



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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2009 HCV 02800**

<b>BETWEEN</b>	<b>GARY HEMANS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>DEFENDANT</b>

**Tort – Trespass to the Person – Assault False Imprisonment and Malicious Prosecution – Whether reasonable cause to stop and request search – whether excessive force – damages.**

**Sean Kinghorn instructed by Kinghorn and Kinghorn for Claimant.**

**Latoya Bernard instructed by the Director of State Proceedings for the Defendant.**

**HEARD: 31<sup>st</sup> October 2012 & 1<sup>st</sup> November 2012,  
9<sup>th</sup> April, 2013 and 31<sup>st</sup> May, 2013**

**CORAM: Justice David Batts, Q.C**

- [1] In his amended claim filed on the 28<sup>th</sup> day of November 2011, the Claimant seeks damages, aggravated and exemplary, for Assault, False Imprisonment and Malicious Prosecution. By way of amended defence filed on the 3<sup>rd</sup> February 2012 the Defendant asserted that the Claimant committed three offences namely uttering indecent language, abusive language and assaulting a police constable. The defence denies that the Claimant was assaulted and avers that the arrest and imprisonment of the Claimant was lawful.
- [2] The issue concerns events which occurred on the night of the 16<sup>th</sup> May 2007. The Claimant and his family were exiting the popular Hellshire Beach after he

complied with a signal to stop by police officers. What happens next is the subject of conflicting evidence and will be addressed later in this judgment, however what is beyond doubt is that the Claimant was taken into custody charged, bailed and 9 months later the charges were dismissed.

[3] Before embarking on an analysis of the evidence I feel constrained to make some observations about the Constitution of Jamaica and its genesis. The Jamaica (Constitution) Order in Council 1962 enacted the Constitution of Jamaica which is to be found in the second Schedule of that Order in Council. Section 13 of the Constitution provides,

13. *Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-*

- (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;*
- (b) freedom of conscience, of expression and of peaceful assembly and association; and*
- (c) respect for his private and family life,*

*the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said right and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”*

[4] The relevant part of Section 15,

*“15- No person shall be deprived of his personal liberty save as may in any of the following cases be authorized by law –*

*(a) – (e)*

*(f) Upon reasonable suspicion of his having committed or of being about to commit a criminal offence;*

*(g) – (k)*

- (2) ....
- (3) ....
- (4) *Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that person.*

The relevant part of Section 16 of the Constitution provides,

- “16 (1) *No person shall be deprived of his freedom of movement, and for the purposes of this section the said freedom means the right to move freely throughout Jamaica, the right to reside in any part of Jamaica, the right to enter Jamaica and immunity from expulsion from Jamaica.*
- (2) .....
- (3) *Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –*
- (a) – (e).

Section 19 provides,

- “19(1) *Except with his own consent, no person shall be subject to the search of his person or his property or the entry by others on his premises.*
- (2) *Nothing contained in or done under the authority of any law shall be held inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required. –*
- (a) *in the interests of defence, public safety, public order, public morality, public health, public revenue town and county planning or the development and utilization of any property in such a manner as to promote the public benefit; or*
  - (b)
  - (c) *for the purpose of preventing or detecting crime; or*
  - (d) *for the purpose of protecting the rights or freedoms of other persons.*

- [5] These rights were reenacted in the Charter of Fundamental Rights and Freedoms which was brought into being in 2011, by the Parliament of Jamaica. In the course of this trial no statutory exception to or suspension of these rights was relied upon.
- [6] The above quoted statements of rights are not trappings which necessarily go with statehood. They are the product of over 400 years of conflict, struggle and sacrifice. Beginning in the 15<sup>th</sup> century the forefathers of the majority of persons in this nation we now call Jamaica were brought here in chains. They were forcibly taken from the country of their birth. Families were separated and humans enslaved to serve firstly Spanish colonizers and then later English economic interests. The system of enslavement continued until it was abolished by an Imperial Act of the British Parliament in 1833. Abolition came after two maroon wars, hundreds of violent slave revolts and agitation by human rights activists called at the time “Abolitionists”. The planters were financially compensated after abolition for the loss of their “property.” The newly freed men received no compensation. In Jamaica civil strife and further rebellion resulted in the free men attaining the right to vote on a basis of Universal Adult Suffrage in 1944. Another 20 years passed before the British lowered the Union Jack and Jamaicans assumed full responsibility for their economic, social, political and international affairs. Central to its position as an independent nation is the Constitution. That document among other things guarantees inalienable rights to Jamaicans. Its ultimate form and content was influenced by developments internationally not least of which were the creation of the United Nations and the Universal Declaration of Human Rights. It is the duty of this Court to protect and uphold the rights guaranteed by the Constitution.
- [7] I find it necessary to quote the Constitution and to recite it’s abbreviated history because of some surprising features of this case. Surprising because when the evidence from the Defendant was completed the matter of a lawful reason to stop

and request a search of the Claimant's vehicle had not been addressed. Indeed the attorney at law representing the Crown when asked stated that, reasonable cause was the fact that the police were conducting random searches for guns and drugs. It is the casual attitude by the Defendant and its witnesses to the individual's right to freedom of movement, freedom of the person and freedom from search which has caused me to restate the source of these rights and the history of struggle to attain them. It bears repeating that while lawfully driving his motor vehicle the Claimant was exercising his right to freedom of movement and was entitled to expect that that as well as his other rights would not be interfered with without lawful excuse.

[8] The Claimant's Amended Particulars of Claim were further amended at the commencement of the trial to insert the date 7<sup>th</sup> December 2011 in paragraph 6. By way of Defence the following among other things is stated,

- “3. Save and except that it is admitted that on the 16<sup>th</sup> May 2007 the Claimant was incarcerated at the Greater Portmore Police Station. Paragraph 27 of the Particulars of Claim is denied. The Defendant contends that the Claimant committed three offences, namely, uttering indecent language, abusive language and assaulting a police constable and in the premises the arrest and imprisonment of the Claimant by the police was lawful Claimant was offered bail on being arrested and charged.
4. Save and except that it is admitted that the Claimant was charged with uttering indecent language, assaulting a police constable and abusive language and the charges were dismissed in the Spanish Town Resident Magistrate's Court for want of prosecution, paragraph 4 of the Particulars of Claim is denied and paragraph 3 of the Defence herein is hereby repeated. In further response the Defendant states that the arresting officer was absent from court sessions on the charges against the Claimant due to no deliberate action of his or any disregard for the Claimant and the Court.”

[9] I will now review the evidence to see which of the contending allegations have been supported and to determine which witnesses I accept as truthful.

[10] The Claimant Gary Hemans stated that he lived in Linstead, St. Catherine. He is a taxi operator. His witness statement dated 9<sup>th</sup> November 2011 was allowed to stand as his evidence in chief. He orally corrected paragraph 13 to say he was locked up until 10 minutes to 11 p.m. and not 9 pm as stated in the witness statement. His evidence in chief can be summarised as follows:

- a). He was born on the 27<sup>th</sup> March 1971
- b). On Wednesday the 16<sup>th</sup> day of May 2007 at 7:00 p.m. he went to the Hellshire Beach in St. Catherine. With him were his brother, his brother's wife and their 3 children as well as a friend, the Claimant's mother, his niece and a cousin.
- c). His brother was visiting from England with his wife and their 3 children.
- d). The group travelled in 3 motor vehicles with the Claimant driving one of them.
- e). At the beach they ate at one of the cook shops.
- f). While there the Claimant observed a police jeep drive in with 3 policemen. They were dressed in blue denim and carrying high powered weapons. One of the police officers said to the proprietor of the cookshop,

"Nuttin caah gwan feh wi"

The Claimant did not hear the reply. The driver of the jeep drove on to the beach. The Claimant says he got a good look at the faces of the policemen.

- g). The Claimant and his party finished eating at about 9:30 to 10:00 p.m. and drove out with the Claimant driving the 2<sup>nd</sup> in line of the 3 vehicles.
- h). As he approached the Hellshire roundabout he saw the same 3 policemen and he was signalled to stop.
- i). He complied.

- j) All 3 policemen jumped out of the jeep and ordered him of the car.
- k) the Claimant his niece, and 2 small nephews got out of the car
- l) His friend (Chris) who was driving the 3<sup>rd</sup> car in line drove up and said,

“officer what is the problem? Is me and dem a travel.”  
The police did not respond.

- m) They ordered Chris out of his vehicle and told him to face the vehicle with his hands in the air.
- n) The children began crying and everyone came out with hands in the air.
- o) The police started to search them. While doing so the Claimant’s brother (Chad) who was driving the lead vehicle turned back. He came to where the Claimant was and asked “Gary what is the problem, we can’t even come a Jamaica come enjoy we self. Every turn yuh turn a police an every time dem stop us is money dem want.”
- p) One of the police officers said to Chad

“a who yuh, long bwoy” and ‘draped’ Chad in his waist.”

- q) The next 3 paragraphs of the witness statement I will quote verbatim.

“9. Chad told him to take his hands off him and he pushed down Chad and he fell on his bottom. My mother and Chad wife began crying. I then said to them,

Officer we a nuh gunman, we a nuh theif, a mi bredda and family.” I turned to them and said

I feel suh secure when mi see oonu drive in a deh premises but to how ooonu a behave now, ooonu mek mi feel insecure.”

- 10. They kept on behaving in an aggressive manner and I said –

“Officer a true oonu have oonu gun ova we why oonu a behave suh?”

The said clear complexion medium built, about five feet nine inches tall one went and put the gun in the jeep returned and said –

“How yuh a gwaan suh” and hit me in my chest and in my face, and said,

“yuh seh if a true mi have mi gun why mi a gwaan suh, see mi put it down mi gun deh.”

He began draping me up and said he was going to arrest me because I assault them. I said to him, ‘how mi could assault yuh and a yuh hit mi in a mi face.’”

11. He and another officer began hitting me. I was boxed in my face again and hit all over my body. I was dragged and pushed in the jeep by the policeman who boxed me. While she was draping me my shirt got torn off.”

- r) The Claimant says he was taken to the Portmore Police Station and was locked up at 10 minutes to 11 pm and was not bailed until the 17<sup>th</sup> May 2007 at 11 p.m. He told the officer on duty at the police station that he was beaten up but no one took his report.
- s) He was held in the holding area of the guard room prior to being taken to the cells. While there many persons knew him and saw him there.
- t) While being processed at the police station 2 police officers told him to take off all his clothes and squat. He hesitated and one of the officers used a baton to poke him twice in his side. He was forced to strip and squat naked in a corner. He felt embarrassed and humiliated.
- u) He up to the time of writing the witness statement was unaware of the reason why he was stopped by the police as they did not ask him for his papers or tell him it was a spot check.
- v) He attended court on the 28<sup>th</sup> May 2007 but the police who charged him did not attend. He attended court no less than 6

occasions. On the 22<sup>nd</sup> January 2008 the matter was dismissed for want of prosecution because the police did not attend.

- w) He was embarrassed to attend court because he is a well known taxi operator in St. Catherine.
- x) He detailed the amounts paid to the attorney to represent him in the Spanish Town Resident Magistrates Court. He also details the medical assistance sought and the amounts paid.
- y) He stated that due to the injuries he was not able to return to work as a taxi operator for 4 weeks after being injured. This is because he was in pain. He earned \$6,000 per week. He gave details of his taxi operation.

[11] When cross examined he said the incident occurred at the entrance to Hellshire Beach. His mother, niece and cousin were there the latter still live in Jamaica. His brother, brother's wife and their 3 children and a friend were there also. They were on vacation and all witnessed the incident. His mother is alive but lives in England. He admitted he was the only one who had come to testify.

[12] It was suggested to the witness that the police "pulled" him over. He said yes. It was suggested that the police officer asked for his papers. The witness responded,

"He asked me to step from the car with my hand on my head.  
He neva asked me for any documents."

[13] It was suggested that when the police pulled him over. He became "boisterous" towards the police. He denied this and also denied using bad words towards the police officer. The following exchange then occurred:

"Q: Police hold unto you and told you he going to arrest you for indecent language you used?"

"A: No.

Q: That was when you pushed the police

A: That's a lie, no."

[14] The witness affirmed to the cross examiner that when taken upstairs at the police station he was told to stoop and squat. He said it was the officer who arrested him who did that. It was then put to the witness that that allegation did not appear in the Particulars of Claim and this was admitted.

[15] He told the cross examiner that when he visited the doctor it was not Doctor Francis he saw. He could not recall the doctor's name. He was asked when did he go to the doctor and responded, "The day after I got bail." He was asked what the police used to beat him and said, "Baton stick and hand." He stated that it was in his statement that the police used baton but after having been shown the statement admitted it was not stated there. He mentioned he was beaten all over his body and side. It was suggested that he was never beaten at all but he denied that.

[16] The following exchange occurred:

Suggestion: You assaulted the police officer when he was arresting you.

A: No.

Q: You used indecent language?

A: No I was so glad to see them come to the beach.

Q: You resisted arrest refuse to enter the police vehicle?

A: No ma'am, not true.

Q: At no times the police officer beat you?

A: Yes ....they beat me bad.

Q: Suggest not even a family members is here to give evidence for you is because it did not happen?

A: It happened. If you did tell me to bring a family member who was with me at the time I would bring him."

[17] He stated that he got bail the following day in the morning. In re-examination an effort was made to clarify the date on which bail was given but the witness said, "Mi get bail on 17<sup>th</sup> due to how long it happen I can't remember exactly to how long it did happen." In answer to a question from the court as to why there was

no reference to the use of a baton he said, "Because when I explain to my lawyer mi never explain they use a baton mi just seh they hit me all over my body"

[18] The Claimant's next witness was Doctor Omar Francis. Gary Hemans he said, had been a patient for 6 or 7 years. In October 2011 he prepared a medical report. This was identified as medical report dated 19<sup>th</sup> October 2011 and admitted in evidence as exhibit 1. When asked whether he was the doctor who saw the Claimant he said "no." The Crown indicated they had no objection to the doctor refreshing his memory from documents in relation to Mr. Heman's medical records. Having done so Dr. Francis indicated it was Dr. Mortel Samuels who examined the Claimant. He is unable to contact Dr. Samuels who no longer works at that office and is believed to have migrated. Dr. Francis admitted that exhibit 1 was prepared from the file notes.

[19] When cross examined Dr. Francis said he did not think it appropriate to say in the report that he had not examined the Claimant. He disagreed the report was misleading but admitted it could have stated the source of the information. He said from the records the Claimant was seen twice in relation to this incident. He admitted the injuries reported were not serious or life threatening. He was asked whether he had Dr. Mortel's report and replied:

"A: He did a police report.

Q: Did he do a medical report?

A: A police report is a medical report."

The witness was asked whether the reported injuries were mostly to the head and he agreed.

"Q: Nothing to speak to beating all over the body?

A: No."

[20] In re-examination he was asked about the police medical. He indicated he was familiar with Dr. Mortel Samuels's signature as he had worked with him for a year or two. He identified Dr. Mortel Samuels' signature on a document. An

objection was taken to its being tendered as it was not signed by a Justice of the Peace, this was not a criminal court and it was not prepared by the witness. I decided to admit the document as **Exhibit 2** being a medical report dated 17<sup>th</sup> May 2007 signed by Dr. Mortel Samuels. I admitted the document pursuant to section 31E of the Evidence Act as a document made by a witness who could not be located and it was impractical to get him to the trial. I also exercised my discretion to abridge such time as was necessary. Secondly, I admitted the document not only to prove the truth of the contents but because its existence supported the assertion that a visit was made to the doctor by the Claimant at that material time.

[21] The Crown was therefore given a further opportunity to cross examine, although the document was admitted in consequence of information uncovered in cross-examination. The witness (Dr. Francis) was asked whether Dr. Samuels ever wrote in his presence and the witness agreed that as they attended the clinic on separate days he possibly had never written in his presence. The following exchange occurred:

“Q: How you come to know Dr. Samuels’s signature?

A: I have seen it on many occasions on dockets where he would have seen my patients.”

He was also cross examined about when Exhibit 2 was prepared but was not able to say when he became aware of it. The following exchange occurred,

“Q: You say that is a copy where the original came from?

A: I don’t know .....

Q: The document was it signed by a Justice of the Peace?

A: There is none.

Q: You say you weren’t present, can you say for sure it was created by Dr. Samuels?

A: Yes.”

[22] The Claimants’ case was then closed. The Defence called Cpl. Andell Stewart. His witness statement dated 19<sup>th</sup> September 2012 was allowed to stand as his

evidence in chief. In that statement he revealed he was a 14 year member of the Jamaica Constabulary Force. He had been promoted to the rank of Corporal in 2008. On Wednesday 16<sup>th</sup> May 2007 he was accompanied by Cpl. Calvin Allen and Constable Wayne Powell. They were dressed in blue denim uniform and wearing bullet proof vests and had their regulation numbers written boldly on them. They were conducting mobile patrols in St. Catherine South Police Division.

[23] At approximately 10:50 p.m. whilst patrolling Hellshire Beach he observed 3 cars coming from the beach towards the entrance. The cars included a white Toyota Corolla. According to the officer:

“Based on the fact that cars with similar features are often stolen and used in the commission of crime I indicated to the other members that I wanted to check out this car. As a result the driver was signaled to stop and he complied. I told the driver who is the Claimant in this case that I wanted to check the documents as also the car to see if there were any breaches and also two other adults who were in the car.”

[24] He further states that at this time 2 other cars stopped and the occupants came to where the Claimant stopped. He heard the Claimant say “a wha you a stop man fah, onu love pressure man too much and unu so dunce, pussy hole a money onu a look. Fuck off me nuh fraid a onu, anything a anything a blood cloth.”

[25] Said the witness in his statement, “At this point I held onto the Claimant and told him that I was going to arrest and charge him for indecent language. He held onto my shoulder and pushed me away and said, “let go off mi blood cloth.”

[26] The witness stated that Cpl. Allen at that point intervened and the Claimant was held and pushed into the police service vehicle. He resisted but they were successful. The witness stated: “At no point in time did I or any member of the police party hit the Claimant. Further, we did not search the Claimant or anyone.”

[27] When cross examined it emerged that Cpl. Stewart was the driver of the police jeep. He signaled the Claimant to stop by putting on his blue flasher light and speaking to him through the car window. When the Claimant stopped Cpl. Stewart came out of the service vehicle and approached the Claimant's vehicle. Before the Claimant stated the offensive words the witness told him that the reason he was stopped was because he wanted to check his documents and that of the vehicle as also to search the vehicle itself. The Claimant had already come out of the vehicle when this exchange occurred. The witness could not recall if children were in the Claimant's vehicle.

[28] The following exchange occurred:

Q: You are of the view you had a legal right to stop Mr. Heman and to check if any breach of the law?

A: Yes.

Q: Was that your sole reason?

A: Yes.

Q: When Mr. Heman uttered those words to you what did you do?

A: I informed Mr. Hemans that I was going to arrest him for uttering indecent language and hold onto him.

Q: Where you held him?

A: His waist band.

Q: Is that all he did before you hold him was utter those words?

A: Yes sir.

Q: Front of waist band?

A: Yes sir."

[29] The witness then stated that the Claimant then held onto his shoulder and uttered expletives. He pushed the witness who let go his waistband. The hold on the shoulder was in the nature of a grab on the shirt. The witness denied holding

the Claimant's hand after the words were issued and maintained it was his waist. When reminded that he had on a bullet proof vest the officer stated he grabbed the shirt above the vest. He said Cpl. Allen intervened and held the Claimant by the front of the waist band. The witness said the Claimant began to resist by "flashing" away but he cannot recall whether in doing so he hit Cpl. Allen. The witness said he watched this and observed other persons around but did not pull his firearm. He said Cpl. Allen held the Claimant and pushed him into the vehicle. The following exchange followed:

“Q: From the moment he intervened to hold his waist Cpl. Allen was the only one who held Mr. Hemans until he got into the vehicle?”

A: Yes.

Q: You assisted by standing close by?

A: Yes.

Q: Never touched Mr. Hemans?

A: No.

Q: Please look at paragraph 6 of your witness statement, you say “we”, what do you mean by that?

A: “We” could have been a mistake.

Q: Could?

A: It is a mistake. It should read Cpl. Allen had to pull Claimant and put him in the vehicle.”

[30] In answer to the question what was Cons. Wayne Powell doing the witness stated that he was “giving coverage and protecting us.”

[31] The witness stated that the Claimant was taken to the Portmore Police Station because he had assaulted officers and used indecent language and resisted arrest. He was charged with assault and calumnious language. The witness admitted he considered the charges to be serious. He wrote a statement and gave it to Cpl. Allen. The Claimant was charged and granted bail to attend the Spanish Town Resident Magistrate Court on 29<sup>th</sup> May 2007. The witness said he

attended court on that date. However while at court the case was not called, he however got the next date for court but did not attend on the 2<sup>nd</sup> occasion. Neither did he attend on the 3<sup>rd</sup> date. He stated that he was in court on the 4<sup>th</sup> occasion. The following exchange followed:

“Sugg: You have never been present in Court even once when case was called up.

A: I disagree.

Q: You are aware that this matter was dismissed for want of prosecution?

A: Yes.

Q: How many times you attended court?

A: On more than 2 occasions. The last occasion I was informed a warrant had been issued for the accused and I will be subpoenaed. I was never ever subpoenaed or summoned hence my non-attendance.”

The witness denied knowing that the case was dismissed for want of prosecution. He said it was Cpl. Allen who informed him that a warrant had been issued for the accused. He also stated that he was not present in Court when the matter was called on 2 of the 3 occasions that he actually attended court. He was unsure of the dates he attended. He was shown a document and having seen it was able to verify the court dates as 3<sup>rd</sup> July 2007, 28<sup>th</sup> August 2007, 28<sup>th</sup> September 2007, and 9<sup>th</sup> October 2008. He was however still unable to say which dates he attended.

[32] The witness stated that Mr. Hemans had been asked to produce his car papers, his driver’s licence, Certificate of Fitness, Registration and insurance. He stated that Mr. Hemans had not produced them at the scene. He did not know whether it was an offence not to produce them as he would have to consult the Road Traffic Act. The following exchange occurred:

“Q: Did he refuse to allow you to search?

A: No he did not refuse.

Q: Did he prevent you from searching the vehicle?

A: No. But he committed other offences that we were pursuing which was indecent language.

Q: Is it correct to say when you attempted to search Mr. Hemans vehicle he held onto you?

A: I did not attempt to search.

Q: Not correct that you held onto him and told him he had assaulted. That sequence not correct?

A: Not correct sequence, not true.”

[33] He stated that he would be surprised to learn that no information in respect of the charge of resisting arrest was ever laid against the Claimant. He could not remember the details of the charges that were before the court. The witness said the indecent language used by the accused was: “pussy hole fuck off any blood cloat thing a anything” and the abusive and calumnious language used was : “the whole a unnoo a dunce a money unnoo a look.”

[34] It was suggested to the witness that when he stopped the Claimants vehicle he was already outside his vehicle. This he denied. It was suggested that he pointed a high powered weapon in the direction of the Claimant and the witness denied he had such a weapon. It was suggested there were 2 small children in the Claimant’s vehicle, he acknowledged that children were on the scene but could not say if they were in the Claimant’s vehicle. Children were part of the group.

[35] Detailed suggestions were put to the witness as to the sequence of events. He denied they had any batons with them. They had he said only guns and handcuffs. The officer saw no one hit Mr. Heman at all; he received no injury at all. It is important I think to note that the officer admitted that the children were crying.

[36] When re-examined Cpl. Andel Stewart stated both the Court Marshall and Cpl. Allen told him a warrant was issued for the complainant. In answer to the court the following exchange occurred:

“J: Is there a reason why you chose to physically arrest rather than issue a summons for the use of indecent language?”

A: No particular reason.

Q: had you seen the complainant prior to that incident?

A: No.

Q: Had you been on the beach before?

A: Yes patrolling the same day patrolling.

Q: When you signaled the vehicle to stop were you aware the 3 cars were travelling together?

A: No.”

[37] The Defendant’s next witness was Cpl. Allen. He was sworn and his witness statement dated 19<sup>th</sup> September 2012 allowed to stand as his evidence in chief. In that statement he indicated that on the 16<sup>th</sup> May 2007 he was dispatched to commence mobile patrol in the Portmore area which includes Hellshire, Waterford, Bridgeport and the Caymanas area. He was along with Constable Wayne Powell and Andel Stewart and they were in a marked police vehicle and similarly attired in blue denims and bullet proof vest marked “police.” He was armed with a 9 mm browning pistol.

[38] At approximately 10:50 p.m they entered the main gate of the Hellshire Beach. He saw a white Toyota Corolla motor car driving out of Hellshire Beach towards the main gate. Constable Stewart said he wanted to check the car and so signaled it to stop. His account then proceeded as follows:

“6. I heard Constable Stewart asked the driver for the documents in respect of the said motor car as also his driver’s licence. It was the first time I was seeing the driver and I later learned his name was Gary Hemans, who is the Claimant in this matter. Constable Stewart requested the other occupants in the Toyota Corolla to step out of the vehicle as he wanted to search the vehicle. “

7. During this time two other vehicles drove up and stopped and the occupants of these two vehicles came from the vehicles and came up and started enquiring what was happening.
8. I heard the Claimant say to Constable Stewart: "a when onnu stop mi fah," "oonu dunce like pussyhole" "fuck off mi nah fraid a onnu", "anything a anything to blood cloth."
9. I then saw Constable Stewart hold onto the Claimant by his hand and told him that he was arresting him for abusive and calumnious language. The Claimant then held onto Cons. Stewart by his shirt in the region of his chest and pushed him away and said "leggo off mi blood cloth bway."
10. I immediately went to the assistance of Constable Stewart and I held on to the Claimant and told him that I was arresting him for Assaulting Police, Indecent Language and Resisting Arrest.
11. I told him to get someone to drive his motor car as he would be taken to the Police Station in our service vehicle. He was however quite reluctant and uncooperative and refused to go into the police vehicle. I had to pull him and placed him into the vehicle and he was transported to the Portmore Police Station where his arrest was recorded by me and he was handed for safe custody."

[39] The Claimant he states was bailed on 17<sup>th</sup> May 2007 to appear in the Resident Magistrate Court on the 29<sup>th</sup> May 2007. The witness said he laid 3 informations on the 28<sup>th</sup> May 2007 numbered 3308-3310/07. On the 29<sup>th</sup> May 2007 he arrived at Court after the case was mentioned. On the 3<sup>rd</sup> July he was again late and was told the matter was adjourned to the 28<sup>th</sup> August, 2007. On that date he did not attend as he had another case in the Gun Court. He was not issued with a subpoena or bench warrant to attend Court. He admits he should have paid more attention in tracking down the progress of the case.

[40] When cross examined Corporal Allen stated that the upper part of his chest by the shoulder was covered by the bullet proof vest. The witness said he was

standing beside the service vehicle when the other vehicle stopped. Cons. Stewart walked up to the other vehicle.

[41] He did not have a baton neither did his colleagues. He heard Cons. Stewart ask the driver to produce documents and ask the other passengers to step from the vehicle as he wished to search it. He denied there were children in the vehicle. The following exchange occurred:

“Q: Mr. Heman when Cpl. Stewart ask him to produce documents and driver’s licence did he respond?”

A: Yes he responded being I heard him say, “wey unno stop mi now fah. Unno love pressure man. A money unno a look”

Q: He said that?

A: He continued uttered some language, he said, “Mi nah afraid a unnooo a blood cloat. Anything a anything.”

Q: What next?

A: I saw, when I heard those words I immediately started walking over to where Cpl. Stewart was.

Q: Where was Cpl. Stewart in relation to Mr. Hemans?

A: Right beside him. I saw Cpl. Stewart hold him in his waist band and told him he is going to arrest him. By this time I reach to where they were standing. I saw Mr. Hemans shove Cpl. Stewart in the region of his chest upper chest.

Q: He was still standing beside him?

A: Yes.

Q: What next?

A: I held onto Mr. Hemans.

Q: Where?

A: In his waist band.

Q: Back or front?

A: Front.

Q: Cpl. Stewart held him where?

A: To the front.

Q: Both of you held him to the front?  
A: Cpl. Stewart by the hand let go of his grip. I was holding him in his waist band.  
Q: Why?  
A: I hold onto him because of his action and the words he uttered and his whole behaviour.  
Q: Meaning?  
A: The loud tone and the words.  
Q: He was breaking law by a loud tone?  
A: No.  
Q: What behaviour?  
A: The loud tone and gesticulation.  
Q: How?  
A: He was flashing his hand cursing bad words "anything a anything: etc.  
Q: You have your witness statement there?  
A: Yes.  
Q: Look at paragraph 9. You see you say Cons. Stewart held Claimant by hand. Do you want to change that?  
A: No.  
Q: Which is true was it in the waist band or hand?  
A: At some point by his hand but in waist band also.  
Q: The first holding of Heman by Cpl. Stewart was waist band?  
A: yes.  
Q: Where in witness statement is that?  
A: not in here."

[42] The witness was then asked to demonstrate how the Claimant held Cons. Stewart by his shirt. The witness at this juncture indicated the centre of the chest and that the bullet proof vest was down in the center of the chest. The witness said he held the Claimant in his waist and told him he was arresting

him for assaulting the police, indecent language abusive and calumnious language and resisting arrest. He had seen these offences committed against Cpl. Stewart. He then told the Claimant to arrange to have someone drive his vehicle as he was to be taken in the service vehicle to the police station. He said at first the Claimant was reluctant but at the urging of his family and friends he eventually complied. The following exchange occurred:

“Q: After the .....insistence of family members what did he do?

A: He walked into the service vehicle. I was still holding him but he went in there.

Q: At insistence of family members he started to co-operate with you?

A: Yes.”

The witness could not recall if he had handcuffed the Claimant. He stated that at the point he intervened Cpl. Stewart was holding the Claimant’s hand and he stepped “like a mediator” because he “did not want any harm to be done.” He also said that he asked Cpl. Stewart to let the Claimant go. He admits he was the arresting officer.

[43] The witness stated that it was his duty to make the entry in the station diary and that he did so on the 17<sup>th</sup> May 2007. He disagreed that his account of the incident differed from the entry in the station diary.

[44] The witness was asked:

“Q: Is it correct to say that Cons. Stewart attempted to search Mr. Heman’s vehicle and Mr. Heman held onto him?

A: No sir, don’t remember that, not correct.

Q: Is it correct that Cons. Stewart held onto him and told him he had assaulted him is that correct?

A: Cons. Stewart held onto him and told him. No not in the sequence.

Q: When you made the entry in the Station Diary of Portmore Police Station did you use these words, "Cons. Stewart who was a member of the patrol attempted to search the motor car and the accused held onto him. Cons. Stewart in return held onto him and told him that he had assaulted him?"

A: Yes.

Q: That entry was that the truth?

A: Yes."

[45] The witness admitted that no information in respect of resisting arrest had been laid. The following exhibits were admitted: Information 3310/07 – Abusive language **Exhibit 3**. Information 3308/07 Indecent Language **Exhibit 4**. Information 3309/07 for Assaulting Constable **Exhibit 5**.

[46] The witness stated that when asked for the car documents the Claimant refused to produce them.

“Q: What did Mr. Hemans say that cause you to say he refuse to produce them?

A: Well immediately he was stopped and told to come from, the vehicle he started to get boisterous. He was asked for it. That was when he asked “wah unnoo a stop mi for.”

Q: You say he was asked for it did he respond?

A: He said mi nuh have nuh document.

Q: You as an officer took that to mean he was refusing?

A: Yes.

Q: You are aware that is an offence?

A: Yes, failing to produce.

Q: Can you tell us why you never charged him for it?

A: Because evidently they were produced.

Q: You mean his licence also was produced?

A: Yes.

Q: The offences are Petty Sessions?

A: Yes.

Q: Why since you got drivers licence etc why not just issue a summons to Court as opposed to locking him up?

A: Reason is we had him right there so I am always going to proceed by arresting. I took the decision to lock him up. I mean arrest and charge him at the station.”

[47] The witness was asked whether he did anything to facilitate the Claimant being bailed at the Station that night. He answered in the affirmative and said among other things he facilitated him getting a phone call. This was whilst the Claimant was in the guard room at the Police Station in the early hours of the 17<sup>th</sup> May, 2007. The witness then acknowledged that there was a cell diary which minuted when persons were locked up. The witness denied that the Claimant was taken to the cell at 11 p.m. on the 16<sup>th</sup> May, 2007. He however admitted that he was not admitted to bail until 10:00 a.m. on the 17<sup>th</sup> May, 2007. The witness could give no reason when asked as to why that was so.

[48] In re-examination the following exchanged occurred:

“Q: In statement you said you had to pull him and place him in vehicle but in answer to counsel you say he walked which is correct?

A: I should have said I pulled him part of the way from his vehicle. When he was first told to he said he was not going into the vehicle.”

The witness was also asked about the inconsistency in stating that he saw Cons. Stewart hold the Claimant’s hand and waist and when asked “which is correct?” answered “Both took place.” In answer to the question from the court, “was a reason given by the complainant for his behaviour?” the witness answered “No, I only heard him say unno always a pressure man.”

[49] The matter was adjourned sine die, part heard and the parties directed to file written submissions on or before the 23<sup>rd</sup> November 2012. Written submissions

having been filed the parties attended before me on the 9<sup>th</sup> April, 2013 at 9:00 a.m. to make oral submissions limited to a response to each other's written submission. The delay is regretted related as it is to misplacement of my bundles. This misplacement is not unconnected to the fact that I had at the time no fixed set of chambers and no dedicated clerk.

[50] I have carefully perused and considered the written submission of the parties as well as the authorities cited. I will not repeat in detail those submissions. The submissions on the law of false imprisonment malicious prosecution and assault was not in serious dispute. The primary area of disagreement is of course factual and each side urged me to accept that version of events most favourable to their side. The attorneys representing the parties must rest assured that I intend no disrespect by declining to repeat the submissions filed.

[51] Suffice it to say that having seen and heard the witnesses and having considered the documentary evidence I find the Claimant to be a witness of truth. The account by the police officers was inconsistent in significant respects one with another. At times there were inconsistencies between evidence in chief and in cross examination. There were even inconsistencies with documentary evidence.

[52] It is worth noting, and I take judicial note if necessary, that the Hellshire Beach is a very popular recreational area for Kingstonians and residents of Portmore, St. Catherine and its environs. There are many eating establishments there and the fried fish and bammy is notoriously popular. The activities continue from morning through the day and even at night. It is not surprising that the Claimant would choose that location to entertain his visiting relatives.

[53] The Claimant's account is also on a balance of probabilities more credible. The Defendant asserts that having been signaled to stop and his papers requested, the Claimant unleashed a verbal assault on the officers laced with what we in Jamaica categorize as indecent language. The Defendant proffers no

explanation for this conduct. I reject the suggestion that the unarmed Claimant at 11:00 p.m. at night verbally assaulted the three (3) armed police officers in the manner described. I also find very significant Cpl. Allen saying that he “intervened as a “mediator” because he did not want “harm” done (Para 42 above). This to my mind is consistent with aggression by Constable Stewart and is consistent with the Claimant’s account of aggression towards him. After all ‘harm’ would more likely be done by an armed officer. Similarly ‘mediation’ may be called for, if as the Claimant stated, one officer placed his weapon in the vehicle, to demonstrate that he could discipline the Claimant and it was not only the weapon, which allowed him to do so. Also militating against the officer’s account is the discrepancy with the entry in the station diary, (that an attempt to search was made which was prevented) (Para 44 above) and the account before this court (that the Claimant did not resist a search of the vehicle Para 32 and 44). There is also much confusion as to whether the Claimant was held in the waist on the hand or both. That by itself may be an insignificant discrepancy, however the officers all deny hitting and assaulting the claimant save for the hold to his waist and on his hand. The medical evidence contradicts this. Even if the rules prevent one having regard to the content of the report (Exhibit 2), the fact that he attended a physician would support his account rather than the Defendant’s. I bear in mind **R v. Cassels (1965) 8 WIR 270** in which the Court of Appeal of Jamaica drew adverse conclusions about their credibility when objective evidence was inconsistent with viva voce evidence of police officers.

[54] I find as a fact that on the night in question the police officers stopped the motor vehicle driven by the Claimant and that it was their intention to search the vehicle and the persons in it. Persons in the other vehicles made oral pleas to the police officers and protested and queried the reason for the stop and search. One of the police officers reacted to these verbal protestations by holding Chad (the Claimants brother) in the waist and pushing him down. The Claimant verbally protested this conduct and suggested it was because the police had guns why they felt they could behave in that manner. The police

officer then placed his firearm in the police vehicle and hit the Claimant and physically held him by the shirt orally challenging him to demonstrate that it was not his firearm which enabled him to get the better of the Claimant. I accept that the Claimant was hit with a baton and boxed and that this would have followed his (the Claimant's) resistance to the earlier assault by the officer who had put his weapon down. I accept that the third officer did intervene to "mediate" and prevent further harm. I accept also that the Claimant was pushed and dragged into the police motor vehicle. I accept that the Claimant was humiliated in the manner he describes by other officers at the police station and that he was bailed the following day. I find that he received bail on the 17<sup>th</sup> May at approximately 11 a.m. and that he attended the doctor for medical attention on the said 17<sup>th</sup> May 2007. It is of course common ground that all charges were dismissed for want of prosecution.

[55] It is therefore manifest on these findings of fact that the Defendant is liable to the Claimant for assault, false imprisonment and malicious prosecution. There was no reasonable or probable cause to stop arrest or charge the Claimant as he had committed no breach of the peace, felony or misdemeanor. There was no reason to assault the Claimant or to arrest or charge him. The action of the police officers in relation to the Claimant was not in self defence or in the defence of another nor was there any breach of the peace threatened or in progress. The officers responded with excessive force and in an unlawful manner to words of protest offered in response to the stopping and search of the Claimant and his passengers.

[56] Let me say further that even on the account given by the Defendant's witnesses no lawful reason is given for stopping the Claimant's vehicle. Nor is there any lawful reason advanced for the desire to search his vehicle or for the alleged request for his documents.

[57] It is still the law of this nation that persons under the Queen's peace are entitled to freedom from search of their person or property unless such a search is legally justified. I hold that it is not a lawful reason to stop and search a car,

“based on the fact that cars with similar features are often stolen and used in the commission of crime.”

It would really be no different saying that an individual walking on the road bears “similar features” to the majority of persons convicted of crime e.g. He is of dark complexion and wearing shorts below the waist. There is in some quarters, (see for example obiter dicta of Daye J in **Foster v. A.G. F135/1997** unreported), the belief that Section 58 of the Road Traffic Act gives a power to the police to stop and search vehicles without reasonable cause. That Act does no such thing. The Act allows redirection of traffic or stopping of vehicles for the purposes of traffic flow or some reasonable purpose. The request for documents and driver's licence similarly follow on some existing cause such as a reasonable suspicion that a crime has been or is about to be committed.

[58] The reasonable cause to suspect that an individual has or is, or is about to commit a crime must relate to peculiar characteristics of the persons or the vehicle he is driving or the manner in which it is operated, or to information received. In Jamaica the citizen is free to move about without an obligation to carry a pass, and is not to be subject to arbitrary or random search. This is still a constitutional guarantee.

[59] On the question of damages I have considered the submissions made and the authorities cited. I therefore make the following award:

- a. For assault (being the pain, suffering, loss of amenities and the embarrassment or “insult” from the injury) \$500,000.00

I apply the authorities of **Foster v. AG F135/1997** unreported decision of Daye J and **Dennis v. AG 2003 HCV 1823** unreported decision of Brooks J.

- b. False Imprisonment \$250,000.00

I refer to and rely upon the authorities of **Sheron Greenwood-Henry CL G 116 of 1999** unreported Decision of Sykes J and **Maxwell Russell v. AG HCV 4024/2006** unreported decision of Mangatal J.

- c. Malicious Prosecution \$450,000.00  
I refer to and rely upon the authorities of **Maxwell Russell** (above), and **Salmon v. Supt. Elan Powell and the AG 2007 HCV 01090** unreported judgment of Simmons, J.
- d. Aggravated Damages \$1,200,000.00  
I apply **Greenwood-Henry v. A.G** (above) and note that the circumstances of aggravation include his treatment at the police station, being made to strip and stoop as aforesaid and the fact that the officers did not attend court.
- e. Exemplary Damages \$200,000.00  
I find that the conduct of the officers is such that a punitive element to the award is appropriate. The claimant was beaten without cause and made to suffer indignities. The authorities cited to me do not offer much guidance and therefore I have discounted the **Sheron Greenwood** (above) and considerably to arrive at my conclusion.
- f. Special Damages  
I accept the Claimants evidence on special damages which was not seriously contested.
- (i) Lost earnings \$24,000  
(\$6,000 per week for 4 weeks)
- (ii) Legal Costs incurred in Defence of criminal charges \$170,000  
(being \$50,000 paid and \$120,000 owed to his attorney)
- (iii) Medical Expenses \$25,000  
(which includes the cost of the 'police' Medical report).

[60] There is therefore judgment for the Claimant as follows:

General Damages	\$2,600,000
Special Damages	\$219,000

Interest is to run on both the general and special damages at a rate of 6% per annum from the date of acknowledgement of the service of the claim being 9<sup>th</sup> June, 2008.

[61] In closing this court is not unmindful of the high level of crime and the difficult circumstances in which the security forces are asked to operate. However experience in this and other countries tells us that the fight against crime will be lost if, in the course of that fight, war is declared on the citizens of the country. That is one important reason why the rights of all citizens must be respected, as the police carry out their very challenging duties.

[62] I have directed the Registrar of the Supreme Court to send a copy of this judgment to the office of the Commissioner of Police and to the Commissioner of Indecom for such action to be taken as they may deem fit.

**David Batts Q.C.**  
**Puisne Judge**