JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 63/85

BEFORE: THE HON. MR. JUSTICE CAREY, PRESIDENT (AG.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

BETWEEN	PETER FLEMMING	PLAINTIFF/APPELLANT
A N D	DET. CPL. MYERS	1ST DEFENDANT/RESPONDENT
A N D	ATTORNEY GENERAL	2ND DEFENDANT/RESPONDENT

Dennis Daley for Appellant

Wendel Wilkins for Respondents

October 18 and December 18, 1989

CAREY P. (AG.):

The appellant was arrested on 10th October 1978 and taken to the Hope Bay Police Station. He was then asked why he had killed 'the man' at Shrewbury; the man was one Calvin Wilson who it was alleged, was murdered on 6th October 1978. He denied any participation in such a crime. From there, he was transferred to the Buff Bay Police Station where he alleged, and this was accepted by the judge, that he was beaten on the soles of his feet by Det. Cpl. Myers and another police officer. He was ill-used in this manner for some two weeks. His disgraceful treatment at the hands of the police resulted in such pain as necessitated visits in 1979 on two occasions to the Kingston Public Hospital where he was treated. It appears that he was first brought before the court on 23rd October 1978. He was discharged finally on 9th February 1979 after a preliminary enquiry into the charge of murder was held.

In his action against the officer concerned and the Attorney General the appellant claimed false imprisonment, malicious prosecution and assault. When the matter came before Walker J. on 14th and 15th October 1985, he entered judgment in the appellant's favour in the sum of $3,000.00 on the claim for assault but dismissed the other two claims, holding that the appellant had failed to discharge the burden of proving absence of reasonable and probable cause or malice on the part of Det. Cpl. Myers. The appeal is from that judgment.

Mr. Daley contended before us, firstly, that the evidence adduced on behalf of the plaintiff/appellant showed that there was no reasonable and probable cause for detaining him over the period 10th October to 23rd October. Moreover no reasons were ever advanced for the period of imprisonment by the respondents. Secondly, he said that even where the initial detention was justifiable, if the period of imprisonment was held to be unreasonable, then the action lay. On behalf of the respondents, it was conceded that false imprisonment lies where the period of imprisonment was unreasonable. Mr. Daley cited to us R. v. Holmes ex parte Sherman & anor. [1981] 2 All E.R. 612, a case dealing with habeas corpus which he felt was marginally useful. In that case, a divisional court of the Queen's Bench Division in England held that the requirement under the English Magistrates' Courts Act 1952 that a person taken into custody for an offence without a warrant shall be brought before a Magistrates' Court, "as soon as practicable", meant within forty eight hours. That case is of course quite unhelpful in the determination of the issue posed in this case.

In this country, the Constabulary Force Act obliges a police officer who arrests any person to take him to a police station or lock-up where he may be offered bail if a senior officer thinks it prudent. See Sections 23 and 24 of the Constabulary Force Act. In the present case, the appellant was arrested and charged for murder. It is a well-known fact that persons thus charged are not offered bail but the usual practise is to place the person before the court as soon as possible. However, there appears to be no general statutory prescription as to when a person charged, should be brought before the court. The Constitution by Section 15(3) requires a person not granted bail to be brought before the court "without delay." No hard and fast rule of inflexible application can be laid down; the matter can only be resolved on a consideration of all the facts of the case. Whatever may be the Constitutional position as respects compensation, where contravention of a fundamental right is alleged, we are concerned in this appeal with legal liability, if any, arising at common law.

The action of false imprisonment arises where a person is 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. Seeing that the arrest is a step in the judicial process, there is a duty on the part of the police officer to see that the person is brought before the court within a reasonable time. I have already adverted to the Constitutional provision in this regard. It follows ineluctably that there can be no false imprisonment where there is a lawful arrest, in the sense I have adumbrated.

There is an ancient doctrine of the common law which operated to remedy abuses of authority. Where an entry upon land or other prima facie trespass is justified by the authority of the law itself, if the person abuses his authority, he becomes a trespasser ab initio; his act is regarded as unlawful from the very beginning. The venerable authority for that proposition is The Six Carpenters' Case (1610) 8 Co. Rep. 146a; 77 E.R. 695 which came before Sir Edward Coke. This is undoubtedly a valuable tool in protecting human rights and a check on executive excesses. But it has to be used with some caution for the reason that it offends against another principle of the common law with which I will deal in a moment.

In Elias v. Pasmore [1934] 2 K.B. 164 the police had lawfully entered premises to arrest a man and while there, they seized a number of documents, some of them unlawfully. It was held that this did not render their original entry a trespass. Thus partial abuse of authority does not thereby render everything done under it unlawful.

In John Lewis & Co. Ltd. v. Tims [1952] A.C. 676, a woman suspected of theft in John Lewis', a large department store in London, was arrested outside, by store detectives and taken back into the shop, where the managing director considered the case, and having decided to prosecute her, immediately sent for police officers to whom she was handed over. The appeal raised the question whether a person who lawfully arrested another without a warrant discharged his duty if he acted reasonably for the purpose of bringing the arrested person forthwith before a Justice of the Peace or a police officer for the purpose of granting bail. It was held that inasmuch as she was not detained beyond a reasonable time for the managing director to make his decision, the owners of the shop were not liable in damages for false imprisonment.

Implicit in that decision is the opinion that if the court had held the period of detention to be unreasonable, the owners would be liable in damages for false imprisonment.

Lord Porter L.C. stated at p. 682:

> "The length of detention would only be material if it had been alleged that the two women were detained beyond such time as was reasonable to acquaint a director or manager of the circumstances and obtain his instructions whether to prosecute or not. No such suggestion was made, no evidence was called to deal with the point, and the respondent is, therefore, precluded from relying on it now. I only mention it because there may be cases in which it could be contended that, though a reasonable amount of detention would be justified, the actual detention wasunduly long. In such a case it would be the duty of the judge to determine whether there was or was not evidence from which it could be deduced that the detention was unduly long, and, if he held that there was, to leave the question to the jury whether in fact it was longer than was justified."
>
> [Emphasis supplied]

That statement, albeit obiter, is powerful support for the principle contended for by the appellant with the concurrence of the respondents. Reference may also be made to Chic Fashions (West Wales) Ltd. v. Jones (1968) 2 Q.B. 299 in which Lord Denning M.R. presiding over a strong court, which dismissed the principle of trespass 'ab initio' as an antiquarian doctrine, nevertheless allowed that the principle might still be efficacious, where goods were held by the police for far too long a period. He expressed himself in these terms:

> "Even if it should turn out that the constable was mistaken and that the other goods were not stolen goods at all, nevertheless so long as he acted reasonably and did not retain them longer than necessary, he is protected."
>
> [Emphasis supplied]

Here again, it is to be inferred that even where a police officer enters premises under a valid search warrant, and acts beyond his authority in seizing goods not included in the warrant but which he reasonably believes to be stolen and detains them, such detention for an unreasonable time, could result in an action for trespass. In that case, police armed with a search warrant to search for specific goods viz. "Ian Peters Ltd." goods but their search did not result in recovering such goods but they did seize other goods which they reasonably believed were stolen. Explanations given by the managing director regarding these goods, were accepted by the police and within three days of their seizure, the goods were returned by them. In an action for trespass against the police, judgment was entered for the plaintiffs with damages to be assessed. In allowing the appeal, the Court of Appeal held that a police officer entering premises by virtue of a search warrant for stolen goods, was entitled to seize not only goods which he reasonably believed to be covered by the warrant but also any other goods which he believed on reasonable grounds to have been stolen and to be material evidence on a charge of larceny or receiving against the person in whose possession the goods were found Although the principle of trespass ab initio was not an issue, the three members of the court dealt with it. Lord Denning M.R. at p. 313 expressed himself thus:

> "I know that at one time a man could be made a trespasser ab initio by the doctrine of relation back. But that is no longer true. The Six Carpenters' Case [8 Co. Rep. 146a.] was a by-product of the old forms of action. Now that they are buried, it can be interred with their bones."

Diplock L.J. (as he then was) at p. 317:

> "At common law, with the possible exception of the antiquarian doctrine of trespass ab initio [see Six Carpenters' Case (8 Co. Rep. 146a, 147c.)], subsequent events do not render unlawful an act which was lawful at the time when it was done, at any rate if those events were not themselves caused by the doer of the act. What application, if any, the rule applied in the Six Carpenters' Case (supra) has in the modern law of tort, may some day call for re-examination, ..."

Salmon L.J. (as he then was) at p. 320:

> "..... but in spite of the Six Carpenters' Case [8 Co. Rep. 146a, 147a.], I very much doubt whether the seizure of the goods, if wrongful, would have made their entry upon the premises wrongful ab initio. The general rule is that an act which is lawful at the time is not to be rendered unlawful afterwards by the doctrine of 'relation back': Wiltshire v. Barrett [1966] 1 Q.B. 312, per Lord Denning, M.R. (Ibid. 323)."

However, in Cinnamond v. British Airports Authority [1980] 2 All E.R. 368, Lord Denning M.R. referred to The Six Carpenters' Case (supra) with approval. In that case, six car-hire drivers who often went to the airport as a result of telephone calls made to them by hotels, would thereafter hang about the airport and solicit arriving passengers to hire them for the drive to London. Their activity was in breach of the Heathrow Airport - London Bye-laws 1972. Prosecutions under these bye-laws were wholly

ineffective to inhibit this practise. The airport authority finally prohibited them from entering the airport by a notice to that effect under a provision of the Bye-laws. The six drivers sought by a writ against the airport, several declarations, for example that the notice was invalid, that the airport had no authority to prohibit them from entering the airport. The declarations were not granted, and that decision was upheld on appeal.

It is clear from that decision that the doctrine of relation back is not as dead as it may be thought to be. But perhaps, the principle of law with which the principle of relation back is in conflict, should now be considered. The principle of relation back may be stated thus - an act which is lawful at the time is not to be rendered unlawful afterwards by what occurs afterwards. In Chic Fashions (West Wales) Ltd. vs. Jones (supra) Lord Denning M.R. in relation to this doctrine observed at p. 313:

> "The lawfulness of his conduct must be judged at the time and not by what happens afterwards. I know that at one time a man could be made a trespasser ab initio by the doctrine of relation back. But that is no longer true. The Six Carpenters' Case [8 Co. Rep. 146a.] was a by-product of the old forms of action. Now that they are buried, it can be interred with their bones."

In Wiltshire v. Barrett [1966] 1 Q.B. 312 Lord Denning M.R. who was denying the efficacy of the doctrine, expressed himself in this way at p. 323:

> "Such a proposition is contrary to the general rule that an act which is lawful at the time is not to be rendered unlawful afterwards by the doctrine of relation back, see Tharpe v. Stallwood [(1843) 5 M. & G. 760, 774], and it is decisively negatived by two cases which were cited to us by Mr. Stock."

The circumstances of that case are I think important. The plaintiff was arrested under Section 6 of the Road Traffic Act for being unfit to drive through drink, the arresting officer having formed that view from the appearance and behaviour of the plaintiff. At the police station to which the plaintiff was taken, he was examined by a doctor who was of the opinion that he was not unfit to drive through drink. He was thereupon released by the officer in charge of the station and the chief constable decided that there should be no prosecution. The plaintiff who had received injuries after being forced out of his car by the police officer, brought an action claiming damages for assault. One of the submissions and which found favour with the trial judge was, that under Section 38 of the Magistrates' Courts Act 1952, a person could not be released from custody without either being charged or entering into a recognizance, and as this section had not been complied with, the plaintiff's arrest was unlawful ab initio. The judge directed the jury to assess damages on the basis that the arrest was unlawful. The argument thus rested on the principle of relation back or the rule in The Six Carpenters' Case (supra). Davies L.J. at p. 329 in rejecting the argument as to 'relation back' said this at p. 329:

> "I have described the argument as a remarkable one, and so it is. It is contrary to principle as laid down in many authorities, both ancient and modern, for hundreds of years, as Lord Denning M.R. has explained. It is also contrary to common sense. For, if it is right, this consequence must follow. A man is arrested without a warrant by a police officer, say, on suspicion of felony. He is taken to the police station. Inquiries

> "there satisfy the officer in charge that the man is innocent. According to Mr. Fay's argument, the man cannot be released without further ado; and if he is so released, the original arrest becomes unlawful. So far from this being right, it is in my view plain that, once the officer in charge has satisfied himself that the man is innocent, any further detention in custody would be false imprisonment. In any event, it is impossible to see how a failure so to detain him could render unlawful the arrest which ex hypothesi was originally lawful."

The situation in the instant case is altogether different from cases like Wiltshire v. Barrett (supra). Here, there was reasonable and probable cause for the arrest and detention of the appellant for a reasonable time until he would appear in court when the Resident Magistrate would determine whether he should be remanded in custody or on bail. He was kept in custody for thirteen days. The appellant argued that he was kept in custody for an unreasonable time. Whether he was or not, is a question of fact to be considered in the light of all the facts. Does the doctrine of relation back apply in these circumstances?

I take the view on the authorities to which I have referred, that the principle of relation back is not dead neither has it been interred with the historical relics of past procedures viz., the old forms of action. Lord Denning who consigned it to the scrap heap of history in Chic Fashions (West Wales) Ltd. v. Jones (supra) resurrected it in Cinnamond v. British Airways Authority (supra) and Lord Diplock thought its application in the modern law of tort might call for re-examination, see Chic Fashions (West Wales) Ltd. v. Jones (supra) at 317. I respectfully agree. Lord Porter in John Lewis & Co. Ltd. v. Tims (supra)

thought that an action for false imprisonment lay if a person was detained for an unreasonable time and Lord Denning took the same approach in respect of an action for trespass where goods taken under a valid search warrant were detained by the police longer than necessary. See Chic Fashions (West Wales) Ltd. v. Jones (supra).

In my respectful view, an action for false imprisonment may lie where a person is held in custody for an unreasonable period after arrest and without either being taken before a Justice of the Peace or before a Resident Magistrate. In this case having regard to Section 24 Constabulary Force Act, he would have to be taken before a Court:

> ".... provided that nothing herein contained shall authorize any Officer or Sub-Officer in charge of a Police Station or lock-up to take bail for any person charged with a capital felony."
>
> [Section 24 so far as relevant]

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. I see nothing either in principle or in authority to prevent an action for false imprisonment. Indeed it is a valuable check on abuses of authority by the police.

In the present case, no evidence whatsoever was led by the respondents which explained the delay in putting the appellant before the court. Was the delay caused by further investigations? We know not. The learned judge dismissed the claim for false imprisonment (as indeed the claim for malicious prosecution) on the ground that the appellant failed

to discharge the burden of proving that the police officer acted either maliciously or without reasonable and probable cause. He did not consider whether an unreasonable delay in putting the appellant before the court, could amount to false imprisonment because it showed the absence of reasonable and probable cause or malice. 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 lenghty 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 appellant was placed before the court was unreasonable and accordingly the appellant's claim for false imprisonment succeeds and he is entitled to damages thereon.

As to the plaintiff's claim for malicious prosecution, it failed as the learned judge held for lack of proof as I previously indicated. He however believed the appellant that he had been tortured while in police custody. It seems to me to follow that the only reason for this torture or third-degree treatment, was the need to secure a confession as to the appellant's participation in the murder. What would be the purpose of such methods if the police had any reasonable and probable belief that the appellant had committed the murder or been involved in it? With all respect to the learned judge, I do not think he gave any significance to his own finding that:

> "..... while he was in the custody of the police at Buff Bay Police Station the Plaintiff was unlawfully beaten on the soles of both feet by the police using a stonehammer, and that he was otherwise assaulted by the police who stood on his legs and that this assault took place on a daily basis over a period of about two weeks.

> "That as a direct consequence of these assaults the plaintiff suffered pain in both feet for which he was treated at the Kingston Public Hospital."

In my view, this finding by the learned judge obliged him to hold that the plaintiff had indeed discharged the onus cast upon him by Section 33 of the Constabulary Force Act.

I must comment on one aspect of the trial. In an endeavour to show that the police had reasonable and probable cause for the arrest, learned counsel for the respondents (who appears also in this court) sought to adduce hearsay evidence of what the investigating officer told the witness, his colleague in course of investigation. But upon objection, being taken, the learned judge disallowed the question. I think the judge was wrong. The hearsay evidence was admissible not as proof of the truth of the contents but to explain his state of mind. It was necessary in that case for the officer to show that he had reasonable and probable cause for the arrest. See Subramaniam v. Public Prosecutor (1956) 1 W.L.R. 965 for the general proposition.

But in my view, there was sufficient evidence capable of showing the reason for the prosecution, viz. a statement made by an eye-witness, who, in the event, did not attend the preliminary examination. Set against that, must be the finding of the learned judge with regard to the allegation of torture and with which I have already dealt. I am of opinion that in that situation the judge must have found in favour of the appellant on the claim for malicious prosecution.

Mr. Daley next argued that the amount of $3,000.00 awarded in respect of the claim for assault was inordinately low and a higher figure should be substituted. In my view the learned judge was entitled to take into account the motives and conduct of the 1st respondent in this case. The motives

and conduct of this respondent aggravated the appellant's injury. A stone-hammer was employed to beat the appellant to induce a confession. It is deserving of punitive damages but those were not claimed. I think Mr. Daley is right: the amount awarded is inordinately low. I would increase it. In my view, an appropriate sum is $10,000.00.

In the result, I would accordingly enter judgment in favour of the appellant in the sum of $10,000.00 in respect of that claim. In respect of the other two claims I would enter judgments in favour of the appellant for $3,000.00 each. In the final result I would enter judgment for the appellant in $16,000.00. I would therefore allow the appeal. The appellant would be entitled to his costs both here and below.

Since preparing this judgment I have had the opportunity of reading in draft the judgments of Forte and Morgan JJ.A. and have the misfortune to disagree with them with regard to the claim for malicious prosecution. We however all agree that the award of $3,000.00 on the claim for assault was inordinately low and should be increased to $10,000.00 and that the claim for false imprisonment succeeds.

In the result therefore, the appeal is allowed. The judgment of the court below on the claim for false imprisonment is set aside and judgment entered for the appellant in the sum of $3,000.00. In the final result there will be judgment for the appellant in $13,000.00 with costs. The appellant is entitled to the costs of the appeal to be taxed if not agreed.

FORTE, J.A.

On the 10th October, 1989 the appellant was taken into custody by Detective Acting Corporal Samuel Dawkins acting on the instructions of Detective Corporal Myers, the 1st named respondent with whom he had been conducting investigations into the murder of Calvin Wilson. The defence alleged at the trial that the appellant and others were taken into custody as a result of information received during the course of the investigations. The appellant was taken to the Hope Bay Police Station where Sergeant Wright asked him why he killed 'the man at Shewsbury' and to that question he replied that he knew nothing about it. He was then told that he was being arrested and thereafter on the same day taken to the Buff Bay Police Station. He remained there until the 23rd October, 1978 when he was taken before the Resident Magistrate's Court for the first time. During this period he was subjected to several beatings by the 1st named respondent and others, which subsequently resulted in his claim for assault, the decision upon which is one of the subjects of this appeal.

The appellant remained in custody, having been remanded on the 23rd October, 1978 by the learned Resident Magistrate and was finally discharged at the Preliminary Examination into the charge for murder which had been laid against him.

In the action from which this appeal has arisen, the appellant claimed damages for malicious prosecution, false imprisonment and assault. He now appeals against (i) the judgment which found for the respondents in respect of malicious prosecution and false imprisonment and (ii) the quantum of damages awarded him in respect to his claim for assault.

The appellant filed several grounds of appeal two of which are of importance to the determination of the issues which were revealed in the evidence. These are:

(1) The learned trial judge having found as a fact that the defendants had failed to justify the arrest of the plaintiff and the fact of the arrest having been admitted on the pleadings was wrong to have adjudged that the plaintiff had failed to prove false imprisonment.

(2) The learned trial judge was wrong to hold that section 3 of the Constabulary Force Act cast an extra burden of proof on the plaintiff, in relation to claim for False Imprisonment and Malicious Prosecution and that as a balance of probabilities the plaintiff failed to discharge that extra burden of proof.

In the process of his submissions, learned counsel for the appellant in support of these grounds, contended that even though the initial arrest of the appellant may have been lawful, the evidence reveals that he was kept in custody at least until the 23rd October, 1987, before being taken before the Resident Magistrate and having regard to the provision of section 15 (3) of the Constitution of Jamaica, the appellant was entitled to damages in respect of the period of detention which was in excess of the length of time allowed by that provision.

Section 15 (3) of the Constitution states:

"Any person who is arrested or detained

(a) for the purposes of bringing him before the court in execution of the order of a court or;

(b) upon reasonable suspicion of his having committed or being about to commit a criminal offence, and who is not released shall be brought without delay before a court."

At common law, a police officer always had the power to arrest without warrant a person suspected of having committed a felony. In those circumstances however, he was compelled to take the person arrested before a Justice of the Peace within a reasonable time. The fundamental rights and freedoms which are preserved to the people of Jamaica by virtue of the Constitution, are rights and freedoms to which they have always been entitled. In D.P.P. v. Nasralla (1967) 3 W.L.R. 13 at page 18 Lord Devlin in delivering the judgment of the Board acknowledged this proposition. In referring to Chapter III of the Constitution which preserves the fundamental rights and freedoms he stated:

> "This chapter as their Lordships have already noted, proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law."

It is my view, therefore, that the words "without delay" as used in section 15 (3) ought to be construed in the light of the common law right which had previously existed and in arriving at the appropriate period which would constitute action "without delay", all the circumstances of the particular case should be examined in order to determine whether the person arrested was brought before the Court within a reasonable time.

Mr. Daley further contended that a period of seventy-two (72) hours was reasonable, conceded that the remand by the Resident Magistrate on the 23rd October, 1987 being a judicial act was unchallengeable and submitted that the appellant, not having been brought before the Court after the passage of that reasonable time, was thereafter falsely imprisoned and was entitled to a judgment in his favour.

He relied upon the case of R. v. Holmes ex parte Sherman & Another (1981) 2 All E.R. 612. In that case Donaldson L.J. at page 616 in commenting on the correct interpretation of the words "as soon as practicable," concluded as follows:

> "The arrested person has to be bailed or brought before a Magistrates' Court 'as soon as practicable'. Practicability is obviously a slightly elastic concept which must take account of the availability of police manpower transport and Magistrates' Court.
>
> It will also have to take account of any unavoidable delay in obtaining sufficient evidence to charge, but this latter factor has to be assessed in the light of the power of the police to release on bail conditioned by a requirement to return to the police station when further inquiries have been completed and a power to release and rearrest when the evidence is more nearly sufficient."

In my view, similar considerations would be applicable in respect of the provision of the Constitution and the common law in determining in a particular case whether an arrested person was taken before a Justice of the Peace or a Resident Magistrate within a reasonable time.

In the case of John Lewis & Co. Ltd v. Tims (1952) A.C. 676 a woman suspected of theft in a large department store was arrested outside by store detectives and taken back into the shop where the managing director considered the case and having decided to prosecute her, immediately sent for police officer to whom she was given in charge. It was held (i) that inasmuch as she was not detained beyond a reasonable time for the managing director to make his decision the owners of the shop were not liable in damages for false imprisonment (ii) where a person arrests another in exercise of the common law power of arrest his duty is to take the arrested

person before a justice or to a police station as soon as he reasonably can and not necessarily forthwith.

Lord Porter in determining the question stated thus:

> "What the common law requires is that if a man be arrested on suspicion of felony he should be taken before a tribunal which can deal with his case expeditiously. The question should be: Has the arrestor brought the arrested person to a place where his alleged offence can be dealt with as speedily as is reasonably possible? But all the circumstances in the case must be taken into consideration in deciding whether this requirement is complied with ..... Those who arrest must be persuaded of the guilt of the accused; they cannot bolster up their assurance or the strength of the case by seeking further evidence and detaining the man arrested meanwhile. ....."

In the case of Dallison v. Caffery (1964) 2 All E.R. 610 at page 617 Lord Denning M.R. treated the matter in this way:

> "When a Constable has taken into custody a person reasonably suspected of felony, he can do what is reasonable to investigate the matter and to see whether the suspicions are supported or not by further evidence. ..... So long as such measures are taken reasonably, they are an important adjunct to the administration of justice; by which I mean of course, justice not only to the man himself, but also to the community at large. The measures must, however be reasonable. In Wright v. Court (1825), 4 B & C. 596 a constable held a man for three days without taking him before the Magistrate. The constable pleaded that he did so in order to enable the private prosecutor to collect his evidence. That was plainly unreasonable and the constable's plea was overruled. In this case it is plain to me that the measures taken were reasonable. Indeed, the plaintiff himself willingly co-operated in all that was done. He cannot complain of it as a false imprisonment. I hold therefore, that the judge was right in rejecting the claim for false imprisonment."

It is clear then that in determining the reasonableness of the time that elapses, the circumstances of each case must be the guiding principle; and that any unreasonable delay in taking an imprisoned person before the Court will result in liability for false imprisonment.

In the instant case, the evidence revealed the existence of a statement from a potential witness, the information from which, together with other information received during the investigations formed the basis upon which the appellant was taken into custody. In those circumstances the 1st named respondent was entitled to arrest the appellant and take him to the police station and consequently the initial arrest would be lawful.

It is agreed on both sides that the appellant was kept in custody for a period of thirteen days before he was taken to Court. The appellant, however was required by section 33 of the Constabulary Force Act, to prove that the 1st named respondent acted either maliciously or without reasonable and probable cause. Section 33 states as follows:

> "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."

The learned trial judge in coming to his decision found that the appellant had not discharged this burden. The evidence disclosed no reason for the delay in taking the appellant before the Court. The appellant contended that he was kept in custody during which time he was beaten, in an effort to

extract information from him in relation to the murder.

In my view, having regard to the evidence that the appellant was detained for 13 days and in the absence of any explanation for the apparently long delay, the court ought to have found on a balance of probabilities that the defendant had no reasonable or probable cause to detain him for such a long period of time, albeit that the initial arrest was indeed lawful.

In determining, however, what damages, if any, the period of false imprisonment in this particular case should attract, consideration must be given to the fact that when the appellant was taken before the learned Resident Magistrate he was remanded in custody until the time he was released at the Preliminary Enquiry. In those circumstances it is reasonable to conclude that an earlier appearance would nevertheless have resulted in his remaining in custody. As there were other accused charged, there is nothing that could lead to a conclusion that the appellant's case would have been heard at an earlier date.

Nevertheless, the detention of a citizen by an arm of the State i.e. the Police Force, without reasonable or probable cause for so doing, is indeed an act which the Court ought to view as a serious breach of the citizen's right to liberty. Consequently, in spite of subsequent events, which kept the appellant in custody, he ought to be compensated for the period during which he was falsely imprisoned. Such compensation however, must be mitigated by the fact that he did remain in custody by a judicial remand when taken to Court.

In the circumstances I would award damages of $3,000.00.

Mr. Daley contended also that the appellant was not at the time of his arrest, told the reason for his arrest and consequently his arrest amounted to a false imprisonment. With this submission I do not agree. When the appellant was taken to the station he was in fact asked questions about the particular murder, and denied all knowledge of it. To my mind that amounted to sufficient notice to him of the reason for his detention and I therefore find no merit in this contention.

In respect of the claim for malicious prosecution something ought to be said.

In the case of Glinski-McIver (1962) 2 W.L.R. 832 at page 856 Lord Devlin in his speech affirmed that at common law in order to succeed in an action for malicious prosecution:

> " ..... the plaintiff must prove both that the defendant was actuated by malice and that he had no reasonable and probable cause for prosecuting .... "

However, by virtue of section 33 of the Constabulary Force Act (supra) in Jamaica, a plaintiff suing a police officer for malicious prosecution as a result of an act done in the execution of his duty is required to prove that the defendant acted either maliciously or without reasonable and probable cause.

The learned trial judge, as he did in relation to the claim for false imprisonment, found that the plaintiff failed to discharge that burden.

1. **MALICE**

For the purpose of malicious prosecution " 'malice' covers not only spite and ill-will but also any motive other than a desire to bring a criminal to justice" - Lord Devlin in Glinski - McIver (supra). There is no evidence revealed

in the transcript which establishes on the plaintiff's case, any spite or ill-will on the part of the 1st respondent nor indeed anything to suggest that the 1st named respondent acted with any motive other than to bring a criminal to justice. On the contrary, the evidence on behalf of the respondents established that the respondent acted on the information of others, when he arrested and charged the plaintiff for the offence of murder.

In those circumstances the learned trial judge was correct in coming to the conclusion, that the plaintiff failed to prove that the respondent acted maliciously in prosecuting the plaintiff.

2. **REASONABLE AND PROBABLE CAUSE**.

In dealing with the arguments in relation to false imprisonment, I have stated the view that the respondent had reasonable and probable cause for arresting the plaintiff, at the time when it was effected. It is the subsequent inordinate delay, which results in the respondent's liability for false imprisonment. This, however, would not be relevant to the claim for malicious prosecution. The appellant has the burden of proving that the respondent in prosecuting him acted without reasonable and probable cause.

It is the act of prosecution and not of imprisoning or detaining as in false imprisonment which must have been done without reasonable or probable cause.

The prosecution of the appellant, as testified to by the witness Samuel Dawkins was a result of information received by the 1st named respondent and himself. Included in that information was a statement of an eye-witness. Apart from his imprisonment and subsequent acquittal, the appellant advanced no evidence to show that the respondent had no reasonable or

probable cause for charging him for the offence of murder.

In my view that is not sufficient to discharge the burden.

In Glinski v. McIver (supra) Lord Denning opined as to the responsibility of the plaintiff in an action for malicious prosecution. He stated thus:

> "..... there are many cases where the facts and information known to the prosecutor are not in doubt. The plaintiff has himself to put them before the court because the burden is on him to show there was no reasonable or probable cause. The mere fact of acquittal gets him nowhere."

In the instant case, it is true that some questions were asked of the Defendant's witness to establish that through the 1st respondent and himself, no evidence was given at the preliminary examination to connect the plaintiff with the offence for which he was charged. However, the evidence also established that the 1st respondent had taken a statement from Randolph Scott who was described as an "alleged eye-witness" but who did not attend at the preliminary enquiry. Indeed, an attempt to reveal the content of that statement as given to the 1st respondent was made by the respondents, but was objected to by the plaintiff's counsel, and the learned trial judge incorrectly in my view ruled the evidence inadmissible. In the face of the evidence of action being taken on information received during the investigations, as well as the possession of a statement from an eye-witness, and in the absence of any evidence in that regard from the appellant, it is my opinion that Walker J. was correct in holding that the appellant had failed to discharged the burden placed on him by section 33 of the Constabulary Force Act.

In so far as the appellant's appeal in respect of the quantum of damages awarded in his claim for assault, I have had the opportunity of reading in draft the judgment of Carey P. (Ag.) and am in agreement with his reasons and conclusions in that regard. I would also award a sum of $10,000.00 in respect of the claim for assault.

MORGAN, J.A.:

In this case the Plaintiff/Appellant sued Detective Corporal Myers and the Attorney General for false imprisonment assault and malicious prosecution occurring as long ago as 10th October, 1978. He was on his legitimate business as a law-abiding citizen, walking on Shewsbury Road in the parish of Portland, so his pleadings say, when he was arrested by Detective Myers and taken to the Hope Bay Police Station, put in a cell and detained for 14 days before he was formally brought before a Resident Magistrate charged with the offence of murder of one Wilson and subsequently discharged.

At the trial of the action before Walker, J. he said he was taken to Buff Bay Police Station where he was beaten on the sole of his foot by Detective Myers every day for two weeks with a stone hammer, asked why he 'killed the man'; and generally questioned, with a tape recorder at his head. This no doubt was intended to extract a confession from him but he maintained that he knew nothing about the offence. After five months in custody a preliminary examination into the charge was concluded and he was discharged.

On his return home articles were missing from his home, his farm was trampled, and his many animals gone.

The records of the Court revealed that the matter first came before the Court presumably at Buff Bay on the 23rd October, 1978 and even though there was no note on the record to indicate that he was at Court, it is clear that he was, and also that he was discharged on the 9th February, 1979. The period for which he complains is 14 days (10th-

23rd October), as the Resident Magistrate had remanded him into custody on the 23rd.

Detective Myers has since migrated but Detective Dawkins said in evidence that he took the appellant into custody as a result of the murder of one Calvin Wilson who died on the 6th October, consequent on a robbery. He assisted Corporal Myers in the investigations and some men, including the appellant, were taken into custody and charged as a result of information received. However, an alleged eye-witness, one Rudolph Scott, from whom a statement was taken did not attend Court.

Respondent's counsel sought to show by this statement reasonable and probable cause and lack of malice but was not permitted to do so.

The learned judge accepted the plaintiff's claim for assault as having been inflicted over a two week period and awarded him $3,000.00. He rejected the claim for loss of crops etc. and also rejected the claim for malicious prosecution and false imprisonment having found that the plaintiff had failed to discharge on a balance of probabilities, the burden of proof cast upon him by Section 33 of the Constabulary Force Act. This section reads:

> "Every action to be brought against a Constable for any act by him in the execution of his office, shall be an action on the case 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."

Mr. Daley for the appellant capsuled his grounds of appeal in the submission that lack of reasonable and probable

cause was shown by the appellant in his being assaulted, a fact which the judge could have found from the evidence of the respondent as it stood unchallenged and no reasonable and probable cause was shown by the defence.

The submission continued, that there was no evidence to explain why he was detained for 13 days in the lock-up before being formally brought before a Justice of the Peace or Resident Magistrate, that he was unreasonably and unduly detained and that an action lay for false imprisonment/detention for any period which can be deemed 'unreasonable.' Counsel cited R. vs. Holmes exparte Sherman and Anor (1981) 2 All E.R. p. 612 and submitted that a period of detention over 48 hours would be regarded as "unreasonable" and that damages should be awarded.

Mr. Wilkins conceded that if the time is unreasonable then false imprisonment would arise but that it depended on a number of factors arising from the circumstances of the particular case.

Sections 23 and 24 of the Constabulary Force Act set out the procedure after arrest, and also the procedure where a person is in custody without a warrant. In the first procedure he can be offered bail by the Officer at the Police Station to which he is taken, and if he fails to secure it **he can be detained** until he is brought before a Justice of the Peace. In the other procedure, he must be taken before a Justice of the Peace by the officer in charge of the station who would offer bail if he thinks it is prudent. In cases of murder - a capital felony - the officer is not authorized to take bail. There is no provision in this Statute as to the time within which this must be done.

Donald L.J. in R. v. Holmes (supra) had before him an application for a writ of habeas corpus and was applying a statutory provision i.e. Section 38(4) of the Magistrate's Court Act 1950 which says:

> "where a person is taken into custody for an offence without a warrant and is retained in custody he shall be brought before a magistrates' court as soon as practicable

He proceeded to examine what was "practicable" in the English context, and even though he thought that much could be said for a change in the law, he commented that the judges and the police "have to live not only with, but by the law as it is" and found that the maximum period of time between arrest and appearance before a Magistrate's Court should not exceed 48 hours.

There is no comparable statute here and Mr. Daley, who argues in support of a period of 72 hours, has invited the Court to indicate what is or is not a reasonable time. For my part I decline to do so. In my view what is reasonable is a question of fact and must be determined on the circumstances of each case. It is unchallenged that the work of the police is affected by a list of variables - manpower, transport, aids for detection, court sittings, accessibility to country areas, reluctant witnesses, difficulties in collecting evidence and a host of other factors. 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.

In this case no evidence whatsoever was offered to explain why the appellant was not taken before a Justice

of the Peace or a Resident Magistrate within the period he was held. On the evidence this appellant's arrest was a result of information given to the police and the inference is that the absence of a prima facie case at the Preliminary Examination was due to the non-appearance of the witness.

It is interesting to note that provision is made in Section 286 of the Judicature (Resident Magistrates) Act to bring up a prisoner before the Court, the section states:

> "Where any person is confined in any prison or place within his jurisdiction it shall be lawful for the Magistrate to issue an order under his hand and under the seal of the Court, for bringing up before the Court such person for the purpose of making enquiries into the circumstances and reasons for the detention of such person **and of making** such orders in the circumstances as he thinks fit."

The purpose of bringing an accused before a Resident Magistrate or Justice of the Peace within a reasonable time is similar to this provision, that is, to have an examination for the purpose of a further remand or to offer bail so as to prevent or to alleviate unnecessary detention.

The respondent acted on information he received when he took the appellant into custody. The learned judge found that the appellant did not prove that the respondent acted without reasonable and probable cause. He accepted the circumstances of the assault. It does not necessarily follow, however, that the assault was due to the fact that there was no reasonable and probable cause for believing that the appellant had committed an offence. The officer had sufficient evidence from an eye-witness to take the appellant into custody and it can be inferred that the infliction of the

assault sometime after was to obtain further evidence to bolster the case against the appellant. The learned judge correctly found that there was an assault, but not evidence on which he could find the want of reasonable and probable cause. He was entitled to do so.

However, the appellant was kept in custody for 14 days before he was brought before the Magistrate. Mr. **Wilkins** while conceding that a claim for false imprisonment can arise in those circumstances, submitted that the appellant had not discharged his burden as he had not shown that he could have been brought before the Magistrate at a reasonable time, and that the police had failed to do so, a factor which the appellant could have elicited in cross examination.

Indeed the respondent was not obliged to bring evidence of the reason for the delay but instead to rely on the appellant to discharge the burden placed on him. This detention, although pleaded, was not argued at the hearing as it was before us. It may be that because of this, there is a sparcity of evidence in this area. It is my view, however, that it is sufficient for the appellant to state the length of time he was in custody before being brought before the Resident Magistrate and it is only if the tribunal considers the time unreasonable that the reason proffered for the undue delay will be taken into account. In my view the time lag is unreasonable. This period of detention then amounts to false imprisonment and no reasonable and probable cause has been shown.

The appellant was charged with murder, a charge for which the Resident Magistrate did not grant bail when the appellant was brought before him. This indicates that if the appellant had been taken before him at a reasonable

time he would not have been offered bail. It is my view that in the circumstances I would award the appellant a sum of $3,000.00 to meet injury done to him.

The other claim is that of malicious prosecution. In a case of malicious prosecution the onus of proving malice rests on the plaintiff who must prove that the law was wrongfully set in motion without reasonable and probable cause or instituted with malice. Malice can be expressed or implied and can sometimes be inferred from want of reasonable and probable cause, but it is not bound up with it.

Viscount Haldane L. C. in Shearer v. Shields (1914) A.C. 808 p. 813 defined malice thus:

> "It must be malice in fact malus animus - indicating that the defendant was actuated either by spite or ill will against the plaintiff or by indirect or improper motives. And

Cave J. in Brown vs. Hawkes (1891) 2 Q. B. 77 said as to proof:

> "malice can be proved either by showing what the motive was and that it is wrong or by showing that the circumstances were such that the prosecution can only be accounted for imputing some wrong or indirect motive to the prosecutor."

So, if in answer, the respondent can show that in prosecuting the appellant he was bereft of motive and honestly believed in the appellant's guilt, malice cannot be inferred.

There is no evidence in this case, neither is there any from which an inference can be drawn that in effecting the arrest the respondent acted maliciously. The appellant has not made any attempt to adduce any.

The respondent received information and it was on the basis of that information he acted and took the appellant into custody and charged him. On this evidence it is my view

that there is no want of reasonable and probable cause, or malice proved. The claim for malicious prosecution therefore fails.

The learned Judge having accepted the nature of the assault as told by the appellant, in my view, was low in his assessment of damages under this head. I would substitute a sum of $10,000.00.

In the event, I would allow the appeal and enter judgment for $13,000.00.