

*Sup 33 - Charge for assault, malicious prosecution and imprisonment
to be - but no evidence - Held: Plaintiff instead
authorised his own magistrates. Judgment for defendant.
No case for defence*

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. M110/1990

BETWEEN	ROBERT MCGREGOR	PLAINTIFF
AND	OWEN MCLEOD	1ST DEFENDANT
AND	THE ATTORNEY GENERAL	2ND DEFENDANT

Mr. A. W. Campbell for Plaintiff

Mr. L. Robinson instructed by The
Director of State Proceedings for
Defendants.

Heard: September 27, 28, 29, 1993;
April 6, 1994

Judgment

HARRISON J. (Ag.)

The plaintiff is seeking damages for Assault, Malicious Prosecution and False Imprisonment.

He alleges in his Statement of Claim that on the 23rd December, 1989 the second defendant assaulted him and thereafter arrested and charged him for several offences which were determined in his favour at Half Way Tree Resident Magistrate's Court.

The defendants have denied these allegations and have contended that on the 23rd December, 1989 the plaintiff was warned that he would be arrested for using indecent language and that in attempting to lay hold of him he resisted arrest. He was subsequently charged with assaulting a police officer, resisting arrest, using indecent language and escaping custody.

Now, section 33 of the Constabulary Force Act provides as follows:

"Every action to be brought against a 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 and

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EVIDENCE

Remitted

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.

Section 4 of the Constables (District Constable) Act confers on every District Constable in the exercise of his office all the powers of a Constable. He may therefore arrest any person found committing any offence punishable upon indictment or summary conviction.

The plaintiff testified that on Christmas Eve, the 23rd day of December 1989, he went to the barber at Papine at about 7.00 p.m. He left the barber shop and went into a bar to purchase a dragon stout. He was denied service and on his way from the bar the defendant, District Cons. McLeod, grabbed him from behind and "put lick on him". He was thumped and tripped by McLeod and this caused him to fall to the ground. He further stated that McLeod was still arresting him saying he should get up but he could not, as it felt as if one of his feet was broken. The plaintiff's son and a friend eventually came on the scene and took him away to the University Hospital where he was treated and sent home.

The plaintiff's evidence further revealed that he went to Papine Police Station the following day. He saw McLeod there and was told by him that he would be charged for Assault. He made a report to the police concerning the treatment meted out to him on the day of the incident.

He went to Court in respect of charges preferred against him by McLeod and he has maintained that he had a "victory".

Professor, Sir John Golding, gave evidence that the plaintiff was his patient and that he was seen and treated by him on the 5th January, 1990. A plaster cast was applied for a fracture of the plaintiff's right tibia and fibula. He was further treated and finally discharged on the 4th October, 1990. The fracture had healed soundly. He had just over 1" of shortening and his disability was assessed at about 15% of the lower extremity. This disability was equivalent to a 1% impairment of the whole person.

District Constable McLeod gave evidence on behalf of the defendants. He stated that on the 23rd December, 1989 he was on foot patrol in Papine Square.

It was Christmas Eve and extremely busy with pedestrians and vehicular traffic. He saw the plaintiff who he knew before coming out of a bar and he was using indecent language. He approached the plaintiff and spoke to him about his conduct. The plaintiff retorted using further indecent language telling him McLeod to move. He identified himself as a District Constable to the plaintiff and told him if he did not behave himself he would be arrested for using indecent language. The plaintiff then chucked McLeod in the chest. McLeod tried to hold him but he shifted away and threw himself to the ground. He was ordered to get up but was unable to as he complained that his foot was broken. A crowd gathered and he claimed that the plaintiff was taken away.

The following morning the plaintiff attended Papine Police Station where he was further charged with using indecent language, assaulting a constable, resisting arrest and escaping custody. He maintains that the plaintiff was arrested on the 23rd December for indecent language, assaulting a constable and resisting arrest.

Leonie McLean, a bartender, was called as a defence witness. She recalled that the plaintiff and a friend came to Bill's Bar on the 23rd December, 1989. He ordered rum and a dragon stout but because he was misbehaving himself she refused to sell the drinks to him. She told him that he was drunk and he resorted to the use of indecent language upon leaving the bar.

Mr. Campbell in a very emotional address submitted that the plaintiff was illiterate but there was nevertheless an abundance of evidence to support his contention that he was tripped wilfully, and assaulted maliciously and without reasonable and probable cause by District Constable McLeod.

Mr. Robinson on the other hand has contended that as a result of the use of indecent language McLeod attempted to hold the plaintiff but he shifted away and fell to the ground. It was also submitted that the second defendant would have been entitled under section 4 of the Town and Community Act to arrest the plaintiff if in fact he was using indecent language in a public place.

Now, is the plaintiff someone I can accept as a reliable witness and one who speaks the truth? I have had the opportunity to watch him in the witness box and I have assessed his demeanour. At times, he appeared unsteady and inattentive and was inarticulate as he gave his evidence. A number of inconsistencies arose from his evidence and I shall deal with them.

Firstly, let me examine his evidence and try to ascertain where he was accosted by District Constable McLeod. In examination-in-chief, the plaintiff stated inter alia, "..... I come out of the bar and was going home. Mr. McLeod grab me up back way and start to put lick pon mi." When he was cross-examined he said, "... I was coming out of the barber shop when Mr. McLeod hold mi at the back of mi shirt. I had just come through the door."

I accept as a fact that it was whilst he was leaving the bar that he was accosted by the second defendant. This aspect of the defendant's evidence has been supported by the witness Leonie McLean.

Secondly, under cross-examination the plaintiff denied that McLeod had said he was arresting and charging him for using indecent language. In chief he did say however, "...When a deh a ground him still a arrest mi saying to get up."

Thirdly, the plaintiff's account to Professor Golding of how he received his injury highlights another area of inconsistency and is also of some significance. His evidence in chief revealed that he was tripped. However, under cross-examination he admitted that he told the Doctor that he had an accident. When he was further cross-examined he admitted telling the Doctor that he was pushed by a drunken 'D.C.'

Then, there is also the issue of whether the plaintiff attended and left the station unaccompanied. He insisted that he left the station alone but with some jogging of the memory he has admitted that a Miss Rosie and himself left together after she had bailed him. Under cross-examination he held firm to his answers and insisted that he did not send for her to bail him and that no-one had requested her attendance to the station. How then did she know to attend the station in order to bail him? Could it be that the plaintiff is not being frank with the Court? McLeod on the other hand testified that three people, inclusive of the plaintiff, a lady and driver alighted from a car which came to the station.

Regrettably, Counsel for the plaintiff describes him to be a fool. He was apparently quite unhappy with certain aspects of the plaintiff's evidence and has blamed this for illiteracy rather than telling lies.

Having carefully examined the evidence and after due consideration of the demeanour of the witnesses I am compelled to conclude that the plaintiff is far from being a reliable witness. He has not impressed me as a truthfull witness.

I find him very evasive and it is my considered view, that he is far from being a credible witness.

I find that on the 23rd December, 1989 the plaintiff was in fact emerging from a bar after he was refused service and was using indecent language when he was accosted by the second defendant. I also find that he was under the influence of alcohol at the material time and when the second defendant spoke to him about his behaviour he continued with his use of expletives.

I further find that the District Constable made an attempt to lay hold of him; he chucked the officer in his chest and threw himself to the ground in order to avoid being arrested. He refused to get up and continued to pull himself away from the officer. Indeed, the officer was over-powered and the plaintiff spirited away by persons who had gathered.

In these circumstances, if force was used to restrain him it was in the lawful exercise of the second defendant's powers to effect an arrest for an offence which was committed in his presence. In so doing I find that the second defendant did not assault the plaintiff.

I hold that the arrest and prosecution were lawful and there was reasonable and probable cause for arresting the plaintiff and preferring charges against him.

In concluding, I must say that it was an unfortunate incident and if the plaintiff was injured during his encounter with the police it is my view that he was the author of his own misfortune.

There shall be judgment for the defendants with costs to be taxed if not agreed.