

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. CL E 219 OF 2001

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|---------|------------------------------------|---------------------------|
| BETWEEN | JOHN CROSFIELD | CLAIMANT |
| AND | THE ATTORNEY GENERAL OF JAMAICA | 1 ST DEFENDANT |
| AND | CORPORAL ETHEL HAMILTON | 2 ND DEFENDANT |

Miss Marion Rose-Green instructed by Marion Rose Green and Co; for
Claimant

Miss D. Archer instructed by the Director of State Proceedings for the
Defendants

***False Imprisonment – Malicious prosecution – Aggravated and
exemplary damages – Interests and Costs***

Heard: 7th October 2008, written submissions received on 23rd January
2009, Oral Judgment delivered on 10th September 2009

CORAM: MORRISON, J (Ag.)

The vexata quaestio is whether the circumstances of the arrest of the Claimant by the second defendant can be justified under the aegis of the Constabulary Force Act. Under section 13 thereof, the second defendant claims to have arrested and charged the Claimant. The Act, so called hereinafter, states in part: "The duties of the police under this Act shall be to... detect crime, apprehend or summon before a justice, persons found committing any offence or whom they may reasonably suspect of having

committed any offence..." Thus, the police can avail themselves of the defence of legal justification.

Following the decision in **Peter Fleming v Det. Cpl. Myers and The Attorney General (1989) 26 JLR p. 525** and quoting therefrom, "the onus of proving the absence of legal justification would be on the appellant but once he showed that the period of detention was unduly lengthy an evidential burden was cast on or shifted to the defendant to show that the period (of detention) was reasonable".

Again, under section 33 of the Act, "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 an 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."

In this respect the Judgment in the **Peter Fleming** case, supra, is instructive. In part (iv) of their ratio decedendi, Carey, P (Ag) as he then was, Forte and Morgan, JJA, expressed themselves in this fashion: "by virtue of SS. 33 of the Constabulary Force Act, in order to succeed in an action for malicious prosecution the appellant must prove that the respondent acted either maliciously, or without reasonable or probable cause. Malice covers not only spite or ill will but also other motive other than a desire to bring a criminal to justice."

Now, it is trite law that in civil proceedings the standard of proof is on a balance of probabilities or, to put it another way, which of the versions of the event as between the Claimant and the defendants, is more likely than not.

As already shown, the Claimant bears the burden of proof in respect of the charges of false imprisonment and for malicious prosecution.

For the tort of false imprisonment to triumph it must be shown that the Claimant was detained against his will without legal justification. The legal justification may be pursuant to a valid warrant of arrest or where by statutory powers a police officer is given a power of arrest in circumstances where he honestly and on reasonable grounds believes a crime has been committed.

In relation to the action for malicious prosecution the Claimant to succeed must prove the prosecution by the Defendant of a criminal charge against the Claimant before a tribunal into whose proceedings the criminal Courts are competent to inquire; that the proceedings complained of terminated in the Plaintiff's favour; that the defendant instituted or carried on the proceeding maliciously; that there was an absence of reasonable and probable cause for the proceedings; and, that the Plaintiff has suffered damage: see **Halsbury Laws of England, 4th Edition; paragraph 134.**

The Evidence

John Crosfield

At time of incident he was employed to Environmental Security Company Limited. His avocation was as a Disc Jockey. His stage name at the time was 'Red

Danger.' He produced Jingles for Jamaica Aid Campaign and appeared on a video. However, this was after the criminal case that was brought against him by Inspector Ethel Halliman in the Half Way Tree Resident Magistrate Criminal Court, was dismissed.

Essentially, he was unarmed at time of the incident. In fact he was so employed as an unarmed guard. He neither had gun, dog nor baton.

On May 2, 1996 at 11.00pm he along with another Security Guard were on duty. He was on the 8.00pm to 8.00am shift at the Queens Warehouse property of the Norman Manley International Airport. While there and at about 11.00pm he saw a car come to the said warehouse with four men aboard. Mindful of the men's avowed intention to engage in unlawful activity on the Queens Warehouse compound he sought the assistance of soldiers, then at the Jamaica Defence Force Air Base, (JDF), the Air Base being in close proximity to the warehouse, by going on foot to them. Soldiers accompanied him back to the warehouse, a warehouse that was not properly lit. The car had by this time left the vicinity of the warehouse. Shortly thereafter, the said car returned to the Queens Warehouse compound, resulting in his re-visit to the JDF Air Base in search of assistance. On his return to the Warehouse without the soldiers in tow, he saw (3) men trying to pry open the grill to the Warehouse. One of the three men was now guarding him by the Warehouse. While so being guarded the police car drove up to the Warehouse compound and the miscreants dispersed in various directions on the said Warehouse compound.

He was arrested by Inspector Halliman, plainly on her suspicion that he was involved in the break-in of the Warehouse proper. He was taken to the Norman Manley

Police Station the said night where he was detained and then taken to Court on the 6th May 1996. Eventually, he was granted bail in July 1996. Subsequently, all charges levied against him were dismissed by the Resident Magistrate Criminal Court.

Ethel Hamilton

She went to the Warehouse pursuant to a telephone call from the JDF Air Base Presumably from Sgt Garfield Coley of the JDF on 2nd May 1996 along with other police personnel including then Constable Garth Hibbert. Upon the police unit arriving at the Warehouse gate she "saw" the Claimant then in the company of the villains who were in the process of executing their evil scheme. In the result, all the men including the Claimant were taken into custody and charged with sundry criminal offences.

Garfield Coley

A Sergeant in the JDF who on 2nd May 1996 was on the JDF Air Base at Norman Manley International Airport. He basically confirms the Claimant's account of the Claimant's visit to the Air Base in pursuit of assistance from them as to his security concerns. He gave measured support to the Claimant on the two occasions in which he was solicited so to do. Snippets from his evidence will suffice:

- a) told man (Claimant) that it wasn't my responsibility to deal with situation (men on compound of warehouse.)
- b) became aware of situation when he was alerted to it by the (2) Security Guards in consequence by which he made a call to the Police Station.
- c) Security Guards told him and his colleague that criminals were trying to break into the Warehouse.

- d) at time of the approach of the police vehicle he saw men running all about (the compound of the Warehouse)
- e) Saw "a" Security Guard and two men going into a room.

Findings of Fact

In 1999 the Claimant was employed as a Security Guard to Environmental Security Company Limited. His avocation then was an entertainer. He, in the latter sphere of operation Court by the stage name of Red Danger. He even laboured to produce a jingle for the Jamaica Aids Campaign. Significantly, this was done in his post-incarceration days.

On the 2nd day of May 1996 the Claimant was deployed for duties on the 8.00p.m to 8.00am shift at the Queens Warehouse, Norman Manley Airport, Kingston. He was not in possession of the usual armamentaria such as a firearm or radio. He had one other colleague on the job with him at that time.

While he was yet on his tour of duty he observed that a private motor car drove up to the gate of the Queens Warehouse compound. Four men were in the car. The men spoke to the Claimant and left the scene in the said car. It is safe to infer that the action of the men prompted the Claimant to solicit the assistance of Jamaica Defence Force Personnel who were then doing duties on their Air Base next door to the said Queen's Warehouse premises.

The second defendant acting through overzealousness or, else, on the spur of the moment, acted precipitously in causing the Claimant to be detained, arrested and charged for offences she perceived to have occurred on the Queens Warehouse

compound without as much as seeking to confirm from the JDF personnel at the air base the telephone call which led to the presence of herself and other police personnel to the scene.

Also, she, the second defendant further compounded her error without ever ascertaining from the Claimant an account of his presence or his involvement in the criminal events there taking place and of which she was alerted to by the JDF personnel. Her failure so to do deprived the Claimant of an explanation which may have exonerated him from his appearance of involvement in the criminal endeavour.

The Law

As stated at the outset it is to be observed that the police has the power of arrest in circumstances of reasonable suspicion that a crime is being committed or has been committed.

In **Shaman Bin Hussein v Chong Fook Law (1970) A.C. 942**, Lord Delvin gave elucidation to the much bandied and used common law and legislative word "suspicion". He said that suspicion in its ordinary meaning is a state of conjecture or surmise where proof is wanting: "I suspect but I cannot prove". Suspicion arises at or near the starting-point of an investigation of which the obtaining of prima facie proof is the end (emphasis supplied).

However, from the JCF Act this suspicion has to be tempered; it must be reasonably suspected.

In Jarrett v Chief Constable of West Midlands Police (2003) EWCA Civ;

397 delivered on 14th February 2003, Potter LJ espoused in this way:... “the test as to whether there are reasonable grounds for suspicion to justify an arrest is partly subjective, in that the arresting officer must have formed a genuine suspicion that the person being arrested was guilty of an offence, and partly objective, in that there must be reasonable grounds for forming such a suspicion” (emphasis mine)

Did Inspector Halliman have reasonable grounds for forming such a suspicion? I fear not. It is my view that having received information from someone at the JDF Air Base it was incumbent on her to interview or investigate the soldier, the source of her information, with a view to obtaining prima facie proof to bolster her suspicion.

If one grants that Inspector Halliman happens upon a scene where, ostensibly, men are caught, as it were, in flagrante delicto, this to mind marks or, should engender, the starting point of an investigation. Surely, at this stage she ought to have asked of the Claimant an explanation for his ostensible presence among the intruders at the scene. Had she done so he would likely have told her that it was he who had initiated the operations by orchestrating the presence of the police and that his proximity to the intruder’s in that scenario was through duress.

Presumably, if not prudently, she would have sought confirmation of the Claimant’s account from the JDF personnel who were at their air base and near at that. But no, there was a rush to judgment - A heedless and mindless rush that obtunded the need for objectively investigating the matter instead of subjectively relying on the dynamic, the appearances, that intruded upon her in the anticipated criminality.

I therefore find that the Claimant was wrongly denied his freedom.

In **Peter Fleming v Myers and Attorney General (1989) 26 JLR 537-538,**

Morgan JA stated: "It is a question of fact and must be determined on the circumstances of each case...it is for the trial judge on an examination of all the circumstances as elicited from the police, to determine reasonableness and in his good sense and understanding to decide from the facts before him such time as he finds it can be held that a person was unreasonably detained".

Damages for false Imprisonment

The Claimant having been falsely imprisoned on 2nd May 1996 and having been brought to Court on the 6th May 1996, the period of detention would be four days, notwithstanding the fact that upon him being put before the Court on May 6, 1996 that he was remanded by the Court. Seeing that he was remanded pursuant to a judicial order his entitlement to damages is curtailed to and limited to that period as described above, that is, four days: **Diamond v Minter (1941) 1 KB 656.** Further, until that judicial order to detain is set aside the imprisonment is not tortious: **R v Governor of Brockhill, ex p. Evans (No.2) [1998] 4 ALL ER 993.** Lord Hobhouse formulates the principle in this way: "a period of detention will in principle be lawful if it is carried out pursuant to a Court order. A subsequent finding that court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention."

In **Maxwell Russell v AG, Claim No. 2006 HCV 4024 delivered on January 18, 2008,** the Claimant was imprisoned for (12) days. The Court awarded

\$75,000.00 for the first day and at a progressively reducing rate for succeeding days thereafter.

In **Herwin Fearon v The Attorney General of Jamaica, Claim No. CLF 046 of 1990 delivered on 31st March 2005** that Claimant was awarded \$280,000.00 for 3 ½ days detention. Today that sum yields \$450,000.00 that is approximately, \$130,000.00 per day.

In **Earl Hobbins v The Attorney General and Cons. Mark Watson, Claim No. 1998/ H 196 delivered on 20th January 2007,** that Claimant was awarded the sum of \$400,000.00 for a period of detention of (20) hours.

The Claimant has asked for a sum of \$600,000.00 whereas the defendant's suggest a figure of \$195,000.00. I think that the figures of \$600,000.00 and \$195,000.00 are in the first instance an over-exaggeration and in the second instance an underestimation. Using the benchmark of **Fearon's case** and bearing in mind the antecedents of the current claimant, the unproven trauma and undoubted embarrassment that he suffered, I think, that a sum of \$60,000.00 per day is apposite bearing in mind that every passing hour in custody etches its corrosive effect on the mind. Thus, I award the sum of \$240,000.00 for false imprisonment.

Damages for false Imprisonment

With respect to the tort of malicious imprisonment I cannot but say that the elements of the offence have been preeminently met in the case at bar.

He was taken to the Corporate area Criminal Court of Half-Way Tree which Courts proceedings the criminal Courts are competent to inquire into; that the proceedings therein in respect of this Claimant was terminated in his favour; that the defendant instituted the proceedings with malice or acted without reasonable or probable cause; that the Claimant suffered damage as a result.

It has to be borne in mind that Claimants who say that they were maliciously prosecuted simply cannot say, as in the instant case, that he caught diseases while incarcerated without tendering some proof hereof.

Indeed, as correctly pointed out by Ms. Archer for the defendants in her written submissions, the Claimant has to demonstrate a number of considerations. Regard for the fact that the Claimant was employed at the time of his arrest yet was able to get a better paying job after his release from custody is one such eminent consideration. Where and what is the diminution in reputation to the Claimant? Not one iota of evidence was presented in its proof. If one bears in mind the authority of **Keith Bent, Faithlyn Bent and Sonia Bent v Attorney General 1988 B 330, 384 and 385, delivered on December 2006** then the sum claimed by him is grossly exaggerated. Certainly, in the absence of proof, the charges against him did not prevent him from going about his normal business, it did not injure his hob prospects as in fact he got a better paying job, and lastly, it did not affect, on the evidence, his relationship with his wife and indeed, any member of the community of his residence

Again, the disparity of the figures suggested by both sides as just recompense for damages for malicious prosecution are eons apart, from \$100,000.00 to \$5,000,000.00.

In **Keith Nelson v Sgt Gayle and the Attorney General of Jamaica, Claim No. CL 1998/N-120, heard on April 16, 17 and 20, 2007,** Brooks, J awarded the sum of \$400,000.00 for malicious prosecution. In that case the Claimant was shot by a licensed firearm holder (a retired police officer) and then suffered the further indignity of being arrested by an agent of the state. Brooks, J opined that the agent of the state, the arresting officer, ought to have been put on inquiry on hearing the Claimants account before he rushed to arrest.

Not dissimilarly, Inspector Halliman's rush to arrest cannot be justified in light of her obvious failure to even at least ask the Claimant to account, let alone to seek to confirm from Garfield Coley details as to his observations and his knowledge.

But I digress. Comparisons are, as correctly observed, quite odious. While not condoning the untoward behaviour of the police towards any citizen of the land, by what rationale can there be justification for such incongruity where a man is shot then arrested and charged, as opposed to a man who is, without more, charged only so as to reflect on the one hand an award of \$400,000.00 and a solicited award of \$5,000,000.00? It seems to me that the answer to this lies in ones reputation and standing in the community.

Every arrest and indeed any arrest carries with it the odium of compromised respectability. Right thinking members of society frown upon criminal conduct. The greater one's standing in the society the greater the opprobrium.

In the instant case not one shred of evidence was led to persuade this tribunal as to his reputation and his standing in the community. In fact this Claimant suffered no diminution in these intangibles as after his release his avocation flourished.

So then I abide the authority of **Keith Nelson** and award the sum of \$500,000.00 for malicious prosecution.

Yet again, the legal costs asked for the Claimant are exorbitant, if not ill-advised. I know of no authority, save the Civil Procedure Rules, which govern this aspect of the Claimant's presentation. Accordingly, the cost pressed for must be based on the Civil Procedure Rules 2002 and as amended.

The Claim for exemplary damages is also rejected. It was not pleaded as is required: **See The Attorney General and Another v Noel Gravesandy (1982) 19 JLR 501.**

The loss of earnings claim is also disallowed. As a rule, if at the time of trial a Claimant's income level exceeds or is equivalent to that which he earned before his injury, he would not be entitled to compensation for prospective loss of earnings. However, he may maintain a claim for loss of earning capacity should he lose his job or take a job at less pay: **Moeliken v A. Reynolle & Co, Ltd [1997] ALL E.R 9.**

The evidence in the instant case does not lend itself to countenance such an award. It is obvious so not as to be stated.

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Thus, on a balance of probabilities, Judgment is hereby entered in favour of the Claimant with sum of \$240,000.00 for false imprisonment with interest thereon at 6% from 2nd May 1996 to the 21st June 2006 and thereafter at 3% from 22nd June 2006 to 30th July 2009; \$500,000.00 for malicious prosecution from the 22nd May 1996 to the 21st June 2006 at the rate of 6% and thereafter at 3% from the 22nd June 2006 to 30th July 2009.

Costs for (1) day trial as per Civil Procedure Rules to go to the Claimant.