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Judgment Both

SUPREME COURT
KINGSTON
JAMAICA

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. F 0931/87

BETWEEN	RENFORD FACEY	PLAINTIFF
A N D	CONSTABLE BURNETT HALL	1ST DEFENDANT
A N D	ATTORNEY GENERAL FOR JAMAICA	2ND DEFENDANT

Mr. Maurice Frankson instructed by Gaynair & Frazer for Plaintiff

Mr. David Higgins & Mr. Neil Hamaty instructed by the Director of State Proceedings for 2nd Defendant

1st Defendant not appearing and not represented

Heard: May 11, 12, 13, 16 & November 4, 1994

Reckord J.

JUDGMENT

This is an action for assault and battery, false imprisonment and malicious prosecution which was proceeded against the 2nd defendant alone as the 1st defendant did not enter an appearance. It was said he had left the force and no longer in the island.

The action arose out of an incident which took place at the home of the plaintiff at about 6' 0'clock on the morning of the 6th of July, 1986. As the plaintiff slept in his bed he was awakened by knocking at his door. He enquired who it was and a voice outside answered "police - open up." As he opened his door he was confronted by men in plain clothes one of whom immediately fired a shot into the roof of his room. He rushed back into the room and hid himself. However, at the request of one of the men whom he knew before, Sergeant Pennycooke, he started coming out and at the same time the 1st defendant Constable Hall entered his room. Near the doorway Constable Hall passed him and went behind him. Then he ordered him to put his hand on his head and walk outside slowly. He did so. "After reaching where I stepped down and go outside I felt like something juke me in my back and then I feel like I was lifted off the ground - I spin over and dropped outside."

He had been shot in the back by Constable Hall with an M16 assault rifle. He was saved from further injury from Constable Hall when Sergeant Pennycooke shouted to him "No shoot him again, a 'Shoeshine from Linstead - me know him." The police searched his room and the yard and in so doing broke three of his figurines. Sergeant Pennycooke told some officers to take the plaintiff to the hospital. Constable Hall ordered him to get up but he could not as the lower half of his body was dead. He was placed in the trunk of the police car which took him to the Spanish Town Hospital where he was admitted under police guard and handcuffed to the bed. He spent over 2 months as a patient in the hospital and underwent two surgical operations.

After discharge from the hospital the police took him to the Spanish Town Police Station where ^{he} was held in custody for over a week before he was taken to the Spanish Town Resident Magistrate's Court where he was told, for the first time, that he had been charged for assault at common law. He was offered bail in the sum of **Five Hundred Dollars** (\$500.00) and he was released from custody with his mother as surety.

He returned to court on four or five subsequent occasions but Constable Hall never showed up. The judge told him to go home without giving him a date to return to court. Since then he had not gone back to court and he has not seen Constable Hall ever since he was released from custody.

The plaintiff testified that on the date of the incident the police found nothing at his home to incriminate him and he denied suggestions put to him under cross-examination that Constable Hall had shot him when he the plaintiff had taken up a machete at his door and attempted to use same to chop Constable Blair who was standing there.

Consequent upon the surgical operations he now has a surgical scar about 10 inches long from below his navel up to his chest. He suffered severe pains due to his injuries for about two months. Even now he feels pains in his right leg when he stands for long. He had pains to his navel for which he had to seek private medical attention last year April and was given prescription which cost him between Seventy dollars to Eight-one dollars, ninety cents (\$70.00 - \$81.90) per day for one capsule.

He paid doctor Two hundred and twenty dollars (\$220.00). The shirt, pants

and underpants he was wearing were destroyed valued	-	\$120.00
Medical expences incurred	-	\$1,167.00
Travelling	-	750.00
Legal fees	-	\$1,400.00
Medical Report	-	25.00
Value of moulds destroyed	-	120.00

As a maker of figurines, the plaintiff, thirty years old, claims that after expenses he carried home Three hundred (\$300.00) per week. He returned to this work two years after the injuries but within one month he was re-admitted to hospital because of pains in his back and vomiting resulting from the lifting of heavy weights in connection with his type of work. Since returning from hospital he has attempted to carry on his occupation but can't cope.

Before his injuries he used to go to dances and loved to swim - because of pains he can't do these any longer. His sister now washes his clothes. It would cost Two hundred dollars (\$200.00) per day for helper to clean his house and washing and ironing his clothes.

Doctor Roy Thomas F.R.C.S (Edin.) saw the plaintiff on the 9th of February 1990. On examination there was a healed bullet entry scar about 5 cm. above the posterior iliac spine on the left side. This scar was 3 cm. from the posterior mid line. There was an exit scar about 2 - 3 cm. above the iliac crest. X-ray showed healed fractures of the 3rd and 4th lumbar vertebrae. There were also bullet fragments in the back on the right side opposite the healed vitebrae. The injuries were consistent with those received from a bullet. The injuries were unlikely to produce permanent disability and were likely to improve with treatment. There was a 20% impairment with respect to his ability to carry on his occupation. Anteriorly, there was a healed supra umbilical scar due to the surgical procedure. Pains being experienced by the plaintiff in back, right leg and abdomen are consistent with fragment in the back. He would not recommend further surgery to remove them as it may cause more damage. As long as the fragments remain it is likely he may continue to suffer pains.

He could not say if the pains would cease.

Humphrey Hanson, who at the time of the incident shared house with the plaintiff, testified on behalf of the plaintiff and supported his case as to how the shooting took place. He assisted in lifting the plaintiff and putting him in the trunk of the police car. When the plaintiff was shot he had his two hands on top of his head. He denied that the plaintiff attempted to chop anyone with a machete.

Application was made and granted for the plaintiff to amend his Statement of Claim to read as follows under particulars of special damages:

Loss of earnings from 11.6.87 to 12.5.94 - 356 weeks @ \$300 per week		
\$106,800.00 - Totalling	-	\$121,800.00
Medication from April 1993 - 12.5.94 @ \$81.90 per day	-	30,875.00
3 Moulds @ \$40.00 each	-	120.00
Doctors fee	-	220.00
Medical report	-	25.00
Domestic assistance from July 1986 to 12.5.94 - 404 weeks @ \$200 per week	-	80,800.00

The Medical Report of Dr. Paul Brown of Spanish Town Hospital dated 19th February, 1987 was admitted in evidence by consent - the report reads as follows:

Re: Renford Facey

"This patient was admitted to Spanish Town Hospital on 6th July, 1986 having allegedly been shot in the back earlier that day following on this he complained of pain in the abdomen and right leg.

On examination he had an entry wound in the back in the right lumbar region, and an exit wound in the right lower abdomen. Both wounds were bleeding and faces appeared to be coming through the exit wound. He was catheterised and it was noted that he had blood in his urine also.

He had X-rays which showed fractures of L4 and L5 vertebrae as well as a non-functioning right kidney. He had emergency surgery that day and it was found that he had damaged his right kidney necessitating right nephrectomy. Also he had injury to his right colon resulting in a right hemicolectomy. It was also felt that there was damage to the spinal nerves resulting in the patient's pain and inability to lift his leg.

Following on his surgery he gradually made his recovery. It was necessary to re-operate on him on 24th July, 1986 because he had developed a right subhepatic abscess. This was drained and he made a more appropriate recovery. He was sent home on 15th September, 1986 to be seen again in surgical out patient department. He was seen on 23.10.86 when he complained of night pain in his right leg. He was given another appointment which we have no record of him keeping.

We think that his injuries were serious but we expect that he will have full recovery from them.

Dr. Paul Brown
Consultant surgeon."

This was the end of the plaintiff's case.

The defence called two witnesses, the first of whom was Detective Acting Corporal Winston Blair. He testified that himself and four other police men went to premises 62 Street, Parks Road at about 5:30 a.m. on the 6th of July, 1986. They surrounded the house, knocked on the door and a lady and a gentleman came out. Himself and Constable Hall were instructed to search the house. "As I entered the house I saw a young man hiding beside the wardrobe. I held him in his waist and was leading him outside when he pushed me and I fell from the door-step. He grabbed a machete and was about to chop me and I heard an explosion and he fell to the ground. He was then placed in the service vehicle and quickly rushed off to the Spanish Town Hospital. He is the plaintiff sitting in Court." He denied the plaintiff's case.

Sergeant Hamlet Pennycooke told the Court he led a party of police men to the premises and surrounded same. After calling out a woman and a man came out the house. He spoke to them and then shouted to Constables Blair and Hall to search the house. "Shortly after I heard an explosion and I rushed to the northern end that is, the door that open, and I saw Mr. Facey lying on his face with a cutlass near to him. Constable Hall and Blair were standing nearby". He enquired what had happened and Constable Hall told him that Mr. Facey attempted to chop Constable Blair "and I had to shoot him." He carried the plaintiff to the hospital and there he arrested and charged him for assault at common-law.

Findings of Fact

The circumstances which led to the shooting of the plaintiff as outlined by detective Acting Corporal Blair for the defence I find incredible. It is most unlikely that the plaintiff seeing armed policemen outside and being aware that Constable Hall behind him was also armed would ever attempt to make any attack on the police. I reject that evidence as untrue and accept the evidence of the plaintiff and his witness that he was told by Constable Hall to go outside his room with his hands over his head.

Under cross-examination as to how the policemen travelled from the scene, Acting Corporal Blair said three policemen sat on the back seat along with the plaintiff. Sergeant Pennycooke denied this. He said one policeman sat in the back with the plaintiff while two others were left on the scene to carry out detailed search.

I reject both these versions as untrue and concocted to mislead the Court. I find from the plaintiff's case that all the five policemen travelled in the body of the car while the plaintiff was literally dumped in the trunk on the order of the police and taken to the hospital.

As happens always in cases of this nature the 'trumped up' charge of assault at common law was laid by the police. I find that without reasonable and probable cause that the plaintiff was maliciously prosecuted and that the prosecution has been discontinued.

Counsel for the defence submitted that the plaintiff had failed to produce evidence that the prosecution complained of terminated in the plaintiff's favour. However, up to when the plaintiff testified in this action some eight years after the event, there has been no trial despite the availability of witnesses. When the plaintiff last attended court in Spanish Town to answer the charge he was sent away by the Court without being given a date to return - the case had been adjourned sine die. There has been no judicial determination of his guilt.

"There need not have been any acquittal on the merits. What the plaintiff requires for his action is not a judicial determination of his innocence but merely the absence of any judicial determination of his guilt. Thus it is enough if the prosecution has been discontinued." See Salmon on the Law of Torts, Fifteenth Edition, page 559.

I further find that the plaintiff was falsely imprisoned both at the Spanish Town Hospital and the Spanish Town Lock-ups for a period of 76 days.

Re: Exemplary Damages

In his statement of claim the plaintiff has claimed exemplary damages. Mr. Higgins for the defence submitted that this claim should fail as it was not specifically pleaded but only claimed in prayer and referred the Court to the White Book 1986 edition, Vol. 1 paragraph 18/8/6 at page 276 which requires that:

A claim for exemplary damages must be specifically pleaded together with the facts relied on and this must be done in the statement of claim and not merely in the prayer.

This requirement was also re-stated in the local case of the Attorney General vs. Constable David Lue and Noel Gravesandy SCCA No. 3/80.

Mr. Frankson submitted that from the very nature of the attack on the plaintiff he must have experienced terror and in the circumstances there was no requirement that the plaintiff plead evidence in his pleadings.

As stated in the White Book the object of the rule is to give the defendant fair warning of what is going to be claimed with the relevant facts and thus to prevent surprise at the trial. The rule not having been followed the plaintiff's claim for exemplary damages cannot succeed.

Special Damages

Claims for property damage (pants, underwear, shirt) \$132.00, Medical expenses \$1,167.00, Travelling \$740.00, Moulds damaged \$120.00, Doctor's fee \$220.00, Medical report \$25.00 - totalling \$3,804.00 were not challenged and are reasonable. Under the amended particulars of special damage claims have been made for loss of earnings for 356 weeks from 11.6.87 to 12.5.94 at \$300.00 per week totalling \$106,800.00.

Medication for April 1993 to 12.5.94 - \$30,875.00

Domestic assistance 404 weeks @ \$200 per week - \$80,800.00

These claims have been challenged by Defence Attorney who referred to the case for Lawford Murphy vs. Luthur Mills (1976) 14JLR, P. 119 the head note of which reads:

"In any action in which a plaintiff seeks to recover special damage the onus is on him to prove his loss strickly. It is not enough for a plaintiff to write down particulars, and so to speak, throw them at the head of the Court, saying this is what I have lost, I ask you to give me these damages. They have to prove it".

He submitted that the claims for \$30,875 for medication has not been substantiated by any receipts or prescription.

Regarding claim for loss of earnings and for domestic assistance Mr. Higgins submitted that the plaintiff should mitigate his loss. Apart from when he worked for a short period and re-admitted to hospital some two years after being shot there is no evidence that plaintiff has sought to obtain any other type of employment.

Save for the short period when plaintiff did some work, his attorney could make no satisfactory response to this complaint of his failure to mitigate his loss.

Dr. Brown in his certificate (exhibit 1) reported that plaintiff would have full recovery from these serious injuries. No time frame was given. The Court will therefore have to infer a reasonable time since 1987. Up to when plaintiff gave his evidence almost eight years since he was injured he had not worked.

Dr. Roy Thomas stated that the plaintiff suffered a 20% impairment with respect to his ability to carry on his occupation. He can still do his work. Why then has he not gone back to work? I am not satisfied that the plaintiff's injuries have prevented him from returning to work after recuperation and am only prepared to make award for loss of income for the period he was in custody and a further period after discharge totalling 52 weeks as reasonable time for recuperation. Quite probable the plaintiff's net earnings was \$300.00 per week making a loss of \$15,600.00.

An award for a similar period for domestic assistance will be allowed. From figures supplied to the Court by attorney for plaintiff the minimum wage for domestic assistance from 1986 to 1988 was \$52.00 per week - total - \$2704.00.

With respect to the claim for medication from 1993 to time of trial, I am aware of Dr. Thomas' evidence that as long as fragments remain in his back it is likely he may continue to suffer pains and in cross-examination "I don't know if the pains will cease." However, the plaintiff has not submitted any receipts or copy prescription or other evidence in support of this very substantial claim. This action had been ready for trial from as far back as January 1990. Surely the plaintiff must have been advised by his attorneys that any expense incurred especially of a substantial nature would have to be supported if such a claim is to be successful. Like Lord Goddard in Murphy vs. Mills (Supra) I too am left in an extremely unsatisfactorily position and would dis-allow this claim.

Re: Claim for False Imprisonment

The plaintiff was in custody of the police for 76 days. However, 70 of these days were spent in the hospital. It was only on his release from the hospital that he was taken to the Spanish Town Lock-ups where he spent the last 5 days before he was released on bail. Save for these 5 days he did not have to endure the trauma of the conditions which are well known in the lock-ups.

Some recent awards in the Supreme Court for false imprisonment do not seem to follow any pattern - a few will suffice:

1991	-	25 days imprisonment	-	damages assessed at	-	\$20,000.00	
1992	-	21 days imprisonment	-	damages assessed at	-	60,000.00	
1992	-	19 days imprisonment	-	damages assessed at	-	54,000.00	
Sept.	1993	-	11 days imprisonment	-	by consent	-	48,000.00
	1993	-	15 days imprisonment	-	by consent	-	200,000.00
Oct.	1994	-	28 days imprisonment	-	assessed	-	100,000.00

On a rough basis of \$3,500.00 per day, this claim would amount to \$266,000 for 76 days. I would scale down this amount to \$200,000.00 bearing in mind the fact that most of the time was spent in hospital where the plaintiff would have been in any event even if he had not been arrested and charged. However, he was kept handcuffed to a bed under police guard for all and sundry visitors to the hospital and the patients and workers there to see.

Re: Claim for Malicious Prosecution

Neither attorney for the plaintiff nor the defendant suggested a figure. From the evidence it does not appear that the police made any serious attempt to prosecute the charge. It was an abuse of the process of the Court which happily was not pursued. However, the police had this trumped up charge hanging over the head of the plaintiff for several months and even after he was admitted to bail during which time he attended court for about 4 or 5 times before it was finally discontinued. An award of \$25,000.00 would seem to be appropriate.

Re: Claim for Assault and loss of amenities

The medical evidence confirmed that the plaintiff suffered serious injuries. Fortunately, save for residuary pains in the back and legs, he has completely recovered as diagnosed by Dr. Brown. However, as a result of the surgery, an ugly surgical scar about ten inches long from the chest down will remain with him forever. There was also a depression on his right side where the bullet exited at the site where the second surgery was performed.

Because of the pains he does not swim anymore or go to dances. If he stands too long his legs hurt and if he sits too long he gets pains in the back.

Among the cases referred to by Counsel for the plaintiff is that of Karl Brown vs. Constable Patterson and the Attorney General - Suit C/L 1985/B262 where a 16 year old boy was shot in the back by the police. An award of \$400,000.00 was made by Pitter J. on the 9th of July, 1990. See volume 3 of Khans account Personal Injury Awards, page 168. The result of these injuries was more serious than the instant case. Using the Consumer price index table that award would be equivalent to about \$1.6M. Counsel submitted that an award of \$1.3M would be reasonable.

In a recent case decided on the 7th of October 1994, Mr. Justice Karl Harrison (ag) made an award of \$350,000.00 for damages for assault - C/L G071/88 Grant vs. The Attorney General. Here the plaintiff was shot in the back by a soldier and was kept in hospital for approximately 28 days. He now walks with a limp and one leg is smaller than the other.

In the instant case the plaintiff spent 71 days in the hospital and had to undergo two surgical operations. He still suffers from pains to his legs and back. I infer from these that they were more serious than the case of Grant mentioned above.

In his computation counsel for the defence by referring to separate cases of injuries to vertebrae, kidneys and colon came up with a figure of \$280,000.00 and suggested an award in that region. Obviously this did not take into account the cumulative effect of all three injuries together and would fall far short of a reasonable sum.

Mr. Frankson's claim seems inordinately high. The plaintiff suffered no permanent partial disability and has recovered satisfactorily from his injuries, save for the occasional pains. Dr. Roy Thomas (F.R.C.S) did testify that "there was a 20% impairment with respect to his ability to carry on his occupation." After considering all the relevant factors I think that an award of \$500,000.00 would meet the justice of the case.

In summary therefore, the awards under general damages are as follows:

False imprisonment	-	\$200,000.00
Malicious prosecution	-	25,000.00
Assault and loss of amenities	-	<u>500,000.00</u>
		\$725,000.00
Special damages - property damages etc.	-	3,804.00
Loss of earnings	-	15,600.00
Domestic assistance	-	<u>2,704.00</u>
		\$22,108.00

There shall be interest at the rate of 6% per annum on the sum for general damages from the date of the service of the writ to the 16th of May 1994, and 6% per annum interest on special damages from the 6th of July, 1986 to the 16th of May, 1994.

Costs of this action shall be the plaintiff's to be taxed if not agreed.