JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 47/06

BEFORE: THE HON MR JUSTICE COOKE JA
THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE MORRISON JA

BETWEEN	WILBERT JOHNSON	APPELLANT
A N D	SAMUEL ELLIS	1st RESPONDENT
A N D	ATTORNEY GENERAL	2nd RESPONDENT

Ms Melrose Reid instructed by Maurice Saunders for the appellant

Mrs Trudy-Ann Dixon-Frith and Miss Stephany Orr instructed by the Director of State Proceedings for the respondents

18, 19 and 22 May 2009

ORAL JUDGMENT

MORRISON JA:

This is an appeal from a judgment of Dukharan J (as he then was) given on 6 March 2006 in the Supreme Court, whereby he entered judgment for the respondents with costs to be agreed or taxed. The appellant, who was the claimant in the court below, is a farmer of Wait-a-Bit in the parish of Trelawny. The first respondent was at all material times a member of the Jamaica

Constabulary Force and there is no dispute that he acted at the material time in the execution of his duties. The second respondent, therefore, is the Attorney General, who has appeared on behalf of both respondents. On 27 June 1995, the appellant was arrested by the first respondent and held in custody at the Wait-a-Bit Police Station for two days until 29 June, when he was taken before the Ulster Spring Resident Magistrate's Court on a charge of obtaining goods by false pretence. He was admitted to bail on that day.

There is a question on the evidence as to whether he had been offered station bail by the first respondent, or whether he was offered bail when he went before the Resident Magistrate. In any event he was not bailed until the 29th, the day when he went to court. After further appearance before the court, he was on 26 October 1995 acquitted of the charge of obtaining goods by false pretence. As a result he brought action against the respondent for assault and battery allegedly committed whilst he was detained and false imprisonment and malicious prosecution.

So far as the evidence which was before the learned trial judge is concerned, I will gratefully adopt his summary of that evidence which is set out at pages 58-60 of the record:

> "The claimant gave evidence which is contained in a witness statement (exhibited). He said that in November 1994 he was painting Miss Babs Smith house where he sought to purchase one cwt. of yam heads from her farm. She told him he could have ½ cwt. for $500.00 at a later date. In February 1995 he spoke to

Verol Adlam the farm supervisor for Miss Smith where he collected the Yam heads at a price of $500.00. He said he confirmed the purchase with Miss Smith and the following day he collected the yam heads. He paid $50.00 to Mr. Adlam as he could not find the balance and sought an extension from Miss Smith which he said was granted. He said at one time he made a suggestion to Miss Smith to return the yam heads as he was having some financial difficulty. This suggestion was refused.

He further said that after hearing the police was looking for him he went to the Wait-a-Bit Police Station where he explained to an officer of the agreement he had with Miss Smith and Mr. Adlam. He said that on the 27th June, 1995 Detective Ellis came to his home and questioned him about the money owing to Miss Smith. He said he told Detective Ellis he did not have the money at the time. He was taken to in a police jeep to the Wait-a-Bit Police Station and left sitting in the station for quite some time. He said when he got up to leave he was manhandled and threatened with a baton by Detective Ellis. He said he was locked up and while entering the cell he was hit with a broom by a police officer named Sewell. He said he was locked up in a cell for two days with other prisoners which was poorly ventilated and with the stench of urine. He was taken to the Clarks Town Resident Magistrate's Court two days later. He said also that during his incarceration he was assaulted by other prisoners.

In cross examination he said there was an agreement to pay for the yam heads within four weeks. He said it was not true that he was cautioned by the police for obtaining goods by false pretences. He said he was never offered bail and only when he was taken to Court he was offered bail.

The 1st Defendant, Det. Cpl. Ellis told the Court that he received a report from Babs Smith of an alleged case of obtaining goods (yam heads) under false pretences committed by the Claimant. He said he approached the Claimant and informed him of the report. The Claimant admitted to receiving the 80lbs of yam and

agreed to pay Mr. Adlam by the end of May 1995. He said that on the 27th June, 1995 Mr. Adlam made a report to him that the $500.00 due and owing to Miss Smith was still outstanding. It was on that basis the Claimant was charged for obtaining property by false pretenses. He was placed in custody and brought before the court two days later.

Cpl. Ellis denied threatening or assaulting the Claimant nor did he see anyone hit or threaten the Claimant.

In cross examination he said he offered station bail to the claimant. He agreed that from information there was an arrangement for him to pay $500.00 for the yams which was due and owing. It was suggested to him that he was putting pressure on the Claimant to pay the money and that was the reason why he arrested him. This he denied. He also said that Miss Babs Smith told him that if the Claimant paid the outstanding sum she would not proceed any-further with the matter.

Miss Babs Smith told the Court that she had an arrangement with the Claimant for him to pay $500.00 for the yam heads. She said she told Cpl. Ellis about this arrangement and that she would not proceed if the matter of the outstanding sum was paid."

The learned judge then stated his findings of fact as follows (page 63):

"I find as a fact that the 1st defendant received a report and acted on that report as he was duty bound to do. I also find as a fact that the 1st defendant acted honestly and without malice and with reasonable and probable cause.

There is no evidence of which I can find that there was an improper motive for the 1st defendant to lock up the claimant and to teach him a lesson. I also find as a fact that the claimant was offered station bail as soon as he was arrested and taken to court at the earliest possible time.

> I do not find the claimant to be an entirely truthful witness. I do believe the 1st defendant when he said the claimant said on the second occasion that he was not paying for any yams.
>
> In relation to the assault, I have doubts as to whether or not he was threatened with a baton at the police station by the 1st defendant. In sum the claimant in my view has failed to prove malice against the 1st defendant or that he was falsely imprisoned."

In the result, judgment was entered for the defendants with costs. The appellant filed five grounds of appeal, as follows:

"(a) that the learned trial Judge erred in that he ignored or fail to take account of the evidence that there was an agreement for sale and that there was essentially a business transaction between Miss Babs Smith and the Plaintiff/Claimant in which a debt was outstanding and that this information was conveyed to the First Defendant before he arrested the Plaintiff/Claimant.

(b) that the learned trial Judge erred in that he found that the arrest and detention of the Plaintiff/Claimant for a criminal offence (without a warrant) was lawful although there was no evidence of any false pretense on the part of the Plaintiff/Claimant and no evidence or statement of what was the alleged act or acts of false pretence(s).

(c) the learned trial Judge erred in finding that the arrest and detention of the Plaintiff/Claimant was lawful notwithstanding the evidence of about (sic) information (as referred to in Ground (a) herein) which had been conveyed to the First Defendant prior to arresting and detaining the Plaintiff/Claimant.

(d) the learned trial Judge erred in that he found that the prosecution of the Plaintiff/Claimant by the First Defendant was not initiated with an improper motive and did not amount to a malicious prosecution notwithstanding the evidence of information (as referred to in Ground (a) herein)

which had been conveyed to the First Defendant prior to the prosecution.

(e) the learned trial Judge erred in that he found that the Plaintiff/Claimant was not assaulted notwithstanding (i) the evidence of the Plaintiff/Claimant that he was struck with a broom stick by Mr. Sewell (a servant or agent of the Second Defendant) and (ii) the absence of any evidence of denial by the said Mr. Sewell."

The last ground challenges the judge's finding that the appellant was not assaulted. It has been indicated by counsel for the appellant that this ground is not being pursued and I therefore propose to say nothing more about it, save to say, that the learned judge was confronted with the appellant's allegations that he was assaulted and by the first respondent's denial that any such assault had taken place. The judge resolved that dispute in favour of the first respondent and there is no basis upon which to disturb that finding.

The appellant's attorney-at-law filed skeleton arguments, but for the purpose of this judgment, it is only necessary to refer to Ms Melrose Reid's spirited oral submissions in support of the appeal. Ms Reid submitted that there was no reasonable or probable cause for the arrest because the officer was aware that there was an agreement between the parties. The officer actually went to the appellant and spoke to him about the money. She submitted that this was a civil matter and the officer ought to have known this or he should have advised himself, for instance by seeking advice from the Clerk of the Court.

She submitted that there was malice and that the prosecution was never intended to satisfy the interests of justice and there was an abuse of the process of the court to enforce payment for the yam heads. She also submitted that "the officer did not have sufficient material to justify putting the matter before the court". She referred us to a number of authorities and in particular ***Glinski v McIver*** [1962] 2 WLR 832, to which I will refer to again in due course. Mrs Dixon-Frith, who also filed a comprehensive skeleton argument, was equally spirited in her response on behalf of the Crown. She submitted that there was a finding in this case by the learned judge that the appellant was not a truthful witness and that was a fact which ought to be taken into account in assessing the various versions of what had transpired in this matter. She pointed us to the evidence in cross-examination of both Corporal Ellis and the appellant as to what was the state of mind of Corporal Ellis at the time when he made the arrest. She submitted that there was reasonable cause in these circumstances. While the court did have concern as to what precisely was the nature of the false pretence alleged against the appellant, Mrs Dixon-Frith unfortunately was not able to produce the information that was actually placed before the Resident Magistrate. She made reference to authorities to make the point that it does not matter if at the end of the day, the person who is arrested is acquitted. What is important was the state of mind of the officer making the arrest and in this case he had an honest belief based on reasonable grounds. In those

circumstances she submitted that the judgment of the learned judge ought not to be disturbed.

Both parties brought to our attention section 33 of the Constabulary Force Act, which refers to the required pleading in actions for false imprisonment and malicious prosecution, that is, that:

> "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 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."

In this case there is no question that the action was properly pleaded, but naturally the respondents contend that the evidence did not come up to proof in the sense required by section 33.

The claimant in an action for malicious prosecution must prove, in our view, four essentials:

(1) that he was prosecuted by Corporal Ellis;

(2) that the prosecution was determined in his favour;

(3) that the prosecution was without reasonable and/or probable cause; and

(4) that the prosecution was malicious.

There is no question in the instant case that the first two requirements have been satisfied and that the real issue is whether it has been demonstrated that the first respondent, Corporal Ellis, acted without reasonable and/or probable cause and also acted maliciously.

We were referred by both counsel to one of the leading authorities ***Glinski v McIver***. I will firstly acknowledge the judgment of Viscount Simon as the judgment from which I derive the four essentials and I think I should make reference to the judgment of Lord Denning at page 850 which covers some of the ground that was contended for by Mrs Dixon Frith in her submission. He said that:

> "Whereas in truth he has only to be satisfied that there is a proper case to lay before the court or in the words of Lord Mansfield that there is a probable cause 'to bring the [accused] to a fair and impartial trial' ... After all he cannot judge whether the witnesses are telling the truth. He cannot know what defences the accused may set up. Guilt or innocence is for the tribunal and not for him. Test it this way: Suppose he seeks legal advice before laying the charge. His counsel can only advise him whether the evidence is sufficient to justify a prosecution. He cannot pronounce upon guilt or innocence. Nevertheless the advice of counsel, if honestly sought and honestly acted upon, affords a good protection... So also with a police officer. He is concerned to bring to trial every man who should be put on trial but he is not concerned to convict him. He is no more concerned to convict a man than is counsel for the prosecution. He can leave that to the jury. It is for them to believe in his guilt, not for the police officer. Were it otherwise, it would mean that every acquittal would be a rebuff to the police officer. It would be a black mark against him, and a hindrance to promotion. So much so that he might be tempted to 'improve' the evidence so as to

> secure a conviction. No, the truth is that a police officer is only concerned to see that there is a case proper to be laid before this court."

We also want to refer briefly to what is common ground between the parties which is the definition to malice given by Lord Devlin on page 856 of the same case. It is said:

> "Malice, it is agreed, covers not only spite and ill-will but also any motive other than a desire to bring a criminal justice. It is agreed also that there was some evidence that when on September 29, 1955 the defendant charged the plaintiff with conspiracy to defraud, he did so not in order to bring him to justice for that offence, but with an irrelevant and improper motive."

Then at page 846 Lord Radcliffe said:

> "The action for malicious prosecution is by now a well-trodden path. I take it to be settled law that if the defendant can be shown to have initiated the prosecution without himself holding an honest belief in in the truth of the charge he cannot be said to have acted upon reasonable and probable cause. The connection between the two ideas is not very close at first sight, for one would suppose that there might well exist reasonable and probable cause in the objective sense, what one might call a good case, irrespective of the state of the prosecutor's own mind or his personal attitude towards the validity of the case. The answer is, I think, that the ultimate question is not so much whether there is reasonable or probable cause in fact as whether the prosecutor, in launching his charge, was motivated by what presented itself to him as a reasonable and probable cause. Hence, if he did not believe that there was one, he must have been in the wrong. On the other hand, I take it to be equally well settled that mere belief in the truth of his charge does not protect an unsuccessful prosecutor, given, of course, malice, if the circumstances before him would not have led 'an

> ordinarily prudent and cautious man' to conclude that the person charged was probably guilty of the offence."

Neither of the two authorities to which we were referred by Mrs Dixon- Frith, that is, ***Walter v W H Smith and Son Ltd.*** (1914) 1KB 595, a judgment of Sir Rufus Isaac CJ and a judgment of Georges CJ of the Bahamas, which would naturally be accorded the greatest respect by this court in the case of ***Anthony Fields v the Attorney General,*** (unreported judgment delivered 3 October 1986) says anything different from what has been put forward in those judgments in ***Glinski v McIver*** and I am happy to adopt both of the passages to which I have referred from that case as also representing law applicable to this matter. On that basis, therefore, the issues are: (1) whether in all the circumstances the detention of the appellant was legally justified and; (2) whether the first respondent acted with reasonable or probable cause and/or without malice in apprehending and prosecuting the appellant.

It is clear from the evidence of the complainant, Miss Babs Smith, that what she reported to Corporal Dennis was that she had agreed to sell 80 lbs heads to the appellant for $500 and that he had failed to pay. The report she made was that she was owed a debt. In her witness statement at paragraphs 13 and 17 to which I directed Mrs Dixon-Frith's attention during the course of the argument, you will see that it is quite clear that although there is some imprecision on exactly what happened between the appellant and Mr Verol Adlam, that is not assisted by the fact that Mr Adlam was not called to give

evidence. What is clear is that after the appellant took possession of the yam heads, Miss Babs saw him on the street in Wait-a-Bit, ask him about payment for the yam heads and extracted a promise from that he was going to pay for them. It is clear from Miss Smith's evidence that even after the yam heads were taken, her concern was how she was going to be paid. She then reported the matter to Corporal Ellis.

In her cross-examination at the trial it was put to her:

"Q. There was an arrangement between you and Johnson for you to sell him yam heads?

A. Yes.

A. When I spoke to Detective Ellis, I told him that I made an arrangement for a price, but Mr Johnson forfeited it.

It was clear that that was the complaint that she placed before Corporal Ellis, although he stated that what was reported to him was:

> "An alleged case of obtaining goods by false pretence."

The real issue was how Miss Smith was to be paid for the yamheads. If one looks at his own witness statement at paragraphs 13 -16, it makes the point that he himself contacted Miss Smith and he told her that she was to return to the station if the claimant failed to pay the sum by the end of May and it was only after having been told that the money had not been paid, that he went back to the appellant to ask him about this.

In cross examination Corporal Ellis stated that at the time when he arrested the appellant he did not have it firmly in his mind that the offence of obtaining goods by false pretences had been committed and this appears clear from the fact that even at the time of the trial he was unable to tell the court what was the false pretence. He was asked:

> **"Q:** What was the pretence?
>
> **A:** He gave an untrue story that suggested fraud that he would soon pay for the yams."

In re-examination Miss Rochester (counsel for the Attorney General) asked:

> "**Q:** To your mind what was the pretence?
>
> **A:** The fact that Mr. Johnson went to Mr. Adlam and pretended that he had an arrangement with Miss Smith."

That, in fact, opened a new dimension because questions would arise concerning whether it was Mr. Adlam who was at fault and whether Mr. Adlam had any goods to be given away in response to the false pretence.

It is quite clear to us from all of the above that Corporal Ellis was not himself honestly satisfied on reasonable grounds at the time when he made his arrest, that the false pretence had been made. In our view, it is clear from the evidence that what was reported to Corporal Ellis was that the appellant owed Miss Smith $500 and that what both he and Miss Smith did, was to hold up the

threat of arrest in order to "put pressure on the appellant to pay". In our view, this supports the finding of malice within Lord Devlin's formulation in ***Glinski v McIver.*** Corporal Ellis charged and prosecuted the appellant not for the purpose of bringing him before the courts for the offence for obtaining goods by false pretences but for the irrelevant and improper motive of enforcing payment to Miss Smith. It is hardly surprising that in these circumstances the Resident Magistrate advised Miss Smith that she should pursue the matter in the civil courts.

It seems to us that this is a fit and proper case in which the court should interfere. While Mrs Dixon-Frith did not say anything about ***Watt v Thomas*** (1947) 1 All ER 582 in her oral submissions to us, the case does appear in her bundle of authorities. On this point there is in fact no real dispute as to facts, so it seems to us that the trial judge was in no better position than is this court to assess the legal significance of the undisputed evidence.

In the result, the appeal in our view should be allowed and the judgment of the trial judge set aside. Judgment should be entered in favour of the appellant for false imprisonment and malicious prosecution. The matter should be remitted to the Supreme Court for assessment of damages. There should be costs to the appellant both here and in the court below, to be taxed if not agreed.