Privy Council Appeal No. 32 of 1997

(1) Spl. Cpl. Aggrey Crooks and
(2) The Attorney-General *Appellants*

v.

Jennifer Ebanks *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE
24th March 1999, Delivered the 30th March 1999

Present at the hearing:-

Lord Slynn of Hadley
Lord Steyn
Lord Clyde
Lord Hutton
Sir Andrew Leggatt

*[Delivered by **Lord Hutton**]*

On 24th March 1999 their Lordships agreed humbly to advise Her Majesty that the appeal should be dismissed and that they would deliver their reasons later. This they now do.

On the morning of 28th September 1991 a Special Corporal in the police force, Aggrey Crooks, was on duty in plain clothes in Coronation Market, Kingston, armed with a revolver. He saw a robber seize a gold chain from another man and run off. Corporal Crooks drew his revolver and pursued the robber. During the chase Corporal Crooks tripped over rubbish lying on the ground and fell, and the revolver fell from his hand and went off discharging one round. Most unfortunately, the bullet struck Mrs. Jennifer Ebanks, who was shopping in the

market, and she sustained a wound to her head with resultant serious brain damage.

Mrs. Ebanks commenced proceedings in the Supreme Court of Jamaica against Corporal Crooks and the Attorney-General. The statement of claim contained the following paragraphs:-

> "2. That the First Defendant was at all material times acting in the performance of his duties as the servant and or agent of the Second Defendant.
>
> 3. That the liability of the Second Defendant arises by virtue of the Crown Proceedings Act in that the First Defendant is a Special Corporal in the Island Constabulary Force which falls under the Jurisdiction of the Ministry of National Security and Justice which is a Department of the Government of Jamaica.
>
> 4. That on the 28th of September, 1991, at approximately 11.00 a.m. the First Defendant wrongfully and negligently shot the Plaintiff in the Head, while she stood in a crowd at the Coronation Market in the parish of Kingston.
>
> 5. That as a result of the aforesaid acts the Plaintiff has suffered severe head injuries, neurological damage, has lost materially the ability to support herself, has suffered loss and damage and has been put to expense."

Paragraphs 3 and 4 of the Defence were as follows:-

> "3. Save that it is admitted that the Plaintiff was shot on the 28th day of September, 1991 at the Coronation Market paragraph 4 of the Statement of Claim is denied. The Second Defendant will contend that on the date and place aforementioned the First Defendant while in the process of giving chase to an alleged robber, tripped over some rubbish in the market and fell face down. On falling one shot went off from his firearm and the Plaintiff was hit.
>
> 4. Paragraph 5 of the Statement of Claim is denied for reasons aforesaid."

However at the trial the defendants were given leave to amend the Defence by adding a plea under section 33 of the Constabulary Force Act 1935, and paragraph 4 was amended to plead:-

> "Paragraph 5 of the Statement of Claim is denied for reasons aforesaid. Further that the Writ of Summons and/or Statement of Claim discloses no cause of action against the Defendants by virtue of Section 33 of the Constabulary Force Act."

Section 33 of the Constabulary Force Act 1935 provides:-

> "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."

At the trial Theobalds J. held in a judgment, of which there is only a short note, that section 33 applied to Mrs. Ebanks' action and dismissed her claim on the ground that she had failed to plead and prove that the act done by Corporal Crooks was done "either maliciously or without reasonable or probable cause".

In the Court of Appeal, Carey and Forte JJ.A., with Patterson J.A. dissenting, allowed Mrs. Ebanks' appeal and ordered the case to be remitted to be tried on its merits. The judgments in the Court of Appeal contained a helpful discussion of the historical background to section 33 of the Constabulary Force Act and of the nature of an action on the case. Carey and Forte JJ.A. decided, in essence, that the section related only to a direct act by a police officer against another person in the execution of his office and that as an action on the case had been the only appropriate remedy under the common law for an indirect act the section was not intended to apply to such an act. Carey J.A., referring to the judgment of Theobalds J., also stated:-

> "The effect of this judgment is that in actions for negligence against police officers, a plaintiff would be obliged to plead and prove that the 'act' i.e. negligence was done maliciously or without reasonable or probable cause. I must confess that I would entertain considerable difficulty in conceiving of the possibility of such proof for I cannot envisage negligence being committed either maliciously or without reasonable or probable cause."

In his dissenting judgment Patterson J.A. stated:-

> "The Legislature must have realized that a constable while zealously performing his statutory duties, may nevertheless overstep his legal bounds and infringe upon the rights of others, thus becoming open to an action in tort. The Legislature seems to have taken the view, as section 33 strongly suggests it did, that it was necessary, therefore, to balance the interest of the individual who may be unfortunately injured against the interest of the general public on whose behalf the constable acts in the execution of his office. The express provisions are intended to protect constables, who are servants of the Crown, from vexatious proceedings for acts done without malice, or with reasonable or probable cause, in the due execution of their public duties. ... If [a constable] acts fairly within the confines of his statutory powers, mere negligence, even if established, would not alone create any liability."

It appears from a later passage in his judgment that Patterson J.A. considered that the plaintiff might have succeeded if she had pleaded that the negligent conduct was without reasonable or probable cause. And he concluded his judgment by stating that the case seemed to be a proper one for the Crown to consider making an ex gratia payment to the plaintiff.

It appears clear that the wording of section 33 is derived from earlier legislative provisions which gave protection to justices and police officers in respect of acts done by them in the course of the execution of their duties. Section 1 of the Justices Protection Act 1848 provided:-

> "Whereas it is expedient to protect Justices of the Peace in the Execution of their Duty: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That every Action hereafter to be brought against any Justice of the Peace for any Act done by him in the Execution of his Duty as such Justice, with respect to any Matter within his Jurisdiction as such Justice, 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 maliciously, and without reasonable and probable Cause; and if at the Trial of any such Action, upon the General Issue being pleaded, the Plaintiff shall fail to prove such Allegation, he shall be nonsuit, or a Verdict shall be given for the Defendant."

Section 31 of the Constabulary Force Law 1867 of Jamaica provided:-

> "Every action to be brought against any officer, sub-officer, or constable of this force, 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."

Their Lordships are of opinion, like the majority of the Court of Appeal, that section 1 of the 1848 Act gives guidance as to the application of section 33 of the Constabulary Force Act 1935. It is clear that section 1 of the 1848 Act related to an act done by a Justice of the Peace with the intent of executing his duty as a Justice, and did not apply to some act which was merely incidental to his duty as a Justice. Thus if a Justice had knocked over a passer-by by a negligent act as he entered the courthouse he could not plead that the act was done by him "in the execution of his duty as such Justice". Their Lordships consider that the same principle applies to a constable who, like Corporal Crooks, injured a third person by an act not

done deliberately in the execution of his office, but accidentally. Corporal Crooks had no intention of discharging his firearm at the time he fell in the course of carrying out his duties, and the discharge happened as a pure accident due to his tripping and falling, and the revolver falling from his hand. The fact that he was carrying his revolver in the performance of his duties, so that the Attorney-General would be vicariously liable for his negligence, does not mean that when the revolver was accidentally discharged it was discharged in the execution of his office as a constable within the meaning of section 33.

The interpretation and application of a somewhat similar section to section 33 of the Constabulary Force Act was considered by the High Court of Australia in *Trobridge v. Hardy* (1955) 94 C.L.R. 147. In that case the following section had been incorporated in the Police Act 1892-1953 by virtue of section 47 of the Interpretation Act 1918-1948 and section 138 of the former Act:-

> "No action shall lie against any justice of the peace, officer of police, policeman, constable, peace officer, or any other person in the employ of the government authorized to carry the provisions of this Act, or any of them, into effect or any person acting for, or under such persons, or any of them, on account of any act, matter, or thing done, or to be done, or commanded by them, or any of them, in carrying the provisions of this Act into effect against any parties offending or suspected of offending against the same, unless there is direct proof of corruption or malice ..."

In his judgment Fullagar J. stated at page 157:-

> "But, although a belief that his act is authorized by law may, even if it is not based on reasonable grounds, bring a constable or other official within a protective statute such as that now under consideration, it is essential not only that such a belief should be honestly entertained, but that the purpose of the act done should be to vindicate and give effect to the law. The statement of the general position by Erle C.J. in *Hermann v. Seneschal* (1862) 13 C.B. (N.S.) 392 [143 E.R. 156] has often been referred to in later cases, and has never, I think, been doubted. That learned judge

> said:- 'I think the governing question for the jury was, whether the defendant really believed that the facts existed which would bring the case within the statute ..., and honestly intended to put the law in force; and that, if the jury found that the defendant did so really believe, and did so honestly intend, then the defendant was entitled to a verdict' (1862) 13 C.B. (N.S.), at pp. 402, 403 [143 E.R. at p. 160]. In *Theobald v. Crichmore* (1818) 1 B. & Ald. 227 [106 E.R. 83], Lord Ellenborough C.J. said:- 'The object' (sc. of the protective statute) 'was clearly to protect persons acting illegally, but in supposed pursuance, and with a *bona fide* intention of discharging their duty under the Act of Parliament' (1818) 1 B. & Ald., at p. 229 [106 E.R., at p. 84]."

In the present case the dropping of the revolver and the discharging of the round were not for the purpose of vindicating and giving effect to the law.

Their Lordships are further of opinion that the interpretation given to section 33 by the majority of the Court of Appeal is supported by the consideration that in the historical context of the distinction between an action on the case and an action for trespass, a claim in respect of consequential injury arising from negligence would have been brought as an action on the case. Therefore it would have been unnecessary to provide in section 33 that: "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", if that section was to apply to a claim in negligence for consequential injury.

The claim brought by the plaintiff for the grave injury which she sustained was far removed from being a vexatious action, and their Lordships are of opinion that the decision of the majority of the Court of Appeal will not open the door for other persons to bring unmeritorious claims against the police, because if such claims were to be brought there is power to strike them out on the grounds stated by the House of Lords in *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53.