

arrest. The police officer testified that he stopped the claimant when he saw him riding a bicycle that had no lights. He searched the claimant and found two parcels of vegetable matter resembling ganja. The officer testified that after he arrested the claimant, and while taking him to the police station, the claimant began to resist, a struggle developed and it was during that struggle that he struck the claimant with the baton. This scuffle led to the charges of resisting arrest and assaulting police.

3. Detective Watson did not take the vegetable matter he claimed to have found to the forensic laboratory. There is no evidence that he gave any instructions for that to be done. Shortly after he arrested the claimant, he went on six months vacation leave. While the detective was enjoying a bucolic existence, the charges against the claimant were dismissed on July 22, 1997. This dismissal laid the foundation for the present action for false imprisonment and malicious prosecution.

4. The issues, therefore are, the quantum of damages for assault and battery and whether the detective falsely imprisoned and maliciously prosecuted the claimant.

False imprisonment

5. The tort of false imprisonment is committed whenever a person is detained against his will without legal justification (see Carey P (Ag) *Flemming v Myers* (1989) 26 J.L.R. 525, 527C). The restraint must be total. In this case, it is agreed that Mr. Campbell was arrested and taken to the police station by Detective Watson. He was totally restrained. The sole question is whether this action was lawful.

6. It is agreed that on the night of March 12, 1997, the claimant rode a bicycle that did not have any light. It was this infraction of the law that caused Mr. Watson to stop the claimant. This was not the breach of the law for which the claimant was arrested; it was the vegetable matter resembling ganja that was allegedly found by the detective that led to the claimant's arrest. Mr. Watson testified that Mr. Campbell was walking peacefully, on his way to the police station. There were some officious bystanders. They incited Mr. Campbell. He became a "new" man. He began

to resist the police officer. It was during this resistance that the detective said that he struck the claimant. Here endeth the detective's version.

7. Mr. Campbell's account is quite different. He stated that Mr. Watson was standing at the gate of the Admiral Town Police Station. He said that the detective asked him who owned the bicycle. The detective, in effect, asked the claimant to produce evidence to support his account. Mr. Watson took the bicycle from him. He went home, got the receipt and returned. When he returned Mr. Watson was standing with two other police officers: Mr. Benjie and Mr. Porteous. On his return, he saw Mr. Watson holding on to a bicycle. Two men were standing nearby. Mr. Watson and the two other police officers took the two men into the station yard. The men came back out of the station yard without the bicycle.

8. The claimant says after he had been waiting on Mr. Watson for some time, he eventually told Mr. Watson that he had the receipt and the light. Mr. Watson's response would cause sailors to blush. The claimant would have none of this rudeness. He told Mr. Watson that he should not speak to him like that and he should tell his (Watson's) son what he told the claimant. At that point, according to Mr. Campbell, Constable Porteous stoked the passions of Mr. Watson. Constable Porteous said, "Don't mek the bwoy talk to you that way!" It was then Mr. Watson hit the claimant with the baton. The claimant fell to the ground. He tried to get up but fell. Mr. Watson and Constable Porteous took the claimant to the guardroom.

9. Mr. Watson took ice to place on Mr. Campbell's foot. Mr. Campbell rebuffed this first aid measure. There is an inconsistency in the claimant's evidence regarding when his foot was placed in a cast by doctors at the Kingston Public Hospital (KPH). In examination in chief he said that Mr. Watson and Mr. Benjie took him to KPH. His foot was placed in cast and discharged the same night.

10. In cross-examination, he said that when he was taken to the hospital by the police he was not treated. He was taken back to the police station without a cast on his leg. He changed this to say that it was after Miss Pearl Hylton (mother in law)

bailed him that he went to KPH. This inconsistency is not material and does not affect his credit on this point.

Analysis of the evidence

11. I have examined the account given by the police officer. It is not internally consistent. He said that he gave the informations charging Mr. Campbell with possession of ganja, assaulting police and resisting arrest to District Constable Weatherly and asked him to take them to the Half Way Tree court. There is evidence that the informations were taken to the court. Mr. Campbell says that the Clerk of Court read to him from a document and asked him if he was guilty or not guilty of smoking ganja or having ganja in his possession. The plea was not guilty. It is not clear why there would be a charge of smoking ganja. I need not resolve this gap since nothing turns on this.

12. Mr. Watson testified that he called the courts office on March 26, 1997 and he was told that no papers concerning Mr. Campbell were submitted. This would mean that as far as Mr. Watson's state of mind is concerned, Mr. Campbell has not been before the court. Let us now look at the conduct of the police officer given his state of mind. The detective did not follow up to find out what happened to the case. There is no evidence that he contacted District Constable Weatherly to find out what he did with the case. The detective did not make any calls to the Admiral Town Police Station to find out the state of his case. Instead, he proceeds on leave. He returned in August of 1997. After he returned from leave, he made no enquiries about the case. He did not contact the Half Way Tree courts office. He did not contact the district constable. He did not speak to the station officer. Mr. Watson did not take the parcels to the forensic laboratory, before, during or after his leave and neither did he ask anyone to take the parcels to the forensic laboratory.

13. Is there a reasonable and rational explanation for this conduct of the police officer other than that he really did not find any parcel of vegetable matter? Mr.

Wilson submitted that this level of inactivity from the police officer is more one of lack of diligence rather than the police officer not being truthful.

14. This explanation is not acceptable. Here is a case in which the police officer is accused of falsely imprisoning and maliciously prosecuting the claimant. I would have thought that faced with these allegations the police officer would have made every effort to explain his conduct. The witness statement of the police officer and his amplified testimony at the trial did not address satisfactorily his unusual behavior. The officer's behaviour is inconsistent with an assertion that he found vegetable matter and that he thought that it was ganja.

15. I accept the claimant's assertion that he was hit because he dared to reprimand Mr. Watson for his (Mr. Watson's) less than polite language. I accept that the charges of assaulting police, resisting arrest and possession of ganja were an attempt to justify the arrest and beating of Mr. Campbell. There was no ganja, no resistance and no assault. I find that Mr. Campbell was falsely imprisoned. There was no lawful justification for the detention.

Malicious prosecution

16. Mr. Wilson submitted that Forte J.A.'s interpretation of section 33 of the Constabulary Force Act in *Flemming's* case is of limited application. His Lordship held that, under section 33, claimant suing a police officer for malicious prosecution is required to prove *either* that the defendant acted maliciously *or* without reasonable and probable cause. Mr. Wilson relied on *Halsbury's Laws of England* (4th ed) Vol. 45 paragraph 1348 to say that the Justice of Appeal was in error. That paragraph says that the claimant must prove:

- a. the prosecution of the claimant by the defendant of a criminal charge in court of competent jurisdiction;
- b. the proceedings were terminated in the claimant's favour;
- c. the defendant instituted the proceedings maliciously;

- d. there was an absence of reasonable and probable cause; and
- e. the claimant suffered damage

17. These requirements were set out by Wooding CJ in ***Wills v Voisin*** (1963) 6 W.I.R. 50, 57. Mr. Wilson submitted that all five elements must be established before the claimant can succeed. He said that Forte J.A.'s formulation required either (c) or (d) whereas Halsbury required all five. According to Mr. Wilson Forte J.A.'s interpretation of section 33 places this area of the law in Jamaica at variance with the established orthodoxy laid down in ***Halsbury's***. It was and is an unnecessary, perhaps even undesirable, innovation. Mr. Wilson is not alone in his criticism of the Justice of Appeal. Professor Gilbert Kodilinye, professor in property law at the University of the West Indies and author of ***Commonwealth Caribbean Tort Law***, Cavendish Publishing Limited (3rd ed), 2003, has a similar view (see page 59 – 60).

18. I must say that this criticism does not stand up to serious scrutiny because Forte J.A. expressly recognised the common law position as stated in ***Glinski v McIver*** [1962] 1 All ER 696 by Lord Devlin. The Justice of Appeal then immediately contrasted the position in Jamaica by referring to section 33 of the Constabulary Force Act. What Mr. Wilson and the learned professor have failed to do is to demonstrate in what way Forte J.A. misinterpreted the statutory provision. The professor states in his text, that if Forte J.A. is right, then the police officer is in a worse position under the statute, than at common law. That may very well be so, but it is not quite the same thing as establishing that the Justice of Appeal was in error in interpreting section 33 of the Constabulary Force Act. The closest the professor comes to an interpretation of the section is when he states that the purpose of the statute was to give additional protection to constables, not less (see page 60 of his text). I do not see how the professor can say that the purpose of the Act was to give the police more protection than at common law when section 33 plainly does otherwise.

19. Morgan J.A. apparently shared the same view as Forte J.A. when she stated much the same thing (see *Flemming* at page 538I). The third member of the court, Carey P (Ag) did not express any view on section 33 of the Constabulary Force Act. His disagreement was in respect of the claim itself and not the meaning of section 33. Carey P (Ag) accepted that on the facts, the prosecution was malicious but he did not say elaborate on the elements of the tort.

20. In *Flemming* then, two members of the Court of Appeal indicated that the claimant can succeed if he can show *either* malice *or* the absence of reasonable and probable cause. Assuming that Mr. Wilson is correct that the Court of Appeal was incorrect in its interpretation, the rule of law in a hierarchical system of courts in a common law jurisdiction depends on lower courts applying the law as declared or stated by higher courts. This interpretation of section 33 is binding on me. I should make it clear that I do not accept that the Court of Appeal was in error in its interpretation of section 33.

21. These are the reasons why I do not accept Mr. Wilson's submissions on this point. I should add that on the facts of this case as I have found them, the prosecution here was both malicious and without reasonable and probable cause. The common law position would have been met.

22. Because of my findings in relation to the false imprisonment, it follows in this case that the prosecution of Mr. Campbell was malicious. The police officer was seeking to cover up his battery of the claimant by alleging that he was arresting him for possession of ganja.

Assessment of damages

23. I will deal first with the battery.

a. nature and extent of injuries sustained.

The claimant received a broken leg and no other injury.

There were two medical reports. They are quite revealing. The reports show that the claimant was attempting to exaggerate the seriousness of his injuries. Paragraph 10 of the statement of claim alleged that Mr. Campbell had a permanent limp and a 15% - 20% partial disability of the left lower limb. Dr. Nyi Nyi Than and Mr. Rose both say that the claimant has no permanent disability.

Dr. Nyi Nyi Than

This report states that the claimant presented at the KPH Orthopaedic Clinic with a history of being struck on his left leg with consequential pain and swelling of the left leg. X rays showed a comminuted fracture of the distal one third of the left tibia. Subsequent radiographs showed that healing was progressing satisfactorily.

Mr. Rose's report

Mr. Rose's report in particular is quite detailed. He saw the claimant in July 2001, four years after the injury. Mr. Rose noted that the claimant said that whenever he stood or walked for approximately ten to fifteen minutes he suffered pain and swelling of the distal left leg. However, this did not limit the claimant's ability to walk or restrict the distances that the claimant walks.

b. nature and gravity of the resulting disability

Mr. Rose stated in his report that "his permanent partial percentage disability [is] zero percent." There was no neurovascular damage. There was full dorsi flexion and plantar flexion of both ankles. There was mild tenderness along the antero medial border of the tibia at the junction of the proximal two thirds and distal one third, which was the site of the injury.

The fracture was stable and clinically united. In light of these two reports, it is difficult to see how the claimant could have pleaded that he suffered 15% - 20% partial disability of the left lower limb. The reports do not support the claimant's pleadings.

c. pain and suffering endured

The claimant suffered pain when his leg was broken. He alleges that in April 1999 the toes on his left leg became swollen. He is still having swelling of his left leg. When he sits down, he says that his foot burns him.

d. loss of amenity

Mr. Campbell says that he can no longer run. He used to play football a lot as well as cricket. These he can no longer do so.

e. pecuniary prospects

Special damages

The claimant can recover his cost of travel to the hospital and cost of crutches. These were agreed. I also award the sum of \$18,000 for cost of extra help. The total special damages for these three heads are \$19,700.

There was a claim for loss of earnings. At the time of the injury, the claimant says United Protection Limited of 22 Beechwood Avenue employed him. He earned \$4,000 per week. No documentary support for this was forthcoming and there was no explanation for this lack of support. I would expect that if he were an employee of a company there would some evidence from the company of his earnings. Failing that, a pay slip or pay advice. *Lawford Murphy v Luther Mills* (1976) 14 JLR 119 is still the law. The claim for loss of earnings based on an income of \$4,000 per week is not recoverable because it was not properly proved.

General damages

Mr. Campbell cited five cases dealing with fractures. Of these five, two dealt with bimalleolar fracture of the left ankle, which is a different part of the foot from the tibia. One dealt with a compound fracture of the fifth metatarsal of the left foot. The fourth concerned a minor fracture of the tip of the right fibula. Nothing more will be said about those cases. The case of some value is *Lindel Garibaldi v Anthony Nicholson* Suit No. C.L. 1994/G 216 (assessed on April 8, 1997). The award then was \$220,000. The CPI at the time was 1031.6. The most recent CPI is September 2004 at 1909.2. The current value of the award is \$407,552.88. The injuries in *Garibaldi* were multiple abrasions over left forearm, right hand and right knee. There was also a fracture of the left tibia and fibula. The claimant in *Garibaldi* was totally disabled for 6 months, 30% disabled for a further two months and 10% for another two months.

The current case has only a fracture of the left tibia with none of the other disabilities of Garibaldi. This immediately suggests that Mr. Campbell's submission that the claimant here should receive \$800,000 for pain, suffering and loss of amenity is not sustainable. The claimant's fracture has healed perfectly. The reports of Dr. Than and Mr. Rose speak volumes to the good work done by the medical team that treated Mr. Campbell. This means that using *Garibaldi* as a guide, the claimant here is awarded \$300,000 for pain, suffering and loss of amenity.

f. false imprisonment and malicious prosecution

Mr. Peter Wilson has put before me a number of cases in which awards for false imprisonment and malicious prosecution have been made. They were decided in the period 2002/2003. He says that these awards cannot be updated using the CPI. When asked why, he said that that was not the

practice of the Supreme Court. I have examined the case of ***Devon McFarlane v Frederick Barnett*** (1991) 28 J.L.R. 536. In that case, the Court of Appeal approved the use of the Consumer Price Index to update awards taking into account inflationary trends.

There is nothing in the case to suggest that it is limited to personal injury cases, although ***McFarlane*** was a personal injury case. I am not aware that the mathematical formula used to update awards in personal injury cases is inapplicable to other kinds of awards. If one examines the formula used, one sees that what it is seeking to do is to give the current value of an award made in the past. This is why the formula is *current CPI divided by old CPI, which is then multiplied by the award*. In other words, it is telling what the current value of a past award is having regard to the inflation in the economy. Or put another way, the formula is telling us what amount of Jamaican dollars today (i.e. the time when current award is being made) would be required to be the equivalent of the Jamaica dollar award in the past. If, therefore, the formula is mathematically sound for this purpose in personal injury I cannot see any logical objection to applying the formula to false imprisonment or malicious prosecution awards. Unless this is done, I do not see how it will be possible to compensate similar instances with similar sums of money. Using the formula in false imprisonment and malicious prosecution cases would provide some degree of consistency in the awards. To find the current value of an award made in a false imprisonment and/or malicious prosecution case is not the same thing as applying that value, without more, to a given case. The purpose of the calculation is simply to have an idea of what the award then is worth now. Naturally, the facts and circumstances of the case under assessment must be taken into account.

In response, therefore, to Mr. Wilson, the antiquity of a practice, by itself, is never a good reason for continuing it. Since no mathematical or legal impediment has been identified to me, I conclude that it is appropriate to update awards in false imprisonment and malicious prosecution cases in order to have some idea of the current value of old awards. I must say that the cases cited by Mr. Wilson have not been particularly enlightening. What has been presented are the final judgments and the statements of claim. No written judgment or a note of what the particular judge held in any of the cases was put before me. Unfortunately, no one has sought to collate awards for these types of cases as is done in personal injury cases by Mr. Justice Karl Harrison and Mrs. Ursula Khan. I am therefore left to decide, quite arbitrarily, what I think is a fair award in the circumstances of this case. This method of assessment is not consistent with reason. It is as logical as a coin toss or drawing straws.

The claimant was falsely imprisoned for what could not have been longer than 2 ½ / 3 hours. On his own evidence, he was released on bail some time around midnight on March 12, 1997. I award the sum of \$70,000 for false imprisonment. I award the sum of \$90,000 for malicious prosecution.

When one looks at the circumstance of this case, I believe that an award for aggravated damages is appropriate. I award the sum of \$90,000.

Conclusion

24. The claimant has established on a balance of probabilities a case of false imprisonment and malicious prosecution against Mr. Watson. Liability for the battery was admitted. My award is as follows:

- a.** special damages \$19,700 at 6% interest from March 12, 1997 to January 6, 2005.
- b.** \$300,000 at 6% interest from November 19, 1998 to January 6, 2005;

- c.** \$70,000 for false imprisonment;
- d.** \$90,000 for malicious prosecution; and
- e.** \$90,000 for aggravated damages.
- f.** Costs to the claimant to be agreed or taxed.