IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 1302/2006

BETWEEN	KENRICK TAFFE	CLAIMANT
AND	ATTORNEY GENERAL OF JAMAICA	1ST DEFENDANT
AND	DET. CONS. JASON ROBINSON	2ND DEFENDANT
AND	CONS. A. BENNETT	3RD DEFENDANT
AND	DET/CPL. OWEN WILLIAMS	4TH DEFENDANT
AND	W/CPL. D.A. WATSON	5TH DEFENDANT

Mrs. Sharon Gordon-Townsend Instructed by Townsend and Watson for the Claimant.

Mrs. Trudy-Ann Dixon Frith and Ms. Gail Mitchell Instructed by the Director of State Proceedings for the Defendants

EDWARDS J.

HEARD: December 7th -9th 2009 and April 9, 2010

INTRODUCTION

On April 16, 2004 the 2nd, 3rd and 4th defendants, who were Police Officers attached to the Narcotics Division, attended the premises of the claimant armed with a search warrant authorizing them to search for illegal drugs. The claimant's residence is in Treadways in the parish of St. Catherine. Following upon the lawmen's visit, there was an incident during which the claimant received a gunshot wound to the right elbow. Detective Corporal Owen Williams, now a Sergeant of Police, also received a gunshot wound to his finger. It is assumed

and inferred that, the bullet that injured the claimant, was the same one which injured Sergeant Williams.

It is generally accepted that when the officers arrived at the premises the claimant had been smoking ganja, for which he was charged and ultimately pleaded guilty before the St. Catherine Resident Magistrate's Court. He was fined. It is also not in dispute that when the claimant was accosted and arrested on the verandah of his home for having ganja in his possession and for smoking ganja, he escaped from the custody of the police and fled. It is also not in dispute that he was pursued and held by the police. It was during his apprehension that he received his injury.

Suffice it to say, that arising out of this incident the claimant filed this case against the Attorney General under and by virtue of the Crown Proceedings Act and against the three male police officers involved in the incident, as well as Woman Corporal. D. A. Watson who ultimately charged him for possession of ganja, malicious destruction of property and unlawful wounding.

THE CLAIM

The claimant filed claim form and amended claim form in the Supreme Court of Judicature of Jamaica in the following terms: -

"The Claimant Kenrick Taffe of Mark Tree Lane, Treadways P.A., in the parish of Saint Catherine claims against the Defendants; Attorney General of Jamaica with offices at 2 Oxford Road, Kingston 5, in the parish of Saint Andrew, Detective Constable Jason Robinson, Constable A. Bennett and Detective Corporal Owen Williams all stationed at Narcotics

Division, 230 Spanish Town, Kingston 11, in the parish of St. Andrew and Woman Corporal D.A. Watson stationed at Spanish Town Police Station, Spanish Town, in the parish of St. Catherine, jointly and severally for damages for assault and battery, false imprisonment and malicious prosecution for that on or about the 10th day of April 2004, the 2nd Defendant being servant and or agent of the 1st Defendant acting in the course of his duty at Mark Tree Lane, Treadways, in the parish of St. Catherine shot the Claimant to the right elbow without reasonable and possible cause and without lawful justification.

Subsequently the 2nd, 3rd and 4th Defendants being the servants and/or agents of the 1st Defendant acting in the course of their duty dragged the claimant on the ground without reasonable and probable cause and without lawful justification and thereafter falsely imprisoned him. The 5th Defendant maliciously prosecuted him for Unlawful Wounding, Malicious Destruction of Property and Assaulting Police without reasonable or probable cause and without lawful justification; consequently the Claimant suffered injury, loss and damage.

THE INCIDENT

In order to ground his claim, the claimant made several allegations against the officers regarding their conduct on arrival at his premises on the 10th April 2004. A critical analysis of the evidence is required to determine the truth of the disputed versions, bearing in mind that the claimant bears the burden of proof on

a balance of probabilities. I have found it necessary therefore, to make initial findings on various aspects of the evidence which I will outline below.

The Issue of the Identification of the Police Party

The evidence on both sides is that the police party arrived at the premises in an unmarked police vehicle. On the defendants' case the evidence is that the party was identified to the occupants by Sergeant Williams, who had a written authorization under the Dangerous Drugs Act to search the premises. Sergeant Williams read the warrant to the claimant and his common law wife who were both seated on the verandah. There were four police officers who were all dressed in plain clothes over which they wore marked police vests. They each had a firearm. The firearms were holstered.

However, the claimant's evidence is that the four individuals, 3 men and a woman, were in plain clothes and not wearing police vests and that all of them exited the vehicle with firearms in hand. In his witness statement the claimant said one of the men said 'don't move". Millicent his girlfriend then asked them if they had a search warrant. One of the men, who they later learnt his name was Williams, introduced the persons as being from the narcotics division and that they were there to search for drugs. He said when Millicent asked for the search warrant Sergeant Williams opened a book and showed her a piece of paper, then closed the book. He did not show them the warrant neither did he read a warrant to them. The claimant in his cross-examination denied they identified themselves as police and denied they told him their reason for being there. He said they opened a book, closed it back and showed him no paper. He told the court that

when they came out of the vehicle they said "police" but never said they were from the narcotics division. He said they never told him that they were there to search for drugs. It was put to him in cross-examination that in his statement to the Bureau of Special Investigations (BSI), he did admit that they introduced themselves as police from narcotics division and were there to search for drugs. He denied making any such statement.

His witness Millicent Small on the other hand, in her witness statement said when they alighted from the vehicle guns in hand and minus police vests, the tallest one (Sergeant Williams) came up to her and identified himself by saying they were from narcotics and they were there to carry out a search. She asked him if he had a search warrant. He had a book that he barely opened and closed it back and said yes. In cross-examination she repeated her evidence. She said when they came into the yard they did not have on any vests but when they were leaving a couple of them, she thinks two of them, had on police vests but she did not see when they put it on.

Roshane Williams, the claimant's nephew, who was also present at the house that day, in his witness statement said he was inside the living room when he saw a policeman enter with gun in hand. He was in plain clothes. He asked him where his uncle lived and he did not answer. He looked outside and saw two men and a lady. Two men held his uncle and one said, "this house is dealing with pure drugs." He heard his uncle say "is one spliff he just done smoke." They then searched his uncle and handcuffed him. In cross-examination he denied knowing that the man who came into his grandfather's house was a

policeman. He admitted giving a statement to BSI in which he said a policeman came into the house but denied he said they were in black vest marked police with a number on it.

Now a search warrant under the Dangerous Drugs Act may be obtained either by an officer above the rank of Sergeant issuing it to a Constable or from a Justice of the Peace under sections 21 (4) and 21 (5) of the Act, respectively. In this case Counsel for the defendants tendered into evidence a copy of a search warrant issued under the hand of Inspector Warren Lecky and dated the 10th day of April 2004. It is addressed to each and all Constables of the parishes of St. Andrew, Kingston and St. Catherine, authorizing the entry and search of premises situated at Treadways District, St. Catherine, belonging to kenrick Taffe o/c Cowboy. This search warrant was endorsed executed by detective Corporal Owen Williams on the 10th day of April 2004. The search warrant was not challenged by the claimant.

It is clear from the evidence, on either account, that the police officers did properly identify themselves on arrival at the premises and did indicate their reasons and authority for their presence there that day. I therefore conclude that the claimant, contrary to his assertions otherwise, was aware that the 2nd, 3rd and 4th defendants were police officers, and that they were lawfully at the premises armed with a search warrant to search for illegal drugs.

Evidence of the Ganja Find

The witness statement of the claimant indicated that when the vehicle drove into his premises he had the end of a spliff in his hand. He had been

smoking it earlier but was finished before they came and only the paper was left. According to him they charged him for the spliff and ganja leaf they claimed they found on the verandah. At the hospital they had a black scandal bag. In cross-examination he denied he was smoking a ganja spliff when the vehicle drove up. He denied having a spliff in his hands. He said he had already finished. He denied the female officer took a ganja spliff from him. He said she took a little thing outside and said it was he who threw it out there. However, he had finished his spliff. He could not recall telling her it was just a little spliff.

He agreed when they drove up he was sitting on a chair. He denied that there was a black scandal bag under the chair with ganja in it. He said the female officer told him it was his spliff but he told her it was not his. He said she told him about a bag under the chair but no bag was there, she just said it. He repeated they had the black scandal bag at the hospital.

Roshane Williams said he saw no black scandal bag. He did not see the police take any black scandal bag from the verandah and take ganja out of it. He denies that he ever said anything to the contrary to the BSI. He did not see his uncle with a spliff but he did hear his uncle say it was just a spliff he had just finished smoking.

In her witness statement, Millicent Small said they told the claimant to stand and they searched him. He told them that it is just a "spliff him just done smoke, that's all." In her cross-examination she denied the claimant was smoking a spliff when the police came. She said he had been smoking a spliff whilst they were seated on the verandah. She admitted Kenrick, who she called Michael,

told police it was a spliff tail. She said the spliff tail was right there. She told the court Kenrick did not have it, it was on the ground. She said she did not hear if the female officer told him of the offence of smoking ganja because Mr. Williams was still talking to her after she asked for the search warrant. She denied that there was a black scandal bag under the chair Kenrick was sitting on or under the chair she had been sitting on.

At the Resident Magistrate's Court the claimant pleaded guilty to the charge of smoking ganja, so I need not say anything about the evidence in that regard. He, however, denied that he had been in possession of any other ganja that day and certainly not ganja found in a plastic bag under his chair. His witnesses claim that no ganja was found in a plastic bag under the chair.

However, it is the evidence of the defendants Williams, Bennett and Robinson, supported by the statement of Woman Constable Whyte, that a black plastic bag with vegetable matter was taken from under the chair on which the claimant was seated; that it was opened and shown to him and that he was charged for the offence of possession of ganja.

Counsel for the claimant submitted that the defendants had sufficient time to fabricate the plastic bag of ganja. However, it is the evidence on both sides that after the incident the parties went directly to the hospital with the claimant, so unless they stopped to gather up a bag of ganja en route to the hospital, that plastic bag of ganja could only have come from the claimant's house. I accept on a balance of probability that ganja in a plastic bag was indeed found under the chair of the claimant, that it was shown to him and that Woman Constable Whyte

arrested him for having it in his possession. As the police went straight to the hospital after the incident they would indeed also have had the plastic bag at the hospital.

Whether the Claimant was Searched and Handcuffed

In his witness statement the claimant said that he went between Detective Corporal Williams and the "next man" and Detective Corporal Williams held onto him and placed handcuffs on his hands. The female held the back of his shorts. He shook them off and ran away. He said he had handcuffs on both hands. In cross-examination he said they handcuffed him as soon as they came. He told the court it was the female who held him. He further said he was between them and ran off. He denied he had ever told the BSI that two police officers took him outside and placed handcuffs on both his hands in front of him.

Millicent Small in her witness statement said she went over to where Michael was. They told him to stand up and started to search him. He told the police it was just a little spliff he just finished smoking. She said the police put handcuffs on both hands. It is her evidence that the police grabbed him in his shorts waist at the back and he ran off. However, in her cross-examination she said three of them searched him whilst Sergeant Williams was talking to her. She said the officers put handcuffs on him and that's when he ran off. She went on further to say that they were putting it on and he ran off at the same time so she did not know whether it was locked or not or whether it was being put on before him or behind him. She said three of them surrounded him and he ran off. She claimed not to have seen if the female officer had been holding him because

she was on the left hand side talking with Sergeant Williams. This evidence is inconsistent with her witness statement and contrary to that of the claimant who testified that it was Sergeant Williams who handcuffed him.

Roshane Williams said he looked through the living room door to the verandah and saw two men and a lady. Two men held his uncle. They searched him and handcuffed him. He ran off. He later on said in evidence that his uncle only had the handcuff on one hand.

It is necessary to determine whether the claimant was handcuffed with his hands behind him when he ran, as it is important to the claim for assault and battery. The defendants' case is that the claimant was not handcuffed but was held by Woman Constable Whyte and he struggled with her and escaped. I accept on a balance of probabilities that when the claimant ran off he was not handcuffed.

The Escape

The witness statement of Sergeant Williams is that after the claimant was told of the offence of possession of ganja he was asked to accompany them into his section of the house. He refused. He became violent and started to fight Woman Constable Whyte in a bid to escape but she held him in his pants waist. There was a struggle and Mr. Taffe managed to escape. He said by that time Constable Bennett, accompanied by Millicent Small, had gone inside the house.

The witness statement of Constable Bennett is that after the ganja was found he went inside the house with Millicent Small. Inside the house he saw two boys. Based on the contents of his statement he did not witness the escape.

Constable Robinson's witness statement indicated that after Woman Constable Whyte found the ganja and informed the claimant of the offence he enquired of him if his name was Kenrick Taffe and he said "yes officer but a no me alone live yah." Constable Bennett by that time had gone into the house with the female. He told Mr. Taffe to accompany them into his section but he refused and became boisterous and started fighting Woman Constable Whyte hitting her all over the body in the bid to escape. She cried out for help and Mr. Taffe ran off. He saw blood coming from her three left fingers.

Woman Constable Whyte is no longer in the Jamaica Constabulary Force and the court was informed that all efforts to locate her whereabouts proved futile. A statement identified by Sergeant Williams to be one signed by woman Constable Whyte was tendered and admitted into evidence. This statement supports the 2nd 3rd and 4th defendants' evidence in all material particulars. However, I bear in mind that it is not evidence which had been tested by cross-examination.

The claimant in his witness statement said they were ordered to go inside the house. However, in cross-examination he said he did not remember saying that. He agreed he told them he only occupied a section of the house but denied that Sergeant Williams asked him to take them to his section.

As already noted, the claimant gave evidence that the female held him in his shorts in the back. He shook them off and ran away from them. In cross-examination he said as soon as they put the handcuff on he was between them and ran off.

He admitted he was charged for breaking three of the female's finger nails; But opined that if they were broken, it happened when she held him. He said all he did was to bend down and get back up while she was holding onto him. He agreed he was trying to get away from her. He denied that the reason he ran was because he had ganja in the house. He said he did not have any. He denied he was running to get away from the police. He said he did not see any police. He said it was only after that, that he knew they were police. He explained that he was robbed and shot already and that other persons had previously passed and said they were police when they were not.

I believe that Mr. Taffe did indeed know that the 2nd, 3rd and 4th defendants were police officers at the time he escaped from the hold of Woman Constable Whyte and ran from the verandah towards the back of his house. Now it is the evidence of the claimant and his witness Millicent Small that they occupied a room at the back of the house. The defendants claim that ganja was observed in a barrel in a room at the back of the house which they said had been identified as the claimant's living quarters. That ganja was never taken by the defendants. The claimant and his witnesses denied it existed. The claimant indicated he ran so that they could do whatever they pleased. However, it is interesting that in running he did not run through his gate but ran towards the back of the house where his living quarters were.

The Shot

The evidence of the claimant is that when he ran away he was handcuffed with his hands behind him. He said he ran to the back of his house. He was held

in his shorts and fell on his face. The other three came up. They wanted to put handcuffs on his ankles but he was fighting and kicking while face down. He was still face down when he heard one of them say "you know me will shoot you." As these words were said he heard an explosion and felt his right arm burning. Two of them draw him up to the Prado. One held his shorts and the other held one of his arms. He refused to go with them and bawled for murder. He was persuaded to go by a soldier visiting the area.

Millicent Small's evidence is that the claimant ran off. The two men ran after him leaving the woman. The third policeman said he was going to search the house. She said she heard the claimant call out for "murder, murder" and the third policeman went down to the side of the house. The woman held a gun on her on the verandah. She peeped and saw the claimant on the ground crying out. Two policemen were by his side bending over him. Same time she heard a shot. She saw Mr. Williams run off with his finger bleeding. She said the other two drew the claimant by his shorts waist and his arms.

In cross-examination she said that she could not see clearly because the officer had her in a corner and she was only able to peep. In peeping she saw that the claimant was on his belly. She said he ran to where the clothesline was at the left side of the house. She said someone held him in his shorts. She said she did not know that he had fallen on the ground. She went on to say he was on his belly crying out for murder under a grape fruit tree near the front of the house but she could not see clearly because she was on the right in the corner. She also said that when he was by the line she did not see him. She said

she saw him under the grape fruit tree. She testified that she was able to see him under the grapefruit tree because they dragged him up on his belly to the grape fruit tree. She said he lay on his belly there crying for murder. She said she could not see what took place down by the line only up by the grapefruit tree. She admitted she was unable to see by the line whether the claimant had been struggling with the Constable. She said at no time did she see him struggling with the police officer, "only when he got the shot and they were dragging him and he did not want to go." She also said when she heard the shot he was under the grape fruit tree.

It is her evidence that she also saw Sergeant Williams bleeding. She said he was bleeding because he had also been shot. However, she did not see what was happening at the time Sergeant Williams was shot. She did not see when he got shot. She said he got shot where the explosion was heard under the grape fruit tree. She also did not see when Mr. Taffe was shot. She said she did not see him being dragged from the line to the grapefruit tree she only heard him calling for murder by the line. After the explosion she saw him being dragged from the grapefruit tree to the jeep. However, the evidence of the claimant is that he ran to the back of the house but he later said it was actually the side of the house. There he was shot and began crying out for murder. He was dragged from there to the Prado which was at the front of the yard. He gave no evidence of being dragged from the line to the grapefruit tree or of being shot under the grapefruit tree and then being dragged further to the Prado.

Millicent Small's evidence is unreliable and cannot be accepted and is clearly inconsistent with that of the claimant and the witness Roshane. It is clear that based on the evidence Millicent would only have looked to see the claimant after the shot was heard and he cried out for murder but not before. The attorney for the defendants submitted that the evidence of Millicent Small that she was on the verandah at the time ought to be disregarded. She urged the court to accept the evidence of Constable Bennett that Millicent Small was indeed inside the house with him at the time the explosion was heard. I agree. The fact that she saw nothing which could assist the court renders her evidence in this regard nugatory.

Roshane Holness said his uncle ran off to the side of the house. He ran out to the verandah and saw his uncle fall to the ground and the lady held Millicent. The police who was inside also came out and went to where the other two were holding his uncle on the ground. His uncle was on the ground on his belly. He heard gun fire from one of the men that had him on the ground. His uncle was crying for murder and they drew him on the ground by his arms and shorts.

The witness statement of Detective Constable Jason Robinson indicated that when the claimant ran off he gave chase and held onto him in the yard. The claimant was behaving boisterously kicking and punching. He said the claimant held onto his shirt and ripped it open exposing his firearm. The claimant then grabbed the firearm and pulled it out of his waist band and they wrestled for it. He said the claimant eventually rolled on top of him and he cried out for help.

Detective Corporal Williams came and tried to pull him off and while wrestling for the firearm it went off. The claimant started crying out and blood came from his right elbow. Detective Corporal Williams also cried out and was bleeding from his left hand. The claimant continued to behave boisterously refusing to go to hospital. He gave no evidence of the claimant being dragged on the ground.

Sergeant Williams' evidence is that the claimant was chased by Detective Constable Robinson and a struggle developed between them. He saw when the claimant held onto Constable Robinson's firearm and they both fell. Constable Robinson cried out for help. He rushed to his assistance. Constable Robinson was on the ground on his back. The claimant was on top of Constable Robinson. It was his intention to remove him from on top of Constable Robinson.

It is noted that the claimant is a reasonably sized man, much larger that Constable Robinson although of roughly the same height. According to the testimony of Constable Robinson, the claimant was much larger at the time of the incident. He estimated the claimant's weight at the time of the incident to be about 280 pounds. The claimant's evidence however, is that his weight at the time he visited the doctor after he was shot, was approximately 180 pounds. In my view the claimant at the time of giving evidence appeared much heavier that 180 pounds. It is not difficult therefore, to envisage that he could indeed get the better of the Constable in a struggle.

THE CLAIM FOR ASSAULT AND BATTERY

In his amended Particulars of Claim which was filed January 10, 2008, the claimant states at paragraph 3 that "On or about the 10th day of April 2004, the

2nd Defendant whilst acting in his course of duty "shot and injured the Claimant." The allegation therefore, is that the 2nd defendant deliberately shot the claimant. He also claims that he was dragged on the ground without reasonable and probable cause. The claim for Assault and Battery therefore, arose out of the shooting and the allegations of being unlawfully dragged on the ground.

Now, having ascertained that the defendants were lawfully at the claimant's premises and having also ascertained from the evidence that the claimant was indeed found to have committed an offence, the question then arises as to whether he was lawfully in the custody of the police when he escaped and if so what are the police officers lawfully entitled to do to apprehend a person who had escaped their lawful custody? Certainly, they can only do what is necessary in the circumstances and no more. They are not entitled to shoot the claimant for no lawful reason. Neither are they entitled to shoot a person in order to arrest him for a misdemeanor offence, for if they did so, it is my contention that they would have acted without reasonable or probable cause. However, the ordinary rules of self-defence would apply.

Section 13 of the Constabulary Force Act states in part:

> ***"The duties of the Police under this Act shall be to keep watch by day and by night, to preserve the peace, to detect crime, apprehend or summon before a Justice, persons found committing any offence or whom they may reasonably suspect of having committed any offence, or who may be charged with having committed any offence...."***

In **Joseph Anderson v The Attorney General of Jamaica** (1981) 18 JLR 434, it was held inter alia, that; It is the duty of the police to apprehend wrongdoers with a view to bringing them to justice; That the police are empowered to carry firearms and to use them when necessary both in the apprehension of suspected wrongdoer and in protecting themselves from serious attack from any quarter; That the police were acting in the course of their duty in trying to apprehend a fleeing felon, however, the police ought not to proceed to extremes without reasonable necessity. See also the case of **George Finn v Attorney General** (1981) 18 JLR 120.

It is therefore, important to analyze the evidence surrounding the circumstances of the shooting. The evidence of the claimant is that after he ran off to the back of the house he was held, tripped and fell. The officers came over him. They stood over him. In is witness statement he said both his hands were handcuffed to the back. He said they wanted to handcuff his ankles but he was fighting and kicking while face down. He heard a voice say "you know me will shoot you." As he heard this he heard an explosion and felt his right arm burning. In cross-examination he said when he was shot his hands were handcuffed behind him. He demonstrated their position, bony parts of elbow sticking out both sides, wrists in the centre of his back. His face was sideways on the ground to the left with his right cheek on the ground. The officers were over him to the right or to the left. They were standing over his back and one beside him on the right side.

He did not see who had the gun but he heard the explosion and knew who was talking to him. However, he could not see him. He did not say how he knew the voice. The one on his right received a shot in hand. One of the two standing over him shot him. He said it was only one shot so he assumed it was the same bullet which went into his hand "bounce up and hit Mr. Williams".

The claimant told this court that Constable Robinson had his gun in his hand before he ran off. However, it is entirely incomprehensible that the claimant would see four persons, police officers, with guns drawn and run from their custody without fear or thought of being shot in the process. But be that as it may. He denies holding Constable Robinson. He says he fell and Constable Robinson came over him. He said he had been shot before and he knew where the entrance wound was. He declared it to be in the inner part of his elbow above the hand. He pointed to the inner fleshy portion of the upper arm near the elbow crease. The exit wound he pointed to close to the bony part of the outer arm below the elbow joint. The medical report of Dr. Mark Minott (exhibit 2), indicated a stippling from gunpowder around the entry wound 5cm proximal to the medial epicondyle and at the exit wound 5cm distal to the lateral epicondyle. "Entry wound on the medial side of the elbow and exit wound was on the lateral side of the elbow (inner for entry and outer for the exit wound)". His distal humerus was fractured as a result.

Sergeant Williams' statement on the issue is to the effect that the claimant was struggling with Constable Robinson. During the struggle he held onto Constable Robinson's firearm which was in his pants waist. They both fell and

rolled on the ground. Constable Robinson called out for help and he rushed to his assistance. The claimant was on top of Constable Robinson. He was bending down to hold onto the claimant when he heard a loud explosion and felt a sharp pain in his middle finger. He had approached the claimant sideways to the right.

Roshane Holness also gave evidence on this aspect of the incident. In his witness statement he said he saw his uncle ran off. He saw when his uncle fell. Two policemen held his uncle on the ground. He heard gun fire from one of the men. In cross-examination he said only his uncle was on the ground. The police stood over him. The police had the gun in one hand pointing to the ground and was using the other hand to try to put the handcuff on his uncle's other hand. When he heard the explosion the gun was still pointing on the ground. His uncle was on his belly. The police was bending over his uncle holding one hand with the handcuff. He admitted that he was not saying the police deliberately shot his uncle. He denied seeing his uncle and the police struggling on the ground fighting for the gun. It seemed to him as if the gun went off accidentally. He said his uncle only had the handcuff on one hand. He however, said that when the police were trying to put the handcuff on his uncle's other hand he was moving about. He was struggling

The attorney for the defendants submitted that the firearm was discharged when both parties were struggling for it; that there was no deliberate pointing of the firearm in the direction of the claimant. Neither was the firearm discharged deliberately in the direction of the claimant. This submission, she says, is buttressed by the fact that Sergeant Williams was also injured. It is her

contention that if the court accepts that the shooting of the claimant was unintentional and accidental then the 2nd Defendant could not be liable for assault. In support of this proposition she cited **Letang v Cooper 1965 1QB 232.** In **Letang** Lord Denning said:

> "***If one man intentionally applies force directly to another, the plaintiff has a cause of action in assault and battery, or if you please to describe it, in trespass to the person. "The least touching of another in anger is battery," per Holt C.J. in Cole v Turner. If he does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only cause of action is in negligence, and then only on proof of want of reasonable care. If the plaintiff cannot prove want of reasonable care, he may have no cause of action at all. Thus, it is not enough nowadays for the plaintiff to plead that "the defendant shot the plaintiff". He must also allege that he did it intentionally or negligently. If intentional, it is the tort of assault and battery. If negligent and causing damage, it is the tort of negligence."***

Counsel for the defendants pointed out that the claimant's cause of action in this case, as pleaded, is assault and battery and not negligence. Consequently, she says, in the circumstances of the case, the claimant's cause of action in assault and battery must fail. She cited **Leroy Chin v Attorney General of Jamaica, Claim No. C.L. 2002/C 186 Unreported and Byfield v AG. 17 JLR 243.**

In **Leroy Chin** the court found that the claimant had failed to prove that his injuries, loss or damage was caused by the wrongful act of the defendant. The claimant in that case failed to establish causation as there was no direct evidence as to the origin of the bullet which caught the claimant. In **Byfield** the court held that the claim in assault must fail as the defendant was justified in discharging his firearm and he was not in breach of his duty of care, that is, he was not negligent.

In this case there is sufficient evidence for the court to find on a balance of probability that the bullet which caught the claimant came from the firearm of Constable Robinson and unlike **Byfield,** there is in this case no claim in negligence.

The attorney for the defendants further submitted that there was no evidence of malice, the claimant having been accidentally injured. She further stated that the second defendant's action did not cause the claimant's injury. The claimant was injured due to his own actions. It was her view that, on that basis as well, the claim for assault should also fail.

The claimant's attorney on the other hand, submitted that there were inconsistencies and discrepancies in the evidence of the police officers. I must state at the out set that whilst I agree that there were minor contradictions in the evidence of the defendants, I did not find that there were any material discrepancies or inconsistencies which would invariably affect their credibility in any material particular. She also asked the court to disregard the evidence of the witness Roshane on the issue of the handcuff as well as the evidence of

accidental shooting, as being mistaken. It was submitted that on a balance of probability the claimant had proven that he was intentionally and deliberately shot by Constable Robinson.

It has been said that if a person is claiming in negligence he must say so. Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulates the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. For negligence to succeed the claimant must prove want of reasonable care in the act complained of. The claimant in this case is saying he was deliberately and intentionally shot. He has made no claim in negligence and it forms no part of his case. The claimant relies on his cause of action in trespass to the person, that is, assault and battery and nothing else.

In **Fowler v Lanning (1959) 1 Q.B. 426 Lord Diplock** stated that:

"Trespass to the person, that is a battery, does not lie if the injury to the plaintiff, although the direct consequence of the act of the defendant, was caused unintentionally and without negligence on the defendant's part."

In **Wilson v Pringle (1986) 1QB 237** the distinction was made between unintended accidents as against deliberate accident, the former being in negligence and the latter being in trespass. The onus of proof in an action for trespass is on the claimant: **Fowler v Lanning**. If the act was intentional it is sufficient if there was no justification for it. There must be something in the nature of hostility. According to the head note in **Wilson v Pringle;**

"Battery was an intentional and hostile touching of, or contact with one person by another, and an intention by the assailant to injure the other was not an essential element of the tort."

Battery is therefore, the intentional application of force to another person and assault is the intentional putting of another person in fear of an imminent battery. It is an assault to approach a person with a firearm with hostile intent and if that person is shot it is a battery. For all intents and purposes today the term assault and battery is generally used synonymously, and imports the actual intended use of unlawful force to another person without that person's consent. Trespass to the person cannot be committed negligently.

Section 33 of the Constabulary Force Act states:

"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."

In section 33 what does the claimant have to prove? He has to prove either malice or that there was no reasonable or probable cause for the action. In this case the claimant has alleged a lack or reasonable or probable cause. He has the burden of proving absence of reasonable and probable cause. However,

it is certain that even if the arrest was lawful, if the constable deliberately shot the claimant in order to apprehend him in the circumstances outlined by the claimant, then I would be constrained to say that there was an absence of reasonable and probably cause. The submission of the attorney for the defendants is that there is an absence of intention to harm or any intentional act which would form the crucial element necessary in the tort of battery. She points to the evidence of Roshane that at the time of the shooting the gun was pointed to the ground and his further evidence that the gun went off accidentally. She also points to the evidence of Constable Robinson both in his witness statement and in cross-examination that the gun went off during the wrestling between himself and the claimant, after the claimant had pulled it from his waist. This she noted was corroborated by the evidence of Sergeant Williams.

The attorney further submitted that the firearm went off while both the claimant and the 2nd defendant were on the ground and that there was no deliberate pointing of the firearm in the direction of the claimant. This she suggested was further underlined by the injury sustained by Sergeant Williams. She asked the court to note that whilst there is a conflict between Roshane Holness' evidence and that of the 2nd and 4th defendants as to how the claimant received his injury, the conclusion is the same. The claimant was not deliberately shot.

Counsel for the defendants went on to submit that, the issue of whether the defendant acted with reasonable and probable cause does not arise on the evidence as the 2nd defendant did no deliberate act which resulted in claimant's

injury. Indeed, according to her it cannot even be said the 2nd defendant injured the claimant unintentionally. She said the 2nd defendant did not injury the claimant at all. The claimant was injured accidentally through his own actions of attempting to get control of the 2nd defendant's firearm. It is her submission that on these grounds the claimant's claim in trespass to the person ought to fail.

On the other hand the claimant's attorney relies on words the claimant said were spoken before the shooting, to ground the claim that he was deliberately shot. She insists that Roshane's evidence that the gun was pointed to the ground should be read in light of the fact that the claimant was lying on the ground.

The question that arises for this court is how did the defendant come to be shot in the first place? He was previously under arrest. According to him he was restrained in handcuffs. According to both he and the defendants, he was physically restrained by Woman Constable Whyte. He escaped. It was during the attempt to apprehend him that he was shot. The claimant says he was deliberately shot. In his pleadings he claims there was no reasonable and probably cause for shooting him. The defendants say he was shot during a struggle for Constable Robinson's firearm, that is, he was accidentally shot when the firearm discharged during the struggle.

To determine the issue the court must consider the following questions:

a) Were the words alleged to have been spoken by Constable Robinson so spoken?

b) If they were, are these words indicative of a deliberate intent to shoot the claimant?

c) Did Constable Robinson deliberately shoot the claimant?

In my view having so painstakingly examined the evidence, the answer to the first question is in the negative. Having so concluded, then the answer to the (b) and (c) must also be in the negative. There is no evidence that the defendant was deliberately shot whilst the officers stood over his leg trying to handcuff his ankle. The claimant's evidence is that he was lying on his belly with his hands cuffed behind his back and he was kicking and fighting to prevent his legs being cuffed. This however is improbable and unlikely. Lying on his stomach hands firmly cuffed behind him, the claimant, in my view, would be so trussed up that he could do little other than flap around ineffectually. In any event the medical evidence and the location of the entrance and exit wounds do not support his evidence that he was shot whilst the 2nd defendant stood over his feet. No doubt in such a position it would take a miracle for the bullet not to have entered his back. Certainly, the trajectory of the bullet would not have led it to the finger of Sergeant Williams who was indisputable beside the claimant.

Roshane Holness was old enough at the time to determine whether a firearm was pointed on the ground or pointed on his uncle. It was indeed necessary for the claimant to say his hands were bound because if bound he was, he could not be in a struggle with anyone. Roshane's evidence is ambivalent at best, having his uncle only partially cuffed to one hand when he ran from the verandah. Neither do I accept his evidence that his uncle was shot

whilst he was on the ground with one hand cuffed and struggling to prevent the officers from placing the handcuff on his other hand. Millicent's evidence on this point is also unreliable and therefore I reject it.

It is questionable whether, restrained as he claimed to have been with both hands behind him and on his belly, the claimant could have put up the level of resistance that he admittedly did put up. Mr. Taffe is a large man who strikes me as very belligerent and not entirely wedded to the truth. He was intent on resisting arrest that day but I do not accept that whilst he was doing so he was at all handcuffed. In my view his resistance was successful due in no small part to his size and personality but also to the fact that he was unrestrained.

Whilst in trespass to the person it is the act which must be deliberate and not the injury, if the act of arrest was unlawful and it resulted in injury then the claimant could succeed in the tort of trespass. For regardless of whether or not the defendant intended to injury the claimant, he would be liable for any injury which resulted from his unlawful assault. Even to hold a man's arm to make an unlawful arrest is a battery: **Collins v Wilcox** (1884) 3 ALL ER 374. However, it is a defence to a case of assault and battery and false imprisonment that the restraint of the claimant was done in the course of a lawful arrest. However, the onus of proof that the arrest was lawful, rest entirely upon the defendant. Section 15 of the Constabulary Force Act states:

> ***"It shall be lawful for any constable, without a warrant, to apprehend any person found committing any offence punishable***

upon indictment or summary conviction and take him forthwith before a Justice..."

I accept the evidence that the claimant, having been found committing an offence under the Dangerous Drugs Act, was arrested by Constable Whyte. I accept that he attempted a get away which was aborted when he was intercepted by Constable Robinson. Having already assaulted Woman Constable Whyte in his bid to escape, I find no difficulty in accepting that he was not willing for his escape to be thwarted.

The claimant by his own admission was unco-operative at his arrest. I accept that the officers were acting in the lawful execution of their duty to arrest the claimant for breaches of the Dangerous Drugs Act. I accept that the claimant resisted the arrest. I accept that after escaping the lawful custody of the police he resisted recapture. I am satisfied that the police officer was justified in his pursuit of the claimant. I find on a balance of probability that after he was held, he continued to resist, pulling the constable's firearm from his waist. I accept that during a struggle for the firearm the claimant was accidentally injured.

The claimant having committed an offence in the full view of the 2nd, 3rd and 4th defendants was liable to be arrested on sight. The claimant was therefore, under lawful arrest and by escaping custody he created a situation wherein the officers would be required by law to do what was necessary and only what was necessary to apprehend him. By his continued counter attack and his admitted continued resistance he created a situation of danger not only to himself but also to the police officers. I find therefore, that the action of the 2nd defendant

was not unlawful and the claimant's injury was accidental and resulted from his own unlawful act. I find that the injury sustained by the claimant is more in line with the defendant's account which I accept on a balance of probability as true.

As for the allegations of being dragged on the ground no submissions were made on this aspect of the case by the claimant's attorney. The attorney for the defendants pointed to the lack of medical evidence to support this claim. The claimant gave evidence in cross-examination of bruises to his stomach and side. He said they dragged him on his side also. He said he also received injury to his hands. He showed the court his inner arm and elbow where he claimed he received scrapes. He said his hands were still handcuffed behind his back when he was being dragged on the ground. In his witness statement he said two men drew him on his belly. He said one held him by his shorts and one on his arm. In his witness statement he makes no mention of receiving any injuries as a result.

Trespass to the person is actionable without proof of damage but the claimant claimed that he was dragged from the side of the house to the front of the house on his stomach in the dirt; these are circumstances in which one would expect to see some damage to the claimant from this alleged action. No medical evidence was tendered to support this claim. The claimant said he was on his stomach handcuffed behind his back. He was dragged on his stomach and side whilst being held in his shorts and on his arm by two persons. I do not believe that any such action took place. The evidence is that the claimant refused to go with the defendants and refused to co-operate until he was persuaded to do so by a soldier. He was also encouraged not to co-operate by Millicent Small. There

is a discrepancy between his evidence and that of Miss Small as to how and where he was dragged.

I also find it highly unlikely that the police having dragged him against his will to the vehicle would then stand back and defer to his wishes not to go in the vehicle. Having dragged him against his will to the vehicle why did they not place him in it? I find on a balance of probability that the claimant was not dragged on the ground, and to the extent that this allegation was made to ground a claim in trespass, it fails.

The claimant's claim in trespass to the person therefore fails.

FALSE IMPRISONMENT

This claim was abandoned by the claimant at the close of the case in light of the claimant's plea of guilty to smoking ganja and the short period of time within which he was confined in custody. I therefore need make no judgment on this aspect of the claim except to commend counsel for her principled stance.

MALICIOUS PROSECUTION

The claimant in his claim form avers that the 5th defendant maliciously prosecuted him for unlawful wounding, malicious destruction of property and assaulting police without reasonable and probable cause and without lawful justification.

At common law this tort is committed where the defendant maliciously and without reasonable and probable cause initiates against the claimant a criminal prosecution which terminates in the claimants favour and which results in damage to the claimant's reputation, person or property.

Under section 33 of the Constabulary Force Act the claimant would need to prove only malice or lack of reasonable and probable cause. See Forte J. A. in **Peter Flemming v Detective Corporal Myers and the Attorney General** 26 JLR 525. In any event I am of the view that the wording of the section is quite instructive.

The requirements to be proved in the tort of malicious prosecution were set out in **Wills v Voisin** (1963) 6 WIR 50 as follows:

i. That the law was set in motion against him on a charge of a criminal offence;

ii. That he was acquitted of the charge or that otherwise it was determined in his favour;

iii. That the prosecutor set the law in motion without reasonable and probable cause;

iv. That in so setting the law in motion the prosecutor was actuated by malice.

In the Jamaican context, in a claim against the police, (iii) and (iv) would be in the alternative. A failure to establish any one or more of these requirements will result in the claimant failing his action for malicious prosecution. It is clear therefore, that in this tort the claimant must show that the prosecution was unlawful. He must establish malice, or the absence of reasonable and probable cause.

The attorney for the defendants cited **Morris Mullings v M. Murrel and Others,** 30 JLR 278 a judgment of Mr. Justice Courtney Orr and the H.L decision

in **Glinski v McIver** (1962), 1 All ER 696, for the premise that the claimant in order to succeed must prove both malice and the absence of reasonable and probable cause in prosecuting him. This is absolutely correct where the claim is made against persons other than police officers. However, as already noted, Forte J.A. in **Peter Flemming,** in interpreting section 33 of the Constabulary force Act determined that, in a claim against the police, the claimant need only prove one or the other. I accept this as a correct interpretation of the section. In **Morris Mullings** the defendants were civilians.

It is not disputed that save and except for the charge of smoking ganja, the remaining charges terminated in the claimant's favour. What is the evidence on which the claimant relies to prove either that the defendant was actuated by malice or acted without reasonable or probable cause? The claimant's case is that, apart form the ganja spliff which he had been smoking and for which he pleaded guilty, no ganja was found in any plastic bag under his chair. He said he was shown the bag for the first time whilst at the Spanish Town Hospital. He denied that he wrestled with Constable Robinson and tore his shirt instead he said that the first time he saw a shirt pocket torn and buttons open was at the Linstead Police Station. As for his assault on Woman Constable Whyte, the claimant's evidence is that if she did indeed receive those injuries it was because she held him in his pants waist.

The witness statement of Woman Sergeant Dionne Watson is to the effect that in 2004 she was attached to the Spanish Town Police Station. On April 10, 2004 whilst on duty, both Constable Andrea Whyte and Detective Constable

Jason Robinson came and made a report to her. The report was to the effect, inter alia, that in the process of arresting a man found with ganja, a tussle ensued between him and Woman Constable Whyte wherein she received injures to her fingers. She was also told that Detective Constable Robinson's shirt was also torn by the accused. Both officers gave her a statement. She observed Woman Constable Whyte had three bandages on the left ring, middle and index fingers. Constable Robinson's blue shirt buttons were missing from the shirt. Based on the information and her observation, she commenced investigations into a case of unlawful wounding and malicious destruction of property. A letter was given to Woman Constable Whyte to seek medical attention.

Woman Sergeant Watson then proceeded to the Spanish Town Hospital where she saw Constables Robinson and Whyte both of whom pointed out a man to her as the accused. This man gave his name to her as Kenrick Taffe a/c Miky o/c Cowboy. He also gave her his address. He was informed of the report made against him by both officers, of unlawful wounding and malicious destruction of property, arrested and charged, cautioned, he said he did not know they were police. He was offered bail a little after 8p.m. She denied she charged him for assaulting police. She attended court a number of times in relation to the charges. The matters were disposed of for reasons unknown to her at a time when she was on maternity leave.

The claimant's attorney in her submissions contended herself with saying that it was clear from the evidence that the claimant was maliciously prosecuted

for malicious destruction of property and possession of ganja. I cannot agree that such clarity exists.

In **Hicks v Faulkner** (1878) 8 QBD 167, Hawkins J attempted a definition of reasonable and probable cause. He said:

> ***"I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of the 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."***

The defendants' attorney pointed out that the prosecution on the charges of unlawful wounding and malicious destruction of property was grounded on complaints/reports made to Sergeant Watson by Detective Constable Robinson and Woman Constable Whyte. This would be in addition to what she also observed. It was counsel's submission that based on these two factors any ordinarily prudent man would conclude that the claimant was probably guilty of the offences.

With regard to the charges laid by Woman Constable Whyte for ganja, Counsel submitted that Ms. Whyte would have experienced and have first hand knowledge of the facts in support of the charge. She saw the vegetable matter

and observed the behaviour of the claimant and had reasonable grounds to conclude the claimant was probably guilty of the charge.

She cited the case of **Glinski v McIver** in which Lord Denning in the House of Lords, noted that the use of the word guilt in **Hicks** was misleading. In that case Lord Denning was of the view that a police officer only had to be satisfied that there was a proper case to lay before the court. He said:

> ***"After all he cannot judge whether the witnesses are telling the truth. He cannot know what defences the accused may set up. Guilt or innocence is for the tribunal not for him.....It is for them to believe his guilt, not for the police officer. Were it otherwise, it would mean that every acquittal would be a rebuff to the police officer... No the truth is that the police officer is only concerned that there is a case proper to be laid before the court."***

I agree with and respectfully adopt the view expressed by Lord Denning. I would only add that if the police were presented with evidence tending to show that the claimant had committed a crime then it is his duty to prosecute regardless of his views on possible innocence or guilt. He would then have reasonable and probable cause to prosecute. If there was no evidence presented to the officer on which to act or the evidence was so tenuous as to be of a nature which ought to place the officer on enquiry then there may be evidence of a lack of reasonable and probable cause.

Was there malice? Malice includes any improper purpose or any motive other than simple prosecution. Forte J. A. in **Peter Flemming v Detective Corporal Myers and the Attorney General** stated that malice covers not only spite and ill will but also any motive other than a desire to bring a criminal to justice.

Justice Morgan in the same case, citing Viscount Haldane in **Shields v Shields** (1914) A.C. 808 at page 813, defined malice thus:

> ***"It must be malice in fact, Malus Animus – indicating that the defendant was activated either by spite or ill will against the plaintiff or by indirect or improper motive."***

It was submitted that there was no evidence the officers acted in malice. Indeed malice was not averred in the claim. The only question therefore is whether on the evidence there is an absence of reasonable and probable cause. I find the submissions of Counsel for the defendant entirely correct. I find that the claimant has failed to prove absence of reasonable and probable cause for his prosecution and has therefore failed to prove the tort of malicious prosecution.

CONCLUSION

This is a case where the police were acting in the lawful execution of their duties. The claimant by his own action courted danger, which resulted in injuries to himself and the 4th defendant. By his own admission he committed an offence for which he was arrested and pleaded guilty. There was also sufficient evidence of other offences committed for which he was properly prosecuted as the

offender. The claimant failed to prove his case against the defendants and I accordingly award judgment for the defendants with costs to be agreed or taxed.