IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. S100/77

BETWEEN	NORMAN SAMUELS	PLAINTIFF
A N D	OLIVE ROSE JOHNSON-HENRY	FIRST DEFENDANT
A N D	EDWIN HENRY	SECOND DEFENDANT
A N D	LLOYD JOHNSON	THIRD DEFENDANT

D. Scharschmidt instructed by Robinson, Phillip & Whitehorn for Plaintiff.

K.C. Burke, A. Gilman, Arlene Harrison instructed by K.C. Burke & Company for the Defendants.

24th - 28th January, 1983; 24th - 26th May, 1983; 30th May, 1985

McKain J:

The plaintiff's claim is for:

1) The return of motorcar lettered AW 516 or its value and/or damages for its detention.

2) Alternatively, damages for illegal seizure of the said motorcar.

3) Further and in the alternative to paragraphs 1 and 2, damages for conversion of the said car.

4) In the further alternative damages for trespass to the said car.

5) Damages for Assault & Battery occasioned to the person of the plaintiff.

The first defendant's defence is a declaration of ownership of the car, a denial of ownership by the plaintiff, and a denial of any assault upon the plaintiff.

The second and third defendants deny the plaintiff's ownership of the car and each denies he has committed any assault on the plaintiff.

The plaintiff is an Attorney-at-Law in private practice in Jamaica. The first defendant's son who is now deceased owned a company named Hi Power Battery Company Limited. The plaintiff was instrumental in the preparation of the memorandum of the company in August 1975, and became one of the

Directors together with the first defendant and the wife of the third defendant for whom the latter was proxy at meetings. The deceased was the Managing Director.

The first and third defendants are brother and sister. The second defendant had not come on the scene until some time after, and indeed his appearance seems to have triggered off the explosion which followed and resulted in this suit.

The first defendant's son died soon after the company was formed. According to the plaintiff he became of great assistance and comfort to the bereaved mother, and visited her quite often. He claims the relationship was in business only.

The company's meetings were held weekly and continued so until the relationship between the plaintiff and the first defendant had deteriorated by October 1976. The plaintiff says in April 1976 the first defendant told him a Professor Stewart at the University of the West Indies, where she worked as Accountant, was leaving Jamaica for Barbados, and that she intended to purchase the VW he had. She told him by the time the professor was ready to sell his VW she had already secured one and felt so ashamed she must buy it as she had asked him for it originally. She told him she could get the car at a reasonable rate (sic) and if he wanted she would give it to him at the same price. He told her he would consider it.

At that time, the plaintiff says, he practised as far as Linstead and Ocho Rios, and he owned a Rover in working condition, and a Vauxhall. The Vauxhall was not in good roadworthy condition and he used it sometimes, but not to go as far as Linstead or Ocho Rios.

In May 1976 the first defendant told him the professor was asking Two Thousand Five Hundred Dollars ($2,500) for the car and later in June she said the professor would not "budge" from $2,300. The first defendant said she had agreed with the professor that some repairs were needed on the car which she would undertake. She asked him, the plaintiff, if he would undertake the repairs and he agreed, and he and the first defendant agreed

that she would repair the car and he would get it for the same price of Two Thousand Three Hundred Dollars ($2,300) which she was paying the professor.

In cross-examination he said he did not need another car at that time, and was not particularly interested in buying but was taking it as the first defendant asked him to do so to save her embarrassment. When he first saw the car it needed repairs and he knew it was repaired before he got it but he never asked her the cost of repairs. He said he paid the licence for the car in a name not his own. He did not get a transfer signed for/or on behalf of the University of the West Indies the registered owners, nor did he obtain one from Professor Stewart. He never checked as to the Insurance on the vehicle although it was paid between the 20th - 30th November, 1976 by him.

Their relationship deteriorated because of his complaint about the running of the company. As a result on 26th October, 1976 he wrote Ex. 3 which reads:

> "Re AW 5 - Kindly let me know the balance owing to complete purchase of the above-mentioned motor vehicle."

It does seem strange that, regardless of the obviously amiable relationship that had existed between the first defendant and the plaintiff, the latter would expect that the first defendant would buy a car, repair it and sell it for the purchase price irrespective of how much she had spent for repairs. It is also difficult to accept that the plaintiff, aware of the need of repairs and agreeing to it being done at the defendant's expense would not be prepared to include the repair cost plus the purchase price.

If as the plaintiff says, he knew the price was $2,300 and he had paid $1,200 of that, it is hard to understand the reason for Ex.3 demanding to know the balance due, especially since any literate ten year old should be able to do such a simple subtraction, let alone the plaintiff who in his evidence demonstrated his mathematical skill. I am left with the inescapable conclusion that the plaintiff was well aware that $2,300 was not the purchase

price agreed between them.

From all accounts the relationship between the parties had been amicable all along so much so that after the death of the Managing Director the plaintiff was using the former's car as he wished and not on hire, nor in the business of the company. It must have been because of the hitherto good relationship between the plaintiff and first defendant. It is not as if the deceased car needed exercising like a housebound dog, and which the first defendant an owner/driver would have been perfectly capable to do herself. Exhibit 3 demonstrates a change in relationship. Moreover, the term used to describe the failing relationship was "deterioration" which leads me to understand the relationship worsened, and not through the operation of the business or anything to do with it.

To continue, about the 19th June, 1976 the plaintiff paid the first defendant $1,200 by cheque and got possession of the car the same or the day after. He also got the Registration Booklet and ignition key. He thereafter used the car on his country practice run and city practice on Fridays.

All went well between them up to September 1976 and he used the VW regularly when attending company meetings. About the first two weeks of October he and the first defendant ceased to get on, and so he attended no company meeting in that month.

Because of the strained relationship he wrote to the first defendant letter dated 26th October, 1976 (Ex 1). He also wrote requesting a meeting of the Board and one was called for 30th November, 1976. This took place at the Arlene Gardens home of the first defendant. Present were first, third defendant and himself and the meeting which lasted an hour turned out to be unpleasant.

As usual he had parked the VW outside the gate of No. 26. He walked out of the meeting and the first defendant followed. When he reached the verandah the second defendant who was sitting down got up and preceeded him to the gate. The first and third defendant brought up the rear.

By the time he reached the gate the second defendant was already there. As he sat in the car with the switch key in his hand the second defendant flung the door on the driver's side open and the first defendant said, "I say you not driving out you car here tonight." Whereupon all three defendants crowded round him whilst he sat in the car. He offered to call the police to settle the matter but the first defendant asked what time he thought the police would come. He said the second defendant asked, "then what you bring me here tonight for?" And the first defendant said "drag him out." The second defendant held his right hand, the third his waist and they manhandled him and dragged him out of the car. When he was out the first defendant cuffed him four times in the neck and wrung his right arm with the switch key to his back. She then told the second defendant to take the duplicate key she had and drive the car in the yard. The second defendant let him go and drove in the car with the key first defendant had given him. The plaintiff went up to the gate asked, and was allowed to take out his possessions from the car. He says this consisted of files, books, mails, jacket, fire extinguisher, lead cable, jack, some brakefluid, some screwdrivers and pliers. In her version the first defendant says all the plaintiff took out was a screwdriver and some brakefluid and these he put in a 18 x 12 plastic shopping bag and that there were no files there except the one the plaintiff had brought into the meeting.

The plaintiff further said that after he got his belongings he walked out to Washington Boulevard where he eventually got a taxi home much later that night. He said he had left his wife and small child with a friend and intended to pick them up after the meeting.

It seems to me it would have made good sense to call them to pick him up instead of waiting for hours, as he said he did, to get a taxi. In any event he did not pick up his family.

He said that as a result of the assault he had to seek medical attention for pain in the neck, swollen and painful right shoulder and elbow, and his entire right arm was swollen and painful. This condition lasted

three weeks and he suffered for nearly a month the inability to lift his right hand in any direction. It may be noted that in all of this struggle the three defendants were unable to wrest the car key from him.

He said that as a result of the loss of the car he had to hire transport at $25 per day from September 1976 when the Rover ceased to function, and the Vauxhall was still unreliable as it had problem in starting. The hireage he did for five months until the Rover was made roadworthy at end May 1977.

He denied that the agreement of sale had been for $3,500, or that there was any agreement for payment of the balance before August 1976. He said he never got from the defendant the transfer, nor the $2 to transfer ownership to anyone.

The plaintiff called one witness as to the assessment of the present value of the car. This witness said he could not remember ever examining the car, or of ever having done any valuation for the plaintiff. What he told the court was based on the method of evaluating VW. He said a good VW in excellent condition would be worth $4,000 - $4,500 - that would be classified as being in A Group. Good (Group B) would be $2,800 - $3,000. Fair (Group C) would be $2,000 - $2,400. Not having seen or known the car this witness' evidence can be of no significant help.

The first defendant an Accountant employed at the University of the West Indies said that from 1969 she knew the VW used by Professor Stewart. It was the policy of the University / to replace the cars every five years. In 1974 she learnt that the car would be coming up for sale and she had been eyeing that car and awaiting the time it would be available. When she got the opportunity she bought the car and got the transfer and $2 to register it and Registration Booklet on 12th May, 1976.

The car needed a lot of repairs including ducoing, upholstering and tyres. She kept it a week or two at home, sent it to a garage where it remained about three weeks. She got it back June 1976 and had it valued.

She said in late 1960's she became acquainted with the plaintiff when he was employed to form her son's company and as far as she knew her

son and the plaintiff had not been friends before then.

The plaintiff asked and was made a Director of the Company. The son got electrocuted in March 1976. The plaintiff became a regular visitor to her home in connection with the business. As she was working the plaintiff visited after work hours, afternoons, at nights and on weekends. This relationship continued up until she left for vacation abroad from 26th June, 1976 to 10th August, 1976.

Before she went abroad the plaintiff who had been asking her to sell him the VW approached her. He told her she knew he was having car problem and she had two VW and would not help him. After refusing several times, she finally agreed in June to sell him the car for $3,500. They agreed and he gave her $1,200. He said he would pay $1,000 on the car and when she returned from abroad he would pay the balance.

At that time there was other money transaction between them on a personal basis. When she got the $1,200 she reminded him of the $250 he owed her. He said $200 of the cheque was towards that $250. She told him to make two cheques. He said he was saving on cheque leaves so she allocated the $1,000 to the car and $200 to his other indebtedness.

She handed him the key, the booklet, transfer form and $2 to transfer in her name. He said she had no need to give him the $2. She said, "take it, it is there" and the plaintiff took it and went away. They spoke about the ownership and she told him on final payment he would receive the duplicate key and she would transfer the car in his name.

When she returned from vacation she asked plaintiff if he had effected the transfer in her name and he told her he had lost the Registration Booklet. She asked for the balance of purchase money and he told her he was having financial problems. On 15th October, 1976 he paid her $500 and promised to finalize before the end of October.

They fell out about the operation of the business and the plaintiff wrote her Ex. 3 referred to previously. She replied by letter dated 15th November, 1976.

After the meeting called by defendant, she and the plaintiff had discussions about the balance due on the car. The plaintiff told her he had no intention of paying more than the $1,500 she had received and she could take the car. He left.

While they were going out she handed the key to the second defendant and directed him to take the car and whilst she, the plaintiff and two of her brothers were on the verandah, the second defendant drove the car into the yard.

She said she and the plaintiff were still arguing and she told him to take his things from the car. These held in a shopping bag with which the plaintiff left. Before he left she asked for the Registration Booklet and he told her it was lost.

She denied assaulting the plaintiff.

The second defendant who was not then married to the first said he and the latter's brother Rudolph Johnson were sitting on the verandah when she came and handed him a car key and instructed him to drive in the car. This he did and when he came into the yard the plaintiff and first defendant were mid-way the driveway, the third defendant was on the verandah with Rudolph. The second defendant says he came out of the car, then the plaintiff and first defendant came to the car and the latter asked the plaintiff to take out his belongings. The second defendant denied touching the plaintiff. He said all he did was to take the key and drive in the car, and that he was present that evening as a visitor to the first defendant.

The third defendant said that after the meeting which lasted 1 - 1½ hours he went outside the verandah to speak to his brother. Whilst he was there the first defendant gave the key to the second defendant who went and drove the car into the yard.

He said he and the plaintiff had always got on amicably. On the night in question he did not go down the driveway. He never assaulted the plaintiff nor did he hear the first defendant say, "drag him out of the car."

He said the only dealing he had with the plaintiff was to attend the meeting as proxy for his wife, and on one occasion he drafted a reply

for her to a letter she had received from the plaintiff. He said he had interpreted the change in attitude by the plaintiff towards him as the result of his wife's letter which had been very sharp.

There are two issues raised:

a) ownership of the car.

b) the question of the assault by all or any of the defendants.

The plaintiff addressing on his own behalf submitted that the property in the car passed from the date of contract by virtue of paragraph 19(1) of the Sale of Goods Act. This paragraph reads:

> "where there is unconditional contract for the sale of specific goods, in a deliverable state the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time delivery or both, be postponed.
> (The underline is mine)

Gilman replied that possession had indeed passed to the plaintiff but not the property, as the contract was conditional. He referred to the transfer and $2 given to the plaintiff to effect the transfer in the name of the first defendant, also to the retention of one key by the first defendant. He cited thereto Chitty on Contract 24th Ed. pp 3333 & 4.

Paragraph 3333 refers to conditional sale of goods and states inter alia "a contract for sale of goods may be absolute or conditional."

Paragraph 3334 refers to the remedies available to a seller on a conditional sale. This paragraph is embodied in our law under sec 20(1) of the Sale of Goods Act quoted below.

Gilman said that alternately, if the property passed to the plaintiff he had by his own letter dated 19th November, 1976, consented to repossession by the vendor, and that the plaintiff had a right to such surrender if he chose.

In dealing with the Sale of Goods Act it seems to me what needs to be determined is whether or not the sale was unconditional.

Sec 20(1) of the Sale of Goods Act states:

> "Where there is a contract of sale for specific goods or where goods are subsequently appropriated to the contract, the seller may by terms of the contract or appropriation reserve the rights of disposal of

> "the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled."

In the present case the plaintiff admits he got one key with the car, and that he did owe a balance on the car, even and up to the date of repossession. He stated that when he licensed the car on 27th August, 1976 it was in the name of the original owners. There was no disc on the car and he did not look on the booklet, but gave it and the money to his office helper to renew the licence. Up to the 30th November, 1976 he was driving without a disc.

It seems strange that the first defendant gave the booklet and not the transfer she had got from the University of the West Indies. I accept that she did give the plaintiff the transfer form and the $2 to effect the transfer in her name. I am of the view that he did not transfer because he expected to effect one transfer and that to himself. Everything points to the fact that when he got delivery of the car the relationship between the parties was a very pleasant one and though not admitted by either appears from events to have been very deep, interrupted and soured by the advent of the second defendant. Given the pleasant relationship there could have been no reason for the plaintiff's not asking for the transfer form, regardless of whose name it was made in by the University of the West Indies, and not then receiving it from the first defendant.

I find that the transfer was to remain in the first defendant's name until the final payment by the plaintiff and that the duplicate key was witheld by the former for the same reason.

Even if I were to accept that no transfer form was given to the plaintiff by the first defendant, a fact which I do not accept, I hold that the witholding of the duplicate key and the non-transfer of the ownership in the name of the plaintiff, and the first defendant's claim that these would be delivered and that the property would pass only on payment of the balance of purchase money are reservations consistent with the property remaining

in the first defendant's anme until the fulfilment of these terms, and are conditions in the sale.

I should like to deal with the original typed letter of the 19th November, 1976 from the plaintiff to the first defendant, and the purported copy thereto. Both are of even date, both profess to be inter-changeable one with the other. Yet they vary in text.

The last sentence in paragraph 2 of the original states:

> "I have no intention of paying $3,500 for a 1969 VW car as this was never the contractural price as agreed."

The copy says:

> "I had no intention and still have no intention of paying $3,500 for a 1969 V.W. car."

Paragraph 3 of the original reads:

> "If I read your letter correctly what you are now trying to do is to make a quick profit of $1,200 off one and to say that was the agreement between us."

The copy says:

> "If I read your letter correctly what you are now trying to do is to make a quick profit of $1,200 off one and to say that, that was the agreement between us is downright dishonest."

Page 2 second line of the original spells "forget." Page 2 of the copy reads "forge."

The word "profit" in page 2 paragraph 2 is correctly, clearly written. The copy letter has the word overwritten which indicates typing error in the original.

It is quite clear an effort was made to let the copy appear to be true copy even by trying to simulate the lines and order in which each paragraph was typed. This has been nearly, but not quite successful. The plaintiff gave no explanation for these differences nor was he asked for any.

The plaintiff opened his address by stating that his case rested on a balance of probabilities. I agree. It appears somewhat harsh to say but I am left with a poor impression as to the plaintiff's regard for the truth.

I would not call him a reliable witness, and he is not straightforward in his approach to the court, nor logical in his account of the history of his acquisition and loss of the car. He cannot be relied upon. On a balance of probabilities I accept the first defendant's account of the transaction.

What is astounding is that a practising Attorney could write such a letter to anyone who made a clain or demand for goods. The plaintiff may have intended to be sarcastic in the final paragraph of his letter but he has deliberately invited her to repossess her car. He had the right to do so. The first defendant also had the right to take the car, and even to sue for any difference in the original and present value. It is fatal for laymen to issue such a challenge it is even worse for one in the legal profession.

The first defendant took her car. She had the duplicate key. The exhibit 3 and copy show that ownership was never transferred to the plaintiff. There is documentary evidence to show that the transfer was given by the University of the West Indies to the first defendant. The plaintiff it was who enquired and was told so by letter dated 9th June, 1977 to Miss Lightbourne who represented him then.

I therefore hold:

a) the sale of the car was not unconditional as required by the Sale of Goods Act.

b) that the plaintiff voluntarily surrendered possession in the property to the defendant.

c) the property had never passed to the plaintiff (by virtue of Sec 20 (1) of the Act).

In view of the above, I find that there was no detinue or conversion despite the demand made by the plaintiff for the return of the car by a specified date.

On the question of assault - the chief combatants are the plaintiff and first defendant, both of whom hitherto had enjoyed a beautiful relationship During the period she must have felt deeply the loss of her only child.

Business was good. Nothing in the operation of the company had ever caused them any hard words to each other. Without any reason the relationship soured. Suddenly everything is going wrong. Personal undertakings no longer seem binding. All further communication must be formal and on paper. Unfortunately the written words themselves tell their own story and not one favourable to the plaintiff.

I find and so hold that on the date alleged, the first defendant did not hold or in anyway assault the plaintiff. That she had given the duplicate key to the second defendant to drive the car into her yard, and he did so whilst the plaintiff and first defendant were in the yard. That when he came out of the car these parties were not near the car.

I find that all the second defendant did was to drive in the car and accept that he did not assault the plaintiff and in driving the car he committed no trespass to any property belonging to the plaintiff.

I find that the third defendant was in no way involved with the plaintiff nor the other two defendants, save in attending the meeting with the plaintiff and that he never went into the yard that evening after the meeting and whilst the plaintiff was in the yard.

Finally I find that none of the defendants either severally or jointly assaulted the plaintiff or committed any trespass to any property of the plaintiff's.

There is judgment for each defendant against the plaintiff.

Costs to be taxed or agreed.