

... whether the act was done in the course of his duties as a servant of the Crown ... whether the act was done in the course of his duties as a servant of the Crown ...
IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. P. 123/86

BETWEEN	HUGH PERKINS	PLAINTIFF
A N D	ATTORNEY GENERAL	FIRST DEFENDANT
A N D	SGT. M. GOODGAME	SECOND DEFENDANT
A N D	ANTHONY LUE	THIRD DEFENDANT

John Graham and Hector Robinson of Broderick & Graham for Plaintiff

Leighton Pusey & Audley Foster instructed by Director of State Proceedings for 1st and 2nd defendants.

Maurice Tenn for 3rd defendant.

Heard: 11th, 12th, 13th and 20th January 1994

HARRISON J.

The plaintiff claims against the 2nd defendant damages for imprisonment by the 2nd defendant in the course of his duties as a servant of the Crown maliciously and without reasonable and probable cause, and against the 2nd and 3rd defendants malicious prosecution of the plaintiff without reasonable and probable cause for the offences of obtaining goods by false pretences and conspiracy to obtain goods by false pretences, in the Resident Magistrate's Court, St. Andrew, which latter proceedings ended in the plaintiff's favour. The first defendant is sued by virtue of the Crown Proceedings Act as a consequence of the act of the 2nd defendant.

The 1st and 2nd defendants admit that the 2nd defendant arrested and imprisoned the plaintiff as a result of information received by the 2nd defendant from the 3rd defendant and also as a result of the investigations of the said 2nd defendant but state that there was reasonable and probable cause for so doing. It is admitted that on the 9th day of May 1986, the charges against the plaintiff were dismissed for want of prosecution.

The 3rd defendant in his pleadings stated that he offered goods for sale valued at \$3000 to the plaintiff to be paid for in cash, the plaintiff tendered a cheque signed by one Hazel Chang, a person unknown to the 3rd defendant, to whom the plaintiff falsely represented that the cheque was good, signed it and guaranteed to make good the cheque if it was returned,

that the 3rd defendant delivered the goods to the plaintiff, the cheque was dishonoured, the plaintiff refused to pay for the goods and a report was made to the police. The 3rd defendant further stated that the plaintiff begged the 3rd defendant to discontinue the criminal prosecution in order to avoid a criminal conviction of the plaintiff, in return for the plaintiff's forbearance to sue in tort. The 3rd defendant gave no evidence in support of any of the allegations in his pleadings.

The Court found inter alia, the facts following:-

The plaintiff, a businessman operated a business at 27 Beechwood Ave, Kgn. 5, of wholesale grocery and fishery called Beechwood Fish & Meat. He also operated at the said premises, the business of a bar and restaurant named Aubin's Love Inn, which was itself operated by Aubin's Enterprises.

On the 6th day of July 1984, the plaintiff was arrested, at this said business place by the 2nd defendant on charges of obtaining goods by false pretences and conspiracy to obtain goods by false pretences.

On the day previously, the plaintiff spoke to the 2nd defendant by telephone. The 2nd defendant accused the plaintiff of dishonesty "...taking the poor chiney man things and don't want to pay for it." The plaintiff remonstrated with the 2nd defendant, protested his innocence, his lack of knowledge about any cheque, and advised the 2nd defendant to "get his facts straight about what he was dealing with before coming back to my place to embarrass me." The 2nd defendant probably referred to plaintiff as "a feisty boy" and promised to prove to the plaintiff that he the 2nd defendant could lock him up and put him away. On the following day, the 6th day of May 1984 the 2nd defendant, accompanied by two armed policeman, arrested the plaintiff without a warrant, in the presence of his two sons and customers.

The plaintiff was taken to Half Way Tree Police Station, where he was charged with the said offences.

These charges arose out a previous commercial transaction. The 3rd defendant, Anthony Lue himself operated a wholesale business named Lue's Enterprises with which the plaintiff had been doing business from 1976: he placed his order by telephone and the meat would be delivered to

his premises. In 1984 defence witness Joyce Canaan, worked as a sales representative for the 3rd defendant. In May 1984, the plaintiff advised by Mrs. Canaan of its availability, ordered from her 30 cases of liver. Mrs. Canaan wrote up an invoice for it, Exhibit 2. A system in operation at Lue's Enterprises provided that the customer would then, having placed an order by telephone, go in and pay for the goods whereupon a delivery slip would be issued to the customer who would then receive the goods at the company's warehouse.

The invoice, Exhibit 2 was written up by Joyce Canaan on 9.5.84 in name of "Beechwood Fish & Meats" for the said 30 cases of liver in the sum of "\$3082.50." The plaintiff's name does not appear on Exhibit 2.

A cheque, Exhibit 3, drawn by one Hazel Chang was tendered, at Lue's Enterprises office, not to Joyce Canaan, as payment for the said liver. The cheque was in the sum of "\$3082.50." On the back of the cheque was the notation "Hazel Chang, Phone 88935 Fox (illegible) 27 Beechwood." Though "27 Beechwood" is the business address of the plaintiff, the cheque contained no reference to the plaintiff. It was neither signed nor endorsed by the plaintiff. There is no evidence that the plaintiff tendered, Ex. 3, nor that he guaranteed its validity or promised to indemnify the payer.

A delivery slip, was issued for the receipt of the goods, but there is no evidence that the said slip was handed to the plaintiff or his agent or that he took delivery of the said 30 cases of liver.

The said cheque, Ex. 3 was dishonoured by the bank and returned. The 3rd defendant informed Joyce Canaan of this. She went to the plaintiff and advised him of this asking him to make restitution. The plaintiff referred her to Hazel Chang. Joyce Canaan contacted Hazel Chang and when she failed to collect the proceeds of the said cheque she returned to the plaintiff - who insisted she collect from Hazel Chang. Joyce Canaan complained to the plaintiff that he was "taking me in circles." She reported the matter to the 3rd defendant.

Presumably, the 3rd defendant made a report to the police, which resulted in the events leading up to the incident of the 6th day of July 1984.

Mr. Maurice Tenn for the 3rd defendant argued that no malice nor improper motive was proven against the 3rd defendant who merely called in the police in order to collect monies owing to him and not to bring anyone to justice - Abbott vs. Ref. Assurance [1969] 3 AU ER 1074 - not every report is a complaint. He stated further that where a felony has been committed, there was a common-law duty to prosecute, as was properly done in the instant case, that when the order was taken from the plaintiff and the goods supplied, and paid for by the cheque of another person whose cheque was dishonoured, that was reasonable and probable cause to prosecute and the plaintiff had not shown that the 3rd defendant has no reasonable and probable cause. He stated finally that the plaintiff and Hazel Chang having made restitution, it negatives both malice or lack of reasonable and probable cause in the 3rd defendant.

Mr. Graham for the plaintiff submitted that there was no evidence that the plaintiff was associated with the cheque which was subsequently dishonoured or took delivery of the goods from 3rd defendant whose behaviour shows an improper motive in initiating the prosecution and used pressure recklessly to collect his money. The information available to the 2nd defendant from the statements collected were inadequate to conclude that there was any reasonable or probable cause to arrest the plaintiff, particularly where Mrs. Canaan, the 3rd defendant's employee denied telling the 2nd defendant that the company would not have accepted a cheque from Hazel Chang who had a history of bounced cheques. He noted further that the arrest and prosecution of the plaintiff by the 2nd defendant was due to malice because of the 2nd defendant's perception of disrespect on the part of the plaintiff. He argued also that the Public Authorities Protection Act cannot avail a public officer who acts maliciously. He relied on Flemming vs Myers et al S.C. Civil Appeal No. 63/85 delivered on 18th December 1989 and Bryan vs. Lindo S.C., Civil Appeal No. 22/85 delivered on 5th May 1986.

Mr. Pusey for the 1st and 2nd defendants argued that the claim for false imprisonment is statute-barred under the provisions of the Public

Authorities Act and even if malice is proven the 2nd defendant is still protected by the Act, though it depends on the degree of the malice. He submitted further that the pleadings show that it is conceded on both sides that the 2nd defendant was acting within the course of his duties as a police officer and therefore the plaintiff is precluded from now saying that there is malice which takes the 2nd defendant out of the protection of the statute; he relied on Abrahams et al vs. A.G. & Ramdatt, S.C.Civil Appeal 31/83 delivered 4th April 1984 which case he stated must be preferred to Bryan vs. Lindo, supra. He stated further that the 2nd defendant having received a report, statement, an invoice and a cheque and conducted his own investigations had a reasonable suspicion that the plaintiff had committed an offence known to law and in the circumstances had reasonable and probable cause to arrest the plaintiff. Even if words of ill-will were used by the 2nd defendant towards the plaintiff that would not be malice sufficient to found liability seeing that the defendants had other evidence against the plaintiff to raise a prima facie case of charges of obtaining goods by false pretences or conspiring to obtain goods by false pretences; that there was a deficiency in proof of obtaining by the plaintiff, but such proof is not necessary as the Court is not confined to viewing the state of mind of the 2nd defendant of the time of arrest but may examine the additional evidence available thereafter to determine if there was cause for arrest.

In any event, the 2nd defendant did not act with ill-will nor an improper purpose towards the plaintiff. He relied on Dumbell vs. Roberts et al [1944] 1 All E.R. 326 and Irish vs. Barry (1965) 8 WIR 177.

The tort of false imprisonment is committed where the defendant intentionally and without lawful justification subjects the plaintiff against his will to a total restraint of his movement by causing his confinement. The onus is then on the defendant to prove reasonable and probable cause for the arrest of the plaintiff.

Malicious prosecution is committed where the defendant institutes criminal proceedings against the plaintiff which proceedings terminated in the plaintiff's favour and there was no reasonable and probable cause

for such prosecution, and there was malice on the part of the defendant or some other improper purpose. The onus is on the plaintiff to prove this.

Reasonable and probable cause is defined as

"....an honest belief in the guilt of the accused based upon a full conviction, founded on 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...." This is the dictum of Hawkins, J in Hicks vs Faulkner (2878) 8 QBD 167 at p. 171.

The defendant's belief must be based on the evidence in his possession at the time of the prosecution pointing to the probable guilt of the plaintiff. It need only be sufficient evidence to justifiably commence a prosecution and need not be to the extent of that which is required to sustain a conviction, i.e. beyond reasonable doubt.

Malice means spite or ill-will and includes any other improper purpose for instituting the proceedings. Criminal proceedings are usually effected with the primary purpose of bringing offenders to justice and if instituted for other improper purposes the defendant has stepped outside the law.

The plaintiff may prove malice by showing that the motive, for the prosecution was improper or that the acts were such that the prosecution can only be accounted for by imputing a wrong motive on the part of the defendant. Of course the same acts may show such a lack of honest belief in the guilt of accused, because of the insufficiency of the evidence - that it shows both a lack of reasonable cause and malice on the part of the defendant.

In the instant case, on the evidence of Joyce Canaan, whom the court found to be a reliable witness, the plaintiff probably did order the 30 cases of liver. Though the plaintiff denied this and still does, the Court prefers the evidence of Joyce Canaan on this point. The plaintiff obviously sent Joyce Canaan to Hazel Chang to collect the proceeds of the cheque.

Sgt. Goodgame, on receiving the cheque Ex. 3 drawn by Hazel Chang, conducted his own investigation. He however uncovered,

- (i) no evidence that the plaintiff took delivery of the goods, and thereby "obtained" for the purpose of the charges.
- (ii) no evidence that the plaintiff tendered the cheque, or signed the back of the cheque - as alleged in paragraphs 3 and 4 of the defence of the 3rd defendant.
- (iii) no evidence of any agreement by the plaintiff and Hazel Chang to carry out an unlawful act, i.e. a conspiracy - Sgt. Goodgame's evidence that the conspiracy he had in mind was based on the cheque endorsed "Hazel Chang for Aubin's Enterprise 27 Beechwood Ave" is deficient in that - neither the writing nor the evidence of its presentation is associated with the name or person of the plaintiff.
- (iv) no evidence of any false pretence on the part of the plaintiff -

Sgt. Goodgame's evidence that the false pretence was based on the information that,

- (i) the plaintiff made the order for the liver - the Court finds this to be true.
- (ii) the plaintiff paid by cheque which was not his - (there is no proof of this).
- (iii) the company would not have accepted the cheque of Hazel Chang who had a history of bounced cheques. This is not supported by Joyce Cannaan who is supposed to have told this to Sgt. Goodgame. Nor does the pleading of the defence of the 3rd defendant support this - on the contrary paragraph 4 recites that the 3rd defendant did accept the cheque on the guarantee of the plaintiff - because Hazel Chang was "a person unknown", is

insufficient in law to amount to false pretence in the plaintiff. Sgt. Goodgame's evidence that "my state of mind was that the cheque was given to Aubin's Enterprise by Hazel Chang to pay for goods" is unsupported by any evidence in his possession at the time that he effected the arrest.

The offence of conspiracy is a common law misdemeanour. The offence of obtaining by false pretences is also a misdemeanour. Sgt. Goodgame therefore had no power at common law in the circumstances to arrest the plaintiff without a warrant; see also section 15 of the Constabulary Force Act. The expeditious apprehension of the plaintiff - without any evidence of his having committed any offence or the alleged offences - was therefore devoid of the description of a justifiable act to bring a guilty person to justice. It is true that the initial order was made by the plaintiff, who misleadingly denied that he did so, frustrating the efforts of Joyce Canaan and the 3rd defendant to collect on the proceeds of the cheque, but seeing that Hazel Chang did not draw a cheque on an account that did not exist, this was a mere commercial transaction by an impecunious purchaser.

There could not therefore be any honest belief in the guilt of the plaintiff, or any suspicion of his having committed an offence - in the mind of Sgt. Goodgame and as a consequence no reasonable and probable cause for his arrest. This court is of the view that the arrest can only be accounted for as satisfying some other improper purpose on the part of the 2nd defendant. He was acting in "pretended execution of his duty" Scrutton L. J. in Scammel vs Harley (1929) KB 419 (C.A.). Both malice and a lack of reasonable and probable cause have been proven by the plaintiff.

The 1st defendant contends that the claim for false imprisonment is statute-barred in that it was instituted not within one year of the 6th day of July 1984 as is required by the Public Authorities Protection Act.

This court holds that the said Act cannot avail the Crown and its servants, where the act complained of is done maliciously as found by this court, or is an act amounting to felony - vide Bryon vs Lindo, Supreme Court Civil Appeal No. 22/85 dated 5/5/86. The limitation statute provides protection for one who acts in bona fide performance of his duties, and not otherwise.

The case of Abrahams et al vs. A.G. et al, supra, a claim in negligence, is unhelpful on this point. I do not take it to decide that if the public officer is acting in the presumed execution of his duty - and he performs those duties maliciously - the limitation statute shields him and restricts the plaintiff to commence his action within one year. Certainly the 2nd defendant was doing what he was employed to do, albeit doing it badly i.e. maliciously. The vicarious liability of his employer, the Crown, still exists, despite his malicious act, but in those circumstances the Public Authorities Protection Act, with its limiting provisions, protects neither the Crown nor the 2nd defendant - Bryon vs. Lindo, supra.

This court finds that the defendants are liable to the plaintiff for false imprisonment and malicious prosecution, respectively.

The plaintiff was arrested and held in custody for approximately four (4) hours; he is a businessman and suffered some degree of embarrassment before the very eyes of his sons and his customers. The stigma attached to this incident is not easily removed. The plaintiff's unco-operative conduct did not however help in the circumstances. On Dr. Davidson's evidence, the plaintiff probably suffered some rise in his blood pressure and some degree of depression, as a result of the act of the 2nd defendant.

There shall be judgment for the plaintiff on the claim for False imprisonment against the 1st and 2nd defendant, Malicious prosecution against all defendants.

Damages are:

False imprisonment	\$30,000
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Malicious prosecution

Special Damages \$23,000

General Damages \$100,000

$$\begin{array}{r} 123,000 \\ \hline \$153,000 \end{array}$$

\$153,000 being.

Special Damages \$23,000 plus interest @ 3% from 6/1/84 to date.

General Damages \$130,000 plus interest \$ 3% from
date of service of the writ to date.

Costs to be agreed or taxed.

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① A Month v Fed Assurance
(1969) 3 AU 121074

② Flannery & Myers et al
S. G. G. J. A. 1963/85
- 1963/85

③ Exhibit 22/82-5/5/80

④ *Abraham* edae v \$15
A.G. 2 Rando - SC
C. v. Annet 3/23

4/4/54
 (5) Dumbbell & Robert Grelal
 (1944) 1 ALLK 326

(6) Irish - Barry
(1965) 8 WIR 177.

(7) Heck v Faulkner (2878) 8 QB 616