

J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 19/76

BEFORE:

THE HON. MR. JUSTICE HENRY J.A.
THE HON. MR. JUSTICE MELVILLE J.A.
THE HON. MR. JUSTICE CARBERRY J.A.

BETWEEN: RICHARD MILLINGEN Plaintiff/Appellant

AND THE ATTORNEY GENERAL)
AND EDWARD G. BURKE) Defendants/Respondents

Mr. Chin See instructed by Clinton Hart & Co. for the Appellant

Mr. Ellis instructed by the Crown Solicitor for the Respondents

February 21, May 1, 1978

MELVILLE J.A.

Damages were assessed in this action in favour of the plaintiff in the sum of \$4,400.00 against both defendants on the 27th February, 1976, as follows:-

(a) Special damages	\$100.00
(b) Assault	\$1,000.00
(c) False imprisonment) Malicious prosecution)	\$3,000.00
(d) Trepass to goods	\$300.00

Being dis-satisfied with the awards of \$1,000 and \$3,000 the plaintiff appealed to this Court.

At about 8.15 p.m. on December 29, 1971 a Miss Walker was driving the plaintiff's car along Washington Boulevard. She was stopped by Constable Burke (the second defendant) who was on motorcycle patrol. He requested her name, address and her driver's licence. She supplied the first two and said that her licence was at her home. The constable did not appear satisfied that she was the holder of a licence, and directed her to go home and fetch it. Her reply was that the Road Code gave her five days in which to produce the licence. The plaintiff who was seated by the driver now entered the discussion and intimated that the law did allow five days within which to pro-

duce the licence. The constable was adamant and insisted that his order be carried out. Thereupon the plaintiff gave his name and address adding that the car was his and that he was the Crown Solicitor; that they were on their way to Patrick City to see a repairman on urgent business about a refrigerator. It emerged that whereas the plaintiff was seeking to get the constable to go to Patrick City which was nearby first, and then to Miss Walker's home, which was a much greater distance away, so that she could produce her driver's licence; the constable's attitude was he didn't care who the plaintiff was; the plaintiff couldn't tell him how to do his job and they must first go to Miss Walker's house for the production of her driver's licence.

Despite assurances that the licence would be produced the constable thereupon arrested Miss Walker for driving without being the holder of a driver's licence and also for driving an uninsured vehicle whilst the plaintiff was arrested for aiding and abetting her in those offences. Miss Walker was then ordered to drive the car to the police station. She could not she said, because she was nervous and trembling. The plaintiff's offer to drive was not accepted on the ground that he was a prisoner and ^{could} not be allowed to drive.

A stalemate having been reached, the constable endeavoured to gain possession of the ignition key. The plaintiff would have none of this. He ordered Miss Walker to hand him the key, which she did. He placed it in the pocket of his shirt. A tussle ensued between the plaintiff and the constable for possession of the key. The plaintiff had at this time got out of the car. In the course of this contretemps, a passing motorist was requested by the constable to summon a patrol car. Prior to the arrival of police reinforcements, however, a Mr. Bond came upon the scene. He knew both the constable and the plaintiff. The latter asked Mr. Bond to identify him to the officer; Mr. Bond did so. Two patrol cars and five police motor-cyclists arrived. The constable thought that he should add a charge of careless driving to the already existing catalogue,

and indicated as much. When the plaintiff enquired how he had arrived at this, his riposte was that the plaintiff would know in court. The police presence provided more than morale; one of the arrivals promised his support in court. The plaintiff was understandably aghast at this subversion of justice.

Arrangements were made to transport Miss Walker and the plaintiff to the police station, but the plaintiff was concerned about the safety of his car being left unattended on the highway. Constable Burke would have had the car removed by a wrecker at the plaintiff's expense, but eventually the plaintiff was allowed to drive his car to the police station taking Miss Walker with him. Before the plaintiff was allowed to drive to the station however, constable Burke had taken hold of Miss Walker and began tugging her towards a patrol car. It seemed that at the very end of this drama the constable could not forbear from pushing the plaintiff into his car, and when asked to lead the way, retorted, "I do not escort prisoners".

At the police station at Maverley the plaintiff was ordered to lock the car and hand over the keys. He duly locked his car, but was loath to part with the keys. He felt that in the same manner a charge of careless driving had been fabricated, as easily could some other charge, for example possession of ganja, be made against him. The constable again grappled with the plaintiff in his attempt to obtain possession of the ignition key. Support was not lacking from the other police officers who had, apparently come along to the station. They formed a circle about the plaintiff and constable Burke, and as the plaintiff endeavoured to evade the attempts of Constable Burke, he was continually being jostled by the others. Miss Walker who was greatly concerned about the plaintiff's safety, urged him to hand over the keys. He eventually did so when he was told that the car had been seized for examination by the certifying officer. Miss Walker was led into the station and the plaintiff followed shortly after.

By this time there could be no doubt as to the identity of

the plaintiff and although he was offered bail in the sum of \$100.00 yet, like Miss Walker, he had find a surety in a like sum to effect his release from custody. As there was no senior officer at the Maverley station capable of admitting them to bail it was not until some four and a half hours after arrest that they were finally bailed at the Constant Spring police station. They subsequently appeared at the Traffic Court where the charges were not proceeded with as on the 30th December, 1971, Miss Walker had produced a valid driver's licence.

Arising out of that incident separate actions were brought against the constable, and the Attorney General (The First Defendant), was joined in each action by the virtue of the Crown Proceedings Act. No defence was filed thus the matter was before Carey J. for assessment of damages as consolidated actions. Having found the facts already enumerated the learned trial judge concluded that the matter was one that called for exemplary damages as the facts fell squarely within the first category stated by Lord Devlin in Rookes v Bernard (1964) 1 All E.R. 367 at 410, namely, "oppressive, arbitrary or unconstitutional action by the servants of the government". That case has been followed in this country - See Douglas v Bowen, in Vol. 11 C.A. J.B. at p. 297. I have already set out the award made to the plaintiff. Miss Walker's award was:-

(a) Special damages	\$100.00
(b) Assault	\$500.00
(c) False imprisonment) Malicious prosecution)	<u>\$3,000.00</u>
	\$3,600.00

Apparently, she must be satisfied with her award as that award has not been pursued any further.

As I understand it, the plaintiff's complaint to this Court was that as Miss Walker - a lowly Secretary/Stenographer in the service of the Government of this country - was awarded \$3,500.00 under heads (b) and (c); the plaintiff, as Crown Solicitor - one of the principal legal officers of the Government

and accordingly of a much higher status - ought to have been awarded much more than the \$4,000.00 made to him under those heads. In effect the argument was that, because of this difference in status between the plaintiff and Miss Walker, that difference ought to have been reflected in the awards for exemplary damages to the respective parties.

A some what similar argument seemed to have been advanced before the trial judge who had this to say at page 7 of his judgment:-

"What was being argued by Mr. Ellis on behalf of the defendants and I hope I do not injustice to his submissions was, that the status of Mr. Millingen as Crown Solicitor should not provoke the court to award punitive damages. Indeed, the status of the plaintiff should be ignored altogether.

In torts affecting reputation such as false imprisonment, malicious prosecution, defamation, the status of the plaintiff is a relevant consideration. Lincoln v Daniels "The Times" 24th and 25th June, 1960 - the higher the status of the plaintiff, the higher the damages. I accept that the status of the plaintiff is irrelevant when the alternative choices are being made. It affects rather the quantum of damages."

I gather that to mean that status was one of the matters to be taken into consideration in making an award for compensatory damages, but that it ought not to be taken into account in considering if an additional amount should also be awarded by the way of exemplary damages. I would accept that as a correct approach as it must not be forgotten that the purpose of an award of exemplary damages is to punish the defendant over and beyond the amount payable as compensation.

In referring to the 'If, but only if' paragraph of Lord Devlin's speech in Rookes v Bernard in Cassell & Co. Ltd. v Broome (1972) 1 All E.R. 801 at 839, Lord Reid said:-

"The difference between compensatory and punitive damages is that in assessing the former the jury or other tribunal must consider how much the plaintiff ought to receive whereas in assessing the latter they must consider how much the defendant ought to pay. It can only cause confusion if they consider both questions at the same time. The only practical way to proceed is first to look at the case from the point of view of compensating the plaintiff. He must not only be compensated for proved actual loss but also for any injury to his feelings and for having had to suffer insults,

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indignities and the like. And where the defendant has behaved outrageously very full compensation may be proper for that. So the tribunal will fix in their minds what sum would be proper as compensatory damages. Then if it has been determined that the case is a proper one for punitive damages the tribunal must turn its attention to the defendant and ask itself whether the sum which it has already fixed as compensatory damages is or is not adequate to serve the second purpose of punishment or deterrence. If they think that that sum is adequate for the second purpose as well as for the first they must not add anything to it. It is sufficient both as compensatory as as punitive damages. But if they think that sum is insufficient as a punishment then they must add to it enough to bring it up to a sum sufficient as punishment. The one thing which they must not do is to fix sums as compensatory and as punitive damages and add them together. They must realise that the compensatory damages are always part of the total punishment.

I would respectfully adopt that approach to this case.

But, said Mr. Chin See, although the trial judge correctly stated the principles of law applicable he did not apply those principles correctly to the circumstances. In the same way, said he, that the amount under head (b) was doubled in the case of the plaintiff when compared to the amount awarded to Miss Walker, so also, ought the same doubling at least to have taken place under head (c). I find this rather startling. In the first place there seems to have been two separate incidents of assault on the plaintiff; the pushing into the car and the jostling at the police station although within a comparatively short time of each other. Whereas in Miss Walker's case it was pulling her in the direction of the police car that was the gravamen of her complaint. Secondly, I would have thought that matters like the seriousness of the assault and the attendant circumstances would be more germane than endeavouring to find a mathematical formula to ascertain an amount, which was taken for granted on all sides to be at large.

However, it appears that the real bone of contention was the award of equal amounts under head (c). I repeat that the argument was that by virtue of his status the plaintiff ought to have been awarded more than Miss Walker. The amount under this head was a lump sum in respect of the false imprisonment and the malicious prosecution. There was no break down of the various amounts under

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each head, nor were any particular reasons stated why equal amounts were awarded in each case. To embark therefore on an exercise to find reasons why the awards were equal under this head would be an exercise in futility in my view. What stands out is that whether - as the trial judge seemed to think it was an alternative choice between compensatory and exemplary damages - or as I think it was to find the compensatory damages first and if that was not sufficient to add something more by way of exemplary damages - some where along the way he clearly had in the mind the status of the parties as he was specifically addressed on this matter. Must it therefore follow that under each head of damage the amount must inevitably differ? I think not. There could well be an overlapping area of damages in the circumstances, between the assaults and imprisonments. Was this the reason why the amounts for the assaults differed, or was it because there were two assault on the plaintiff? The learned trial judge has not specifically said so, and it would be mere speculation for this Court to embark on any such course. The reasons why these sums were equal may be legion. It may have been that Miss Walker suffered much more than the plaintiff in their ordeal - the evidence would seem to suggest this - and having already awarded the plaintiff a greater sum for the assault than Miss Walker, the learned trial judge might have thought it fit that the awards under head (c) should be in the same amount. The situation here seems to be no different from that which not infrequently happens on the criminal side where two persons who are equally incriminated in an offence, and all other things being more or less equal receive different sentences. See for example R v Gordon 9 J.L.R. 320.

At the end of the day the all important question is can it be said that the amount awarded the plaintiff is so inordinately low that this Court ought to interfere? ~~Concededly~~ ~~conceded~~ that the trial judge correctly stated the principles of

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law applicable to the circumstances, but wrongly applied those principles. For the reasons stated I am unable to share this view and would accordingly dismiss this appeal.

(BETWEEN RICHARD MILLINGEN

AND THE ATTORNEY GENERAL
AND EDWARD G. BURKE)

CARBERRY J.A.

I have had the advantage of reading the judgment of Melville J.A., and though not without some doubt I have reached the same conclusion.

This case is, regrettably, a type of case that is not uncommon in Jamaica - it concerns a constable on traffic patrol duty who chose, quite unjustifiably, to abuse his authority in relation to two persons in a manner which the learned trial judge aptly described in his judgment as:-

"This unchallenged catalogue of police action is the most disgraceful and deplorable that I have had the melancholy duty to record."

The constable wrongfully arrested, assaulted, imprisoned and maliciously prosecuted two persons whom he had stopped for no rhyme or reason while they were driving in the car owned by one of them, at night on their own lawful business. One of these persons, the Plaintiff-Appellant in this case, then held the high office of Crown Solicitor to the Government of Jamaica. He was the owner of the car being driven by the female plaintiff whose licence the policeman demanded to see, and whom he ordered to stop and go home and produce to him then and there, although section 18 of the Road Traffic Law gives drivers the right in such circumstances to produce their driving licence at a police station within five days of such a request being made, if they do not have their licence on them at the moment of request or demand.

When the plaintiffs demurred, the constable, though he had their names, and addresses and verification thereof, ^{arrested and} imprisoned them and subsequently prosecuted them on a variety of charges which were withdrawn at the actual trial. Both plaintiffs then brought separate actions against the Attorney General and the policeman claiming to recover damages in respect of assault, false imprisonment and malicious prosecutions, and, in the case of the appellant,

trespass to goods as well. Both actions were heard together (they were consolidated) and in a carefully reasoned judgment Carey J. found in favour of both plaintiffs on all the issues.

Further he held that in the circumstances of this case - or these two cases - after considering Rookes v Bernard (1964) 1 All E.R. 367; Cassell & Co. Ltd. v Broome (1972) 1 All E.R. 801 and the decision of this Court in Douglas v Bowen 11 C.A.J.B. p. 297, that the Court ought to award Exemplary Damages to the two Plaintiffs, and he purported to do so. Carey J. in making his award itemized the damages awarded thus:-

	<u>To Miss Walker</u>	<u>To Mr. Millingen</u> (The Appellant)
Special damages	\$ 100.00	100.00
Assault	\$ 500.00	1,000.00
False imprisonment & malicious prosecution	\$ 3,000.00	3,000.00
Trespass to goods	-	300.00
	<u>\$3,600.00</u>	<u>\$4,400.00</u>

The present appeal has been brought by Mr. Millingen against the award of damages made in his favour. Essentially the appellant claims that his award is too small when compared with the award made to Miss Walker.

The case is unique in that here we have two plaintiffs, each of whom underwent the same common experience of illegal arrest for a fictitious cause, assault, false imprisonment, and malicious prosecution. There are differences in detail: The appellant was more roughly handled and assaulted than his co-plaintiff - though it is more than likely that she may have had the more harassing experience being a woman - held up in this way at night by a constable clearly behaving in an arrogant and ignorant manner quite uncalled for. She may well have asked herself "what did he really want of me?"

The appellant was a man, a trained lawyer of considerable eminence, knowledgeable as to his rights and better able to cope with

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the situation which was well within his professional experience. Mr. Chin See in his short but attractive argument pointed out, and it is conceded, that the appellant was, as compared with Miss Walker (a steno-typist employed in the Government service) a person of greater eminence and that the unjustified damage done or that might have been done to his reputation was the greater because of his position. Mr. Chin See suggested that though the learned trial judge in his judgment reviewed the authorities as to exemplary damages and the relevance of status, and sought to apply them, he had failed to do so adequately in the case of the appellant when his award was compared with that made to other plaintiff.

The comparison of the two awards set out earlier shows that the appellant was awarded \$800.00 more in damages than the other plaintiff. He got twice as much for the assault. The complaint really turns on the fact that both were awarded the same sums for false imprisonment and malicious prosecution. The appellant claims he should have received more than Miss Walker under this head as well as under the head of assault. Granted that the learned trial judge stated that he was awarding exemplary damages is the appellant's argument well founded? Does the award of the two identical sums of \$3000.00 to each plaintiff on this head necessarily show that the trial judge failed to adequately consider the higher status of the Appellant?

There are three possible interpretations of the award -

- (a) That Miss Walker received the proper award and the appellant is right - he should have got more;
- (b) That the award to the appellant is correct and that Miss Walker received too much; (but there is no appeal by the Crown against her award);
- or (c) That the learned trial judge, having weighed all the matters carefully, decided that though the appellant's status was higher, Miss Walker had suffered greater humiliation and had a more devastating experience, and that all things considered both should under the head

of false imprisonment and malicious prosecution get the same amount of damages, balancing the status of the appellant as against Miss Walker's vulnerability. As I have stated, the case appears to be unique - it can not be often that a situation occurs where two plaintiffs have suffered so similar an experience at the hands of a Defendant. A careful search for authorities that might assist has been unsuccessful.

When all that can be said has been taken into account, the fact remains that the appellant did recover \$800.00 more damages than his co-plaintiff, and had the Judge not itemized the two awards as he did, the appellant's argument would have been almost impossible to sustain.

No real complaint has been made that the appellant's award considered in isolation by itself is inadequate or so low that this Court ought to interfere. We were referred to a few local awards for malicious prosecutions, assault and false imprisonment, but after reviewing them, I am unable to conclude that the award in this case was so low that this Court ought to interfere. The real argument has been based almost wholly and solely on the comparison made with the award to the other plaintiff.

For the reasons set out above in interpretation (c) I am not able to reach the conclusion that the learned trial judge must necessarily have erred in law in his application of the principles governing the award of exemplary damages because on one item or head of damage he awarded the ^{same} sum to both plaintiffs. I too would dismiss the appeal with the usual order to costs.

HENRY J.A.

I agree with the conclusions of my brethren. The appeal will be dismissed with costs to the Respondent to be agreed or taxed.