



[2019] JMSC Civ 214

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN CIVIL DIVISION**

**CLAIM NO. 2013 HCV 06980**

<b>BETWEEN</b>	<b>ADMINISTRATOR GENERAL OF JAMAICA (ADMINISTRATION AD COLLIGENDA BONA FOR AND ON BEHALF OF ESTATE GREGORY POMMELLS)</b>	<b>CLAIMANT</b>
<b>A N D</b>	<b>ATTORNEY GENERAL OF JAMAICA</b>	<b>DEFENDANT</b>

**IN OPEN COURT**

Mr. Aeon Stewart and Miss Nieoker Junor instructed by Knight, Junor and Samuels for the Claimant

Miss Kamau Ruddock and Miss Kristen Fletcher instructed by Director of State Proceedings for the Defendant

Heard: 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> June, and 26<sup>th</sup> July, 2019

**Negligence – Duty of Care – Credibility of witness – Evidence Act S.31E (4)(d) – Hearsay evidence – Claimant’s case based solely on hearsay evidence – Wrongful death – Fatal Accident Act – Law Reform (Miscellaneous Provision) Act – Loss of expectation of life**

**WILTSHIRE, J**

## Background

- [1] On the 28<sup>th</sup> December, 2010 Mr. Gregory Pommells was shot in Redberry District, Porus, in the parish of Manchester by members of the Jamaica Constabulary Force. The Claimants' case is that on the said date Special Corporal Devon Ffrench and Special Constable Dave Johnson were acting in their capacity as servants and/or agents of the Crown. The Defendant's said servants and/or agents maliciously and without reasonable or probable cause negligently discharged their firearms and shot Gregory Pommells, who succumbed to his injuries. In the alternative it is claimed that the Defendants' servants and/or agents assaulted and shot and killed the deceased doing so wrongfully, maliciously and without reasonable or probable cause.
- [2] The actions of the Defendants' servants and/or agents were detailed in the Particulars of Claim as follows;
- (a) *Using excessive and disproportionate force while trying to apprehend the deceased.*
  - (b) *Discharging their firearms in a manner reckless as to whether law abiding citizens would have been injured.*
  - (c) *Failing to take all reasonable and necessary measures to avoid discharging their firearm in the presence and or direction of the deceased.*
  - (d) *Failing to carry out any or any sufficient enquiries before resorting to the use of lethal force in firing on the deceased who was at the relevant time unarmed and posed no threat to the police or any other person.*
  - (e) *Discharging their firearm without reasonable or probable cause.*
  - (f) *Firing recklessly and indiscriminately at the deceased with the intent to kill rather than to apprehend him.*

(g) *Maliciously and without reasonable or probable cause exposing the deceased to a risk of injury or death by discharging their firearm at the deceased.*

(h) *Res Ipsa Loquitor*

[3] Mr. Pommells having succumbed to the gunshot wounds to his chest, left behind two (2) children. The claim has been made for damages under (i) the Fatal Accident Act for his dependents, (ii) the Law Reform (Miscellaneous Provisions) Act for the benefit of his estate (iii) loss of expectation of life and General Damages.

### **Claimant's Case**

[4] Miss Junor on behalf of the Claimant made an application for the witness statement of Shakeil Barnes to be tendered into evidence as a hearsay document. The application was made under section 31e (4) (d) of the Evidence Act. Said application was opposed by Counsel for the Defendant. The court having heard the submissions was satisfied that all reasonable steps had been taken to locate Mr. Barnes and remind him that he was required to attend court. It was therefore ordered that the Claimant be permitted to tender Mr. Barnes' witness statement into evidence as a hearsay document.

[5] The Claimant's case therefore rested on the evidence of Annette Francis, Mordecia Sinclair and Shakeil Barnes. On Mr Barnes' hearsay evidence it was said that he, Gregory Pommells, Nigel Holmes and Nicholas Anderson went to Reese Wood District on Tuesday, December 28, 2010 in a blue motor car which belonged to his brother. On their way returning home, Mr. Barnes noticed a police jeep with 3-4 policemen. The jeep drove close to the car but did not stop. He said shortly thereafter the jeep turned back and he started driving fast trying to get home to park as the car was neither licenced nor insured. He lost control of the car and ran off the road. He, Nigel and Gregory ran from the car but he did not see Nicholas. Gregory ran in one direction and he and Nigel ran in another direction. He heard two gunshots while running. He said that none of them were shooting at

the police and the only thing illegal in the car was ganja. He ran because the car was not straight.

- [6] After some distance running, he heard more gunshots and he and Nigel kept on running until they were some three (3) or four (4) miles away. He received cuts and bruises so he went to the doctor the following day. He was subsequently detained by the police and questioned. Thereafter he was released and never charged concerning what transpired on the 28<sup>th</sup> December, 2010. He never saw Gregory alive after the incident.
- [7] The evidence of Annette Francis and Mordecia Sinclair dealt with funeral expenses, the occupation, expenses and earnings of the deceased.

### **Defendant's Case**

- [8] Constable Oraine Henry stated that on the 28<sup>th</sup> December, 2010 while on mobile patrol and traffic duties, he along with Detective Constable Ricketts and Constable Carlos Coke responded to transmissions over the radio from Area 3 Control.
- [9] On arrival at the intersection of Redberry and Good Hope Roads he saw a blue car which had appeared to have crashed as well as a marked service vehicle. He also saw Special Constable Preddie beside the service vehicle. He referred to the presence of a young man to whom Detective Constable Ricketts was speaking when he heard explosions that sounded like gunshots. He could not see who was firing. Subsequently he saw a man with what appeared to be bloodstains on his shirt being placed in a police van.
- [10] Constable Henry admitted that one of the transmissions referred to a blue car with three (3) men and he did not hear any other identifying feature of the car. He also indicated that he did not know whether the young man to whom Detective Constable Ricketts was speaking was Nicholas Anderson.
- [11] Constable Dave Johnson testified that he, Special Corporal Ffrench and Special Constable Preddie were patrolling and received a transmission from Area 3 Control

about a robbery. He said the information received was that the robbers were travelling in a blue Toyota Corolla motor car and there were three (3) men on board said car.

**[12]** He observed a blue Toyota motor car in which he saw some men. Special Corporal Ffrench alighted from the service vehicle and signalled them to stop but the driver refused. Consequently, they went in pursuit. At a point on the road he saw that the vehicle they were chasing had crashed and he saw three men running from the vehicle. He and Special Corporal Ffrench gave chase.

**[13]** He stated that initially the men were all running in the same direction but eventually split up. Further that after a one minute chase he saw the men turn and fire shots in their direction causing them to get low to avoid being shot. He responded by discharging eight rounds in the direction of the men as they continued running away with the guns held behind them firing in his direction. A subsequent search of the area led to a man being found suffering from what appeared to be gunshot wounds. He stated that he recognised the man as one of the three men who ran from the vehicle and fired shots at him.

**[14]** Constable Johnson insisted that the men were shooting at the police and he denied any knowledge of Mr. Barnes being detained and questioned. He admitted that the transmission only stated a blue Toyota Corolla with three (3) men on board with no mention made of the licence plate.

**[15]** He responded that when Special Corporal Ffrench tried to stop the motor car he could see some men through the front windscreen. He then went on to say that he saw three men and further that it was three men and not four that disembarked from the car. He said that he and Special Corporal Ffrench ran in the same direction and even after the three men split up he continued to have all three men in his sight and could see them during the chase.

**[16]** He maintained that all three men had firearms and began shooting after one minute of being chased in the area which was overgrown with bushes. He further stated

that they did not stop to fire but kept running, holding the guns behind them. After the shooting ended, a search which lasted ½ hour was conducted and Gregory Pommells was found suffering from gunshot wounds. No gun was found in his possession.

- [17] He stated further that he was not sure the men were charged for robbery and when asked whether they were charged for disobeying Special Corporal Ffrench's signal, or shooting or illegal possession of firearm and ammunition, he answered, "Not to my knowledge." He insisted that all three men were shooting. He also indicated that none of the police officers searched the blue car for stolen items.

### **Claimant's Submissions**

- [18] Miss Junor submitted that the police officers owed a duty of care to the men being pursued. Further that in their pursuit, it should have been in the officers' contemplation that, a careless discharge of their firearms was likely to result in damage and injury to the men where the circumstances did not warrant the use of lethal force. In addition there were no factors from which it could be concluded that the scope of that duty of care had been limited or reduced.

- [19] Miss Junor urged the court to accept that none of the men were shooting at the police or in possession of firearms. Hence the police did not act in self-defence, but discharged their weapons at the men while they were fleeing, in breach of their duty of care. Counsel also contended that the information transmitted by radio and on which the officers relied was not sufficient for them to conclude that the men were those involved in the robbery.

### **Defence Submissions**

- [20] Miss Fletcher submitted that the police in chasing the men were acting upon a reasonable suspicion that they had just committed a crime. Counsel further submitted that the Claimant has failed to discharge its burden of proof. Reference was made to the hearsay evidence/unsworn statement of Shakiel Barnes and the

court was urged to give it very little weight, as Mr. Barnes by his conduct was untrustworthy, and treat it with caution as the court was not afforded the opportunity to assess his credibility. Hence said statement ought not to be relied on as proof of any primary facts in relation to how the incident occurred.

**[21]** It was argued that in discharging their duties, under the Constabulary Force Act, the officers did not use unreasonable force. They came under fire and the situation required quick and equal response, as they were trying to protect themselves while at the same time trying to effect the lawful arrest of suspected offenders.

### **Issues**

**[22]** This court must decide whether on a balance of probabilities the servants and/or agents of the Defendant acted without reasonable and probable cause and were negligent. I must therefore determine whether:

- i. a duty of care was owed by the police officers to the deceased
- ii. the police officers breached that duty of care in discharging their firearms thereby causing loss.
- iii. the use of force by the police officers in the circumstances was reasonable and constituted lawful self-defence.
- iv. If found liable, damages ought to be awarded to the estate and in what quantum.

### **Law and Analysis**

**[23]** It is not disputed that the police shot Gregory Pommells. For the Claimant to succeed however, it must prove that the act of the police officers was done either maliciously or without reasonable or probable cause. Section 13 of the Jamaica Constabulary Act states that:

*“The duties of the Police under this Act shall be to keep watch by day and by night, to apprehend or summon before a Justice, persons found committing any offence or whom they may reasonably suspect of having committed any offence.....”*

[24] E. Brown J. stated at paragraph 20 of **Clarke v Attorney General (Claim No. 2007 HCV 00031)** that:

*“The standard of care required of the officers is that which was “reasonably demanded in the circumstances” per Asquith LJ in Dabora v Bath Tramways Ltd. [1946] 2 All ER 333 at 336.”*

In discharging their duties as prescribed in the Jamaica Constabulary Act, the police may meet force with force. In **Finn v The Attorney General (1981) 18 JLR 120**. Wolfe J said:

*“It is settled law that an officer may repel force by force where his authority to arrest or imprison is resisted and will be justified in doing so even if death should be the consequences, yet he ought not to proceed to extremities upon every slight interruption nor without reasonable necessity.....”*

[25] Miss Junor has contended that in the officer’s pursuit of the men it ought to have been in their contemplation “that a careless discharge of their firearms was likely to result in damage and injury where the circumstances did not warrant the use of lethal force.” What were the circumstances surrounding this shooting? The Claimant relies on a version outlined in the witness statement of Shakiel Barnes, which was admitted as hearsay evidence. Regarding this type of evidence, D. Fraser J said at paragraph 26 in **White v Mullings et al [2017] JMSC 111**:

*“In the case of hearsay evidence the assessment of its weight depends on all the circumstances from which inferences can reasonably be drawn as to the accuracy or otherwise of the out-of-courts statements.”*

[26] There is no other evidence on the Claimant’s case regarding the circumstances which led to these men being in a blue car on the road and subsequently being chased and shot at by the police. There are factual areas of dispute that can only be resolved based on the credibility of the parties. Credibility is largely assessed both on the evidence and on the observation and assessment of the demeanour of the witnesses.

**[27]** He who alleges must prove. The burden of proof lies on the Claimant who must establish a prima facie case. Only if and when that is established, does the evidential burden shift to the Defendant. It is not being contested that Gregory Pommells was found with gunshot wounds after police fired at him. What is in issue is that the deceased and his friends shot at the police and they responded, meeting force with force.

**[28]** Were Gregory Pommells and the other occupants of the car armed? Were they fleeing to prevent apprehension while shooting at the police? Did they shoot at and therefore present force to which the police was obliged to repel with force and death having resulted, same would be justifiable by law. The cases are diametrically opposed. Mr. Barnes said he started driving fast because the car was not insured. He knew that the police were chasing them and when the car crashed, they jumped out and started to run. He said that the police were shooting at them and they had no guns and were not shooting at the police.

**[29]** The men would fall in the category of persons whom the police “*may reasonably suspect of having committed any offence.*” Hence the degree of force used to apprehend them would materially depend on whether or not they were armed, and if armed, whether they had used force of arms to prevent their apprehension. And the only evidence on the Claimant’s case regarding the men being unarmed and not shooting comes as hearsay, and untested versus the sworn tested evidence of the witnesses for the Defence.

**[30]** On that critical issue I cannot give any weight at all to the hearsay evidence. There being no other evidence, the Claimant has not been able to establish a prima facie case that the deceased was unarmed and posed no threat to the police. The Claimant has failed to discharge its burden. It is therefore ordered as follows:

- *Judgment for the Defendant*
- *No costs awarded.*

