JAMAICA

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IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. C.A. 22/71.

BEFORE: The Hon. Mr. Justice Henriques, P.
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.

BETWEEN SYDNEY THOMAS DEFENDANT/APPELLANT

A N D OSWALD SUTTON PLAINTIFF/RESPONDENT

W. Frankson, Esq. and Mrs. M. Forte for the appeLLANT

Respondent not appearing.

March 20, 22, 1974

GRAHAM-PERKINS, J.A.

In July, 1967, the appellant obtained a judgment against the respondent in the Resident Magistrate's Court for the Parish of Clarendon in the sum of eighty-eight pounds three shillings, and costs seven pounds twelve shillings and threepence. By August, 1968, there remained outstanding a balance of forty-eight pounds twelve shillings and threepence due to the appellant in respect of the judgment debt and costs, whereupon he caused a Commitment Summons to be issued in respect thereof. On October 7, 1968, the appellant obtained an Order of Commitment in the following terms:

> "Debtor ordered to be committed to the St. Catherine District Prison for 30 days unless he sooner pays the Judgment Debt forty-eight pounds twelve shillings and threepence and costs two pounds twelve shillings and ninepence. Execution of this order is suspended while the debtor pays four pounds monthly. First payment on 1.11.68."

Thereafter the respondent made six payments, five of four pounds each and one of three pounds in respect of the six months November, 1968 to April 1969. Up to May, 6, 1969, the appellant had not received the instalment due on May 1, 1969. In the result he applied for and obtained a Warrant of Commitment. In his affidavit to ground the issue of this Warrant

the appellant swore that under the Order of Commitment he had received only fifteen pounds. This, of course, was not the fact since, on his admission, he had received twenty-three pounds. Acting on the authority of the Warrant of Commitment the bailiff of the court arrested the respondent on May 15, 1969. The respondent's evidence as to the circumstances of his arrest was as follows:

> "He (the bailiff) came to my business place. He said he had a warrant of commitment for me saying I must pay forty-one pounds nineteen shillings. I queried the matter.....I told him that I owed him twenty-seven pounds eighteen shillings, because I had made out cheque for twenty-seven pounds eighteen shillings. I said I had thirty-five pounds here now. I handed him thirty-five pounds. He said he cannot take more or less than forty-one pounds nineteen shillings. I tendered money to Mr. Boothe. He never accepted it. He took me to May Pen goal and handed me to the Police. I declared my thirty-five pounds... It was again refused..... I was detained there for.......4-5 hours. If I had been asked for the right amount of money I would have paid it and had change left over."

The foregoing is the background on which the respondent, on July 8, 1969, issued a writ endorsed: "The plaintiff's claim is for damages for false imprisonment". In his statement of claim he described in some detail the events culminating in his arrest. He alleged that by reason of those events he had been deprived of his liberty and had suffered damage. It is, I think, accurate to say that the appellant's defence as filed did not raise any substantial issue of fact. Indeed, at the trial of the action before Astwood, J.(Ag.), as he then was, the appellant elected not to give evidence and to call any witnesses. It is important to observe that the respondent did not allege in his statement of claim, nor did he seek to establish by evidence at the trial, that in applying for the warrant of commitment the appellant was actuated by malice and that he acted without reasonable and probable cause. This allegation would, of course, have been quite unnecessary in an ordinary action for false imprisonment where a plaintiff is required to do no more than to prove that

he was imprisoned by the defendant.

In his judgment the learned trial judge set out his findings, so far as they are material to this appeal, as follows:

"3. On the 6.5.69, when the defendant applied for the warrant the instalment for the 1.5.69 was due and unpaid.

4. The Clerk of Courts was right to issue the warrant of commitment.

5. The defendant issued the warrant for forty-one pounds nineteen shillings inclusive of costs when thirty-four pounds seven shillings and fivepence inclusive of costs alone was due.

6. In Court's opinion it makes no difference if forty-one pounds nineteen shillings is due or thirty-four pounds seven shillings and fivepence is due for reason that the default in the payment of the instalment of 1.5.69 had the effect of making the order for committal for previous contempt immediately operative, but the defendant could not issue the warrant for more than thirty-four pounds, seven shillings and fivepence.

7. The Court accepts Boothe's evidence that the plaintiff offered to pay a sum less than that called for by the warrant and also accepts the plaintiff's evidence that he offered thirty-five pounds.

8. The Court is satisfied that the plaintiff did tender thirty-five pounds to Boothe and to the police.

9. The plaintiff has discharged his burden of proof on the probabilities.

10. The plaintiff was falsely imprisoned by the defendant.

11. The case of Jenings v. Florence (1858) 2 C.B.N.S.467 seems to be most relevant to this case."

In the result he awarded the respondent four hundred pounds and costs.

In my view the real, and indeed the only, question raised by this appeal is whether Astwood, J., was right in holding in effect that the respondent was entitled to succeed, in the factual situation as I have outlined it above, in an action for false imprisonment. I think that

the learned trial judge was clearly in error in so holding. I think, too, that he was wrong in holding that Jenings v. Florence was relevant to the problem with which he was concerned. No useful purpose will be served here to go into the history of the action for false imprisonment nor, indeed, of an action founded on an abuse of the process of execution. It is desirable, however, to go back to Churchill v. Siggers (1855) 3 E. & B. 929 in which Lord Campbell C.J. said at p. 937:

> "To put into force the process of the law maliciously and without any reasonable or probable cause is wrongful; and, if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action on the case. Process of execution on a judgment seeking to obtain satisfaction for the sum recovered is prima facie lawful; and the creditor cannot be rendered liable to an action, the debtor merely alleging and proving that the judgment had been partly satisfied and that execution was sued out for a larger sum than remained due upon the judgment. Without malice and the want of probable cause, the only remedy for the judgment debtor is to apply to the Court or a Judge that he may be discharged, and that satisfaction may be entered upon payment of the balance justly due. But it would not be creditable to our jurisprudence if the debtor had no remedy by action where his person or his goods have been taken in execution for a larger sum than remained due on the judgment, this having been done by the creditor maliciously and without reasonable or probable cause: i.e. the creditor well knowing that the sum for which execution is sued out is excessive, and his motive being oppress or injure the debtor."

See also Lindsay v. Wong (1917-1932) Clark's Reports 148.

Three years later Jenings v. Florence was decided. Delivering the judgment of the Court of Common Pleas Cockburn, C.J., said, at p. 469:

"This was an action for maliciously and without reasonable or probable cause causing (the plaintiff) to be arrested under a writ of execution issued upon a judgment obtained by the defendant against the plaintiff, and upon which the defendant, as the declaration alleges, maliciously and without reasonable or probable cause endorsed a direction to levy the whole amount recovered by the judgment, whereas, a portion of that amount had been previously satisfied : and the declaration proceeds to allege, as damage caused by the arrest for the greater amount, that the plaintiff was, after he was taken, during his detention, and before his discharge, able and willing and offered to pay, and always afterwards during his detention was willing to pay, and was finally discharged from imprisonment upon paying, and discharaged the judgment by paying, the smaller sum; and that the plaintiff, by reason of the premises, was necessarily put to and incurred divers costs and expenses in and about his maintenance during the said detention, and in and about obtaining his discharge as aforesaid. To this declaration the defendant demurred; and the case was argued on his behalf by Mr. Mainsty, who admitted the authority of the case of Churchill v. Siggers, where the court of Queen's Bench, in an elaborate judgment, held an action to be maintainable for a malicious arrest without reasonable or probable cause for more than remained due upon the judgment, as in the present case, special damage being shown to have been sustained by the plaintiff in consequence of such arrest. He, however, insisted that such damage was not sufficiently shown by the declaration in the present case. We are, however, of opinion that special damage is sufficiently alleged."

It will be seen that the short point decided in Jenings v. Florence

was that the declaration therein had sufficiently alleged special damage. It was an action for maliciously and without reasonable and probable cause causing the plaintiff to be arrested under a writ of execution. It was not an action for false imprisonment. In my view it had no relevance except by way of sounding a warning to Astwood, J., to avoid the very pitfall into which he fell.

The respondent was quite clearly not entitled to a judgment in his favour. I wondered, however, whether this Court could do anything in order to assist the respondent who was obviously the unfortuate victim of an error on the part of the appellant. I say error because that is as high as Mr. Stewart, who appeared for the respondent before Astwood, J., attempted to put it. In the absence of any evidence of malice and of reasonable and probable cause in the appellant I am constrained to the view that this appeal must be allowed. I would set aside the judgment of Astwood, J., and enter judgment for the appellant with costs to be agreed or taxed. I would also order that the appellant have the costs of this appeal to be agreed or taxed.

Henriques, P., I agree.

Edun, J.A., I agree.