



[2022] JMSC Civ 211

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2019CV02048

BETWEEN	VERNALDO GRAHAM	CLAIMANT
AND	THE ATTORNEY GENERAL OF JAMAICA	DEFENDANT

IN CHAMBERS

Ms. Chantal Bennett instructed by Dunn Cox for the Claimant

Louis-Jean Hacker and Mr. Javon Bowes instructed by the Director of State Proceedings on behalf of the Defendant

Heard: September 27, 2022 and November 11, 2022

Application to Strike Out Statement of Case-Crown Proceedings Act-Constabulary Force Act-Claim brought in respect of Judge of the Supreme Court-Prosecutor and Police-Malicious Prosecution-False Imprisonment-Loss of Family Life?

O. SMITH, J (Ag.)

[1] In this matter, the Applicant/Defendant filed a Notice of Application for Court Orders on November 27, 2019 for the Claimant/Respondent's statement of case to be struck out or in the alternative that they be granted an extension of time to file their defence.

[2] The grounds on which the Applicant/Defendant relies are:

1. Rule 26.3(1)(c) of the Civil Procedure Rules, 2002 (CPR) vests the Court with the power to strike out a statement of case, in whole or in part, if it appears to the Court that the statement of case discloses no reasonable grounds for bringing a claim.
2. There is no reasonable ground for bringing the claim for wrongful arrest and wrongful conviction as these are not causes of action known to the law of this jurisdiction.
3. The Claim concerns directions given by a judge during the course of judicial proceedings and as such, the Crown is not liable for same by virtue of section 3(5) of the Crown Proceedings Act.
4. The Claimants statement of case relative to false imprisonment discloses no reasonable grounds for bringing the claim as the Claimant was serving a sentence imposed by a judicial officer and prior to same was remanded in custody at the discretion of a judicial officer. Further, the claim relative to this cause of action is statute barred as the cause of action if any, arose more than six years prior to the filing of this claim and the claim is therefore an abuse of process of the Court.
5. The claimants statement of case relative to the breach of his right to a fair trial discloses no reasonable grounds for bringing the claim as any error resulting in the conviction and sentencing of the Claimant was rectified on appeal...”

[3] An affidavit in support was filed on December 24, 2019. However, before the application could be heard, the Claimant’s Attorneys filed a Further Amended Claim Form on November 18, 2020. The Further Amended Claim Form deleted the claims for damages for wrongful arrest, wrongful conviction and imprisonment. They now claim damages for: Malicious Prosecution, False Imprisonment and Loss of Family Life.

BACKGROUND

[4] On March 25, 2006 the Defendant was arrested for the offence of Murder after he was identified by an eyewitness. He was subsequently tried and convicted in the Home Circuit Court on the 19th of June 2013 and sentenced to thirty (30) years in prison.

[5] On the 4th of July 2013, grounds of appeal were filed against the conviction and sentence. The grounds of appeal were:

“a) That the prosecution witnesses wrongfully identified the Claimant as the person or among the persons who committed the alleged crime.

b) That the prosecution failed to produce in court any form of material, forensic or scientific evidence to link the Claimant to the alleged crime.

c) That the evidence and testimonies upon which the learned trial judge relied to direct the jury lacks facts and credibility thus rendering the guilty verdict unsafe in all circumstances of the case.

d) That based on the conflicting and contrary testimonies as presented by the prosecution, it is evident that the Claimant was wrongfully convicted for a crime he knew nothing about.”

[6] On the 10th of July 2017, The Court of Appeal allowed the Claimant’s appeal, quashed his conviction, set aside the sentence and judgment and entered a verdict of acquittal.

[7] As a consequence of his conviction being quashed Mr. Graham filed a Claim Form and Particulars of Claim on May 15, 2019, an Amended Claim Form and an Amended Particulars of Claim on November 11, 2019 and a Further Amended Claim Form on November 18, 2020 seeking the following:

“a. damages for:

- (i) Malicious Prosecution
 - (ii) False Imprisonment, and
 - (iii) Loss of family life.
- b. Aggravated Damaged
 - c. Interest on damages...”

SUBMISSIONS ON BEHALF OF THE APPLICANT/DEFENDANT

[8] The issues as identified by the Applicant/Defendant are:

- a. whether the Claimant’s statement of case discloses any reasonable grounds for bringing the claim and as such ought to be struck out as a consequence of the claim being brought against a judicial officer
- b. whether the claim for false imprisonment is statute barred.

[9] They submitted in relation to issue 1, as identified by them, that they recognised the Courts power to strike out pursuant to Rule 26.3(1). See ***Construction Developers Association Limited v Urban Development Corporation***, Supreme Court of Judicature of Jamaica, Claim Nos 2008HCV02213 and HCV02214. However, they acknowledged that the Courts power should only be exercised in the most severe of cases and in giving consideration to such an application should contemplate the implications of striking out the statement of case. Reliance was placed on ***S&T Distributors Limited and S&T Limited v CIBC Jamaica Limited and Royal & Sun Alliance***, Court of Appeal, SCCA 12/04, delivered July 31, 2007.

[10] It was submitted that the Court in exercising its discretion to strike out a statement of case is entitled to look at the pleadings to see whether they disclose a cause of action. They commended to the Court the cases of ***Sebol Limited and Another, v Ken Tomlinson (as the Receiver of Western Cement Company Limited) and others***, Supreme Court of Jamaica, Claim No. HCV 2526/2004, delivered on October 9, 2007 and ***Sebol Limited and Another, v Ken Tomlinson (as the***

Receiver of Western Cement Company Limited) and others, Court of Appeal, SCCA 115/2007, delivered December 12, 2008 and **Drummond Jackson v British Medical Association and Others** [1970] 1 WLR 688.

Liability of a Judge.

- [11] They agreed that the claims for false imprisonment and malicious prosecution are known causes of action in Jamaica. However, whether there are reasonable grounds for bringing them had to be assessed.
- [12] The pleadings filed by the Claimant, they argued were levelled at a Judge of the Supreme Court discharging her duties in the criminal jurisdiction. As such they cited section 3 (1) and (5) of the **Crown Proceedings Act, CPA**. Reliance was also placed on **Sirroos v Moore and Others** [1974] 3 ALL ER 776. Counsel submitted that the proper course of action from an order of a judge was to appeal and the Claimant availed himself of the avenue. They referred the Court to the Court of Appeal decision of **Vernaldo Graham v R** [2017] JMCA Crim. 30. As a consequence, the claim cannot be maintained against the Judge.

No reasonable grounds – False Imprisonment.

- [13] Counsel cited the case of **Peter Flemming v Det. Cpl Myers and the Attorney General** (1989) 26 JLR 525. In particular, the court was referred to page 527, paragraph B of the judgement where Carey, P stated the requirements in an action of false imprisonment. However, as it pertains to a claim against a police officer, the Claimant had to satisfy section 33 of the **Constabulary Force Act, CFA**. On an examination of the pleadings the Claimant has so to do. On this ground, they highlighted the fact that the tort of false imprisonment begins the moment of arrest and ends when a person is placed before a judge. As such the claim cannot be maintained. **Delroy Thompson v The Attorney General of Jamaica and Det. Taylor** [2018] JMCS Civ. 78.

No reasonable Grounds - Malicious Prosecution

[14] In relation this issue, counsel also relied on the case of *Delroy Thompson v The Attorney General*. He submitted that there were no reasonable grounds for bringing the claim. He utilized the four elements required to prove malicious prosecution as outlined by Anderson J and concluded that in the case at bar there were no reasonable grounds for the bringing the claim based on the following: “(1) the judge was not the person who laid the charges and prosecuted the Claimant; (2) the Judge was immune from liability based on the authority of *Sirroos v Moore* (3) there are no allegations within the pleadings against the person who laid the charges... and (4) there are no allegations against the prosecution.

Whether the claim for False Imprisonment is statute Barred

[15] It was submitted that a claim for False Imprisonment which is not filed within six years is statute barred. See *The Attorney General v Arlene Martin* [2017] JMCA Civ 24 and section 3 of the **English Limitation Act of 1623 21 James 1 Cal 16**. Counsel argued that Mr. Graham was arrested on March 25, 2006 and although no evidence was presented in relation to when he was first brought before the Court, the evidence is that he was convicted on June 19, 2013. It can therefore be inferred from the pleadings that Mr. Graham would have been placed before a court prior to his trial and as such was subjected to judicial remand. As such any period of imprisonment without lawful justification would have preceded the trial when he was subjected to judicial remand. The claim is therefore statute barred.

Submissions on behalf of the Respondent/Claimant

[16] The Respondent/Claimant identified five issues, namely:

1. “Whether the Defendant is liable in tort for false imprisonment in all the circumstances of the case.
2. Whether the Defendant is liable in tort for malicious prosecution in all the circumstances of the case.

3. Whether the nature of the tortious acts makes the defendant liable to pay aggravated damages.
4. Whether the Defendant is liable to pay damages for the loss of family life suffered by the Claimant.
5. Whether the Defendant is liable to pay damages for breaches of his fair trial rights.”

[17] The Claimant’s Attorney accepted that a claim was not maintainable in relation to the judge and as such argued that “the learned judge’s failure was not the cause of miscarriage of justice.” Nonetheless, they submitted that “the judge had the opportunity to correct the unfairness and injustice caused by the breach in procedure and the failure to undertake a proper investigation...”. It was further argued that it was the police/prosecutions decision to institute proceedings that set the judicial system in motion. They are not granted immunity by the CPA as the decision to institute legal proceedings was not an exercise of a judicial function.

Whether the Defendant is liable in tort for false imprisonment in all the circumstances of the case.

[18] They relied on the definition of False Imprisonment stated in *Freckleton, Jerome v The Attorney General of Jamaica and Detective Sergeant Puddie, Maurice* [2018] JMSC Civ. 127 and **Peter Flemming**. To this end they argued that there was insufficient evidence of the crime to establish reasonable suspicion. Counsel stated that the witness knew two of the three perpetrators but did not know the Claimant. She further submitted that the witness improperly entered the parade before it was ready and failed to identify Mr. Graham who was standing under number 8. However, when she re-entered he was still under # 8 that is when she identified him. This “impropriety”, she argued, should have been evident to the police/prosecutor in light of the lack of identification on the first parade and the breach in procedure, as such they could not have had any reasonable suspicion.

Whether the Defendant is liable in tort for malicious prosecution in all the circumstances of the case.

[19] Counsel examined the case of ***Neville Williams v Janine Fender, Carlton Henry and The Attorney General*** HCV 00126/2005, delivered on July 1, 2009 where it was stated that the police will generally be treated as the prosecutor. As such only one of the two elements needed to be proved. The Claimant's Attorney used the case of ***Willis v Voisin*** (1963) 6 WIR 50 to establish that when it is being contended that malicious prosecution was caused by the actions of the police, malice and reasonable and probable cause are to be applied disjunctively and in the alternative.

[20] Based on the cases of ***Hicks v Faulkner*** (1978) 8 QBD 167, ***Marcia Ellington v AG*** [2012] JMISC Civ, ***Brown v Hawkes*** [1891] 2 QBD 718, ***Glinski v McIver*** [1962] AC 726 counsel finally submitted that they had proved all the elements of malicious prosecution. As the police and the prosecutor set the law in motion without reasonable and probable cause as the investigation was flawed since it was based on an improper identification. The prosecutor was aware of all the flaws and still persisted. In the circumstances, the prosecutor was motivated by malice because the decision to prosecute was based on an improper purpose.

[21] I received written submissions from both sides which were supplemented by oral submissions on the day of the hearing. I found the submissions and the cases cited by both sides very useful indeed and really saw no need to depart from the law stated therein. I wish to thank counsel for their submissions. They were of great relevance and assistance.

THE ISSUES

[22] Having considered the affidavit filed by the Applicant/Respondent and the submissions from both sides the identified issues are:

1. Whether the Claimant's statement of case discloses any reasonable grounds for bringing the claim for False Imprisonment and as such ought to be struck out.
2. Whether the Claimant's statement of case discloses any reasonable grounds for bringing the claim for Malicious Prosecution and as such ought to be struck out.
3. Whether the claim for False Imprisonment is statute barred.
4. Whether 'Loss of Family Life' is a known cause of action in this jurisdiction.

THE LAW

[23] CPR Rule 26.3(1) (c)

The **Crown Proceedings Act, (CPA)**, sections 3(5) and 13(2).

[24] Section 3(5) of the CPA states that:

"No proceedings shall lie against the crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him or any responsibilities which he has in connection with the execution of judicial process"

[25] This section is prefaced by Section 3(1) which states:

"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) ...

(c)...

Provided that no proceedings shall lie against the crown by virtue of paragraph (a) in respect of any act or omission of 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."

[26] The **Constabulary Force Act** (CFA) is also of relevance in this matter. In particular section 33 which reads 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."

[27] The Application is granted in terms of paragraphs 1 and 3 of the Notice of Application for court orders filed on November 27, 2019. My reasons are set out below:

[28] In this case the application to strike out was adjourned to give the Respondent/Claimant time to file and serve a response to the application. Instead, a Further Amended Claim Form was filed. To date the Respondent/Claimant has not filed a response to the application, just submissions.

Whether the Claimant's statement of case discloses any reasonable grounds for bringing the claim for False Imprisonment and as such ought to be struck out.

Reasonable Grounds

[29] The application by the Applicant/Defendant is for the Respondent/Claimant's statement of case to be struck out as it discloses no reasonable grounds for bringing the claim. The interpretation of this rule has been ably dealt with by Sykes J, as he then was, in **Sebol Limited**. His approach was endorsed by the Court of Appeal in their judgment in the said case. In the Supreme Court decision of **Sebol Limited** Sykes J, in interpreting Rule 26.3 (1) (c) at paragraph 24, said this:

"Let us look at what rule 26.3 (1) (c) actually says. The rule does not speak of a reasonable claim. It speaks of reasonable grounds for bringing the claim. It would seem to me that simply as a matter of syntax the instances in which a claim can be struck out against a defendant are wider than under the old rules. The rule contemplates that the claim itself may be reasonable, that is to say, it is not frivolous, unknown to law or vexatious, but the grounds for bringing it may not be reasonable. Clearly the greater includes the lesser. Thus if the claim pleaded is unknown to law then obviously there

can be no reasonable grounds for bringing the claim. It does not necessarily follow, however, that merely because the claim is known to law the grounds for bringing it are reasonable. The rule focuses on the grounds for bringing the claim and not on just whether the pleadings disclose a reasonable cause of action."

[30] In ***Drummond Jackson v British Medical Association and Others*** [1970] 1 WLR 688 Pearson LJ, stated that;

"A reasonable cause of action connotes a cause of action which has some chance of success when only the allegations in the pleading are considered. As long as the statement of claim discloses some cause of action, or raises some question fit to be decided at the trial, the mere fact that the case is weak and is not likely to succeed is no ground for striking it out. Where a statement of claim is defective only in not containing particulars to which the defendant is entitled, the application should be made for particulars under O 18 r 12 and not for an order to strike out the statement."

False Imprisonment

[31] In ***Jerome Freckleton v The Attorney General*** Evan Brown J, addressed the definition of false imprisonment. At paragraph 64 he stated:

*"False imprisonment "is the infliction of bodily restraint which is not expressly or impliedly authorised by law" according to the learned authors of **Winfield & Jolowicz on Tort 18th Ed** at para 4-15. Simply put, false imprisonment is the detention of someone against his will, without legal justification. The tort therefore contemplates, ... the complete loss of physical liberty without legal justification."*

[32] Evan Brown J, did not end there. In his analysis he examined section 14 of the **Charter of Fundamental Rights and Freedoms** which states that a person should not be deprived of his liberty 'without reasonable grounds' and in accordance with certain circumstances outlined in the section. One such circumstance is for the purpose of bringing him before a competent authority on reasonable suspicion of having committed an offence.

[33] He also examined section 13 of the **Constabulary Force Act** which indicates when the police should apprehend or summon a person before a Justice. One of

those circumstances being where they reasonably suspect a person of having committed any offence.

- [34] In ***Hussein v Chong Fook Kam*** [1970] AC 942, PC 7 Oct. 1969, [1969] UKPC 26, Lord Devlin in explaining reasonable suspicion said,

“In order to have a reasonable suspicion the officer need not have evidence amounting to a prima facie: Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: ‘I suspect but I cannot prove’. Suspicion arises at or near the starting point of an investigation, of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage.”

- [35] In ***Hough v Chief Constable of Staffordshire Police*** [2001] EWCA Civ 39, the Claimant was arrested based on information from the police national computer. The issue in this case was not whether he was to be held accountable for wrongful arrest and false imprisonment in relying on the information that did not justify the suspicion but whether the constable acted reasonably in relying on the information. On appeal from a finding of false imprisonment and malicious prosecution, Simon Brown LJ expressed the view that the question to be asked is what is in the mind of the arresting officer...”

- [36] In ***Commissioner of the Police of the Metropolis v Mohammed Raissi*** [2008] EWCA Civ. 1237, Sir Anthony Clarke MR restated the proper test:

*“On the other hand it is important to have in mind that, as the judge held at [47], the threshold for the existence of reasonable grounds for suspicion is low: see eg ***Dumbbell v Roberts*** [1944] 1 ALL ER 326 per Scott LJ, where he said at page 329 A-B that “the requirement is very limited”; ***Hussien*** per Lord Devlin at pages 948G to 949A; and per Lord Steyn at page 293C and Per Lord Hope at page 296 D-E .”*

- [37] Finally, in the case of ***Delroy Thompson v The AG***, which was relied upon by both parties, Anderson, J at paragraphs 23 to 25 stated that:

“In the case at hand, the claimant gave evidence that he was detained on September 10, 2005 and that he was taken to the gun court lockup, where he was detained until September 16, 2005. He was then placed before the Half Way Tree

Resident Magistrate's Court on September 16, 2005 and was then granted bail, but did not take up the bail offer, until September 22, 2005.

Once he was taken by the arresting officer, before the court, the claimant was no longer, unlawfully detained. His unlawful detention by an agent/servant of the Crown, came to an end, once he had been brought before a court of law.

*The claimant was arrested without a warrant. That arrest, having been carried out without reasonable and probable cause, was unlawful and damage is presumed, as that arrest constituted a trespass to the person. Once taken before the court though, the imprisonment on remand, can only be redressed through the courts, upon a claim for damages for malicious prosecution. See: **Clerk and Lindsell on Torts**, 20th ed. [2010] at para. 15.42, wherein the learned authors have stated, '... if a party is arrested without a warrant and taken before a magistrate, who thereupon remands him, he must seek his remedy for the first imprisonment in an action of trespass and for the imprisonment on remand, in an action for malicious prosecution.' See: **Lock v Asliton** – [1848] 12 Q.B 871; and **Diamond v Minter** – [1941] 1 K.B 656; and **Donovan McMorris v Maurice Bryan** – [2015] JMSC Civ. 203, at para. 26, per Anderson, J.”*

Analysis

[38] Although the Attorney General of Jamaica is named as the Defendant in this matter it has not been made clear in the pleadings who the Claimant is saying wronged him. However, in relation to actions in tort against the police, section 33 of the CFA is instructive. It states, that a claimant shall expressly allege the act of either malice or without reasonable or probable cause in the declaration. The Claimant's statement of case is silent in this regard. The Claim Form and Particulars do not make any allegations of malice or that the officer acted without reasonable or probable cause. In fact, the pleadings do not state or even infer any wrong doing on the part of the police. The Claimant had three opportunities, in the Claim Form and Particulars of Claim which were filed on May 15, 2019, then on November 11, 2019 when an Amended Claim Form and Amended Particulars of Claim were filed and finally in 2020 in the Further Amended Claim Form which was filed on November 18. None of the documents mention the words malice or without reasonable or probable cause nor do they expressly allege any act to ground or substantiate a claim for False Imprisonment. In his statement of case, the Respondent/Claimant grounds his claim on the following: that the prosecution witness wrongfully identified him; that no forensic or scientific evidence was

brought and finally that the evidence on which the judge directed the jury lacked credibility and this lead to his conviction.

[39] The pleadings therefore have run afoul of section 33. Nevertheless, I will examine the pleadings in order to determine whether the Claimant had any reasonable grounds for bringing the claim.

[40] The case for the prosecution is that in the early morning of March 25, 2006 three armed gunmen entered the home of the deceased to effect a burglary. In the course of the burglary the deceased was shot and killed. Mr. Graham was arrested based on the statement of the sole eyewitness, who later pointed him out on an identification parade. This is generally how investigations progress. The issue Mr. Graham has, is that the eyewitness entered the parade room before the police were ready and saw 'him' standing under the number 8. The evidence is that he spoke to her at that point. When the parade was indeed ready and she was called, the witness identified Mr. Graham who was still standing under number 8. What the police had to deal with was this; a crime had been committed and the eye witness knew two of the three assailants. Based on her report, Mr. Graham was arrested. The police, in my mind, at the time of the report had enough evidence to reasonably suspect that Mr. Graham had committed an offence. As Lord Devlin said in ***Chong Fook Kam***, he need not have enough evidence for a prima facie case in order to have reasonable suspicion.

[41] One could argue that this was a case of recognition that did not necessitate an identification parade, nonetheless one was held. This reasonable suspicion, it could be said, was concretized when the witness pointed him out on an identification parade. The fact that the witness entered the parade before it was ready and saw the accused whom she said spoke to her, was not in and of itself enough to say that the officer had no basis for suspicion. However, in light of the fact that he had been seen under a particular number, common sense should have dictated that the officer move the accused to a different number. The fact that the identification parade proceeded, is not in my view, sufficient to undermine the

officer's reasonable suspicion and reduce the officer's arrest of Mr. Graham to a detention without legal justification. I therefore disagree with counsel's submission that this irregularity should have led the police on the one hand not to arrest Mr. Graham and the prosecution on the other not to proceed to trial.

- [42] The Court of Appeal, recognised the irregularity of the parade, however, their findings on this issue turned on their conclusion that the Learned Trial Judge did not assist the jury in relation to how they should approach the weaknesses in the identification evidence that she had highlighted on the Crowns case. The fact of the irregularity, in and of itself, was not the reason the conviction was overturned.
- [43] It also has not gone unnoticed that the Claimant did not name the arresting or investigating officer as a party to this claim. Which to me, means, that the claim for false imprisonment was never aimed at the police officer/s but more so at the prosecutor and specifically the trial judge. This will be dealt with next. Further, even if one could conclude, in the circumstances, that based on the identification parade, Mr. Graham should not have been arrested, it must be remembered that Mr. Graham was brought before the Court sometime between his arrest and conviction. On that first occasion when he was brought to Court and remanded any claim for false imprisonment ended. His only recourse then, having been imprisoned on remand, would be upon a claim for damages for malicious prosecution. I agree with counsel for the Applicant/Defendant that thereafter he would not have been unlawfully detained as his time in custody would have been based on the order of a judicial officer.
- [44] Undoubtedly, false imprisonment is a known cause of action in this jurisdiction. However, based on the facts surrounding the arrest of Mr. Graham and my finding, that the officer had enough evidence before him on which the Court can conclude that he had reasonable suspicion, I quite agree with counsel for the Applicant/Defendant that there are no reasonable grounds for bringing same against the officer or the prosecution. It is for those reasons I find, the application to strike out the Claimants statement of case irresistible.

[45] Although counsel has sought to say that the claims for False Imprisonment and Malicious Prosecution are not aimed at the Judge, the pleadings and the text of their submissions lay the blame squarely at the feet of the judicial officer. The Further Amended Claim Form rely on the grounds of appeal filed on July 4, 2013 as the basis for the claim. They are set out above. The pleadings also state that; *“the learned trial Judge failed to deal adequately with specific weaknesses in the visual identification evidence and failed to address, sufficiently, the material inconsistencies that cast serious doubt on the reliability of the said visual identification evidence.”* Counsel then followed up on this in her submissions by saying *“that the judge had the opportunity to correct the unfairness and injustice caused by the investigating officers’ breach of procedure and the prosecution’s failure to undertake a proper investigation of the alleged crime. The learned judge’s neglect to so do only furthered the miscarriage of justice.”* Section 3(5) of the CPA is not open to misinterpretation. A judge discharging his or her duties is immune from liability. Any Claim that is based on how a judge executes his or her judicial function cannot be maintained. See **Sirroos v Moore**.

[46] In this case, the Claimant appealed his conviction, which was the correct route to take, if he was aggrieved. The Court of Appeal having made a decision in his favour, no action lies against the Judge. In the circumstances, there are no reasonable grounds for bringing this cause of action against a judge executing her judicial duties.

Whether the Claimant’s statement of case discloses any reasonable grounds for bringing the claim for Malicious Prosecution and as such ought to be struck out.

[47] The ingredients of malicious prosecution were laid out by Wooding CJ in **Wills v Voisin** (1963) 6 WIR 50. This is also a case cited by the Respondent/Claimant. The ingredients are:

- “a) ... That the law was set in motion against him on a charge for criminal offence;

- b) That he was acquitted of the charge or that otherwise it was determined in his favour;
- c) That the prosecutor set the law in motion without reasonable and probable cause and
- d) That in so setting the law in motion the prosecution was actuated by malice.” See also ***Delroy Thompson v The Attorney General of Jamaica and Detective Taylor*** [2016] JMSC Civ. 78

[48] The cases in this jurisdiction tend to support the view that section 33 of the CFA, should be read disjunctively. As a consequence, a claimant need only prove either that the police acted out of malice or that there was an absence of reasonable or probable cause. I will examine both malice and reasonable and probable cause.

[49] The Respondent/Claimant relied on the definition of malice as stated in ***Brown v Hawkes*** and adopted by Sinclair Haynes JA in ***Neville Williams***:

“Malice in the widest and vaguest sense has been said to mean any wrong or indirect motive; and malice can be proved by either showing what the motive was and that it was wrong, or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor.”

[50] Prosecutor has also been interpreted to mean the police. ***Neville Williams***.

[51] The definition of reasonable and probable cause was also provided by the Respondent/Claimant’s Attorney. They looked at the case of ***Herniman v Smith*** [1938] AC 305, in which Lord Atkins adopted the definition as stated by Hawkins J in ***Hicks v Faulkner***;

“I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which assuming, them to be true would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.”

Analysis

- [52] How the law treats with claims against judicial officers and the application of section 3(5) of the CPA is also applicable here. In the Amended Particulars of Claim, the Respondent/Claimant states that the learned trial judge failed to do a number of things. The clear inference is that the Respondent/Claimant is saying that the actions or directions of the Judge are the basis upon which he is claiming damages for Malicious Prosecution. Based on the preceding discussion there are no reasonable grounds for bringing the Claim against a judicial officer. This aspect of the claim must also fail.
- [53] The application of section 33 as it relates to claims in tort has already been discussed. As it pertains to the claim of damages for malicious prosecution, the pleadings also do not expressly or even impliedly allege that the police acted maliciously or without reasonable or probable cause.
- [54] The allegation that the officer acted with malice and without reasonable or probable cause was first introduced by Counsel for the Respondent/Claimant in her written and oral submissions. It was also in the written submissions filed on February 18, 2022, that the Respondent/Claimant expressed the view that the *“police and prosecutor set the law in motion without reasonable and probable cause... as the single evidence linking Mr. Graham to the crime was a ‘flawed identification’”*. It was further argued that the prosecutor was actuated by malice because the decision to prosecute was based on an inappropriate and improper purpose. The purpose was not elucidated.
- [55] It needs to be said that submissions are not evidence nor are they pleadings. Evidence is normally contained in a witness statement or an affidavit. Although an affidavit was filed in support of the application before this Court and although the Respondent/Claimant was given time by the Court to respond to that affidavit, no affidavit was filed. The application to strike out is made pursuant to Rule 26.3 (1) (c) that the statement of case discloses no reasonable grounds for bringing the

Claim. What the pleadings amount to is a recitation of the background to this case and a statement of the grounds of appeal. It is also for these reasons this Court finds that the Claimant had no reasonable grounds for bringing the Claim.

[56] However, if I am wrong, let me examine the ingredients needed to establish Malicious Prosecution. Based on *Wills v Voisin*, it is safe to say that the Claimant has satisfied (a) and (b) as set out above. However, in relation to (c) I rely on my examination of the facts set out under issue 1 supra. I will add, that Counsel has said that the witness failed to identify Mr. Graham when she first entered the room. That is an incorrect statement of the facts. From the Court of Appeal Judgment, the witness had no reason to identify him when she first entered the parade because she was instructed by the police that they were not ready for her and so she left the room. At that time the parade was not ready so there was no failure on the part of the witness to identify. In the appeal, as outlined above, this issue turned on the fact that there was not sufficient direction by the judge to the jury on how to treat with the irregularity that occurred at the identification parade. Additionally, because it was a case of recognition the Court of Appeal was of the view that the trial judge ought to have told the jury why the identification parade was not an issue. They expressed the view that the confrontation between the witness and the accused before the parade could affect the parade and therefore should have been explained to the jury.

[57] On an examination of the facts of this case, even as laid out by the Respondent/Claimant, I do not agree that the police had no reasonable and probable cause? The police officers were aware that the witness had entered the room before they were ready and they told her as much. There is no evidence that anyone assisted her in identifying him, albeit no explanation was given in relation to how the witness ended up wandering onto an unprepared identification parade. There was still never a failure to identify. The parade in my view was not detrimentally flawed.

- [58] On the part of the prosecutor, it was submitted, that because of the circumstances outlined in paragraphs 40 and 56, no prudent person would have made the decision to prosecute. I do not agree. The prosecutor had undeniable evidence that a crime had been committed and that the sole eyewitness knew one of the assailants. This identification was supported by an identification parade. The impact of the parade and how the Court of Appeal dealt with it has already been examined.
- [59] In relation to ingredient (d) in **Wills v Voisin**, I am not persuaded by the submissions on behalf of the Respondent/Claimant in relation to malice. No motive has been given for the actions of the police or the prosecution. In addition, the circumstances of the criminal case, in my view, were not such, that it would lead to the conclusion that the prosecution of the case could only have been based on a wrong or indirect motive. I once again rely on the discussions above. As such, I find the submissions of the Applicant/Defendant more favourable. The Respondent/Claimant has failed to demonstrate that there are reasonable grounds for bringing the claim for Malicious Prosecution.

Whether the claim for false imprisonment is statute barred.

- [60] The Court of Appeal decision of **The Attorney General v Arlene Martin** [2017] JMCA Civ 24, which was relied on by the Applicant/Defendant, establishes that the issue to be settled, is, when was the prosecution determined in the Respondent's favour. P. Williams, JA in assessing this issue laid the foundation by examining when the tort arises and ends. At paragraph 52 she said;

“The tort of false imprisonment arises where there is the complete restraint and deprivation of one's liberty, however short, without lawful justification. The tort is complete when the restraint or detention of the person ceases.”

- [61] It has already been settled that detention without legal justification ends after a person is properly remanded by a judicial officer. This is by no means to be

interpreted as a finding that Mr. Graham's time in custody prior to him being brought to court was without legal justification. Nonetheless, there is no evidence of that date before this Court. Regardless, in my view, any action giving rise to the claim of false imprisonment would have ended when Mr. Graham was brought to Court. Mr. Graham was convicted on June 6, 2013, this means that he would have been brought before the Court long in advance of that date. By simple deduction therefore, the tort would have been complete far in advance of 2013. It has been long settled that in this jurisdiction actions in tort must be commenced within six years after the cause of action arose. This issue was not addressed by the Respondent /Claimant.

Whether 'Loss of Family Life' is a known cause of action in this jurisdiction.

- [62] There is no cause of action in this jurisdiction known as "Loss of Family Life". Consequently, there can be no reasonable grounds for bringing that aspect of the claim. In the circumstances that part of the Respondent/Claimants case ought to be struck out.
- [63] I see no benefit in keeping this matter on the courts list.
- [64] Application granted in terms of paragraphs 1 and 3 of the Notice of Application for Court Orders filed on November 27, 2019.
- [65] Leave to appeal is granted.