JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S ~~CRIMINAL~~ CIVIL APPEAL NO. 23/95

BEFORE: **THE HON. MR. JUSTICE RATTRAY, PRESIDENT**
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.

BETWEEN **BARZIE SALMON** **PLAINTIFF/APPELLANT**

A N D **LOUISE ROACHE** **DEFENDANT/RESPONDENT**

Alvin C. Mundell for the Appellant

Leroy Equiano for the Respondent

November 13, 14 and 20, 1995

RATTRAY P.:

This action arose out of a transaction between the plaintiff/appellant Barzie Salmon and the defendant/respondent Louise Roache, the former having been engaged by the latter to carry out certain renovations at her house at 1 Dudney Road, Olympic Gardens. Mrs. Roache had provided the material to be used, and had given Mr. Salmon the keys to the house so that the work could be done. Mr. Salmon on his own admission was responsible for the material. As found by the learned Resident Magistrate Mr. Salmon in the season of

Christmas, 23rd or 24th of December 1989 went to Mrs. Roache and told her he was going to the country. The job had not yet been completed. Mrs. Roache having received certain information made a report to the Olympic Gardens Police Station, and the police in the person of one Corporal Jarrett accompanied her to the house. Since she had no keys the police kicked in the door. Material which she had expected to have seen there was missing.

Some time in early January 1990 Mr. Salmon attended at the home of Mrs. Roache. While he was there according to his evidence:

> "... she sent her daughter to buy lime. Child about 16 at the time.
>
> Daughter came back with police. She rode a bicycle.
>
> Police Officer came out of jeep and question Mrs. Roache if is him that.
>
> She said 'Yes a him.'
>
> Police Officer stick me up with gun and searched me.
>
> They then put me up into jeep back and took me to Waterford Police Station.
>
> Miss Roache and her daughter also went to Waterford Police Station.
>
> At Police Station she asked for a phone call to Corporal Jarrett at Olympic Garden Police Station. She spoke into the phone and said 'A catch de guy'."

He was placed in a cell where he spent the night. Next morning Corporal Jarrett whom he knew before spoke to him and arrested him. Corporal Jarrett charged him in respect of two sheets

of solitex, the property of Mrs. Roache and took him to the Olympic Gardens Police Station. The solitex was valued at $90.00 each.

He spent one day in custody at the Olympic Gardens Police Station. After this he was taken by the police to Hunts Bay where he was in custody for one week before he was brought before the Resident Magistrate's Court, Half-Way Tree. An information was read by the Clerk of Court relating to $10,000.00 worth of material and his bail was increased from $1,000.00 to $10,000.00 by the Court. He was in custody for another week before he received bail.

Mrs. Roache admitted making a report to the Olympic Gardens Police Station to Corporal Jarrett in respect of the transaction as to the renovation of the house. The police accompanied her down to the house and kicked in the door to gain entry. Several sheets of solitex were missing.

She admitted too that Mr. Salmon came to her house in early January. She did send her daughter out to buy lime. Her daughter was in the house when the police jeep came. On her evidence:

> "I spoke to the police. Police Officer asked me if Salmon was the carpenter and I said yes and explained and tell them that I gave him a job to do on my house; that material gone and Salmon has the key for house. Several times Police Officer question Salmon for keys and he said he don't have it.
>
> Police Officer took Salmon into the jeep and told me to come to Waterford Police Station. I later went to Waterford Police Station after tending to my husband.
>
> At Waterford Police Station, Police Officer questioned me and in Salmon's presence I told him that I had reported it to Olympic Gardens Police Station.

> "A Police Officer called Olympic Gardens Police Station.
>
> Police Officer question me who was the Police Officer I gave statement to. I told him Mr. Jarrett and Police Officer asked for Corporal Jarrett. I then spoke to a police but I did not used words 'I catch the guy'.
>
> Not true that my daughter came back with police.
>
> Not true that police asked me if this is him and I said a him.
>
> I said this is the carpenter I gave the job."

It is clear from the evidence that Mrs. Roache is saying she did not direct the police to arrest Mr. Salmon - she only made a report and the police acted in their discretion.

In her reasons for judgment the learned Resident Magistrate stated correctly:

> "There can be no false imprisonment if a discretion is interposed between Defendant's act and Plaintiff's detention."

She found that the discretion of the police was interposed between the report by Mrs. Roache and the arrest of Mr. Salmon. "Therefore", she said:

> "The incarceration of the Plaintiff was not caused by the defendant's having him falsely imprisoned."

On her assessment of the evidence she stated:

> "Thus, on a balance of probability and with no apparent evidence of malice on the part of the Defendant and having seen the demeanour of the witnesses, judgment for the Defendant."

Her findings of fact were such as she could properly have come to on an assessment of the evidence. Her determination of the law governing the situation was correct, and is supported by authority well established in the old cases, among them ***Grinham v Willey [1859] 4 H & N 446; 157 E.R. 934,*** in which ***Pollack C.B***. stated:

> "The circumstances of this case are, that the defendant appealed to the authorities who are charged with the preservation of the peace. The arrest and detention were the acts of the police officer, and the defendant did nothing more than he was bound to do. ... We ought to take care that people are not put in peril for making complaint when a crime has been committed. If a charge be made mala fide, there are ample means of redress. But in the absence of mala fides we ought not to be too critical in our examination of the facts, to see if something is not done without which the charge against the suspected person could not have been proceeded with. A person ought not to be held responsible in trespass, unless he directly and immediately causes the imprisonment."

The appeal therefore fails and is dismissed with costs to the respondent of $500.

GORDON J.A.:

I agree.

PATTERSON, J.A. (DISSENTING):

The issue to be decided is this: Can an aggrieved person who makes a report to the police and, as a result, the police arrests someone, be sued for false imprisonment, if the arrest is unjustified by law? It seems quite clear that an action is sustainable at the suit of the person unlawfully imprisoned against any person who was "active in promoting and causing the imprisonment." In ***Aitken v. Bedwell*** (1827) Mood. & M 68, it was held that "a person may be liable in false imprisonment either because he himself effected the arrest or, in line with the general principles, that he who instigates another to commit a tort is a joint tortfeasor, because he actively promoted the arrest by another."

The plaintiff who claims to have been falsely imprisoned has not got to prove that the imprisonment was unlawful or malicious, all that is necessary for him to establish a prima facie case is that he was imprisoned by the defendant. The onus then shifts to the defendant to prove that the imprisonment was lawful.

There can be no doubt that the action for false imprisonment will lie against a defendant who himself effects the arrest. Thus a private person who unlawfully arrests another, or gives him in charge to a police officer who thereupon detains or arrests him, or if he causes a police officer to detain or arrest the other, or if he participates in the arrest or detention, will be liable for false imprisonment. But the mere giving of information to the police officer, although it may lead to the arrest, is not sufficient to support the action against the informant. In other

words, if a person makes a report to a police officer, and the latter, acting on his own initiative, arrests or detains the person about whom the report was made, the informant would not be liable for false imprisonment. But it is otherwise if the informant has taken on himself the responsibility of directing the imprisonment, if "he directly and immediately causes the imprisonment" (per Pollock, C.B. in ***Grinham v. Willey*** - 4 H & N 496 at 498; 28 L.J. (ex.) 242). It is not necessary to touch a person in order to constitute an imprisonment.

An interesting case came up before Lord Ellenborough in 1808. It is ***Flewster v. Role*** - Nisi Prius (1808) 1 Camp. 187; 170 E.R. 924. The report reads as follows:

> "On October 6, 1807, the defendant, a widow, went to the place of rendezvous for the impress service near the tower, and gave information that there was a young man, meaning the plaintiff, at a house she described, who was liable to be impressed, and who was a fit person to serve His Majesty. In consequence of this, the plaintiff was seized by the press-gang and carried on board the tender, where he was detained until it was discovered that he had never been in a ship before, except once, when he had been in like manner wrongfully impressed.
>
> LORD ELLENBOROUGH (to the jury): This is not like a malicious prosecution, where the party gets a valid warrant or writ, and gives it to an officer to be executed. There was clearly a trespass here in seizing the plaintiff, and the defendant therefore was a trespasser in procuring it to be done. Nor is any proof of malice necessary. If a person causes another to be impressed, he does it at his own peril, and is liable in damages if that person proves not to have been subject to the impress service. If the defendant in this case had said, that she believed the plaintiff was liable to be impressed, leaving it to the

> "officer of the press-gang to make the necessary inquiries, and to act as he should think most advisable - for such a line of conduct, which a regard for the public service would have induced her to adopt, she would not have been amenable in this action. But she took upon herself positively to aver that he was compellable to serve in a King's ship, and she must therefore answer for the consequences.
>
> *The jury returned a verdict for the plaintiff (who was represented by the Attorney-General).*"

In order to justify an arrest by a private person, at common law, such person must prove that he reasonably believed that the person arrested had committed a felony and that a felony had in fact been committed. A private person may also lawfully arrest a person who is attempting to commit a felony, but has no such power once the attempt ceased. He has no power to arrest for a misdemeanour save that he may arrest a person who commits a breach of the peace in his presence, when the breach is still continuing, or where there is reasonable ground for apprehending a renewal of the breach. He may also, at the request of a constable, assist the constable in the arrest of a person who has committed a breach of the peace in the presence of the constable.

The common law powers of a constable to arrest without warrant must not be confused with the common law powers of a private person. Sir Rufus Isaacs, C.J. clearly stated the difference in the powers when, in ***Walters v. W. H. Smith & Son Limited*** [1914] 1 K.B. 595 at page 602, he said:

> "At common law a police constable may arrest a person if he has reasonable cause to suspect that a felony has been committed although it afterwards appears that no felony has been committed, but that is not so when a private person <u>makes or causes the arrest</u>, for to justify his action he

> "must prove, among other things, that a felony has actually been committed: see per Lord Tenterden C.J. in ***Beckwith v. Philby*** 6 B. & C.635." [Emphasis supplied]

At page 606-607, the judgment continues:

> "It is true that very often there is a duty cast upon a person to put the law in motion in order to bring offenders to justice, and it is no doubt for reasons of public policy that some excuse, limited in character, is permissible in an action for damages at civil law for false imprisonment when a private person has wrongly caused the arrest of another. But be it observed that this concession is limited to felonies, and although a misdemeanour, which may be a more serious crime than some felonies, may have been committed, yet if a person causes a wrongful arrest, however serious the misdemeanour may be, it cannot be made the basis of any legal excuse if the party has been wrongfully arrested.
>
> When a person, instead of having recourse to legal proceedings by applying for a judicial warrant for arrest or laying an information or issuing other process well known to the law, gives another into custody, he takes a risk upon himself by which he must abide, and if in the result it turns out that the person arrested was innocent, and that therefore the arrest was wrongful, he cannot plead any lawful excuse unless he can bring himself within the proposition of law which I have enunciated in this judgment."

That proposition is this:

> "A private individual is justified in himself arresting a person or ordering him to be arrested where a felony has been committed and he has reasonable ground of suspicion that the person accused is guilty of it."

The short facts in ***Walters'*** case are these: Walters was employed to the defendants as assistant manager of a bookstall. Stocktaking on three occasions showed deficiencies. A "trap" was set by marking copies of a book. The plaintiff removed a copy of the marked book, which was later found at a shop kept by him and his wife. A member of the defendant's firm

questioned the plaintiff who failed to give an explanation of his possession of the book, and at the end of the interview, the member of the defendant's firm "gave the plaintiff into the custody of Sergeant Budge, who had been employed in the matter as a detective officer. The plaintiff was taken to the police court and charged with stealing the book." The defendants later admitted that the plaintiff had not stolen the book, but had taken it away with the intention of subsequently accounting or paying for it. The final section of the judgment is worthwhile quoting, and may be applied to the instant case. It reads thus:

> "In this case, although the defendants thought, and indeed it appeared that they were justified in thinking, that the plaintiff was the person who had committed the theft, it turned out in fact that they were wrong. The felony for which they gave the plaintiff into custody had not in fact been committed, and, therefore, the very basis upon which they must rest any defence of lawful excuse for the wrongful arrest of another fails them in this case. Although I am quite satisfied not only that they acted with perfect bona fides in the matter but were genuinely convinced after reasonable inquiry that they had in fact discovered the perpetrator of the crime, it now turns out that they were mistaken, and it cannot be established that the crime had been committed for which they gave the plaintiff into custody; they have failed to justify in law the arrest, and there must, therefore, be judgment for the plaintiff for the damages which have been awarded, with the consequent results."

The facts of the instant case may now be stated. The resident magistrate recorded "Findings of Facts", but, as Mr. Mundell rightly pointed out, no findings have been made on some salient issues. It is open to this court to make such findings. The appellant claimed against the defendant damages in the sum of

$10,000 for false imprisonment "for that sometime in January, 1990 the defendant caused the plaintiff to be arrested at Waterford in the parish of St. Catherine on a false charge of larceny" and was taken to Half Way Tree Police Station and imprisoned for two weeks. He was placed before the court and allowed bail, and although he attended court on about nineteen occasions, the defendant never turned up and the case was adjourned sine die.

The evidence in support of the claim was given by the appellant himself. He is a contractor and builder and he entered into a contract with the respondent to renovate a house. The respondent supplied the material which was bought on his estimate and delivered to him on the site. After working for two weeks up to Christmas Eve 1989, he left his tools at the premises and went off to the country parts. The work was not completed. About the 10th January, 1990, as a result of a message he received, he went to the home of the respondent. There he saw the respondent and her husband and daughter. The respondent sent out her daughter on a bicycle "to buy lime". The daughter returned riding her bicycle and accompanied by the police in a jeep. A police officer came from the jeep and asked the respondent "is him that", referring to the appellant, whereupon the respondent said, "Yes, a him." The police officer then searched the appellant at gunpoint, put him in the jeep and drove him to the Waterford Police Station. The respondent and her daughter also attended the police station. The respondent requested a telephone call to Corporal Jarrett at the Olympic Gardens Police Station and she spoke into the telephone saying, "A catch the guy."

The appellant was placed in a cell at the Waterford Police Station where he spent the night. Next morning Corporal Jarrett came there and arrested him and charged him "for two sheets of solitex, property of Mrs. Roach" (the respondent). He was taken from the Waterford Police Station to the Olympic Gardens Police Station, locked up and later was transferred to the Hunts Bay Police Station.

It seems quite clear to me that the reasonable inference to be drawn from what transpired at the respondent's home is that she sent her daughter to call the police, on the pretext that she was sending her to buy lime. She did not have a telephone at home. The daughter and the police returned together and the police asked if "is him that." The inescapable inference to be drawn from that is that the police had been notified that the appellant was at the home of the respondent, and that is confirmed by her answer, "Yes, a him." The police detained the appellant, and that must have been as a result of what the respondent had sent to tell the police and her identification of him. There is no evidence that the appellant was told why he was being detained; he admitted that the respondent did not say to the police officer "arrest the man now." But that is not necessary to ground the action. The unchallenged testimony of the appellant, which I accept, is that at the police station at Waterford the respondent asked for a telephone call to Corporal Jarrett at Olympic Gardens Police Station and when she spoke on the telephone she said, "A catch the guy." That makes it abundantly clear that she had caused the appellant to be detained, and he was kept in custody at

Waterford until the following morning when the said Corporal Jarrett came and arrested him.

What was the lawful justification for the arrest? The defence is stated thus:

> "There was a discretion interposed between report made and action taken. Discretion laid on police officer. There was reasonable and probable cause for said report to be made."

The respondent testified that she entered into an agreement with the appellant to repair a house. He supplied an estimate and she took him to a hardware store and "introduced him to owner as my contractor." Arrangements were made for the delivery of necessary building materials to the appellant. She subsequently saw materials stored on the premises and the appellant gave her the delivery receipt. She gave him keys to a room and told him "he was responsible for the materials and keys." All this evidence establishes that the material was never reduced into the possession of the respondent. The appellant took delivery and possession of the materials for the purpose of using it to effect the repairs to the house. She said she gave him extra zinc sheets. She was satisfied that work was being done on the house. She went there on the 17th December, and in the storeroom she saw "latch, zinc, nail, strips and a whole lot of solitex" - two rooms were being ceiled at that time. On Christmas Eve the appellant got money from her and told her he was going to the country to see his sick mother. Subsequently, she went to the house, but could not get in as she did not have the keys and the watchman was not there. She went back after getting "certain information", and it was then that she went to the Olympic Gardens Police Station and made a report to Corporal Jarrett.

Accompanied by the corporal, she went to the house and he broke in as she had no keys to the house. She did not see any material then. The ceiling of that room had "about 7 out of 35 sheets" of solitex. She said she did not see the balance of the sheets. It is to be noted that it was only one room in the house that she entered, although the agreement was for work to be done on three rooms. She could not say what material had been used and if any was missing. It does not appear to me that there was any reasonable cause to suspect that the appellant was guilty of the felony of larceny. I will go further and say that on the evidence it was never proved that the appellant had committed a felony or that a felony had actually been committed. Such proof is vital to justify the action of the respondent.

Her evidence as to what transpired on the night that the appellant was taken into custody differs from what the appellant said. She denied that she had left a message for the appellant to attend her home. She recalled sending her daughter "to buy lime" that night, and that a police jeep came to her home, but she said her daughter was then in the house, and she was in the hall attending to her husband. The appellant, she said, "was then out the gate." She spoke to the police, and the notes of evidence read as follows:

> "Police officer asked me if Salmon was the carpenter and I said yes and explained and tell them that I gave him a job to do at my house; that material gone and Salmon has the key to my house. Several times police officer question Salmon for keys and he said he don't have it. Police officer took Salmon into the jeep and told me to come to Waterford Police Station. I later went to Waterford Police Station after tending to my husband."

The heart of the appellant's claim lies in what transpired on the night the appellant was given into custody, but it does not appear that the resident magistrate appreciated that fact nor did she address that issue. She did not refer to that evidence either in her findings of fact or her reasons for judgment. It was crucial to her judgment that she should resolve the conflicting stories of what the two witnesses said transpired that night. The credibility of the witnesses came into sharp focus, but having failed to make a finding, this court is at large. From what I have said earlier, I find the narrative of events, as testified to by the appellant, to be more probable than that of the respondent. It is plain that the police did not come to the home of the respondent on his own initiative - the police was summoned for the purpose that the appellant would be given into their custody, and that is just what the respondent did. There was absolutely no justification for her actions, and it is crystal clear that, but for the active part she played in promoting and causing the Waterford police to detain the appellant until he could be handed over to Corporal Jarrett, the appellant would have been at liberty to go about without restraint. In those circumstances, I find the respondent liable for the imprisonment.

I mentioned earlier on that he who instigates or procures another to commit a tort is a joint tortfeasor, and I will now consider whether that principle is applicable in the instant case. There can be no doubt that a constable has the power at common law to arrest without warrant any person upon reasonable suspicion that a felony has been committed and that that person committed it, whether or not the

felony was in fact committed. Can it be said that the Waterford police had sufficient evidence to justify the arrest? It does not seem to me to be so. The policeman who took the appellant into custody was not acting under a warrant, nor is there any evidence that he acted on reasonable suspicion that the appellant had committed a felony. The detention was clearly for the purpose of restraining the appellant to await Corporal Jarrett's arrival, although it does not appear that the appellant was informed of the reason for his detention. The detention was unlawful and the appellant is entitled to be compensated. The unlawful detention was instigated or procured by the respondent and it is the law that he who instigates or procures another to commit a tort is deemed to have committed the tort himself, and it is of no moment that that other is a servant, an agent, or independent contractor. It seems, therefore, that both the police from Waterford and the respondent would be liable in false imprisonment to the appellant as joint tortfeasor.

As to the further imprisonment by Corporal Jarrett, the resident magistrate relied on ***Austin v. Dowling*** (1870) L.R. 5 C.P. 534 for the proposition that "there can be no false imprisonment if a discretion is interposed between defendant's act and plaintiff's detention." That case did not, in my opinion, lay down any such wide proposition. Willes J. in his judgment clearly pointed out that the defendant's wife, who had given the plaintiff into custody of the police inspector on the mistaken belief that a felony had been committed by the plaintiff, was liable for false imprisonment. The defendant signed a charge sheet on which the inspector acted and detained the plaintiff

until the following morning. The plaintiff was then taken before a magistrate who discharged him. The learned judge drew the distinction between false imprisonment and malicious prosecution in the following illustration:

> "Where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment. There is, therefore, at once a line drawn between the end of the imprisonment by the ministerial officer and the commencement of the proceedings before the judicial officer." [emphasis supplied]

The point that the resident magistrate overlooked is that false imprisonment continued "so long as the matter remained in the hands of the ministerial officer", but it came to an end when "the opinion and judgment of a judicial officer are interposed between the charge and the imprisonment." The resident magistrate fell in error when she expressed the view that Corporal Jarrett was "exercising independent discretion" when he arrested the appellant. It seems to me that the respondent played a major role in the arrest. It was the respondent who, on evidence which I accept as true, asked at the Waterford Police Station for a telephone call to Corporal Jarrett at Olympic Gardens Police Station, and spoke into the telephone saying, "A catch the guy." It is more probable than not that it was the corporal to whom she spoke, and the words spoken must have conveyed to the corporal that

the respondent was referring to the appellant. Corporal Jarrett it was who went to the Waterford Police Station the following morning and arrested the appellant charging him for larceny of two sheets of solitex. It is quite obvious that it was the respondent who gave the appellant into the custody of Corporal Jarrett, in furtherance of her imprisonment of the appellant. The appellant remained in custody under horrible conditions for a period of approximately eight days before he was released on bail. The charge laid against him was not prosecuted before the resident magistrate, although the appellant attended court many times.

Before us, counsel for the appellant contended that the learned resident magistrate erred in law in finding that the defendant gave information to the police on which the police acted in their sole discretion, and that the judgment is against the weight of the evidence. For the reasons already expressed, I find that there is merit in his contention. In my judgment, therefore, the appellant has proved on a balance of probabilities that the respondent procured and caused his detention by the Waterford police and subsequent arrest and imprisonment by Corporal Jarrett. There was also proof that the imprisonment extended over eight days. The respondent has failed to show that the imprisonment was lawful or justified. She has failed to show that the appellant committed a felony or indeed any offence whatsoever to justify the detention and arrest. I come, therefore, to the clear conclusion that the appellant had been deprived of his liberty without lawful justification and he is entitled to damages. The appellant is a contractor and he asked

for $10,000 in damages. I do not think that the respondent acted mala fides, but she acted without reasonable cause. Proper investigation was necessary to discover if there was in fact a larceny of the building material, and the matter should have been left in the hands of the police, but that was not done. The respondent acted in reliance on what she was told by neighbours. Scott, L.J. said in ***Dumbell v. Roberts*** [1944] 1 All E.R. 326 (at p. 329):

> "The more high-handed and less reasonable the detention is, the larger may be the damages, and, conversely, the more nearly reasonably the defendant may have acted and the nearer he may have got to justification on reasonable grounds for the suspicion on which he arrested, the smaller will be the proper assessment."

Applying those principles, I would award the appellant the sum of $8,000 general damages.

In the event, I would reverse the judgment of the resident magistrate and order that judgment be entered for the appellant in the sum of $8,000 with costs to be agreed or taxed; cost of this appeal, fixed at $500, to the appellant.

Cases referred to

1. Gingham v Willey [1854] 4 H & N 446; 157 ER 934
2. Aitken v Bedwell (1827) Moo. & M 68
3. Flewster v Role – Nisi Prius (1808) 1 Camp. 187; 170 ER 924
4. Waelers v W.H. Smith & Son Limited [1914] 1 KB 595
5. Austin v Dowling (1870) LR 5 CP 534
6. Dumbell v Roberts [1944] 1 All ER 326