

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1980/W-067

BETWEEN	OLGA WEST	PLAINTIFF
A N D	THE ATTORNEY GENERAL FOR JAMAICA	FIRST DEFENDANT
A N D	FAMILY FOODS LTD.	SECOND DEFENDANT
A N D	ABE MOORE	THIRD DEFENDANT
A N D	CONSTABLE DENSEL DAVIS	FOURTH DEFENDANT

Crafton Miller, Monica Earle-Brown & Pauline Miller for the plaintiff
Glen Brown & Ernle Johnson, Crown Counsel for the first and fourth
defendants.
Donald Scharschmidt for the second and third defendants.

HEARD: February 18 & 19, 1985, May 20 & 21, 1985,
October 8 & 9, 1985, December 6, 1985 &
July 31, 1986

DOWNER, J.

WHICH OF TWO COMPETING PRINCIPLES
GOVERN THE FACTS OF THIS CASE?

The commercial counterpart of industrial mass production in the retail distributive trade is the self service supermarket, with a wide range of groceries displayed on open shelves for inspection and selection by the customer. In contrast to the old type grocery, pilfering is a serious problem, and various imaginative means aided by the latest scientific devices have been used to assist management in coping with this problem. A purse may be left in a handbag at the baggage counter, and a middle-age housewife will need to retrieve it in order to pay the cashier when the sale is made. In such circumstances, there can be no finding of larceny even though it is customary for

payment to be made at that point. As there is no intention to defraud the owner of his goods, and no taking within the definition of larceny, the transaction remains within the law of contract, and no criminal sanctions are applicable.

Disputes inevitably arise where a customer does not pay simultaneously with the checking of the goods by the cashier. The goods in this case was a mere half a pound of Anchor butter and half a pound of bacon, although at that time they were regarded as scarce goods. Yet it has given rise to actions in tort for assault and false imprisonment against the supermarket and its manager, and for false imprisonment and malicious prosecution against Constable Densel Davis and the Attorney General. Since this dispute gave rise to the use of force against a background of contractual relations, there are two competing principles which could be applied. The important issue therefore, is to determine which principle governs the facts of this case. So considered, it is appropriate to formulate these principles from the outset, especially since the one relied on by the supermarket is illustrated by cases which went up to the Privy Council and the House of Lords, and the other principle was first stated by some of the most respected judges of the common law. The older principle which does not support the use of force to enforce contractual relations, has its origin in the Six Carpenter's Case 77 E.R. 695 or 8 Co. Rep. 146a. There it was held that to drink at a tavern and to go away without paying was no trespass, but that the taverner should have his action in debt. An equally good illustration of that principle was Sunhof v. Alford 3 M & W 248 or 15 E.R. 1135 where it was decided that an inn keeper cannot detain the person of his guest in order to secure payment

of his bill. Although these authorities were not cited before me, the principle was hinted at in the submissions of Mr. Miller.

Counsel for the supermarket, Mr. Scharsehmidt cited Robinson v. Balmain New Ferry Co. Ltd. (1910) A.C. 295 to illustrate the principle on which he relied, which stressed that any defendant is empowered to make reasonable rules for the economical and safe conduct of his business and as such is entitled to use such moderate force to achieve his objectives. Furthermore, the use of such force would be justified in law in actions for assault and false imprisonment. A further illustration of this principle is to be found in the case of Herd v. Weardale Steel Case and Coke Co. Ltd. (1915) A.C. 57 or 3 L.T.R. at 660. Before a decision is taken as to which of these principles govern the particular facts and circumstances of this case, we must determine what were the findings of fact.

DETERMINATION OF THE FACTS IN RESPECT OF THE SUPERMARKET AND ITS MANAGER AND MRS. WEST

It is always easy to lament the fact that he or she who ought to be a vital witness was not called either by plaintiff or defendant, so I will take the easy way out and state how helpful it would have been in this case if the cashier was called. I have to decide however, on the credibility and reliability of Mrs. West, the plaintiff and Mr. Moore, the supermarket manager. I have had to take into account the fact that the incident happened as far back as 29th June, 1979 and that the plaintiff is slightly hard of hearing. Moreover, although it does not directly concern this aspect of the case, I have to bear in mind that when the defendant, Moore related to Constable Davis his reason for arresting Mrs. West outside the supermarket, she made no comment, but I watched her demeanour carefully at those points and found that she was telling

the truth when she said that she made no comment initially because she was so vexed and she did not hear Moore saying that she was held outside.

Mrs. West gave her age as 57 and stated that she was a dressmaker, and that she was somewhat hard of hearing. Moore related that he was an accountant by profession. He managed the supermarket and knew the police officer, Constable Densel Davis, who responded with promptitude to Moore's request that he should come to the supermarket to deal with the matter. As it turned out, Moore now works in Westmoreland, Constable Davis is now stationed at Hunts Bay and Mrs. West still lives in St. Mary. The supermarket still continues its business at the same site.

Mrs. West further told us that she went to Family Foods Supermarket on the 29th June, 1979, there selected two scarce items which was half a pound Anchor butter and half a pound bacon. She went to the cashier and when the goods were checked out she immediately recalled that she had left her change purse with about Fifteen Dollars (\$15.00) in her handbag at the baggage counter. She told the cashier of this and she took up the two items and proceeded to the baggage counter, and at that point she was accosted by Mr. Moore and detained for a period of about five to ten minutes until the police arrived. She protested vigorously to Mr. Moore, but it does not appear that he sought any confirmation from the cashier as to what happened. Mr. Moore's version on the other hand, is that Mrs. West was held outside the supermarket and that he had been watching her movements based on information he had received. He admitted that he was not able to cover her entire movements, but on the point I find that Mrs. West was held inside the supermarket and accept her version that Moore was in a position

to hear when she told the cashier that the money was in her travelling bag by the baggage counter. On my finding, no question of larceny could have arisen and the use of force could not be justified save in the exceptional situations adverted to in Robinson and Herd. When she was pressed under cross-examination as to why she did not return to the baggage counter in the opposite direction, she explained that it was a long queue in a narrow area and it would be difficult to return in the direction from whence she had come. It is also important to note that I have accepted Mrs. West's version, and this was not denied by the defendant that a crowd gathered by the glass door outside the supermarket watching the proceedings, and that those in the supermarket were also onlookers. When one takes into account that she was a leader in her local Methodist Church, the circumstances must have been most distressing and reinforces her assertion that she made no protest when the police came some five to ten minutes after she was held.

ARE THE SECOND AND THIRD DEFENDANTS LIABLE FOR ASSAULT AND FALSE IMPRISONMENT?

It was contended that the principle to be derived in Robinson's case governs the circumstances in the instant case, therefore the supermarket and its manager were justified in using force to restrain Mrs. West from leaving the supermarket, but certain features present in Robinson's case are absent here. Perhaps it may be pertinent to rehearse the facts of that celebrated case before examining the principles to be derived from it. Robinson, a barrister, had entered the defendant's wharf by way of the entry turnstile. The rules required payment of a further

penny on departure. Robinson changed his mind about taking the Ferry to Balmain suburb and insisted on leaving the exit turnstile without paying the stipulated fee. He was restrained, but eventually managed to get out and brought an action for false imprisonment. The Privy Council decided that the use of force was justified ⁱⁿ and the crucial passage explaining this, Lord Loreburn, L.C. said:-

"The rules as to exit from the wharf by the turnstile require a penny from any person who went through. This the plaintiff refused to pay, and he was by force prevented from going through the turnstile. He then claimed damages for assault and false imprisonment."

It is clear that Lord Loreburn was approving reasonable rules being instituted by the defendants for the economical and safe conduct of their business, and that it is the failure to obey such rules justified the use of force. No such situation existed here, no rules were promulgated, although it is customary in supermarkets to pay at the cashier's point. The situation here however, was an exception to the regular pattern, as Mrs. West went to retrieve her purse to pay at the checkout point, although she had taken up the goods as she explained to prevent them being mixed up with the goods of other customers who were in the queue. Also one must take into consideration the difficulty of obtaining such goods at that time.

Nor is there any assistance to be derived from Herd's case 3 L.T.R. 660 where the facts were that a miner, who downed his tools and refused to carry out a task assigned to him by the company, insisted on being removed by the elevator before the time stipulated by the rules. He brought an action for false

will
 as it is hardly likely that police officers/respond with the
 alacrity which Constable Densel Davis answered the call of this
 supermarket manager. In these circumstances, I have awarded a
 sum of SEVEN THOUSAND DOLLARS (\$7,000.00) to Mrs. West as
 appropriate, as the defendants are guilty of assault and false
 imprisonment. I have taken into consideration the duration for
 which she was held by a youngster who could have been her son, the
 fact that the whole matter was viewed by curious onlookers both
 within and outside the supermarket, and the embarrassment caused
 to Mrs. West by being suspended from her church as a result of the
 incident.

WHAT IS THE POSITION OF THE FIRST AND FOURTH
 DEFENDANTS AS REGARD TO TORTS AND FALSE
 IMPRISONMENT AND MALICIOUS PROSECUTION CHARGED
 BY MRS. WEST?

The manager of Family Foods, Abe Moore managed to put
 through a call to Constable Densel Davis and with remarkable
 promptitude that constable arrived within ten minutes. He knew
 the manager for about two years, and the manager related to him
 that Mrs. West had gone outside the supermarket with the two items
 when he held her and had kept her until his arrival. He explained
 that he took up a watch on Mrs. West's movements near to the
 entrance of the supermarket, as his suspicions about her had been
 aroused by information he had received. What is significant, is
 that although Mrs. West contested this version, she did not make
 any comments to the contrary even when the constable asserted that
 he asked her if she had any comments on that aspect of the matter.
 Mrs. West did however, point out to the police that her purse was
 at the baggage counter. When later the officer charged her for
 larceny, he reported that she had said, "is not steal mi steal it,
 you know sir," and Davis further also reported that she remonstrated
 with him that he had made her loose her ticket. As regards her

having any money, Davis said that he vaguely recalled that she had, but he could not recall his having accompanied her to the baggage counter. Mrs. West stated that she counted out her money to the police in Moore's presence. Surprisingly, for an officer who acted with such alacrity in response to the call of Abe Moore, he took no statement from the cashier although he told us that the manager told him that Mrs. West had passed the cashier's cage. The plaintiff's account was not markedly different from this, and ^{large} by and/I preferred it. She said that the police retrieved her purse from the baggage counter, so the number she referred to was for the bag in which the purse was placed. In any event, she said she gave the police her number, which I accept. To my mind, had the first and fourth defendants relied on a no case submission, it would have been successful.

As for the prosecution, informations were preferred in the Resident Magistrate's Court, and after being called up on at least six (6) occasions, a "no order" was applied for, thus the criminal proceedings terminated in Mrs. West's favour. Even on the most favourable view of this evidence, it is difficult to see how the plaintiff could succeed in respect of false imprisonment and malicious prosecution against the first and fourth defendants. As Mr. Glen Brown helpfully reminded the Court, Section 33 of the Constabulary Force Act governs any civil action against a police officer. That Section reads as follows:-

"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."

When we take the statutory provisions coupled with the common law position in Herniman v. Smith (1938) 1 All E.R. 1, Glinski v. McIver (1962) 1 All E.R. 696 & Dallison v. Caffery (1964) 2 All E.R. 610, we find that in respect of the tort of false imprisonment, it could never be said that Mrs. West has proven malice or that the constable's conduct was without reasonable and probable cause, as she made no comment when Mr. Moore gave his version of the incident, which could therefore, if it were to be accepted, amount to larceny on her part. Her explanations that she was so vexed is accepted and understandable, but it disentitles her to succeed for an action for false imprisonment. Malicious prosecution is equally difficult to establish against the constable. It is true that the proceedings terminated in Mrs. West's favour, but given the information he had received from Mr. Moore, where was the malice? Further, where is the absence of reasonable and probable cause, when the assertions of Mr. Moore was capable of establishing a good prime facie case? I cannot trace such absence and Mr. Miller did not refer to it. To my mind therefore, Mrs. West has failed against Constable Davis and the Attorney General.

CONCLUSION

The plaintiff has succeeded against the second and third defendants, and I have awarded damages amounting to SEVEN THOUSAND DOLLARS (\$7,000.00), also I have ordered that she is to have her costs against those defendants, which is to be agreed or taxed. But Mr. Miller goes further and has asked for a Bullock

-11-

order, I do not see how this could be fair in the circumstances of this case, when the defendants were not sued in the alternative, but for a combination of separate and distinct causes of action. In view of this, the plaintiff must pay the agreed or taxed costs of the Attorney General and Constable Densel Davis.

-7-

imprisonment against the mine owners, but the House of Lords held that the rules governing the use of the elevator were for the economical and safety of the business, and that keeping the miner in the shaft until the pre-arranged time for the elevators to ascend was not an instance of false imprisonment.

Different considerations arise however, when we examine the stream of authority which emphasizes the exclusive use of civil remedies for breach of contract. Deeply entrenched in the common law is the principle as Lord Haldane, L.C. puts it in Herd's case that, "no man can be restrained of his liberty without the authority of the law," and we find this principle applicable to innkeepers ^{and} taverners and I have decided that the same principle governs modern supermarkets. In Sunbulf v. Alford 3 M. & W. 248 at 254, Lord Abinger said:-

"If an innkeeper has a right to detain the person of his guest for the non-payment of his bill, he has a right to detain him until the bill is paid which, may be for life; so that this defence supposes that, by the common law, a man who owes a small debt, for which he could not be imprisoned by legal process, may yet be detained by an innkeeper for life. The proposition is monstrous."

Parke, B. was equally emphatic at page 253 he said:-

"It is admitted that this plea cannot be supported, unless it is made out to the fullest extent that an innkeeper has a lien also on the person of his guest. Now that is a startling proposition, and one that would require a great weight of authority to support it, on the ground of the great inconvenience to which it must necessarily lead."

To my mind, these principles are applicable to the circumstances of this case and if there be no larceny as I find, it would mean if the respondents were right, that Mr. Moore would be entitled to detain Mrs. West for half a day or more until the police arrived.