

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L 2001-S044

BETWEEN	MICHAEL SMITH	CLAIMANT
AND	ATTORNEY – GENERAL OF JAMAICA	DEFENDANT

Miss Christine Hudson & Miss Alicia Thomas instructed by K.C Neita & Co. for claimant.

Miss Katherine Francis, Peter Wilson & Garfield Haisley instructed by the Director of State Proceedings for defendant

**Heard: December 13, 2004 and February 17, 2005**

**JONES, J:**

[1] All along, from the very beginning, there has been a touch of Sir Alfred Joseph Hitchcock weaved into the fabric of this case. On the account of The Attorney-General of Jamaica, on February 10, 1999, of all the buses criss-crossing the heart of Kingston, some strange twist of fate directed Michael Smith to try to rob an armed plain-clothed police officer travelling on a No. 78 bus travelling to August Town, in the parish of Saint Andrew. They say that Michael Smith attacked Corporal Walker with a knife. Corporal Patrick Walker opened fire wounding him. Implicitly, they argue that police officers must sometimes make difficult, split-second decisions about how much force to use; they say that is all that Corporal Walker did; they ask the court to find that Corporal Walker was in fear of his life and acted, honestly, in self-defence.

[2] Then again, it might not have happened like that at all. Michael Smith says that he was a passenger in a bus in Kingston when two men came on the bus and tried to rob some of the passengers. Corporal Patrick Walker accused him of being associated with the robbers and without reason shot him in the back at close range. Michael Smith was subsequently arrested, charged, prosecuted and acquitted of the offences of assault with the intent to rob and robbery with violence. He now brings an action in this court to recover damages for assault, false imprisonment, malicious prosecution and negligence arising from the incident.

### **The Issues**

[3] There are two issues to consider here:

- a) Was Corporal Patrick Walker justified in shooting Michael Smith, causing injury, and if not, what damages is he entitled to for his injuries?
- b) Was Michael Smith falsely imprisoned and maliciously prosecuted, and if so, what damages is he entitled to?

### **The Evidence of Michael Smith**

[4] Miss Alicia Thomas for the claimant contends that Michael Smith has been truthful and consistent throughout his evidence. She submits that he was not shaken by cross-examination and that his explanation as to why he carried the knife on the bus that day is not suggestive of an illegal intent. On the contrary, Miss Thomas argues that the fact that Michael Smith was shot in the back negatives any claim by the defendant that Corporal Walker was acting in self-defence.

[5] Michael Smith says that on February 10, 1999, sometime after 1 o'clock, he was in a bus going to a Cross Roads Meat Shop to collect meat (hog head). He entered the bus at West Parade, Kingston, near to the Manhattan Store with a wrapped up bag in his hand. He said that the bag was a bulk rice bag. In that bag he had an ordinary sized kitchen knife, wrapped up in a scandal bag and then placed in the rice bag. He said that he uses the knife for scraping off hair from the skin on meat, which usually needs cleaning. When challenged Miss Katherine Francis on behalf of the Director of State Proceedings as to why he carried the knife on the bus, this is what he said:

“...On the day I was shot I was going to Cross Roads to get some meat stuff I left there in a fridge...I left it at Pablo's as he has a fridge. He sells meat but he is not a butcher. He had a knife to cut up the meat to sell. He would have more than one knife. The hog head was not cut up. It was in a scandal bag. I had to go to Pablo's to get it. I was going to pick up the hog head...I supplied a man with meat and I was to use the knife to clean the hog head. I did not say that I would share the meat. I was not going to cut it up there. I would take it over to “Stewies” house to cut it up. I was not planning on cutting up the hog head at the market...When I said this morning that I was not going to clean the hog head, I mean I was not going to clean the hog head at the market”.

[6] He gave this amplification to his evidence under re-examination:

“I intended to cut up the hog head at Harbour View at Stewie”.

[7] Mr. Smith told the court that he entered the bus from the back door. The bus had two doors. As all the seats were occupied, he stood up on the left hand side of the bus near to the second row of seats closest to the back door. At this time there were other persons standing in the bus.

[8] He said two young men came onto the bus through the back door. One of the men spoke to him and then both men came onto the bus.

[9] While the bus was travelling to its destination, he noticed something going on about three seats from where the two men were standing in the bus. Everyone in the bus started to panic and he found himself being pushed towards the front of the bus. A faint absurdity hung in the air as Mr. Smith sought to explain why he moved closer to the front of the bus (in the direction of the robbery) while the robbery was taking place. He said:

“I was at the second seat at the left closer to the back of the bus. I went to the front to get away from the robbers...I was moving in the direction where the robbery was taking place...I did not move closer to them to get away from them”

[10] Mr. Smith said that on reaching about two seats from the front of the bus Corporal Walker bounced into him and accused him of assisting in the robbery. Corporal Walker told him that he was going to give him “everything”. He asked Corporal Walker “give me everything of what” and tried to move past him. Corporal Walker refused to allow him to pass, so he turned and started to walk to the back of the bus to avoid a confrontation. He heard an explosion; felt a burning sensation, and fell to the ground.

[11] While he was on the ground Corporal Walker came over to him with a gun, put it to his forehead and told him that he was going to blow his brains out, as it was his friends who tried to rob the woman. Mr Smith denied that the men who robbed the passengers on the bus were his friends. Corporal Walker then kicked him over his left eye while he lay on the floor of the bus. Corporal Walker told the driver to go to the Cross Roads Police Sta-

tion. When the bus reached the Cross Roads Police Station, Corporal Walker dragged him from the bus onto the sidewalk in front of the police station.

[12] Mr Smith denied that Corporal Walker identified himself as a police officer before shooting him. He also denied that he used a knife or any weapon to rob anyone on the bus. He said that while the police were taking him to the Kingston Public Hospital for treatment he received multiple blows from one of the police officers. On reaching the Kingston Public Hospital, he was taken to the emergency room where a doctor treated him. While he was at the hospital, he was handcuffed to the bed and placed under police guard.

[13] Some two months after the incident he went to court and after many delays, the case was eventually tried. During the course of the trial his knife was produced in court and that was the first time he became aware that the claim was being made that his knife was used to rob the persons on the bus. Under cross-examination by Miss Francis, Mr. Smith contradicted himself. He said:

“Mr. Sutherland was my lawyer at Half-Way-Tree...I was told what I was charged with before the case. He told me that the police said that I had used a knife.”

[14] In December 2000, Her Honour Mrs. Almarie Haynes acquitted Mr. Smith of all charges at the Half-Way-Tree Resident Magistrate's Court.

#### **The Evidence of Corporal Patrick Walker**

[15] On the other hand, Corporal Patrick Walker in his evidence says that on February 10, 1999, at about 2:15 pm he was a passenger on a No. 78 bus that goes to August Town in Saint Andrew. He was on his way to work at Crime Stop, which is located at 101 Old Hope

Road, in the parish of Saint Andrew. He was dressed in plain clothes and armed with his service pistol.

[16] The bus travelled in a northerly direction along Orange Street and he stood in the aisle towards the middle of the bus. When the bus reached near to the Jewish Cemetery, one of two men who had been standing beside the backdoor of the bus pulled a knife and attempted to rob a woman seated in front of him. Corporal Walker said that the man placed a knife at the woman's neck and demanded that she hand over her belongings. When he saw this, he attempted to move away from the man. The man then placed the knife at the left side of his neck and demanded money. Corporal Walker said that the man placed his hand in his pocket. He held on to the man's hand as he had a spare cartridge in his pocket. He pushed away the man's hand, which held the knife, and took a few steps backward. The man threatened to kill him and started to advance towards him in a threatening manner with knife in hand. When the man reached about three or four feet away from him and he said he became fearful of his life. Corporal Walker removed the service pistol from its holster under his shirt and fired one shot in the direction of the man as he advanced. As he fired the shot, the man turned away as if to run. The bullet struck the man in the left side of his lower back at which time the man fell in the aisle of the bus.

[17] He then retrieved the knife that had fallen from the man's hand. The other man that was standing in the backdoor of the bus with Mr Smith jumped from the bus and escaped. He said that the passengers on the bus became angry and started to beat Mr Smith. He had to intervene to prevent Mr. Smith from being killed.

[18] He directed the driver of the bus to drive to the Cross Roads Police Station where Mr. Smith was immediately placed in a radio car and transported to the Kingston Public Hospital, and later admitted under police guard. He made an official report to Constable Bucknor at the Cross Roads Police Station. The following day he gave a statement to the investigating officer, Detective Sergeant Basil Maitland, of the Cross Roads Police.

[19] He later found out that Michael Smith was charged with assault with intent to rob. The case came up for hearing on a number of occasions at the Half Way Tree Resident Magistrate's Court before it was actually tried. He went to court and gave evidence at the trial. Detective Sergeant Maitland did not testify as he was on interdiction at the time.

#### **The Evidence of Miss Marion Smellie**

[20] Marion Smellie was a commuter on the bus during the incident between Corporal Walker and Michael Smith. She did not give evidence in the trial of Michael Smith at the Half Way Tree Resident Magistrate's Court, but in these proceedings, she supported Corporal Walker's evidence in all the important particulars.

[21] She said that on February 10, 1999, at approximately 2:15 p.m. she was a passenger in a No. 78 bus registered PP 3342 travelling to August Town. She was seated in the middle of the bus on the right side near to a window. A woman sat beside her, and a man stood beside that woman in the passageway of the bus.

[22] When the bus reached to the Jewish Cemetery along Orange Street, a man approached her from behind and placed a long knife at her neck. He told her to hand over the envelope, which she had in her possession. She said that she begged him not to kill

her and told him that there was no money in the envelope. She took out some articles in the envelope and showed it to him to prove that it did not have any money. The man appeared to be in the company of other men who were standing nearby looking on.

[23] The man then removed the knife from her neck and attempted to rob Corporal Walker who was standing in the passage beside the woman who was sitting next to her. The robber placed the knife at Corporal Walker's neck and tried to push his hand in his pocket. Corporal Walker grabbed onto the robber's hand in his pocket and said, "let mi give you what mi have in me pocket". In one motion, Corporal Walker pushed away the robber's hand, which held the knife, and took several steps backwards. The robber threatened to kill him Corporal Walker and started to advance towards him. She heard an explosion and the robber fell in the passageway of the bus. Another man who appeared to be in the company of the robber jumped from the bus and escaped.

[24] The knife fell from the robber's hand and Corporal Walker picked it up. Corporal Walker then identified himself as a police officer and ordered the bus driver to drive to the Cross Roads Police Station. The passengers on the bus then proceeded to beat the robber who was only saved from certain death by the intervention of Corporal Walker. When the bus reached the Cross Roads Police Station, the police immediately rushed the robber to the hospital. She gave a statement of what happened at the station.

[25] When cross-examined by Miss Hudson for the claimant, Miss Smellie remained a model of composure and self-assurance. While pointing at Mr. Smith in court she uttered the following statement:



“The next time I saw the man that held me up is today in court. I was looking at him. That is the man. This is the first time I am seeing him in five years. It was like a nightmare. I will never forget that man. He was right there”.

[26] In the end, it may be hard to point fingers with certainty. Yet, on a balance of probabilities, the accumulated weight of the evidence against the account given by Michael Smith is damning. One by one, the witnesses for the defendant in this case, built up an image of Michael Smith as a man who has placed before this court, a facade of respectability, but who lived another awful life deep in the dungeons of his mind. They contend that he is not a victim, as he asserts, but simply, a shameless mugger who has come forward to deceive the court with a tissue of lies.

[27] So then, is there any significance that this court should attach to the evidence that Michael Smith was acquitted of the charges before Her Honour Mrs. Almarie Haynes at the Half Way Tree Resident Magistrate's Court? Should this court accept the fact of his acquittal as evidence going to his credit and supporting his version of the events? In **Blackstone's Civil Practice 2004**<sup>1</sup> the question is raised as to whether the principle of *Hollington v F. Hewthorn and Co. Ltd* [1943] KB 587 should apply to previous acquittals so as to render them inadmissible as evidence of innocence in subsequent civil proceedings. The editors argue that on balance, the question should be answered in the affirmative because although it is desirable that a person acquitted of an offence should be granted some measure of immunity from assertions to the contrary, an allegation, which was not proved beyond reasonable doubt, may still be susceptible to proof on a balance of probabilities.

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<sup>1</sup> Page 567

[28] On this basis, this court concluded that evidence of Michael Smith's acquittal of the charges at the Half Way Tree Resident Magistrate's Court is irrelevant to these proceedings. On a balance of probabilities, this court accepted the evidence of the defendant in this case, and finds as a fact that Michael Smith was shot while he attacked Corporal Patrick Walker with a knife on February 10, 1999. This, however, is not the end of the matter.

**Was Corporal Walker Justified in Shooting Michael Smith?**

[29] The burden of proving the absence of reasonable and probable cause in this case rest with Michael Smith. The *Constabulary Force Act*<sup>2</sup> provides that:

“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 expressly alleged that such act was done either 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”.

[30] The action that the claimant Michael Smith complains of in this case is, in effect, an assault and battery. An assault in law is the direct threat made by the defendant to the plaintiff, which has the effect of putting the plaintiff in reasonable fear or apprehension of immediate physical contact with his person. A battery is the direct application of that force. It is a defence to a claim of assault and battery that the defendant was acting in reasonable defence of himself or another person. In *Byfield v The Attorney-General of Jamaica*<sup>3</sup> the plaintiff was accidentally shot when a constable discharged his firearm in the plaintiff's yard. The constable and another were on foot patrol when they were shot at by a

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<sup>2</sup> Section 33

<sup>3</sup> [1980] 17 J.L.R 243

man and three others who fled; they pursued the men who then ran onto the plaintiff's premises. The gunman who they were pursuing fired again at the constables, who returned the fire. The constables were not aware that the plaintiff was present in the yard at the time that they fired and claimed that they were acting in self-defence. Gordon J, (Acting) held<sup>4</sup>:

"That the constable was justified in discharging his firearm, i.e., self-defence, nor was he in breach of his duty of care therefore both claims of assault and negligence fail. In a case where the constable fired to avoid being shot by the gunman 'detached reflection' cannot be demanded in the presence of an uplifted knife".

[31] In this case, Miss Thomas argues that Michael Smith's back was already turned to Corporal Walker when he fired the shot, and as a result, he cannot claim to have been acting in self-defence as he was not in any danger. Corporal Walker said under cross-examination that when he pulled his firearm from under his shirt Mr. Smith's eyes become bright and he stopped. He demonstrated to the court that when he fired the shot Michael Smith spun to the right and fell on his right side. This evidence is consistent with the evidence of Dr. Amir who in his report on his examination of Mr. Smith at the hospital said that it revealed an "entry wound to the left sacral region". The demonstration revealed to the court that turning to the right would indeed expose the left sacral region. On this basis, Miss Thomas' contention that the evidence of Mr. Smith being shot in the back, is not consistent with Corporal Walker acting in self-defence, appears specious.

[32] This court concludes as a matter of law that Corporal Patrick Walker fired in self-defence as Michael Smith was attacking him and that he used no more force than was

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<sup>4</sup> Ibid page 243

reasonably necessary to defend himself. This is a complete defence to the action for assault brought by Michael Smith.

**The Claim for False Imprisonment, Malicious Prosecution and Negligence**

[33] False imprisonment arises where a person is arrested, imprisoned or otherwise prevented from exercising his right of leaving the place in which he is without any lawful justification: see *Peter Fleming v Det. Cpl. Myers & the Attorney-General of Jamaica*.<sup>5</sup> In that case, the court recognized that at common law a police officer always has the power to arrest, without warrant, a person suspected of having committed a felony. However, the officer was compelled to take the person arrested before a Justice of the Peace within a reasonable time.

[34] The evidence of Sergeant Basil Maitland is that on February 10, 1999, at about 3:00 pm he went to the Cross Roads Police station where a Constable Bucknor gave him some information. He was told of a report made by Corporal Walker about the claimant, Michael Smith. He went to the Kingston Public Hospital where he saw Michael Smith whom he knew before. He said that he identified himself to him and cautioned him. Mr Smith said to him "Mr. Maitland, it look like dem set mis so yah sah". He said he told Michael Smith that he was being arrested and charged with two counts of assault with intent to rob. After he cautioned him again Mr. Smith said "a set people set mi so Mr. Maitland". When Sergeant Maitland arrested and charged Michael Smith, this is how he describes Smith's response:

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<sup>5</sup> [1989] 26 J.L.R 525

"...He did not make any complaint to me about being beaten while being taken to KPH. He did not tell me he was in possession of a knife. He did not tell me that he was on his way to the market to collect hog head. He did not tell me that the police on the bus had threatened to kill him. He did not tell me that one of the men that committed the robbery asked him a question."

[35] A lawful arrest cannot be considered false imprisonment. In this case, it is abundantly clear from the evidence of Sergeant Maitland that he had received sufficient information that Michael Smith had committed a felony to ground reasonable and probable cause to lawfully arrest, charge and detain him. The claim of false imprisonment also fails.

[36] In *Wills v Voisin*<sup>6</sup> a case from Trinidad, Wooding J.A said that in an action for malicious prosecution the claimant must, in order to succeed, prove:

- a) That the law was set in motion against him on a charge for a criminal offence;
- b) That he was acquitted of the charge or that otherwise it was determined in his favour;
- c) That the prosecutor set the law in motion without reasonable and probable cause; and,
- d) That in so setting the law in motion the prosecutor was actuated by malice.
- e) That he suffered damage as a result.

[37] The onus of proving the absence of reasonable and probable cause is on the claimant. In the absence of such evidence, judgment ought to be for the defendant: see *Abrath*

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<sup>6</sup> [1953] 6 W.I.R 50

*v N.E Railway*.<sup>7</sup> In *Hicks v Faulkner*<sup>8</sup> Hawkins J defined reasonable and probable cause

as:

“...an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily 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. There must be: first, an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; thirdly, such secondly-mentioned belief must be based upon reasonable grounds; by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused.

[38] In this case, Michael Smith has not led any evidence as to the existence of malice or lack of reasonable and probable cause in bringing the prosecution against him. The claim for malicious prosecution also fails.

[39] In the words of Brett M.R in *Heaven v Pender*,<sup>9</sup> actionable negligence consist:

“...in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property”.

[40] Three ingredients are required in a claim for actionable negligence:

- a) A duty to take care owed by the defendant to the claimant;

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<sup>7</sup> [1883] 11 Q.B.D 440

<sup>8</sup> [1878] 8 Q.B.D 167

<sup>9</sup> [1883] 11 Q.B.D at page 507

- b) Breach of that duty;
- c) Damages resulting from that breach.

[41] The burden of proof is on the claimant to establish negligence. The court has rejected the account of Michael Smith that the shooting was unjustified. The court has also found that Corporal Walker discharged his firearm intentionally, in the course of defending himself from an attack by Michael Smith. In *Byfield's*<sup>10</sup> case the court held that where the police officer is justified in discharging his firearm he would not be in breach of his duty of care, and, therefore, not liable for negligence. As a result, there is no evidence, which this court has accepted, which would establish on a balance of probabilities that Corporal Patrick Walker failed in his duty to Michael Smith in handling his service revolver in a negligent, careless or reckless manner. The claim under this head also fails.

### **Conclusion**

[42] In conclusion, for the reasons that I have given, the court orders that there shall be judgment for the defendant, together with cost in accordance with the CPR 2002.

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<sup>10</sup> Previously cited