall in the parish of St. Andrew the First Defendant falsely maliciously and without any reasonable and probable cause arrested and imprisoned the Plaintiff in the Half Way Tree lock-up in the parish of St. Andrew until bailed on Monday 7th January 1980." The claim goes on to assert that the Defendants falsely malciously and without any reasonable or probable cause prosecuted the Plaintiff who appeared in the Resident Magistrate's Court at Half Way Tree on the 7th and 9th January 1980 when the Plaintiff was found not guilty..... and the proceedings determined in favour of

the Plaintiff. The claim in relation to Detinue and Conversion concerns some twelve (12) motor vehicle tyres and three (3) motor vehicle batteries which the First Defendant is alleged to have detained despite demand made after acquittal; it is claimed that the First Defendant has refused and/or neglected to deliver the said goods and chattels to the Plaintiff and has unlawfully maliciously and without any reasonable or probable cause converted same to his own use and benefit. As items of special damage the Plaintiff claimed:

Loss of earnings for 5 days at $800 per day	$4000.00
12 tyres of different sizes	1200.00
3 batteries	551.00
Legal expenses for senior and junior counsel	10000.00
	$15751.00

Additionally the Plaintiff sought exemplary damages.

While admitting the arrest and imprisonment the defence pleaded that the search of the Plaintiff's premises and his subsequent arrest was done on the authority of a Search Warrant. Further the defence claimed that the goods which were the subject of the search and arrest were all returned to the Plaintiff on the 9th January 1980. A copy of the said Search Warrant under the Unlawful Possession of Property Law along with the Information and Notes of Evidence taken in the Half Way Tree Resident Magistrate Court were all tendered and admitted in evidence by consent. It should here be noted that neither the information nor the warrant make any mention of goods other than "tyres of varying description." The accused was never charged in relation to any batteries. Although batteries (3) are included in the Statement of Claim no mention is made either in the opening remarks of counsel for the Plaintiff or in the evidence in chief of the Plaintiff as to any batteries having been removed from the Plaintiff's storerooms at Temple Hall.

In his opening remarks learned counsel for the Plaintiff

merely states. "Later that day he went for his tyres and batteries. Twelve tyres and three batteries short". The Plaintiff towards the very end of his evidence in chief merely states "They took away batteries too and I lost 3". He does not say when and from where these batteries were supposed to have been removed.

Since the arrest and imprisonment are admitted it is unnecessary for the purpose of this judgment to deal at length with the evidence in relation thereto. Suffice it to say that during the course of investigation into cases of larceny of tyres from corporate area service stations information is forthcoming which leads the Firstnamed Defendant to premises of the Plaintiff at Temple Hall. The Firstnamed Defendant quite sensibly takes along with him three corporate area service station proprietors (all complainants in relation to loss of their tyres) for the sole purpose of identifying their tyres. At all times the particular identification marks by which these complainants were to identify their tyres remain a closely guarded secret. The identification is clear and unequivocal. To use the Plaintiff's own words "the three men searched and could not readily identify their tyres there." As an added precaution the detective en route to Temple Hall stops and obtains a search warrant under the Unlawful Possession of Property Law. That warrant Exhibit (2) is more illumimating for what it does not say than for what it says. It does not state on whose information or complaint on oath the said warrant is issued although a long blank space is left on the face of the warrant for this express purpose. It specifies that the stolen articles and/or articles unlawfully obtained are "tyres of varying descriptions". Not a word about batteries or whose body it is must be brought before the Resident Magistrate although again blank spaces are left for that purpose. Yet the Firstnamed Defendant procedes on the authority of this document to bring batteries and the body of the Plaintiff Josclyn Campbell to the Police Lock-Up at Half Way Tree. To make matters worse the

Justice of the Peace who signs the warrant is a complainant in the tyre theft case and one of the service station proprietors who is taken along to identify his tyres and who fails so to do. If the Firstnamed Defendant is to be believed when he says that his suspicious were aroused when the Plaintiff offered to compensate the gas station proprietors who had been defrauded or who had suffered as a consequence one can only wonder what in the batteries aroused his suspicious since he had no complaint in respect of batteries. To find anyone, least of all a service station proprietor in possession of a large quantity of batteries, ought not per se, to lead one to suspect that such batteries have either been stolen or unlawfully obtained. It was held in R v. Melvin Spragg [1979] W.I.R. 370 that:

> "It must always be demonstrated by evidence that an arresting constable did in fact suspect and that he had reasonable cause to suspect, that the thing found had been stolen or unlawfully obtained since it was the state of his mind that was called in question."

After the Plaintiff's statement that on acquittal he made no demand on the police at Half Way Tree for either the tyres or batteries which he claimed were missing for the reason that he had no wish to tangle with policemen, it would appear that the claim in detinue and/or conversion was abandoned. Nothing further need be said in relation thereto.

It was submitted by learned counsel for the Plaintiff that the fee of $10,000 allegedly paid to counsel by the Plaintiff for his defence in the Resident Magistrate's Court is not unreasonable and ought to be allowed as an item of special damage. In support of this he assests that there is no fixed scale of charges applicable to matters of a criminal nature. I venture to say that the test cannot be one of reasonableness. An accused person may be prepared to pay an unreasonable sum to have counsel of his choice represent him. An other accused may be prepared to pay what he considers a reasonable sum bearing in mind the gravit of the offence with which he is charged and the

possible consequences of a conviction. Yet a third category might decide, perhaps not unwisely, to "go it alone", leaving the question of his guilt or innocence to be determined by the adjudicating tribunal solely on the evidence adduced before it. Would this mean that upon acquittal category No. 3 would be entitled in an action for false imprisonment or malicious prosecution to claim as special damages a reasonable sum for the conduct of his defence? Would this mean that category (1) could not recovery because the sum paid by him was unreasonable? The answer to both these questions would be emphatically no. The principle being that an injured party should be put, so far as money can do it, as nearly as possible in the same position as if he had not been injured, both these categories would be entitled to recover any sums actually expended in their defence upon proof of actual payment. The test is proof of actual payment and this must like any other item of special damage be strictly proven. The only proof of payment adduced in this case is the plaintiff's say so. He had knowledge very early in these procedings from as far back as the filing of the defence that special damage was not being admitted. It is therefore his duty to prove payment, and this burden is not discharged by a Plaintiff merely saying that he paid the amounts charged "by cheque to Mr. Brown and some cash ..... I got receipts." The returned cheques or the receipts must be produced or the amount claimed will not be allowed. Similar principles apply to a claim for loss of earnings and for tyres and batteries. Under cross examination the Plaintiff stated quite clearly that he did not know how many tyres and batteries were taken from his store so he could not know how many (if any) were missing on return. An attempt to fill this omission was made under re examination when the Plaintiff testified that at the time he gave instructions to his Attorney he had a record of the missing tyres and batteries but he was not able to supply this information at this hearing, and it is my view that such information

is essential in order to prove special damage. In relation to the claim for loss of earnings I formed an impression of a Plaintiff being fully aware that he is entitled to a judgment, has no qualms about padding his claim for special damage in the hope that he might be awarded a sum slightly less than he has claimed.

Acting on the authority of a warrant provides a Police Constable with complete protection if he finds the goods for which he executes the warrant. If he finds no such goods he is still protected for the warrant is his authority but his protection is limited in its scope. He cannot be liable in an action for trespass to property. But if he finds no goods and he procedes to arrest and detain the person named in the warrant then how could he claim any protection? He has acted ultra vires, flown in the face of the limited protection and authority afforded him by the warrant and lays himself immediately open to an action for false imprisonment and for malicious prosecution.

Of course if he brings himself within the scope of Section 33 of the Constable Force Act he is still protected. Section 33 reads:

> "Every action to be brought against any Constable for any act done by him in the execution of his office, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done either maliciously or without reasonable or probable cause; and if at the trial of any such action the plaintiff shall fail to prove such allegation he shall be non-suited or a verdict shall be given for the defendant."

Let us examine the evidence here to see if this Defendant can reasonably claim any such protection by bringing himself within the ambit or scope of section 33.

It was submitted that if the Plaintiff did make an offer of restitution, that per se, was sufficient to arouse suspicion and would have amounted to reasonable and probable cause for the arrest. But this forms no part of the Pleading filed and in any event the First Defendant had agreed under cross examination that "there were no sufficient grounds as nobody identified anything."

I believe the Plaintiff (and reject the Defence) when he says that he does not know of his "offering to make restitution to the 3 men who came with Ferquson." Such an offer does not accord with common sense. If 3 men accompanied by a policeman search premises for tyres which they claim have identifying marks on them and find no such tyres it is extremely unlikely that at such stage the owner of the tyres would offer compensation to the 3 men. I agree with the Defendant Ferquson when he says there were "no sufficient grounds as nobody identified anything". There was therefore no reasonable and probable cause for the arrest of the Plaintiff. See Broad v. Hamm (1839) 5 Bing N.C. 722, 725 Turber v. Ambler (1847) 10 Q.B. 252 Herniman v. Smith [1938] A.C. Section 33 cannot help the Defendant.

It appears that obliquely learned counsel for the Defendant was invoking the provisions of Section 34 of the same Act. Section 34 reads:

> "When any action shall be brought against any Constable for any act done in obedience to the warrant of any Justice, the party against whom such action shall be brought shall not be responsible for any irregularity in the issuing of such warrant or for any want of jurisdiction of the Justice issuing the same, but may plead the general issue and give such warrant in evidence at the trial; and on proving that the signature thereto is the handwriting of the person whose name shall appear subscribed thereto and that such person was reputed to be and acted as a Justice for the parish, and that the act or acts complained of was or were done in obedience to such warrant, there shall be a verdict for the defendant in such action who shall recover his costs of suit; provided that it shall be the duty of the Constable, if required so to do, in the execution of any warrant to him directed to produce the same to the party or parties taken into custody thereunder and to permit a copy thereof to be taken by him or them or on his or their behalf, either at the time of their capture or at any time afterwards, whilst the warrant remains in his custody.

The defence have failed totally to comply with the provisions of Section 34. They have failed (1) to give such warrant in evidence at the trial. (2) to prove that the signature thereto is the handwriting of the person whose name shall appear subscribed thereto. Section 34 likewise cannot assist the Defendants.

There will be a judgment for the Plaintiff. Careful thought has been given as to whether or not an award of exemplary damages as sought in the Statement of Claim ought to be made. I do not consider that the conduct of the Firstnamed Defendant though in a sense amounting to a contumelious disregard of the Plaintiff's rights is sufficient to justify an award of exemplary damages. He acted more in my view from an excess of zeal. See Broome v. Cassell & Co. Ltd. [1972] A.C. Rookes v. Barnard [1964] A.C. 1228 and Clerk & Lindsell 14th Edition paragraph 400. The Plaintiff's claim under the head of Special damage for loss of earnings, tyres and batteries and legal expenses all fail because in my view he has failed to prove them. I believe an award of $5000 under the heads of malicious prosecution and false imprisonment would meet the circumstances of this case.

There will accordingly be a judgment for the Plaintiff for $5000.00 with costs to be agreed or taxed.