

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005/HCV 01500

BETWEEN	ODAINE HENRY	CLAIMANT
A N D	CORPORAL COLE	1 ST DEFENDANT
A N D	DET CPL WILLIAMS	2 ND DEFENDANT
A N D	THE ATTORNEY GENERAL	3 RD DEFENDANT

IN CHAMBERS

Mr. Akin Adaramaja and Ms. Dameta Gayle instructed by Forsythe & Forsythe for the Claimant.

Kalasia Clarke instructed by Director of State Proceedings for the defendant.

Heard 16th, 18th and 25th April 2008

Campbell J.

1. On the 17th January 2005, the claimant, then a 20 year old deliveryman was one of three persons travelling in a white Toyota Corolla. On reaching the vicinity of the zinc factory, the vehicle was stopped by the police.
2. The claimant states in his witness statement dated 30th January 2008, "My cousin and I were given a lift in a motorcar." The claimant's version of the events in his witness statement is that the police then searched both himself and his cousin, Glenroy Harper, and found nothing. The driver was also asked to come out of the

car with the relevant documents. He was subsequently searched by the police and a "clip" was found on his person, in his pocket.

3. Sgt. Henzel Cole said he was conducting a spot check, when he noticed a white Toyota Corolla with three young men aboard. He signalled the vehicle to stop and asked the men if they were carrying any firearms, ammunition or drugs. He states that they all replied in the negative. He said the driver appeared nervous. As a result, he told the driver he was going to search him, at which point, the driver attempted to run off. He held him and searched him and found a Glock 9mm magazine with 10 live 9mm cartridges in one of his pockets. The Sgt. stated that the men were cousins.

4. It is clear from the claimant's witness statement, that he was not acknowledging the relationship between himself and the driver. On the other hand, all references to the other passenger acknowledge the fact of their relationship. At paragraph 6 of the Particulars of Claim, which the Claimant signed on the 20th May 2005, he contended that the driver was not previously known to him. He however denies in cross-examination that he had ever said he did not know the driver of the vehicle. His omission from his statement of the attempt of the driver to escape when accosted by the police is also noteworthy. The driver of the vehicle subsequently pleaded guilty to the offence of illegal possession of ammunition and was fined \$50,000.00 or two years imprisonment.

5. The claimant alleges that he was forced to lie face down on the ground, then in a trench and that he was there for about one hour and fifteen minutes. During the time he was on the ground, he claimed that the officers pointed a gun at him and threatened to shoot him. He testified that he was taken to the Hunts Bay

Police station, where he was imprisoned until the 27th January 2005. Whilst in custody he was forced to continue without a change of clothing for three days.

6. Sgt. Cole, said that he searched the men after assistance was called. The assistance came in the form of three radio-cars. The witness said that the three men remained there for about twenty minutes before they were taken to Hunts Bay.

7. On the 25th May 2005, the claimant filed a Claim alleging that

(1) he was falsely and maliciously arrested without reasonable and probable cause by Cpl. Cole and Det. Cpl. Williams,

(2) and that he was detained without reasonable and probable cause at Hunts Bay Police Station for eleven (11) days until the 27th of January when he was released without charges therefrom.

8. The defendant, Det. Insp. Campbell, was at the time of the claimant's arrest, the Divisional Inspector, who exercised a supervisory management role over all serious crimes in the division. He said he was at the station when the claimant was brought there. He had previously reviewed statements in respect of two murders that had been committed in the division. He had assisted in the interviewing of the three men when they were brought to the station. He said he became suspicious because there had been two to three murders committed recently in that division by men travelling in a white Toyota Corolla, as these men were.

9. Acting on his mind, according to Det. Insp. Campbell, were the following; the fact that the men had been stopped in close proximity to the Greenwich Town area where the murders had taken place. Guns were used in both murders. The men had been in a car where a 9mm magazine, with live rounds had been taken from the

driver. The claimant fitted the description of one of the men in the murder of Patrick Fiddler on November 20, 2004, as contained in the statement of Anthony Smith. He also was similar to the description of the assailant, given by a witness in her statement dated January 7, 2005 in relation to the murder of one Jimmy Anderson.

10. Both statements were admitted into evidence, the description which were sparse, could be said to be consistent with the claimant's. The officer said from the moment they were taken in, he immediately pulled the file on the murders.

11. The claimant was held in custody until the 27th January 2005, pending the holding of identification parades for the respective murders. Campbell had said that he personally spoke to the claimant and advised him that he could instruct his own lawyer or that an Attorney-at-law could be provided to represent him on the parade. He said that he informed the claimant of the entire process. Although arrangements were made for the holding of the parade on the 20th and 26th of January 2005, the witnesses failed to attend. The claimant has denied that he was advised of the holding of any parade.

12. Counsel for the claimant has argued that the claimant was deprived of his liberty for eleven days without lawful justification. Further, the claimant was not charged with any offence. He submitted that an assault had been committed on the claimant. He further submitted that this was an appropriate case for exemplary damages,

13. I find that the claimant's testimony was unreliable and he was less than frank with the Court. I find that he had previously asserted that he had not known the

driver prior to the incident on the causeway. I find that there was no threat levelled at him to shoot him. I find that the Det. Insp. Campbell had reasonable and probable cause for suspecting that the claimant was involved in two murder cases he was investigating.

14. I find that there was some similarity between the descriptions of the witnesses to the murder and the claimant. This was clearly an important factor in the Det. Insp. Campbell's detaining of the claimant. I find that, in the circumstances where the claimant was detained to be placed on an identification parade, it was not unreasonable that he be kept from the public view, so as not to impugn the integrity of the parade. A period of eleven (11) days for the police to make their attempts to locate the witnesses is not unreasonable. It is not uncommon for a witness, having given the police a statement, to change the community through fear.

15. The defendant had submitted that the claimant had the burden of proving that the defendants acted without reasonable and probable cause. I don't agree.

16. It is an essential element of the defendants' case that they acted with reasonable and probable cause. It is also a burden placed on the arresting officer by law, Section 13 Constabulary Force Act. The learned authors of Murphy on Evidence Ninth Edition at page 74 at paragraph 4.5.2 put it this way:

"The statement of case should make clear in what way the case or the defence is put, and fix the legal burden accordingly. Ultimately, of course, it is the law, not the pleadings, which establishes the burden of proof, the pleadings should offer a reliable guide, but they do so only insofar as they correctly reflect the law."

17. And at 4.5.2.3 Malicious Prosecution

The claimant bears the burden of proving not only the unsuccessful prosecution of him by the defendant, but also the absence of any reasonable and probable cause for the prosecution, this being an essential element of the claimant's case, even though expressed as a negative. By way of contrast, in a claim of false imprisonment, where the claimant proves the fact of restraint, restraint being *prima facie* tortious, it is for the defendant to prove lawful justification for his act.

18. In **O'Hara v Chief Constable** (1997) 1 all E.R. 129, the house of Lords, after examining the provisions of s 14(1) Prevention of Terrorism (Temporary Provisions) Act 1989 and reciting provisions in statutes, similar to the S13 of the Constabulary Force Act, concluded that such provisions have been a part of English Law for more than half a century. "The protection of the subject lies in the nature of the test which has to be applied in order to determine whether the requirement that there be a reasonable ground for suspicion is satisfied."

...."It relates entirely to what is in the mind of the arresting officer when the power is exercised. In part it is a subjective test, because he must have formed a genuine suspicion in his own mind that the person had been concerned in an act of terrorism. In part it is also an objective one, because there must also be reasonable ground for the suspicion which he has formed. But the application of the objective test does not require the court to look beyond what was in the mind of the arresting officer. It is the grounds that were in his mind at the time which must be found to be reasonable grounds for the suspicion which he has formed."

Judgment for the defendants with costs to be agreed or taxed.