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IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 40/78

BEFORE: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Rowe, J.A.
The Hon. Mr. Justice White, J.A. (Ag.)

BETWEEN	DENNIS PEART	PLAINTIFF/APPELLANT
AND	NORMAN RICKETTS	1ST DEFENDANT/RESPONDENT
AND	THE ATTORNEY GENERAL FOR JAMAICA	2ND DEFENDANT/RESPONDENT

Mr. W.K. Chin-See and Mr. A. Morgan for Plaintiff/Appellant

Mr. Karl Harrison for the Defendants/Respondents

16th & 17th July, 1980;
and 10th April, 1981

WHITE, J.A.:

On the 16th July, 1980, we allowed this appeal but ordered a new trial in respect of the plaintiff's claim for personal injuries arising out of the plaintiff's allegation that he was shot by the first defendant on January 16, 1974. We promised to put our reasons in writing. We now do so.

The point at issue in this appeal concerns the judgment of Carey J. whereby, although the plaintiff succeeded at the trial on his claim against the defendants for false imprisonment and malicious prosecution, judgment was given in favour of the defendants on the claim of the plaintiff for damages for personal injuries. In paragraph 2 of the Statement of Claim the plaintiff alleged:

"On or about the 16th day of January, 1974 the Plaintiff was walking along the South Camp Road extension, otherwise known as New Road in the parish of Kingston, when the 1st Defendant maliciously and without reasonable and/or probable cause shot the Plaintiff in the back as a result of which the Plaintiff was seriously injured and has suffered loss and damage. "

The defence pleaded so far as is material is in the following terms:

"2. Save that it is admitted that on the 16th day of January, 1974, the Plaintiff was shot in the vicinity of South Camp Road the Defendants expressly deny paragraph 2 of the Statement of Claim together with the particulars of injury contained therein.

" The Defendants say that on the 16th day of January, 1974 the first named Defendant and other policemen were chasing a group of men who were reported to have robbed a person at gun point. The first named Defendant was ahead of the other policemen when he saw the Plaintiff, who was one of the group aforesaid mentioned, took a gun from his body pointed it at the first Defendant and fired shots at him. The first Defendant on being fired at drew his service revolver and discharged one shot in the Plaintiff's direction and the Plaintiff jumped into a gully and the Defendants say that when the first Defendant discharged his service revolver he was fired at and was being fired at by the Plaintiff and at least two other persons from that group that was being chased.

"3. The Defendants aver that if, which is not admitted, the Plaintiff was shot by the first Defendant the Plaintiff was not shot maliciously and/or without reasonable and probable cause. Further the Defendants say that the Plaintiff was shot in order to defend life and limb and that in all the circumstances the shooting was justified. "

Furthermore, the defendants pleaded the following objection to the statement of claim:

"6. The Defendants make objection that the Statement of Claim discloses no Cause of Action in that it makes no allegation that the shooting of the Plaintiff was intentional and/or negligent and will at the trial of this action contend for the striking out of the Statement of Claim.

"7. The Second Defendant make objection that the Statement of Claim discloses no Cause of Action against him and will contend at the trial for a striking out of the Statement of Claim. "

The Record shows that the objection was taken in limine. It was argued that the absence of the word 'intentionally' rendered the claim for assault bad in law, and therefore disclosed no cause of action. This objection was over-ruled. Nevetheless, after hearing the evidence, the learned trial judge made a finding on the case for assault:

> "that shooting not intentional and in the face of the pleadings action for personal injuries failed. See Fowler v. Lanning and Letang v. Cooper. Claim for personal injuries dismissed."

The apposite grounds of appeal are:

> "(1) That the learned trial judge erred in law in finding that the Plaintiff needed to plead that the shooting by the first Defendant/Respondent was done either intentionally or negligently.
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> (2) That the learned trial judge erred in law in finding that the shooting of the Plaintiff by the first Defendant having been done negligently, and as the Plaintiff had not specifically pleaded negligence, the action in respect of his personal injuries must fail.
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> (3) That Section 39 of the Constabulary Force Law of Jamaica (now Section 33 of the Constabulary Force Act) prescribes the formula to be used in all actions against any Constable for torts committed in the execution of his duty, and that the Statement of Claim as pleaded complied with the said Section.
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> (4) That the learned trial judge erred in finding that the English authority of Fowler v. Lanning reported at 1 All E.R. 1959 (sic) applied to the instant case, since the said Statutory requirement, that the tort was committed "maliciously and without reasonable or probable cause" was complied with, and, therefore, the authority of Fowler v. Lanning is not relevant or applicable in actions brought against members of the Constabulary Force of Jamaica."

The factual background to the submissions which were made to us was provided on the one hand, by the plaintiff/appellant's evidence of how he was shot. He said that on the 16th January, 1974

he was walking along Barry Street in Kingston and when he reached the intersection of Barry Street and South Camp Road, he saw three men run past him. The three men ran and fled into the nearby gully. He then heard an explosion and felt something hit him in his back. He fell on his face. After the three men passed him he did not see them again; and in fact, he had never seen them before; thereby testifying that he did not known them at all. The plaintiff/appellant further said that while he was on the ground a man, whom he identified as the first defendant/respondent, came up to him. This man ordered the plaintiff/appellant to get up. The latter was then taken to the Kingston Public Hospital. He denied that he had any gun; nor was he involved in any robbery with aggravation.

On the other hand, in his evidence the first defendant/respondent's account was that consequent on the complaint of a civilian who had reported a robbery at gun point he and other policemen had gone in search of the robbers. It was his evidence that in pursuit of the alleged robbers they approached an open lot of land in the vicinity of South Camp Road and at the intersection of Barry and Fleet Streets "the complainant (Ebanks) sighted the men in question." The first respondent said that during the ensuing chase one of those men, who was identified as the plaintiff/appellant, drew a revolver, and discharged it at the first defendant/respondent; who fired one shot in reply. The plaintiff/appellant then fell over the bridge into the gully, and it was later discovered that he was bleeding from a wound in his back.

The arguments by Mr. Chin-See on behalf of the plaintiff/appellant were an elaboration on the filed grounds of appeal. He reiterated that it is not necessary at all to insert either the words "intentionally" or "negligently" into statements of claim against policemen. In fact he said that where the allegation is that the act was done "maliciously" that is sufficient, and it becomes

unnecessary to insert the word "intentionally" because the meaning of the word "maliciously" is a wrongful act done intentionally.

In opposition to this position Mr. Harrison for the defendants/respondents sought to contend that Section 33 of the Constabulary Force Act does require the words "intentionally" or "negligently" to be inserted. We did not agree with Mr. Harrison's contention. Section 33 reads:

> "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 as for a tort; and in the declaration it shall be alleged that such act was done 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. "

The Section adverts to redress by an action on the case as for a tort. There is, therefore, the temptation to confuse the chief distinction between trespass and action on the case - this is, that the former was brought in respect of violence either actual or implied, where the matter was tangible and the plaintiff's interest was immediate, while the latter was brought when the element of violence was absent or the matter affected was intangible, or the injury was consequential, or the interest was only in the reversion. (Halsbury's Laws of England, Vol. 1 (3rd Ed.) para. 51 at p. 28).

However, one must take pause and be guided by two clear considerations. Firstly, the section under scrutiny states unambiguously how the pleading is to be framed in that the alleged act was done maliciously and without reasonable or probable cause. That is a pleading which is in our view, unaffected by the decision in Fowler v. Lanning (1959) 1 Q.B. 426. That was a case of unintentional act in a shooting incident. Diplock J. at pages 431-2, stated the practical issue to be:-

> "Whether, if the plaintiff was in fact injured by a shot from a gun fired by the defendant, the onus lies upon the plaintiff to prove that the defendant was negligent, in which case under the modern system of pleading, he must so plead and give particulars of negligence (See R.S.C. Ord. 1914), or whether it lies upon the defendant to prove that the plaintiff's injuries were not caused by the defendant's negligence in which case the plaintiff's statement of claim is sufficient and disclose a cause of action (see R.S.C. Ord. 19 r.25). The issue is thus a neat one of proof. "

As a result of his own examination of the cases Diplock J. came to the conclusion, at p. 440, that:

> "If as I have held, the onus of proof of intention or negligence on the part of the defendant lies upon the plaintiff then under the modern rules of pleading, he must allege either intention on the part of the defendant, or, if he relies upon negligence, he must state facts which he alleges constitute negligence. Without either of such allegations the bald statement that the defendant shot the plaintiff is unspecified circumstances with an unspecified weapon in my view discloses no cause of action."

Be it noted that these remarks were made in the context of an action against a private individual and were an exposition of the relevant common law rules in the light of which that learned judge allowed the amendment to the statement of claim in Fowler v. Lanning.

Those views were endorsed by dicta in the later case of Letang v. Cooper (1964) 2 All E.R. 929. Interestingly, it is worthy of note that in Australia Windeyer J. has held, in McHale v. Watson (1964) 111 C.L.R. 384, that in trespass to the person by a blow or missile, it is for the defendant, if he would escape liability, to prove that in delivering the blow or missile he acted without intent to hit the plaintiff and without negligence. Despite this conflict of judicial authority it must be borne in mind that the recent judgment by the Court of Appeal in Attorney General for Jamaica v. Miguel Green, S.C.C.A. No.73/78, delivered on the 12th June, 1980 underlines the inappropriateness of applying the decision in Fowler v. Lanning to actions against a constable for acts of

trespass to the person committed in the execution of his office. That appeal was concerned primarily and specifically with the award of damages for assault. In the statement of claim it was stated:

> "On the 17th day of July, 1975, a member of the Echo Squad of the Jamaica Constabulary Force a servant and/or agent of the Crown, assaulted the plaintiff by shooting him in his right leg."

The evidence for the plaintiff was that while he was a bystander observing a fight between two men on the street where he lived, he saw these two men running in his direction. At the same time he observed three other men running from behin the first two men. They were all coming in his direction. The plaintiff turned to go away from the scene, at which time he heard a sound, felt a heavy feeling in his right foot, and saw blood running down his foot.

The evidence for the defence in that case projected the necessity for Constable McAnuff, the policeman involved, to have discharged his revolver at the plaintiff, who had earlier been seen fighting with another man. The police witness said he saw the plaintiff flash at the other man with a ratchet knife and when ordered to desist, instead of obeying, the plaintiff slashed twice at the police witness even after the latter had identified himself. Because of this threat to his person, the police witness said he fired his service revolver in the plaintiff's direction. The evidence disclosed that the plaintiff had been shot in the back.

Zacca J.A. in the Court of Appeal recounted the arguments propounded by the defendant:

> "That the pleading or the state of pleadings does not disclose any cause of action, that in so far as the assault is concerned it does not allege an intentional shooting, nor does it disclose any other cause of action such as negligence. Learned attorney for the defendant/appellant cited two cases; Fowler v. Lanning reported at (1959) 1 Q.B. at p. 426 and specifically at p.440 and also Letang v. Cooper reported at (1964) 2 All E.R. page 339."

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The unanimous view of the Court was that the relevant paragraph in the Statement of Claim alleged a good cause of action.

In the result the Court of Appeal upheld the findings of the learned trial judge that the shooting of the policeman was an unlawful act, that there was no reasonable and probable cause on the part of the policemen in shooting at these men, and therefore having shot at the two men unlawfully and without reasonable and probable cause, and having hit the plaintiff he was entitled to damages for assault (pp. 4-5).

As regards the applicability of Fowler v. Lanning and Letang v. Cooper, Carberry J.A. denied that they were of any assistance in the particular circumstances of the case. This opinion followed from the earlier assessment of those two cases. At. page 7 of the judgment the learned Judge of Appeal stated:

> "Both cases are authority for the proposition that trespass to the person nowadays usually required an allegation of negligence to sustain it, or alternatively, an allegation that it was intentionally done, put another way way, no action will be for unintentional trespass to the person in the absence of the allegation and proof of negligence. Both these cases turned on pleading points. "

And in his judgment Carey J.A. (Ag.) stressed that:

> "It is still good law that to set out the bare allegation that "(A) shot at (B)" as an averment is defective in that it discloses no cause of action; Fowler v. Lanning (1959) 1 All E.R. 290. In the case before this Court that however was not the allegation in the plaintiff's statement of claim."

The cause of action was emphasised by him to be clearly formulated in the material words:

> "Assaulted the Plaintiff by shooting him ....."

It will be observed that the allegation of assault by shooting was more explicit than in the instant case. The Court found that the pleadings were not defective in this respect, nor even on the ground of the failure of the plaintiff to allege

negligence, which did not form any part of the plaintiff's case. In the instant case we do not accept the submission that the pleading was so defective as to have warranted the learned judge striking out the statement of claim for the reasons submitted.

The second clear consideration refers to the onus of proof. It is only necessary to read the last part of Section 33 of the Constabulary Force Act to ascertain upon whom lies the onus of proof. It clearly lies upon the plaintiff:

> "And if at the trial of any such action the plaintiff shall fail to prove such allegation (that such was done maliciously and without reasonable and probable cause) he shall be non-suited or a verdict shall be given for the defendant. "

In Solomon v. Adams (1912) Stephens Supreme Court Decisions of Jamaica, 1774 - 1923, Vol. 1 at p.939 Beard J. is quoted as follows:

> "The statute casts the onus on the plaintiff of proving that the defendants acted maliciously or without reasonable and probable cause. "

These comments were made in relation to Section 31 of Law 8 of 1867, entitled a Law to organize a Constabulary Force, the forerunner of the current statutory provision. Indeed in Rayon Laird v. Attorney General of Jamaica and Constable Justin Bennett (1971) 12 J.L.R. 1393, Fox, J.A. acknowledging that, although in an action of assault a plaintiff is required to prove only that he was assaulted, and the defendant must then justify the assault, went on to say:

> "In both assault and false imprisonment it is open to the defendant to justify his action in several ways. The most frequently encountered is proof that the defendant had "reasonable and probable cause" for the assault or false imprisonment. In Jamaica this common law position is qualified by Section 39 of the Constabulary Force Law, Cap. 72."

So although a Constable would have failed to discharge the burden of proof which the common law places upon him to justify the assault and false imprisonment:

> "That failure would not necessarily render him liable in damages to the plaintiff. As a Constable acting in the execution of his office he would be entitled to rely upon the further protection given to him by Section 39 of the Law. By virtue of the provisions of that section a burden was placed upon the plaintiff to allege and prove that the second defendant acted maliciously or without reasonable and probable cause. The section shifts to the plaintiff the burden which the common law places on the defendant."

Mr. Chin-See argued that on the pleadings intention was no longer in issue and he cited the well-known case of Cumbell v. Roberts (1944) 1 All E.R. 326 to support the submission that this not being in issue the learned judge could not make a finding against it, and was therefore in error when he found that "shooting was unintentional." Mr. Chin-See's reference to the abovementioned authority was in particular to the remarks of Goddard L.J. on p. 331. Firstly at Letter B- there is this comment:

> "The next point to observe is that, in action of trespass to the person once the trespass is admitted or proved, it is for the defendant to justify the trespass, and he must justify by plea. Under the former system he could not justify under the plea of the general issue; "Not guilty" operated only as a denial of the wrongful act alleged: see Bullen and Leake, 3rd Edn., p. 791. If, therefore, a defendant pleaded a justification and failed to prove it, he could not take advantage of some fact emerging in the evidence and set up that as a justification under his plea of not guilty."

More importantly by analogy later down on the same page at letters G - H Goddard L.J. said this:

> "The plea in fact in this case justified the arrest under the provisions of the Act, and as solely under the pro[illegible] of the pleadings, we there was some criticism of the pleadings, we think it right to say that, in our opinion, the pleader properly confined himself to that plea. Had he pleaded a justification based on a reasonable suspicion of felony committed by the plaintiff, he would have been setting up a case which there was no evidence to support. With all respect to the trial judge he was not, in our opinion, entitled to decide this case on a

> justification which was not pleaded, nor do we think he was justified in holding that the evidence disclosed a justification at common law, for, as we have already said, the officer, though he suspected the goods had been stolen, never said that he suspected that the plaintiff had stolen them or feloniously received them. "

The principle deduced from the foregoing quotations can be applied to the facts of the instant case. In doing so, the Court is not unmindful of its power to draw inferences, Benmax v. Austin Motor Co. Ltd., (1955) 1 All E.R. 326 H.L. However, in the instant case because of the absence of any positive findings of certain primary facts, in particular, the circumstances that moved the first defendant to fire the shot, this Court would not be in a position to properly do so with respect to whether the shooting was done maliciously or without reasonable and probable cause.

Having allowed Mr. Harrison to argue his point on appeal despite the absence of a respondent's notice we were constrained to grant leave to the plaintiff/appellant to amend the prayer of his grounds of appeal to ask that in the alternative a new trial be ordered on the issue of assault. Accordingly, as stated before, a new trial was ordered.

As was pronounced by Kerr J.A. at the time of the oral judgment, the plaintiff/appellant will have the costs of this appeal to be agreed or taxed.