IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1995/M076

BETWEEN	KENNETH MORGAN	PLAINTIFF
AND	ATTORNEY GENERAL OF JAMAICA	DEFENDANT

Dennis Daly, Q.C., instructed by Daly, Thwaites and Company for the Plaintiff.

Garfield Haisley instructed by Director of State Proceedings for the Defendant.

Heard on: 4th, 6th, 14th February 2002 and 4th September 2002

Campbell J.

The plaintiff's claim is against the defendant to recover damages for malicious prosecution for that on the 4th day of April 1991 at Operations Headquarters at 230 Spanish Town Road. The Plaintiff was arrested and charged with possession and dealing with cocaine by Det. Cpl. A.R. Anderson of the Police Narcotics Division and following a trial was acquitted of the charge without being called to answer in his defence.

The defendant is the Attorney General of Jamaica, in whose name the suit was brought pursuant to the provisions of the Crown Proceedings Act.

The action arose out of a search and consequent arrest of occupants of premises at 1a Dillsbury Avenue, in St. Andrew after the police, armed with a written authorization under the Dangerous Drugs Act, found two parcels containing cocaine on the premises. The main witness as to the events leading up to the search was Det. Sgt Anderson, who testified that in April 1991 he was attached to the Narcotics Division, 230 Spanish Town Road. He said that on the 18th April 1991 whilst on duty, he had received information pertaining to 1a Dillsbury Road and a surveillance of that property. To better carry out this surveillance, he dressed in "ragged clothing, short pants and unkempt hair". He assumed positions from which point he could observe 1a Dillsbury. He said he observed the plaintiff on that premises. He saw the plaintiff and an occupant of the premises pass transparent parcels containing white substance to persons who would approach the property and give something to either the plaintiff or the other person. Sgt. Anderson sought and obtained written authorisation to effect a search on the property. He said the police party arrived at the premises in an unmarked police vehicle, which he drove.

The Sgt. evidence as to what transpired next was the source of very vigorous cross-examination by Dennis Daly, Q.C.

The Sgt. says that on his arrival, he saw a red Uno drove off; the driver was the plaintiff. The officer said he signaled the plaintiff to stop but he sped off. On entry to the premises the two parcels containing the drugs were found. On an enquiry as to the whereabouts of the plaintiff, the Sgt. testified he was told that he had just driven off. The plaintiff in his testimony has denied that he was there on that day and has accused the police of telling lies. He said that on the 19th April 1991 at about 7:00am, he had visited the house but had left about 7:30-8:00am for Bellevue Heights and had busied himself in preparation of some farm products for export, and slept at his farm house with the lady who is now is wife. The following morning he had taken the produce to the agricultural place on Spanish Town Rd., and took a meal for his children at about 4:00-5:00pm. It was on his arrival at that time he realised that the police had been there and that the adults and several of his children had been arrested.

The plaintiff testified that he was a Farmer, and Contractor of 2a Bellevue Heights, in St. Catherine. He testified that, in April 1991 he lived at Collie Smith Drive, in Arnett Gardens and that he used to live at 1a Dillsbury Avenue with Annette Power, the mother of his five children, who died in 1988. However, after she died, he stopped staying at 1a Dillsbury Avenue. His children however continued living there. They ranged in ages from Michelle who was then aged 16

years to Stephanie, aged three years. In addition to his five children, there was a niece of Annette Power, Tanya Power then aged 15, who the couple treated "as one of our own". The plaintiff testified that in that house was a Marlene Fraser, a friend of his wife. He said under cross-examination, that he was unaware that Tanya had said he lived at 1a Dillsbury Avenue. He admitted owning a red Fiat Uno, but stated he was not driving it on the 20th April 1991. Fraser was convicted of possession in respect of the cocaine find. The other adult, who absconded bail, was described by the plaintiff as a boarder. The plaintiff said that he would sometimes sleep on the premises. He would take the children to and from school. He would also pay the bills. Marlene Fraser was employed as a waterwoman at a construction site in close proximity to 1a Dillsbury Avenue. The plaintiff, in his capacity as building contractor, had a contract with Ashtrom for about two years at the construction site. The house is situated in a locale described by Sgt. Anderson as "in a upper-class residential area". The plaintiff was unable to say who was responsible for paying the land taxes, however he would pay the bills.

The plaintiff was arrested on the 4th May 1991 when he took Marlene Fraser to report to 230 Spanish Town Road, in accordance with the terms under which she was granted bail. The plaintiff contends that his arrest was effected in the station.

The defence asserts that he was outside the station when he was accosted and a warrant was executed on him.

The learned authors of Clerk and Lindsell, on Torts Fourteenth Edition at paragraph 1881 state, inter alia;

> "It is the right of everyone to put the law in motion if he does so with the honest intention of protecting his own or the public's interest, or if the circumstances are such, be his motive what they may, as to render it probable prima facie that the law is on his side. But it is an abuse of that right to proceed maliciously and without reasonable and probable cause for anticipating success, and thereby to cause damage to another."

Unlike a claim for false imprisonment which has its orgins in the old writ of trespass and is therefore actionable per se, the claimant for malicious prosecution has to prove damages. The plaintiff testifies that the effect of his arrest was "his business mash-up", and that people don't have any respect for him. The people for whom he grew the beans "don't deal with him anymore". He denies the testimony of Anderson that when he was arrested he said that "he was a senior jail-bud". He does not know what those words mean.

Malicious Prosecution

The case of Wills v Voisin (1963) 6 W.I.R. 50 at page 57, letter A, Wooding C.J. listed the essential which must be proved by the plaintiff in order to establish a

case of malicious prosecution. "Now, as to the law relating to the claim for malicious prosecution, it is in the public's interest, and it is a public duty, that offenders should be brought to justice. It is the obligation, as well as the right of every individual to set the courts in motion whenever infringements of the law occur. The burden of so doing lies upon police officers who are paid appointed guardians of the public peace. Nonetheless it is entirely wrong that anyone should be subjected to legal process without reasonable and probable cause. Thus the duty to prosecute and the right to be protected against unwarranted prosecution may often be so balanced as to make it difficult to resolve which ought to prevail. Hence, in the public's interest, the law will stand by him who essays to discharge the duty against him who seeks to enforce the right, provided that in essaying to discharge the duty, the prosecutor has not been actuated by malice. Accordingly, in an action for vindication of the right to be protected against unwarranted prosecution which is the action for malicious prosecution, a plaintiff must show;

A. that the law was not in motion against him on a charge of a 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 prosecutor was actuated by malice.

Crown Counsel has conceded that the plaintiff has proven the first two of these essentials.

The fundamental issue therefore is, did Sgt. Anderson have reasonable and probable cause for launching the prosecution against the plaintiff. What is reasonable and probable cause for these purposes? The House of Lords in Herniman v Smith approved Hawkins J. definition in Hicks v Faulkner (1878) 8 Q.B.D.167 at page 171 as follows;

> "An honest belief in the guilt of the accused based upon a full conviction, found 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."

Sgt. Anderson acted under colour of a warrant. The warrant, like the authorisation to search for dangerous drugs, demonstrate a course of conduct undertaken by the officer, that a reasonable officer would take. In his evidence-in-chief, Sgt. Anderson, who did not know the plaintiff prior to the institution of the criminal prosecution, testified that he had received information that drugs were being sold on the premises. This hearsay evidence was admissible not as proof as to the truth of the contents but to explain the state of mind of the arresting officer

(see Peter Fleming v Det. Cpl. Myers and the Attorney General, SCCA 63/85). This information he had received in March. Another bit of information that came to the officer was on the 20th April 1991, when he spoke with Marlene Fraser, a lady whom the officer referred to throughout as the common law wife of the plaintiff. He said he asked her if Morgan lived there and she replied that they both lived there as common law wife and husband. The drugs for which Marlene Fraser was convicted, the officer was able to find as a result of the information he had received. To my mind, this provides sufficient ground for the officer to hold a belief that the plaintiff lived on that premises. There was no duty on the police officer to launch an investigation to prove the plaintiff lived elsewhere, or that he was innocent. In Glinski v McIver (1962) A.C. at page 745, Viscount Simonds says;

> "A question is sometimes raised whether the prosecutor has acted with too great haste or zeal and failed to ascertain by inquires that he might have made facts that would have altered his opinion upon the guilt of the accused. Upon this matter it is not possible to generalise, but I would accept as a guiding principle what Lord Atkin said in *Heriman v Smith*, that it is the duty of the prosecutor to find out not whether there is a possible defence but whether there is a reasonable and probable cause for prosecution. Nor can the risk be ignored that in the case of more complicated crimes, and particularly perhaps of conspiracies, inquires may put one or more of the criminals on the alert."

The plaintiff had said that he can't recall if he went there on 18th April 1991, in any event he has testified that he visits that home every other day, that makes it likely that he was there and observed by the police officer. Was it reasonable, in those circumstances, for the officer to form the opinion that the defendant was in charge of the Premises? Was it reasonable for the officer to assume that the plaintiff had some knowledge and control over the drugs, and that what was taking place there was being done with the plaintiff's knowledge? I accept Sgt. Anderson's testimony that he did observe some activity that cause him to assume that cocaine was being sold from 1a Dillsbury Avenue. The traffic, both pedestrian and vehicular, that would come seeking the drug, would attract attention. It would be reasonable for a police officer who observes an adult on those premises to impute the knowledge of that activity to him.

The Court must consider whether, a reasonable man, knowing the facts which Sgt. Anderson knew at the time he instituted the prosecution, would have believed that the plaintiff was probably guilty of the offence of possession and dealing in cocaine. The case turns on whether the Court accepts the evidence of the officer, which is in direct conflict with the plaintiff's evidence in a substantially material area. I prefer the evidence of the defendant. I find that the observations of the officer and the information he had garnered would provide a reasonable

basis for believing that the plaintiff was probably guilty of the offences for which he arrested him.

The obtaining of authorisation for search under the Dangerous Act, the serious attempt at surveillance of the premises in order to substantiate information already received. The swearing out of a warrant for the arrest of the defendant accords with an officer who honestly believes, albeit erroneously in the guilt of the plaintiff. Of this subjective element Lord Devlin says, at page 721 of Glinski v McIver;

> " The defendant can claim to be judged not on the real facts, but on those which he honestly, and however erroneously believes; if he acts honestly on fiction, he can claim to be judged on that. This being so, I do not feel disposed to dispense with the need for the defendant's honest belief in his case."

The action stands dismissed. Costs of the proceedings to the defendant to be agreed if not taxed.