[2016] JMCA Civ 17

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 140/2009

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)

BETWEEN	**ERIC GORDON**	**APPELLANT**
AND	**CONSTABLE DELROY D CLARKE**	**1ST RESPONDENT**
	CONSTABLE RICORDO S MORGAN	**2ND RESPONDENT**
	CONSTABLE DIONNE W WILLIAMS	**3RD RESPONDENT**
	INSPECTOR NATHAN BORELAND	**4TH RESPONDENT**
	ATTORNEY GENERAL OF JAMAICA	**5TH RESPONDENT**

Miss Carlene McFarlane and Miss Deneve Barnett instructed by McNeil & McFarlane for the appellant

Miss Marlene Chisholm instructed by the Director of State Proceedings for the respondents

9 February and 8 April 2016

MORRISON P

[1] At the very outset of the hearing of this appeal, and virtually right up to the end of the hearing, I was strongly inclined to think that there was no basis for this court to disturb the findings of fact made by the learned trial judge in this case. However, the detailed and insightful analysis of the evidence undertaken by my sister Sinclair-Haynes

JA in her admirable judgment has completely persuaded me to the view that this is one of those cases - hopefully rare - in which the trial judge failed to take proper advantage of having seen and heard the witnesses, thus warranting the intervention of this court. In the light of this, there is nothing that I can possibly add to my sister's judgment, save to say that I agree with it and with the outcome she proposes.

SINCLAIR-HAYNES JA

[2] This is an appeal from Morrison J's order, dismissing the appellant's claim against Constable Delroy D Clarke, the 1st respondent, Constable Ricordo S Morgan, the 2nd respondent, Constable Dionne W Williams, the 3rd respondent, Inspector Nathan Boreland, the 4th respondent and the Attorney General, the 5th respondent, for assault and consequential injury, loss and damage suffered and costs.

Background

[3] On 3 July 2000, the appellant attended the Ocho Rios Police Station consequent on instructions from the police to produce his driver's licence. Whilst at the station, the appellant sustained serious injuries. The appellant complained that he was boxed by the 4th respondent and severely beaten by the other respondents.

[4] The 1st, 3rd and 4th respondents deny beating the appellant and they assert that the 1st and 2nd respondents were not at the station at the material time. They allege that the 4th respondent's thumb was injured by the appellant when the 4th respondent attempted to restrain him.

The appellant's case

[5] It was the appellant's evidence that on 29 June 2000, a police officer spoke to him about his tyre. The officer told him that the tyre was defective and that he would be charged for same. He however disagreed with the officer. He was instructed by the officer to drive the car to the police station. He refused because he did not want to drive a car which the police officer described as defective. He told the officer to tow it the police station.

[6] On 1 July 2000 he went to the police station and enquired about the officer who had requested his driver's licence. The officer was not at the station and he was told to return on 3 July 2000. He returned on 3 July 2000 as instructed and handed an officer the driver's licence. He asked the officer to whom he had given the driver's licence for his name. The officer took umbrage at being asked his name. The appellant expressed his displeasure at the manner in which he was addressed by the officer by telling him that he "should not speak to [him] in that way".

[7] That statement evoked the ire of another police officer from the CIB area. That officer "draped" him and asked him to whom he was speaking. The appellant told him that he needed to know the name of the police officer with whom he was leaving the driver's licence. The officer whose name he requested also "draped" him and both men inflicted blows to his body. This occurred in the vicinity of the guard room but the men came from the direction of the CIB office. He later discovered that one of the officers was Constable Delroy Clarke. The two officers were also speaking loudly.

[8] During the assault he cried out for help and attempted to get away because he felt that there was no legal justification for them to hold on to him. He called out to the 4th respondent for help. As the 4th respondent approached him, the appellant was under the impression that he was coming to assist him but, instead, the 4th respondent "boxed" his face.

[9] He (the appellant) protested. His protest elicited further violence, as the 4th respondent pushed him into the guard room and onto a bench. He attempted to get up and the 4th respondent "boxed" him a second time. The 4th respondent attempted to strike him a third time but the blow connected with the face of a female officer.

[10] He was charged for using indecent language, arrested and placed into a cell. That incident, he said, occurred at 9:30 am. At about 2:30 pm he was handed documents to sign which appeared to him to be "bail bonds". At that juncture he remonstrated with the police for having beaten him without a cause and insisted on being told the reason he was placed into a cell. His insistence resulted in the officer on duty instructing that he be placed into the holding area which was near to the guard room. He nevertheless continued to enquire the reason he was being held. He received no answer.

[11] Because of his insistence, the 4th respondent told the other officers to take him to the cell which was to the back of the station. The appellant however went "further down" in the holding area and held onto the grill because he not only wanted to know why he was being held, he feared for his safety. The police held on to him and pulled

him but he continued to insist on being told the reason he was placed into the cell as he had "done nothing wrong".

[12] He was then set upon by the 1st, 2nd, 3rd and 4th respondents who administered blows to his head, right hand, cheek, and other parts of his body. He could not state which blow was administered by which officer because they were all raining blows on him. He consequently lost consciousness. He regained consciousness and felt water being thrown on him. He opened his eye and realized that an officer had thrown dirty water from a cleaning pail on him to revive him.

[13] He lay on the floor for a while and was eventually placed in the back of a service vehicle and was taken to the Saint Ann's Bay Hospital by Constable Dean Patterson on 3 July 2000. He discovered at the hospital that his fingers were broken; there were lacerations to his head, and swelling and tenderness to his face and other parts of his body. His head injury was sutured and he was treated for his injuries.

[14] In support of his injuries, the appellant relied on two medical certificates. The first was obtained from the Saint Ann's Bay Hospital. That certificate reads:

> "a. Laceration of size approximately 5 cm on the left side of forehead
>
> b. Swelling and deformity of right hand
>
> c. Tenderness in right infra-axillary region
>
> d. Tenderness at the right side of cheek

> His lacerations were cleaned, sutured and dressed. He was given injection-TT stat dose to prevent tetanus and voltaren injection for pain.
>
> He was requested to return for a review with x-rays. Unfortunately, I cannot certify severity of injuries as he did not show up for review with x-rays."

[15] The second was obtained from Port Maria Medical Centre where he attended on 5 July 2000. That certificate reported as follows:

> "(1) fractured proximal phalange of Ring finger (r) hand
>
> (2) fractural SMMCP Bone on (r) hand
>
> (3) trauma to head resulting in concussion
>
> Plaster of Paris was applied to (r) hand for 6 weeks and analgesics given for concussion he was given analgesics, granted 28 days home initially.
>
> He was unable to work for 12 weeks. The injuries to (r) hand will result in temporary partial disability.
>
> The injury to head although it is not serious now might have repercussions later."

The respondents' version

The 1st respondent

[16] The 1st respondent averred in his witness statement that he was not at the station at the material time as he was on leave. He however could not recall whether he was on one or two days leave. He said that whilst he was on leave he overheard a radio programme in which a man complained of being assaulted at the station. In those circumstances, he said he could not have assaulted the appellant. He was

supported by the 3rd and 4th respondents whose evidence was that they did not see the 1st respondent at the station at the material time.

The 2nd respondent

[17] The 2nd respondent did not participate in the trial. He filed no witness statement and did not attend the trial. The 3rd and 4th respondent's evidence was that they were not aware of any Constable Ricordo Morgan being stationed at the Ocho Rios Police Station at that time.

The 3rd respondent

[18] The 3rd respondent's evidence was that he was aware that on 3 July 2000, the appellant was placed into a cell at the Ocho Rios Police Station. According to him, he was in the station's yard when the appellant was placed into the cell. About 15 minutes after, he heard the prisoners who were in one of the cells, shouting and banging on the gate of the cell and shouting for help to "the effect that someone was dying and needed to be taken to the hospital."

[19] It was his evidence that he observed the appellant lying on the floor of the cell and he appeared to be unconscious. Thinking it was a prank he threw water on him to ascertain whether he was really unconscious. He however got no response. He pulled on the appellant's foot but the appellant still did not respond.

[20] He entered the cell and saw a cut to the back of the appellant's head. Upon enquiry, the prisoners informed him that the appellant had fainted and had struck the

back of his head on a sharp edge of the steel bars which joined the concrete to form a window. On his evidence, there were two incidents which were separated by 15 minutes.

The 4th respondent

[21] It was the 4th respondent's evidence that on 3 July 2000, he was stationed at the Ocho Rios Police Station as the sub-officer in charge. The appellant attended his office at approximately 7:45 am and informed him that an officer from the Ocho Rios Police Station was seizing his car. He told the appellant to wait on the outside until that officer returned. He was shown neither traffic ticket nor a seizure form.

[22] About 30-35 minutes later, he heard a loud noise outside in the station area which continued outside the station building. He heard "a male voice chatting indecent language". He looked out of his window and saw two uniformed police officers struggling with the man (the appellant) who had earlier attended his office. He went up to the men and enquired of them what was happening, whereupon the appellant addressed him thus, "move your bombo cloth from here".

[23] He instructed the two officers who held the appellant to release him and they did. He informed the appellant of the offence of indecent language and instructed him to go to the guard room where he would be charged but the appellant refused to comply. He held unto the back of the appellant's pants waist with his left hand in an effort to put him into the guard room.

[24] The appellant however immediately held unto his right thumb with both his hands and bent it backwards. As a consequence he experienced excruciating pain which caused him to release the waist of the appellant's pants. In an effort to have the appellant let go of his thumb, he used his left hand to slap the appellant's cheek.

[25] The appellant released his thumb and the 4th respondent held unto him and took him into the station guard room where he was placed on a bench. At that point in time he had stopped resisting physically but continued shouting. A number of police personnel and civilians gathered around the compound.

[26] He instructed the station guard, Constable Barrows, to place the appellant into the holding area and to charge him for the offences of resisting arrest and using indecent language. About five minutes after he returned to his office, he experienced pain in his thumb and noticed that it was swollen. He consequently returned to the guard room and reported to Constable Courtney Johnson that the appellant had assaulted him and he had thereby occasioned actual bodily harm. The appellant, however, denied touching him.

[27] He left the station and sought medical attention. He obtained a medical certificate and returned to the station about an hour and a half after. He provided a medical certificate which stated that he suffered tenderness and swelling of his right thumb. Upon his return he did not see the appellant. He was informed that the appellant was beaten by prisoners and was sent to the Saint Ann's Bay Hospital. A medical certificate was tendered into evidence on the 4th respondent's behalf. The

doctor reported that he was suffering from tenderness and swelling of his right thumb which was consistent with infliction by a blunt instrument.

[28] The appellant was found guilty of assaulting the 4th respondent and was fined $6000.00 or 30 days at hard labour on 30 May 2002. It was the 4th respondent's evidence that at the time of the incident he did not see the 1st respondent at the station and he was not aware of the 2nd respondent being stationed at the Ocho Rios Police Station at the material time. It was also his evidence that at no time he saw any police assaulting the appellant.

The appeal

[29] Being aggrieved by the learned judge's dismissal of his claim, the appellant has filed the following five grounds of appeal.

> "1. That the judgment is inconsistent with the evidence given.
>
> 2. The findings of the learned Trial Judge was [sic] erroneous, as the evidence of the [appellant] was consistent with the evidence of the independent medical evidence agreed upon by the parties, and was in all the circumstances, more reliable than the conflicting evidence of the [respondents].
>
> 3. The Learned Trial Judge failed to properly recall witnesses and their testimony and also the sequence in which events occurred.
>
> 4. The Learned Trial Judge's findings of fact that there were two incidents is inconsistent with the evidence of the [respondents], but consistent with the evidence of the [appellant].

5. That the internal inconsistencies in the [respondent's] case were substantial and significant, and rendered the [respondents'] evidence wholly unreliable."

[30] For convenience, ground 2 will be dealt with first.

Ground 2

> **The findings of the learned Trial Judge was [sic] erroneous, as the evidence of the Claimant was consistent with the evidence of the independent medical evidence agreed upon by the parties, and was in all the circumstances, more reliable than the conflicting evidence of the [respondents].**

[31] In respect of ground 2, the appellant has registered the following complaints (in her amended notice and grounds of appeal) about the learned judge's treatment of the matter:

> "The learned Trial judge failed to consider that the evidence given by the 3rd [respondent] in relation to the injuries that he allegedly observed on the [appellant] was totally inconsistent with the medical evidence agreed upon by the parties, and set out in the medical reports.
>
> 7. The Learned Trial Judge erred in his findings by speculating that the Medical report showed injuries that were equally consistent with the [appellant] having been beaten by inmates of the cell into[sic] which the [appellant] was introduced, in that there was no **admissible** evidence from either the 1st, 3rd, or 4th [respondent], or the [appellant] receiving injuries by inmates, except that the 4th [respondent] provided Hearsay evidence, that at about 11:00 to 11:30 upon returning to the station from the doctor he learnt that the [appellant] had already left for hospital after allegedly being beaten by prisoners but gave no details what-soever as to the type of injuries the [appellant] is alleged to have received, and from whom he received this information. The learned trial

judge should therefore have e rejected this bit of 'evidence' from the 3rd [sic] [respondent] and/or ruled that it was inadmissible.

8. That there was no evidence given by any of the [respondents], as to the specific injuries [appellant] is alleged to have received at the hands of the inmates, and the only other mention of injuries to the [appellant] was the 2-3 inches chop at the **back** of the [appellant's] head, and bleeding from his nose given as **Hearsay evidence** by the 3rd [respondent], and mentioned in the Station Diary In which the inmates are alleged to have stated, that he must have received when he fainted and hit his head on the window ledge." [Emphasis as in original]

The judge's treatment of the medical certificate

[32] In rejecting the appellant's version that he was beaten as he asserted, the learned judge found that the medical evidence was equivocal. He said:

> "A word on the medical repeats [sic] as to the [appellant] and as to the fourth [respondent]. While it is seemingly consistent with the [appellant's] version of the event, I think that it is equally consistent with the [appellant] being beaten by inmates of the cell into which the [appellant] was introduced. It is equivocal. Of course there is not one jot or tittle of evidence that he was beaten by inmates. Yet, in spite of this absence of evidence, I incline to the view that the [appellant's] attempt to link the first, third, fourth [respondents] to the brutal assault was manufactured and leavened by lies so as to shore up his overall credibility."

[33] There is no evidence that the appellant was beaten by inmates. Wherein then lies the equivocation? On the 4th respondent's evidence under cross-examination, no statement was taken from the prisoners. His evidence was that he was told that the appellant was beaten by prisoners. On the 3rd respondent's evidence, although he was

on cell guard duty, he was either outside under a guinep tree or in the guard room. His evidence was that he was told by prisoners that the appellant had fainted and hit his head on a sharp instrument. Not only was that evidence at variance with what Inspector Boreland was told, it was also hearsay and ought not to have been relied on.

[34] Ms Marlene Chisholm, counsel for the respondents, submitted that the learned judge was faced with two conflicting versions, whether the appellant was beaten by the respondents or by prisoners in a cell. This, she said, was an issue for the judge's determination of the witnesses' credibility. Indeed it was not open to the learned judge to rely on the respondents' assertion that he was beaten by prisoners.

[35] Although the issue of credibility was entirely for the learned judge, he was obliged to demonstrate that he understood and properly assessed the evidence. The 3rd respondent's evidence was that he saw a 2 inch cut/chop to the back of the appellant's head. There was no mention in either medical certificate that the appellant sustained a wound to the back of his head, more so a two inch chop as testified to by the 3rd respondent. Indeed the injuries stated in the appellant's medical certificates were more supportive of the appellant's version of how he came by his injuries.

[36] There was no dispute that the appellant suffered the injuries disclosed in the medical certificates. The learned judge failed to consider the unchallenged evidence that the appellant attended the station without injuries but he not only sustained several serious injuries whilst in custody, he was found in a state of unconsciousness from which he had to be revived, and left with serious injuries, which, on the

respondents' case were unexplained or explanations for which were wholly unsatisfactory. Had he any injuries when he attended the station, the police would have been obliged to make a record of same. (See the Prison (Lock-ups) Regulations 1980.)

[37] The absence from any of the medical certificates of any 2/3 inch chop to the back of the appellant's head belies the learned judge's findings that the 3rd respondent's delivery was with "unimpeachable candour" and that the respondents were "unsparing with the truth". The learned judge's finding that the appellant's medical report is "equally consistent with the Claimant being beaten by inmates..." is, it seems to me entirely wrong. He seemingly resiled from that statement when he said:

> "Of course there is not one jot or title of evidence that he was beaten by inmates, Yet, in spite of this absence of evidence, I incline to the view that the Claimants attempt to link the first, third and fourth defendants to the brutal assault was manufactured and leavened by lies so as to shore up his overall credibility."

[38] Not one cell guard gave any evidence or statement that he was so beaten. Although the 3rd respondent was unable to say how many cell guards were present that day, it was his evidence that "[n]ormally there are three of them". The pertinent question in the circumstances ought to have been: how then, on a balance of probabilities, did he (the appellant) come by his injuries? The appellant was in the custody of the police. They therefore had a responsibility to account for the injuries he received while he was in such custody.

[39] The learned judge also failed to weigh the 3rd respondent's evidence in respect of the injury he observed to the appellant, as against, that of the appellant's, that the respondents all set upon him and battered him. In his words, they were "hitting [him] on [his] head, chest, right hand, cheek and other parts of [his] body", which was not inconsistent with the doctor's findings. The appellant testified under cross-examination that the respondents used batons to inflict the blows to his body. The learned judge made the following finding in respect to that evidence.

> "Then there are the glaring afterthoughts, the most notable of which, is the introduction of the batons into evidence by the [appellant]. In his cross-examination this is what he had to say: 'Police were hitting me and boxing me. At the time of hitting me to my head, chest, right hand, cheek and other parts of my body the police were using batons to do so. I told this to my lawyer. I told my lawyer about the baton. When my witness statement was being taken by my lawyer I told her about the baton..."
>
> The beating of the [appellant] by the police with batons is absent, not only from the pleadings, but also from his witness statement. Had this allegation been give[sic] to his experienced counsel, I fail to see that she would not have been guided by manifest prudence to have included it both in the pleadings and in the [appellant's] witness statement.
>
> The introduction of the baton was no more than a ruse intended to mislead this Court."

[40] Although it was not specifically pleaded that a baton was used to inflict the injuries, it was pleaded and stated in his witness statement that he was assaulted and the injuries were duly outlined. The appellant's evidence was that the respondents hit him "on [his] head, chest, right hand, cheek, and other parts of [his] body". The

learned judge failed to properly examine the medical evidence. Had he done so he would have noted that the injuries sustained by the appellant and which were pleaded, and were supported by the medical, on a balance of probabilities could have been inflicted by a baton.

[41] Certainly on a balance of probabilities the fractures he sustained to his finger, right hand and head are consistent with the use of a baton. There was no attempt by the learned judge to weigh the appellant's evidence in this regard as against the respondents'. There is certainly merit in the appellant's challenge to the judge's following findings of fact and law.

> "1. The learned trial judge failed to consider that the evidence of the [appellant] in relation to the injuries that he sustained is totally corroborated/supported by the independent medical evidence submitted in the case by the Claimant, which said medical evidence was agreed upon by the parties.
>
> 2. Alternatively, the learned Trial judge failed to consider that the evidence given by the 3rd [respondent] in relation to the injuries that he allegedly observed on the [appellant] was totally inconsistent with the medical evidence agreed upon by the parties, and set out in the medical reports.

The judge's dealing with this issue was unsatisfactory. Ground 2 therefore succeeds.

Ground 3

> **The Learned Trial Judge failed to properly recall witnesses and their testimony and also the sequence in which events occurred.**

[42] In respect of ground 3, the appellant has challenged the learned judge's following findings of fact and law:

> "That the Learned Trial Judge's consistent reference to the 3rd [respondent] as **she** demonstrates his total lack of recall of the witnesses and their evidence, in that the Learned Trial Judge's reference to the 3rd [respondent] on at least nineteen (19) occasion is inconsistent with his findings that '**she delivered herself with unimpeachable candour**' when the 3rd [respondent] was in fact a male Police Officer." (Emphasis added)

[43] Ms McFarlane, on behalf of the appellant, submitted that although the learned judge saw and heard the witnesses, he failed to take sufficient advantage of having seen and heard them and consequently arrived at the wrong conclusion on the evidence which was presented to him. Her submission that the learned judge's failure to recall that the 3rd respondent was male is critical. She said it challenged his assertion that the officer delivered "herself with unimpeachable candour" which, she submitted, also leads to the reasonable and unavoidable conclusion that he did not have full recall of the matter.

[44] His failure to recall such vital information, she said, led him to the erroneous conclusion which resulted in an injustice to the appellant. She directed the court's attention to the House of Lords case of **Watt or Thomas v Thomas** [1946] AC 484 and the case **Powell v Hibbert** (1963) 6 WIR 43, a decision of this court, in which the principle which was enunciated in **Watt** was applied.

Analysis

[45] The learned judge's repeated reference to the 3rd respondent, in the feminine gender is an indication that indeed he did not recall the witness with the clarity with which he ought to have. Counsel Ms Chisholm's submission that it might have been a typographical error because his Christian name was feminine is unsustainable. The witness had provided the court with his middle name which is unmistakably male.

[46] It is not unreasonable to expect that the learned judge should have re-read his notes of evidence. Ms Chisholm's submission that there was no necessity for the learned judge to recall specific individuals because he had reserved his decision and had seen several other witnesses is therefore untenable. A judge's responsibility in those circumstances would have been to revisit his notes with even more care.

[47] Had the error occurred a few times, that explanation might have been plausible. It is however improbable that his reference to the 3rd respondent as "she", 19 times was an error. Had it been an error, it is unlikely that it would have eluded him so many times.

[48] In determining whether the exercise of a trial judge's right to determine a witness' credibility, ought to be interfered with, a crucial factor which an appellate court considers, is the trial judge's ability to have assessed a witness' demeanour, having seen and heard the witness. Indeed an appellate court ought not to disturb the trial judge's judgment:

> "[U]nless it is plainly unsound. The appellate court is, however, free to reverse his conclusions if the grounds given by him therefor are unsatisfactory by reason of material

> inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved." (See the head notes of **Watt** [1946] AC 484.)

[49] In **Watt**, Lord Thankerton in addressing the issue, said:

> "The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and **the matter will then become at large for the appellate court**…
>
> It may be well to quote the passage from the opinion of Lord Shaw in ***Clarke v. Edingburgh & District Tramways Co***., Ld. (I), which was quoted with approval by Viscount Sankey L.C. in *Powell v. Streatham Manor Nursing Home* (2). Lord Shaw said: 'In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, am I who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case in a position, not having these privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment'." (Emphasis added)

Lord Shaw had already pointed out that these privileges involved more than questions of credibility; he said (I):

> "Witnesses without any conscious bias towards a conclusion may have in their demeanor, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be

> reproduced in the printed page." (pages 487-489)

[50] Had the learned judge taken proper advantage of having seen and heard the witnesses, he would not have mistaken the gender of the 3rd respondent. Nor would he have concluded that "she delivered herself with unimpeachable candour" had he considered the glaring conflict between "her" evidence that the appellant sustained a chop to the back of his head and bleeding from his nostrils and the unchallenged medical evidence. The learned judge has demonstrably not taken advantage of having seen and heard the witness. This ground therefore succeeds.

[51] It is convenient to deal with grounds 1, 4 and 5 together.

Ground 1

> **The judgment is inconsistent with the evidence given.**

Ground 4

> **The Learned Trial Judge's findings of fact that there were two incidents are inconsistent with the evidence of the respondents, but consistent with the evidence of the respondent.**

Ground 5

> **That the internal inconsistencies in the [respondent's] case were substantial and significant, and rendered the [respondents'] evidence wholly unreliable.**

The judge's findings

The learned judge said:

> "I find as a fact the following:
>
> Before I do so, I think, the facts have to be dichotomized in relation to the two incidents. In relation to the first incident, I accept that, the fourth [respondent] was involved to the extent that he had intervened owing to the obstreperous, scurrilous and ribald behaviour of the [appellant]. The fourth [respondent] having insinuated himself in the fracas between the [appellant] and two police officers the [appellant] proceeding to lambast him and in doing so used expletives. Such effrontery the fourth [respondent] found to be criminal and proceeded and in the process proceeded to lay hands upon the [appellant] who resisted and in the process grabbed the right thumb of the fourth [respondent] which he bent backwards. The fourth [respondent], in my view, was legally entitled to use force to repel force and is exonerated on the score of self-defence. I find as a fact that this was the extent of the fourth [respondent's] involvements in the entire incident for that day.
>
> No more force than was necessary was used in that first incident.
>
> With respect to the second incident, I find that the first, third and fourth defendants were not involved. I accepted their evidence and in so doing I found them to be unsparing with the truth."

[52] The appellant has challenged the learned judge's findings of fact and law in respect of his complaint at ground 4, as follows:

> "3. The Learned Trial Judge failed to consider the direct contradiction and irreconcilable inconsistencies between the 3rd [respondent's] evidence and that of the 4th [respondent] as to the time, at which the incidents took place. In particular the evidence of the 4th [respondent] is that the 1st incident took place at about 7:30 when he was forced to slap the [appellant] in his face in order to restrain him, but left him uninjured about 9:00-9:30 a.m. and the evidence of the 3rd [respondent] is that when he saw the [appellant] at about 8:00a.m. he was bleeding from

his nose as well as from a wound at the back of his head lying in a cell.

4. That the Learned Trial Judge's recall of the evidence which he stated was "as if in cinematic progression" is inaccurate and out of sequence in respect of both the evidence of the [appellant]and the 4th [respondent], (see page 5) 2nd and 3rd paragraph. The injuries that the [appellant] described as being received by him whilst holding unto the grill in the holding area, were from an occurrence, which took place during the second incident in the afternoon, whereas the Trial Judge has this incident occurring immediately following 4th [respondent's] slapping of the [appellant] that morning at about 7:45a.m. to 8:00a.m.

5. The Learned Trial Judge failed to address his mind to the following inconsistencies between the 3rd and 4th [respondent's] evidence:

a. On the 4th [respondent's] evidence he first saw the [appellant] at about 7:45a.m. when he came to his office voluntarily. He next saw him 30-35 minutes later being escorted by two (2) police officers. The 3rd [respondent] on the other hand, saw the two (2) female police officers, and later at 8:00a.m. lying on his back, injured in a cell.

b. At about 8:00a.m. the 4th [respondent] saw the [appellant] in good health, whilst the 3rd [respondent] saw him bloodied in a cell with a chop wound to the back of his head.

c. The 3rd [respondent] has no recall [sic] of seeing the 4th [respondent] at the Ocho Rios Police Station that morning despite the fact that his evidence is that he saw the [appellant] from the time he was escorted to the station at 6:30a.m. Whilst the left [sic] [respondent] presence is central to the entire morning occurrence.

6. The Learned Trial Judge having accepted as a finding fact that there were two incidents, failed to distinguish the 'cinematic progression' of the two

incidents and failed to distinguish the injuries that the [appellant] received at the hands of Inspector Boreland during the morning incident from the injuries he received at the hands of the [respondents] several hours later whilst he was holding unto the cell bars in the guardroom area. It is only the [appellant], who makes reference to two incidents, one at 8:30a.m. and one at 2:30p.m., which is not challenged, yet the Trial Judge accepts that there were two incidents whilst rejecting the [appellant's] case.

...

10. That the Learned Trial Judge findings (on pg 10), "that the Resident Magistrate's Court, Ocho Rios found the [appellant] guilty of Indecent Language is not surprising" is of no probative value, as the [appellant] pleaded guilty to this offence as arising from the first incident, which occurred in the morning.

11. That the Learned Trial Judge failed to attach any or sufficient significance to the evidence of the 3rd [respondent] that he saw injuries to the [appellant] at 8:00 .am**.** whilst the [appellant]was lying on his back in the cell, which is irreconcilable with the evidence of the 4th [respondent] that he left the doctor about 9:00a.m. and that at the time he left the prisoner uninjured, except that he had by then received a slap to the cheek by him, which is irreconcilable with the evidence of the [appellant] and the evidence set out in the Medical Reports."

12. That the Learned Trial Judge failed to consider that none of the [respondents] challenged the [appellant's] evidence that the second incident took place during the afternoon, which is supported by some of Diary entries**,** supplied by and relied upon by the [respondents] in support of their case, and which shows, inter alia, the approximate time which the [appellant] was alleged to have arrived at the station, the approximate time of the second incident when he was alleged to have been in the process of being bailed, when he left for the hospital, and returned, and the presence of his wife during the afternoon

when he was in the process of being bailed. Some of the diary entries on which the [respondents] relied were in direct contraction with their witness statements and their viva voce evidence.

13. The Learned Trial Judge erred or misdirected himself in law in not attaching sufficient significance or, failed to consider the numerous unexplained inconsistencies between the evidence of the 3rd and 4th [respondents], in coming to his conclusion, and failed to say whose evidence he accepted or preferred, in the face of the blatant inconsistencies, and his reason for accepting or rejecting the particular evidence.

14. The Learned Trial Judge failed to accept that the [appellant's] evidence was the more credible in that he was fully able to explain his presence at the station that morning, which is confirmed by the 4th [respondent], the injuries he received supported by the medical reports, the issue of the water being thrown on him, which is partially supported by the 3rd[respondent] albeit he alleged clean water from a cup, as opposed to dirty water from a pail, the fact that the second incident took place during the afternoon, and was in the process of being offered bail in relation to the morning incident, confirmed by the station diary entries and for the most part inconsistent with the [respondent's] evidence, which is contradictory."

Submissions

[53] Ms Chisholm submitted that the learned judge's finding that there were two incidents was not inconsistent with the evidence of the respondents. According to her, on the respondents' version there was only one incident in the morning. In that incident, the appellant was justifiably "boxed" by the 4th respondent. She said that the 4th respondent's evidence was that he was not involved in the second incident and the 1st respondent denied being present that day.

[54] The 3rd respondent, she submitted, testified under cross-examination that he was unaware of two incidents for which the appellant was taken to the hospital. He knew of one incident, which was in the morning. Counsel submitted that his evidence is to be interpreted to mean that that incident was at the point in time the inmates called from the cell.

[55] Ms Chisholm's submission was that although the events of the timing of the two incidents did not occur in cinematic progression as stated by the learned judge, he nevertheless captured the material aspects of the appellant's evidence to wit: he was "boxed" in the first incident by the 4th respondent and in the other, he was beaten by all four respondents and consequently suffered serious injuries. She urged the court not to interfere with the learned judge's decision as the learned judge recognised that the determination of the matter depended largely on the credibility of the witnesses and their accounts. She argued that the learned judge found, on a balance of probabilities that the claimant had not only not proven his case, but also rejected it for the reasons he provided.

[56] She directed the court's attention to two decisions of this court, **Algie Moore v Mervis L Davis Rahman** (1993) 30 JLR 410 and **D&LH Services Limited and Others v The Attorney General and The Commissioner of the Jamaica Fire Brigade** [2015] JMCA Civ 65 in which the court agreed and adopted the principles espoused by the Privy Council in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC] 21 in support of the proposition that an appeal

court ought not to disturb the finding of a judge of first instance unless satisfied that the judge was plainly wrong.

[57] Ms Chisholm acknowledged that there were inconsistencies and contradictions on the 3rd and 4th respondents' cases in respect of the timing of the incidents and contradictions with the entries made in the station diary. She however submitted that the learned judge's statement concerning the entry in the station diary, the final page, shows that he gave consideration to issue.

[58] Ms McFarlane however submitted that the learned trial judge finding's that the two incidents occurred "as if in cinematic progression" revealed the learned judge's failure to recall the sequence of events as it related to the timing of the two incidents.

Analysis

[59] Careful examination of the witnesses' evidence was necessary. Under cross-examination, the 3rd respondent's evidence was that at about 7:30 am, whist he was under a guinep tree, the appellant was escorted by bicycle police officers to the guard room. He however was unable to see the appellant being placed into the cell because he was under the tree.

[60] At 8:00 am, he was at a desk in the guard room. He heard "calling from a cell". The noise from the said cell block and the "sound of somebody that needed to be taken to the hospital" led him to the cell block. It was then he saw the appellant lying on his back and not "responding to touch or calling". It was at that time "he dripped" the

water from a cup which he got from the bathroom onto his face. The appellant was "rushed" to the hospital. It is reasonable therefore to assume that he would have been taken sometime after 8:00 am as there was no tarrying in so doing.

[61] The evidence of the 4th respondent under cross-examination, regarding the time the appellant was found injured, does not accord with that of the 3rd respondent. The 4th respondent's evidence was that the appellant arrived at the station at 7:45 am. The incident involving the appellant's struggle with the two police officers and his use of indecent language occurred 30-35 minutes later which would have been sometime between 8:15 am and 8:20 am. He left the station at about 9:00 am to seek medical attention for his injured thumb.

[62] Upon his return from the doctor, he was informed that the appellant had been beaten by prisoners and that he "had already been taken to the hospital". He was also unaware that water was thrown on the appellant to revive him. He could not remember if he received any information that the appellant had fainted. It was his evidence that he left his office after 5:00 pm.

[63] On his evidence, he witnessed and was aware of one incident. Subsequent to his return after 11:00 am from the doctor, there was no further incident. At no time was the appellant placed into a cell before he left the station. His evidence was that he left him seated on a bench in the guard room.

[64] He was categorical in his denial of any knowledge of or involvement in a second incident in which the appellant was injured. Upon his return to the station he said:

"there was no altercation between the [appellant] and anyone". Nor was he aware that the appellant received most of his injuries from the second incident. He too did not know if the appellant was given bail.

[65] On the 3rd respondent's evidence, the appellant would have been rushed to the hospital after he was found lying in the cell. On his account, the incident would have occurred shortly after 8:00 am. On the 4th respondent's evidence he would have been present at 8:00 am when according to the 3rd respondent, the appellant was found unconscious, yet his evidence was that it was upon his return to the station that he was informed that the appellant had been beaten by prisoners and that the appellant had already left for the hospital. The 3rd respondent's evidence is therefore irreconcilable with the 4th respondent's evidence. The station diary entries however have the appellant returning to the station at 8:30 pm and being bailed at 9:30 pm.

[66] The 4th respondent's evidence was that he was the officer in charge of the station that day. It was his evidence that there were "[n]ormally... several cell guard officers at station". The 3rd respondent said there were three. Had the appellant been beaten by prisoners, the cell guards who were on duty ought to have had knowledge and would have been expected to formally report the matter to the 4th respondent.

[67] It is curious therefore, that the 4th respondent was unable to state whether he had given instructions for investigations into the beating of the appellant which he said was reported to him. Nor could he recall if he enquired whether entries were made in the station diary. He was also unable to say whether statements were taken from the

prisoners. Nor did he enquire in which cell the incident took place or the number of prisoners who were in the cell.

[68] The 3rd respondent was also unable to say whether any investigation was conducted into the matter. Although he said he "supplied" a statement, he could not say to whom it was given or whether statements were taken from the other inmates. Interestingly, there was no entry in the station diary that the appellant was beaten by the prisoners in support of the assertion of the 4th respondent that he was so informed.

[69] There was an entry at 2:00 pm by Woman Corporal Haughton that the appellant "was seen in cell number 3 suffering from wounds to his head and bleeding from the nose". The entry further stated that she was told by prisoners that the appellant "complained of feeling sick and fainted to the ground hitting the back of his head". She did not state from whom (the prisoners) the information was received.

[70] As the officer in charge of the station, the 4th respondent was under a duty to ensure that not only entries as to the condition of the appellant are made in the station diary, but also from whom the information was received; incidents relating to the appellant and steps taken to alleviate his condition and otherwise deal with what might have arisen as a consequence of any injury he received. Certainly the absence from the station diary of information as to the identity of the 'informants' and any statements from the 'informants' would serve to undermine the 3rd and 4th respondents' credibility.

[71] Regarding the entry in the station diary which contradicted both the 3rd and 4th respondents' evidence and which supported the appellant, the learned judge said:

> "With respect to the Station Diary entry, it is trite law that it is admitted into evidence to show that an entry was made but not as to the truthfulness of its contents. Therefore, any argument as to its contents being in conflict with the viva voce evidence of the [respondents] is redundant and of no use."

[72] The 4th respondent's version of what transpired was somewhat different from that registered in the station diary. It was recorded by a Constable Johnson that:

> "The [appellant] was brought to the station when he began to behave boisterous and violent when Inspector Boreland tried to calm him and find out what was the problem. He grabbed his arm and held thump [sic] and tried and bent same causing it to be swollen. He was given a letter to seek medical attention. Reported to the police on Monday 03.6.00 about 4pm, invest. cont."

[73] In respect of the above mentioned entry, in a column of the station diary under the heading, 'Subject' was recorded thus:

> "Reporting Assault O B Harm, Omission Entry about 1:30pm."

The alleged assault of the 4th respondent was therefore entered in the station diary as having occurred at 1:30 pm, which contradicts and undermines both the evidence of the 3rd and 4th respondents.

[74] Further, there was an entry made in the station diary at 1:00 pm which supported the appellant's evidence of a second incident which occurred at the time the appellant said he was removed from the holding area, in the afternoon, and was given documents which appeared to be bail bonds. That entry stated that the appellant in the process of been bailed:

> "... started behaving boisterously and uttering the following words in the holding area of the Ocho Rios Station 'yu must bumbo cloth talk to mi lawyer because it noh blood cloth go so".

[75] It was the appellant's evidence that:

> "That I was later charged for Assault and arrested and placed in a cell. The incident happened in the morning at about 9:30am. That I remained in the cell for several hours and at about 2:30pm I was given some documents which appeared to be bail bonds to sign. I was at this stage quarrelling that the police beat me up without any cause, and that I needed to know the basis for putting me in a cell. The Officer on duty then told them to put me back in the holding area near to the Guard Room. I kept asking the police why I was being held and I could get no answer. Eventually I heard when Inspector Boreland advised the other officers to take me around to the cells at the rear of the station. He went further down into the holding area and held onto the grill as I wanted to know why I was being held in custody, and I feared for my safety. The police held me and were pulling me and I insisted on being advised as to why I was being placed in the cells, as I had done nothing wrong."

It was at that point in time he said, the 1st, 2nd, 3rd and 4th respondents battered him to the point that he lost consciousness. There was no attempt by the learned judge to analyse the evidence or attempt to reconcile either of the respondents' evidence in light of the conflict. There was no weighing of the respondents' version against the appellant's in an effort to determine on a balance of probabilities where the truth lay.

[76] In light of the appellant's evidence that he was beaten at 2:30 pm, it was necessary for the learned judge to demonstrate that he appreciated the conflict, and that he considered the impact, if any, that that conflict in the respondents' evidence

might have had on the appellant's version of the facts. He ought also to have demonstrated the manner in which it was resolved in allowing him to conclude that:

> "With respect to the second incident, I find that the first, third and fourth [respondents] were not involved. I accepted their evidence and in so doing **I found them to be unsparing with the truth**." (Emphasis added)

[77] The learned judge ought to have dealt with the evidence comprehensively. Instead, he neglected to address the inconsistencies and discrepancies in the respondents' evidence. He failed to demonstrate that he appreciated how the said discrepancies in the respondents' evidence impacted their case. Furthermore, he arrived at conclusions that were unsupported by the evidence and the reasons he proffered, were unsatisfactory.

[78] Ms McFarlane's submission that the learned judge's unsatisfactory handling of the evidence in its totality and in respect of the station diary warrants the court's intervention is therefore meritorious. She directed the court's attention to the statement of Lord Rodger of Earlsferry who delivered the advice of the Board in the Privy Council case from Jamaica of **Union Bank of Jamaica v Yap** (2002) 60 WIR 342. At page 355, he said:

> "[35] Their lordships are accordingly satisfied that the trial judge misconstrued the memorandum of 6 July 1993 and failed to take account of the memorandum of 21 July 1993. Both mistakes critically affected the reasoning which led to his conclusion that the defendant had breached his contract of employment with the Bank by opening the Worldwide Marketing account. In these circumstances, the Court of Appeal was fully entitled to interfere with the Judge's

> conclusions on the relevant matters of fact and to substitute its own conclusions based on the evidence. The Board agrees with those conclusions."

[79] Indeed the learned judge's conclusion as to the "unimpeachable candour" with which he said the 3rd respondent testified was arrived at without examination or analysis of the discrepancies in the respondents' evidence. It was the 3rd respondent's evidence that at 7:30 am a car with police officers entered the compound and the appellant arrived at the station escorted by bicycle police officers which included a female. The car stopped 25 feet from the guinep tree under which he stood. He saw the appellant being led to the guard room while he was still under the tree. He however did not see when the appellant was placed into the cell as he was still under the guinep tree.

[80] Curiously he could not recall seeing the 4th respondent who was a major player in what transpired shortly after the appellant's arrival. On the 3rd respondent's evidence, he would have been at his desk in the guard room at 8:00 am and there was no evidence that he left.

[81] Indeed it is puzzling that the 3rd respondent, who placed himself under a tree by the guard room at the time of the appellant's arrival at the station at 7:30 am, could not recall seeing the 4th respondent at the station between 7:30 am and 8:00 am. It is also remarkable that he could not recall whether he was going or coming off of duty at the time. The appellant, he said, was placed into the cell while he was still under the tree. Curiously, he was unable to recall what happened 19 minutes after.

[82] On a preponderance of possibilities, it is improbable that the 3rd respondent, who was in the yard at the time the appellant and the police arrived at 7:30 am and who placed himself in the guard room at 8:00 am, neither heard nor witnessed the incident in light of the 4th respondent's evidence. On the 4th respondent's evidence, at about 8:30 am the appellant would have created a commotion at the station. On the 4th respondent's evidence, "a number of police personnel and civilians had gathered around the station compound" and in relation to this evidence, the learned judge made the finding that the 4th respondent "intervened owing to the obstreperous, scurrilous and ribald behaviour of the [appellant]".

[83] It is indeed surprising that the 3rd respondent's attention was not drawn to that commotion which attracted the attention of the 4th respondent to wit: "a loud noise outside in [sic] the station area [sic] continued [sic] outside of the station building and the appellant chatting indecent language" and the appellant struggling with police in the yard.

[84] It is significant that the 3rd respondent, who was in the vicinity, whether in the yard or seated in the guard room, neither heard nor witnessed that incident and did not see the appellant placed into a cell. On the 4th respondent's evidence the incident would have occurred between 8:15 am and 8:30 am. There is no evidence that the 3rd respondent had removed from the guard room at that time. The 4th respondent testified that he left the appellant seated on a bench in the guard room. In arriving at

the conclusion that the respondents were unsparing in the truth the learned judge could not have been mindful of the evidence in its totality**.**

[85] The learned judge ought to have explained how he arrived at "two incidents" and he ought to have pointed to the evidence which supported his interpretation of the appellant's evidence that after the appellant was "boxed", the incident continued:

> "As if in cinematic progression, the next action was that he was ordered to be placed in a cell at the Cell block area of the Ocho Rios Police Station. He was then in the guard room. On being taken to the cell block area he remonstrated with the police escorts by holding on to the bars to the cell block..."

[86] As highlighted above, the appellant's evidence was that his injuries were sustained in the afternoon. The learned trial judge, however, found on the 3rd respondent's evidence, that that incident occurred in the morning, which would have been soon after he would have been slapped by the 4th respondent. Also it was the 4th respondent's evidence that the incident occurred between 8:15 am and 8:30 am. The learned judge's finding that that there were two incidents would have been more supportive of the appellant's version that the first incident occurred at 9:30 am and the second at about 2:30 pm when he was given documents to sign which appeared to be bail bonds. There is therefore merit in Ms McFarlane's submission that the learned judge's recall of the evidence which he stated that "as if in a cinematic progression is inaccurate and out of sequence in respect of both the evidence of the [appellant] and the 4th respondent".

[87] There was no attempt by the learned judge to consider the glaring discrepancy between the 3rd and 4th respondents' evidence as to when the incident occurred. It is of significance that the station diary confirmed the appellant's assertion that an incident occurred in the afternoon. An entry in the station diary at 1:45 pm reveals that the appellant was escorted to the Saint Ann's Bay Police Station for "injuries he received in cell at Ocho Rios Police Lock-up".

[88] The burden rested with the appellant to prove his case on a balance of probabilities. The unchallenged evidence was that the appellant received his injuries whilst in the custody of the police. His evidence was that he was beaten by four police officers,(albeit his identification of two was unsatisfactory). He said he received blows to his head, chest, right hand, cheek and other parts of his body. The learned judge seemingly ignored the doctor's report which supported his assertion that the injuries were consistent with infliction by a blunt instrument.

[89] The learned judge failed, in weighing the evidence, to consider the conflicts in the respondents' evidence as to when and how the appellant sustained his injuries. His rejection of the appellant's evidence as to how he acquired his injuries, on a balance of probabilities, was, in the circumstances, unreasonable. The reason proffered by the learned judge for his rejection of the station diary is wholly unsatisfactory. There was no attempt to examine and analyse the evidence in its totality in order to determine what weight, if any, he could attach to the said entry.

[90] Consideration ought to have been given to the fact that the diary was in the control of the police and the said entry was made by the police and not the appellant. The 4th respondent would have been at the station at 1:30 pm as his evidence was that he had returned to the station at 11:00 am and left 5:00 pm. No consideration was given by the learned judge to the 3rd respondent's evidence that the 4th respondent would have been present at the station at 8:00 am when the appellant was found unconscious and with injuries. Had he properly evaluated the evidence he would not have concluded that that the 3rd and 4th respondents were unsparing with the truth.

[91] In the absence of any explanation from the learned judge as to the reason for his finding of two incidents, in light of the fact that it is the appellant's version was more supportive of that finding, his conclusion is unreasonable. Miss McFarlane directed the court's attention to the words of Sir David Simmond CJ in the case of **Weekes v Advocate Co Ltd** (2002) 66 WIR 26. At page the learned chief justice said:

> "[17] It should always be remembered that the duty of a judge sitting in a civil trial is two-fold. First, he must try to determine what happened (that is, 'find the facts'). And, secondly, he must apply relevant legal principles to the facts which he finds. In discharging that first duty he must critically analyse and evaluate the evidence of the witnesses, attach such weight to the evidence as his judgment directs and then make up his mind. The weight to be attached to evidence involves an examination of its nature and texture to see where it leads. In coming to a conclusion, the reasons for reaching that conclusion must be apparent in the text of that decision."

[92] The learned judge, in assessing the witnesses' credibility, was under a duty to ensure that he appreciated exactly what each witness asserted. His failure to so appreciate resulted in a misunderstanding of the sequence in which the witnesses said the incident unfolded and the conflicts in the evidence of the 3rd and 4th respondents. His failure to understand the evidence led to him arriving at incorrect conclusions which warrant this court's intervention. In **Beacon's** case the Privy Council, at page 563, said:

> "It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts...Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to indentify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence ..."

The appellant's failure to cross-examine the respondents

[93] In respect of the 1st and 2nd respondents, learned judge said:

> "In point of fact, both the third and fourth [respondents] support the first [respondent] that, the latter was not present at work on that day and, that the second [respondent] is unknown to them. This the [appellant] did not establish or, else, did not even attempt to rebut."

Apart from the cross examination concerning the "struggle in the yard" which involved the 2nd respondent, there was however no further cross-examination in respect of the 2nd respondent.

[94] In dealing with the 3rd respondent's evidence, the learned judge said:

> "With respect to the third defendant she[sic] was never confronted by the [appellant] during her [sic] cross-examination that she was among the persons who beat the [appellant] into a state of unconsciousness. I accept her [sic] as a witness of truth. She delivered herself [sic] with unimpeachable candour."

[95] In her written submissions, Ms Chisholm postulated that the appellant's failure to put to the 3rd respondent, the point at which he assaulted the appellant was indeed fatal. She said that fact was noted by the learned judge in his finding that the 3rd respondent "was never confronted by the [appellant] during her cross-examination that 'she' was among the persons who beat the [appellant] into a state of unconsciousness". She posited that the appellant's claim that the 1st respondent was one of the two police officers, who had beaten him, was not suggested to the 1th respondent. Nor was it put to the 1st respondent that he was one of the two police officers who assaulted him in the vicinity of the guard room.

Analysis

[96] Regarding the 1st respondent, it was put to him in cross-examination that he was present during the assault and that he participated in the assault. The 3rd respondent was in fact not cross-examined on the issue of his participation in the beating.

Counsel's questions were not recorded but from the witnesses' response, it is apparent that it was put to him (the 3rd respondent) that he threw water from the cleaning pail on the appellant. The learned judge's notes of evidence read:

> "I threw water on him. Don't have pail in the cell. Got water out of the pipe. Water was from a cup-not pail. Water was dripped onto his face, to see if he was twitching. Got water from bathroom. Bathroom is by cell."

[97] Evidently it was put to the 4th respondent that the appellant was being assaulted by two other police officers and that he called him for assistance. The learned judge's notes of evidence stated that the 4th respondent denied seeing "any officer try to hit the Claimant during the struggle in the yard". He said they were merely holding on to him. He also denied that a woman constable was "outside during the beating incident". Later in his notes of evidence the learned judge recorded the following:

> "S: That sometime later he sought your assistance as he was being assaulted.
>
> Ans. No"

He denied he approached the appellant, "boxed" him and pushed him into the guard room. He denied "boxing" him twice.

[98] The 4th respondent also testified in cross-examination that he didn't "know of water from a pail being thrown" on the appellant. The alleged throwing of the water would have occurred in the afternoon on the appellant's evidence and in the morning on the 3rd respondent's evidence. There was therefore a very feeble attempt at cross-examining the 4th respondent about that incident.

The law

[99] The learned authors of Halsbury's Laws of England, 3rd edition, volume 15 at page 444, under the rubric "Purpose of cross-examination", said as follows:

> "Cross-examination is directed to (1) the credibility of the witness; (2) the facts to which he has deposed in chief, including the cross-examiner's version them; and (3) the facts to which the witness has not deposed but to which the cross-examiner thinks he is able to depose. Where the court is to be asked to disbelieve a witness, the witness should be cross-examined; and failure to cross-examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence..."

[100] The use of the word "may" by the learned authors is instructive. The failure of the appellant's attorney to specifically cross-examine the 3rd respondent by putting it to him that he participated in beating the appellant is not *per se* fatal as it cannot properly be asserted that the appellant, by his failure so to do, accepted the 3rd respondent's assertion that he sustained his injuries when he fainted and hit his head.

[101] Although the appellant's attorney did not put to the 3rd respondent in cross-examination that he was among the persons who had beaten him that was an issue

which was joined in his pleadings and in his evidence-in-chief. His claim form, particulars of claim, reply to defence and his witness statement all state that the 3rd respondent participated in beating him.

[102] The learned authors of Phipson on Evidence 11th Edition at page 1544 in dealing with the omission to cross-examine, stated:

> "As a rule a party should put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness, or in which he had a share...
>
> Moreover, where it is intended to suggest that the witness is not speaking the truth upon a particular point his attention must first be directed to the fact by cross-examination, so that he may have an opportunity of explanation; and this probably applies to all cases in which it is proposed to impeach the witness's credit. Such questions are rendered by statute a condition precedent to proof of a previous contradictory statement by the witness. **Failure to cross-examine, however, will not always amount to an acceptance of the witness's testimony, e.g., if the witness has had notice to the contrary beforehand, or the story is itself of an incredible** or romancing character, or the abstention arises from mere motives or delicacy, as where young children are called as witness or their parents in divorce cases, or when counsel indicates that he is merely abstaining for convenience, e.g., to save time). And where several witnesses are called to the same point it is not always necessary to cross-examine them all. (Emphasis mine)

[103] In Blackstone's Civil Practice 2004, page 689, paragraph 59.37 entitled "Role of the judge", the following was stated:

> "…In the absence of cross-examination (for example, where a witness statement is simply read to the court) the court cannot make findings against a party who denies what is alleged against him, **unless the denial is self-evidently**

> **wrong, for example, because of other facts which are admitted or because the denial is plainly contradicted by reliable documents** (*Re Hopes (Heathrow) Ltd* [2001] 1 BCLC 575)." (Emphasis added)

Conclusion

[104] The learned judge's failure to properly evaluate the evidence and the mistakes he made in evaluating the evidence which have undermined his conclusions provide the scope for this court's intervention. In respect of the 1st respondent, the appellant has not proven, on a balance of probabilities, that he was present. The appellant's evidence was merely that he "later discovered that one the officers was 'Con Delroy Clarke'."

[105] The 1st respondent' evidence however, was that he was not present on the day of the incident. He said he was on leave. He could not recall whether he was on a day or two days leave. He provided no evidence that he was on leave.

[106] The 3rd respondent's evidence was that he did not "recall seeing the 1st respondent present at the station at the time of the incident". Although there is an element of uncertainty in his evidence, and the 1st respondent provided no evidence that he was on leave, the appellant bore the burden, on a balance of probabilities to prove that 1st respondent was indeed one of the officers who was involved in the beating.

[107] The 2nd respondent remains a phantom. The appellant provided the court with no proper evidence as to the identity of this officer. He has therefore failed to prove, on a balance of probabilities, that the 2nd respondent was one of his assailants.

[108] Having regard to the principles earlier discussed, this court is now able to substitute its findings for those of the learned judge. I am of the view that the appellant's evidence is to be preferred on a balance of probabilities. In the circumstances, he has proven his case against the 3rd and 4th respondents.

[109] The Crown Proceedings Act fixes the Crown with liability for the tortuous actions of police officers. Section 3(1) of that Act reads:

> "Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject-
>
> (a) in respect of torts committed by its servants or agents;
>
> (b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and
>
> (c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property:
>
> Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) in respect of any act or omission or a servant or agent of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action in tort against that servant or agent or his estate."

[110] In order to succeed against the respondents, the appellant is required to prove not only that the respondents actions were committed in the execution of their duty, but also that their actions were malicious and without reasonable and probable cause. Section 33 of the Constabulary Force Act 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."

Quantum of Damages

[111] The appellant's claim for the sum of $74,000.00 for special damages was agreed.

General Damages

[112] Ms McFarlane relied on the following authorities, **Leeman Anderson v The Attorney General of Jamaica and Christopher Burton** (Claim No CL 2002/A 017, damages assessed 16 July 2004) cited in Mrs Ursula Khan's compilation, Recent Personal Injury Awards made in the Supreme Court of Judicature of Jamaica (Khan), volume 6 at page 98 and **Trevor Clarke v Partner Foods Limited & Marlon Scotland** (Suit No CL 1989/C256, damages assessed 12 June 2000) Khan, volume 5, at page 112.

[113] In the matter of **Leeman Anderson**, in July 2004, an award of $400,000.00 for pain and suffering was made to Mr Anderson who was beaten by police officers. He received the following injuries:

> "Blows to right hand, head and body with a lot of pain.
>
> Undisplaced fracture of right ulna.
>
> Swelling, deformity and tenderness over right forearm.
>
> An above elbow plaster of Paris was applied to the right forearm and this was removed on February 27, 2001.
>
> There was no Permanent Partial Disability."

The CPI at July 2004 was 77.6 and the CPI February 2009 was 137.1 which converts the award of $400,000.00 to $706,701.03. Counsel submitted that that award ought to be increased because of the fracture to appellant's head.

[114] In **Trevor Clarke,** Mr Clarke was awarded the sum of $565,000.00 in June 2000 for the following injuries:

> "Bruises to ankle, right knee & right shoulder
>
> 2. Pain & swelling of right index finger
> 3. Open injury to right index finger
> 4. Compound fracture of right index finger.
>
> B. He was treated at the University Hospital where his wounds were cleaned and dressed. One week after he underwent operative fixation of the fracture of the proximal phalanx of the right index finger. The fracture did not heal and he underwent another surgical procedure to fix the fracture on the 26/6/99.

C. On 11/4/00 he was examined by Dr. Emran Ali, CCH, MBBS, FRCS, FACS, FICS, and Consultant Orthopaedic Surgeon, who found that

(i) the index finger was markedly swollen
(ii) there was a healed 2½" lazy S scar over the dorsum of the finger
(iii) the PIP joint was absolutely stiff with only 5% flexion
(iv) there was diminished sensation over the distal ½ of the finger
(v) the index finger stuck out when making a grip
(vi) there was zero punch grip."

In June 2000 the CPI was 54.5. The CPI for February 2009 was 137.1. The award of $565,000.00 converts to $1,421,311.93.

The respondents' submission

[115] The respondents relied on four cases. In **Wayne Griffith's v Detective Duncan and The Attorney General** No CL 1986/G283, the sum of $15,000.00 was awarded to Mr Griffiths, a chain operator, for loss of distal phalanx of right fourth finger, laceration of right foot, soft tissue swelling to left elbow, bruises on back, swollen and bruised right jaw. Mr Griffith also had minor permanent disability of his right hand. In October 1988, he was awarded the sum of $15,000.00. The CPI for October 1988 was 4.457. The award equates to $482,275.07. It was submitted on the respondents' behalf that the appellant has no permanent disability or any laceration to his foot.

[116] Reliance also was placed on the case **Everald Slater v Adolph Sheriff** CL 1988/SO70. In that case the claimant was a 40 year old security guard. He suffered a

2¼" laceration to his left index finger, stiffness in the proximal and terminal interphalangeal joints of the left index finger, ½" shortening of the left index finger, permanent partial disability of 10%-15% of the left hand. He was consequently unable to continue his job as a security guard and was forced to work as a messenger because of his inability to handle a gun.

[117] In March 1990, he was awarded the sum of $778,609.63 as general damages. Counsel for the respondents however contends that that case was considerably more serious than the instant because the appellant has neither permanent disability nor shortening of his finger. The CPI for March 1990 was 5.609. That award now values $855,500.09.

[118] In respect of the injury to the appellant's face and head, reliance was placed on the cases **Raymond Shaw v Micheal Gordon** CL1989/SO37; and **Verta Scott and Ashborn Scott v Tankerweld Equipment Ltd** CL1990/S267. In **Raymond Shaw**, in July 1992, he was awarded the sum of $25,000.00 for trauma to his resulted in lacerations to his cheek, forehead, chin and neck. He also suffered throat irritation and hoarseness. He was a security guard and was injured whilst a passenger on a bus owned by the defendant. In July 1992, the CPI was 16.632. That award equates to $206,078.64.

[119] The case **Verta Scott and Ashborn Scott v Tankweld Equipment Ltd,** received an award of $9,000.00 in January 1992 for a blow and wound to his head

which resulted in pain to his neck and head. Jan 1992 CPI was 13.120 which now values $94,190.84.

Analysis

[120] The appellant sustained the following injuries:

> Laceration of size approximately 5cm on the left side of forehead
>
> b. Swelling and deformity of right hand
>
> c. Tenderness in right infra-axillary region
>
> d. Tenderness at the right side of cheek

On 3 September 2000 Dr Ravi stated that the appellant was seen on 3 July 2000 but did not return for a review with X-rays as was then requested. The doctor was therefore unable to state the severity of his injuries.

[121] On 3 July 2000 the appellant attended the Port Maria Medical Centre and was examined by a doctor who found:

> Laceration of size approximately 5cm on the left side of forehead
>
> (1) fractured proximal phalange of Ring finger (r) hand
>
> (2) fractural SMMCP Bone on (r) hand
>
> (3) trauma to head resulting in concussion
>
> Plaster of Paris was applied to (r) hand for 6 weeks and analgesics given for concussion he was given analgesics, granted 28 days home initially.

> Initially he was unable to work for 12 weeks. The injuries to (r) hand will result in temporary partial disability.
>
> The injury to head although it is not serious now might have repercussions later.

[122] I agree with Ms McFarlane that the injuries sustained by the appellant are more serious than those sustained by the complainant **Leymond Anderson**. The appellant suffered fracture of his finger and palm and he was unconscious for a period unknown. The injury to his head in the words of the doctor "might have repercussions later".

[123] The injuries sustained in **Trevor Clarke**, however, were significantly more serious than those of the appellant. Mr Clarke endured the trauma of undergoing two operations. He has diminished sensation in a part of his finger.

[124] Regarding the cases relied on by the respondent, I cannot agree with the submissions on behalf of the respondents that the injuries sustained in **Wayne Griffiths** were more serious than the appellant's because the appellant did not receive a laceration to his leg or suffer permanent disability as did Mr Griffith. The appellant's injuries were similar to those of Mr Griffiths. However both the appellant's finger and palm were fractured. He received a wound 5 cm to his head which resulted in him losing consciousness. The doctor's prognosis is unfavourable as he opined that the appellant might suffer repercussions later. The injuries sustained by the complainant Raymond Shaw are also not as serious as those sustained by the appellant.

[125] I am of the view that an award of $1,000,000.00 as general damages is reasonable. I would therefore allow the appeal, enter judgment for the appellant, and award $1,000,000.00 as general damages to the appellant, special damages having been agreed. Costs to the appellant to be agreed or taxed.

P WILLIAMS JA (AG)

[126] I have read in draft the judgment of my sister Sinclair-Haynes JA. I agree with her reasoning and conclusion and have nothing to add.

MORRISON P

ORDER

Appeal allowed. Judgment entered for the appellant on the claim. General damages awarded in the sum of $1,000,000.00 with interest at the rate of 12% per annum from the date of service to June 2006 and thereafter at the rate of 6% per annum. Special damages awarded in the sum agreed with interest at the rate of 12% per annum from 3 July 2000 to June 2006 and thereafter at the rate of 6% per annum. Costs here and in the court below to the appellant to be agreed or taxed.