

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. K.048/1988

BETWEEN MARTIN KEANE PLAINTIFF
AND THE ATTORNEY GENERAL DEFENDANT

Dennis Daly Q.C. instructed by Daly, Thwaites & Campbell
for Plaintiff.

Laxton Robinson & Neil Hamaty, instructed by The Director of
State Proceedings for the Defendant.

Heard: April 7, 1994, June 27, 28,
& 29, 1994 & November 1, 1996

JAMES, W.A. J.

By Writ of Summons filed 19th October, 1988, the Plaintiff's
claim against the Defendant is to recover damages for assault,
false imprisonment and malicious prosecution.
Subsequently on the 25th January, 1989 the plaintiff filed his
statement of claim and in paragraph 3 thereof he pleaded as follows:-

"On or about the 25th December, 1986 the
plaintiff was outside the Wyndham Hotel
in New Kingston when Detective Corporal
Donald Fogarthy acting maliciously and/
or without reasonable or probable cause
unlawfully and feloniously assaulted
the plaintiff by firing two shots at
him one of which struck the plaintiff
in the back of his right thigh".

At the commencement of the trial Mr. Robinson raised some
preliminary issues in which he sought to have the several causes of
action dismissed. He relied on the provisions of Section 2(1)(a)
of the Public Authorities Protection Act. Section 2(1) is pertinent
and is also set out.

(1) "Where any action, prosecution or other
proceedings is commenced against any
person for any act done in pursuance,
or execution, or intended execution,
of any law or of any public duty or
authority, or in respect of any
alleged neglect or default in the
execution of any such law, duty or
authority, the following provisions
shall have effect:

(a) The action prosecution or
proceedings shall not lie
or be instituted unless it

is commenced within one year after the act or default complained of or, in case of a continuance of injury or damage, within one year next after the ceasing thereof".

It is clear from the pleadings that more than one year had passed before the filing of the Writ of Summons.

Submissions were made from both sides, but for the purposes of this judgment and particularly its outcome I find it unnecessary to deal with that aspect of the trial. Having ruled that the shield afforded under the Public Authorities Protection Act is not available in certain instances, evidence was given for and on behalf of the Plaintiff and Defendant.

The Plaintiff's Case

The plaintiff was at the time of trial a male who described himself as a 48 year old wood carver and seller of costume jewellery. On Christmas day 1986 he left from Waterford for New Kingston where there should be a stage show at the New Kingston cinema. He arrived earlier than showtime and stopped in front of Wyndham Hotel and talked to a friend. While talking Detective Corporal Fogarthy, who was not known to him, emerged from the hotel in the company of a woman and beckoned to him. He went to Fogarthy who asked him if he (plaintiff) could purchase some cocaine for him. The plaintiff replied in the negative. The plaintiff said he left and went to New Kingston Cinema. It was not yet time for the show to begin so he returned to the vicinity of the Wyndham Hotel. On his return Detective Corporal Fogarthy and the woman again came out of the hotel. Again Fogarthy called him and asked him whether he could purchase cocaine for him, this time remarking that he knew that the plaintiff did not deal with "coke" but must know someone in the area who deals with it. Plaintiff told him he didn't know any such persons. This answer caused Fogarthy to become hostile and among other things threatened to take away his jewellery. The plaintiff said he told Fogarthy that he (Fogarthy) was "showing off" himself. Having thus said he turned and walked away. While walking he heard two explosions from behind him. He felt a burning pain in his right thigh. He saw blood flowing from that area and then he fell to the ground.

Fogarthy returned to the hotel followed by the woman. He was lying on the ground for sometime before a J.U.T.A driver one Mr. Caulie with the assistance of a lady put him inside his taxi, and took him to Kingston Public Hospital. Two other men also went with them to the hospital. While his wound was being dressed a Mr. Simpson asked him if he was the man police shot in New Kingston and what he was doing. He was admitted to that hospital. Some two or so days later while in hospital a policeman came, and having ascertained whether he was the person shot by police in New Kingston proceeded to handcuff him to his bed and at the same time informed him that he was charged with robbery. After about eleven (11) days in the hospital during which time he didn't see Fogarthy he was taken to Half Way Tree Police Station. It was while he was at Half Way Tree Police Station he heard that he was charged with having cocaine in his possession. He was taken before the Resident Magistrates' Court in Half Way Tree and was offered bail on 23rd March, 1987.

At a preliminary inquiry held into the charges of Robbery with Aggravation and Possession of Cocaine, Detective Corporal Fogarthy and one Lorna Burrowes gave evidence (Lorna Burrowes was identified as the woman who was in the company of Detective Corporal Fogarthy on 25th December, 1986.)

The plaintiff was committed for trial in the Home Circuit Court. On the 8th April, 1988 at the trial before Judge and jury a verdict favourable to the plaintiff was returned.

The plaintiff also gave evidence of his earnings and by consent medical certificates were tendered.

The evidence tendered for the defendant

Donald Fogarthy, a Detective Corporal of Police gave evidence for the Defendant. He testified that on the 25th December, 1986, he was leaving the Wyndham hotel at about 8:00 p.m. when he observed the plaintiff and a lady facing each other at a short distance away. He noticed that the plaintiff grabbed money from the lady's hand and as the lady attempted to retrieve it the plaintiff pulled a knife, flinched it open and held it up as if to injure the lady. He pulled his service revolver and fired two shots in plaintiff's direction. The plaintiff ran off and fell to the ground. Fogarty said he went to where plaintiff had fallen and identified

himself to him as a police officer. He took from his right hand an open ratchet knife and \$80 in U.S. currency notes.

In searching the plaintiff he found in his shirt pocket a parcel with white substance resembling cocaine.

Fogarthy further testified that Miss Burrowes who was present made report to him that the plaintiff had approached her and offered her drugs for sale. When she refused his offer he robbed her of her money.

He told the plaintiff that the white substance was cocaine and arrested and charged him for the offence. With the help of a taxi driver he took the plaintiff to the Kingston Public Hospital where he left him after giving certain instructions to a policeman at the hospital. He then took Miss Burrowes to Half Way Tree Police station where both of them made a report to a Detective Corporal Simpson who later charged the plaintiff for robbery with aggravation.

He also testified of the holding of the preliminary inquiry and the plaintiff's committal for and trial at the Home Circuit Court. He gave evidence at the trial but he said Miss Burrowes who lives abroad was not here for the trial. He said that the plaintiff was acquitted of the charges.

A Richard Clarke, taxi driver of some ten years also gave evidence in this action. He said that on the night of the incident he was on Knutsford Boulevard when on hearing something he went to the scene. He saw the plaintiff bleeding and the Policeman asking persons there to get the plaintiff to the hospital. The J.U.T.A persons present refused saying they did not want to get their cars "blood up", so he offered and took plaintiff, the police officer and a lady to Kingston Public Hospital.

Findings of Facts

On the plaintiff's evidence Detective Corporal Fogarthy emerged from the Wyndham hotel in the company of a woman and Fogarthy beckoned to him. I find this remarkable as the plaintiff testified that he did not know Fogarthy and no where in Fogarthy's evidence did he say that he knew the plaintiff. What is even more remarkable is that this police officer asked a stranger to purchase cocaine for him not once but twice within a short time.

I am constrained to conclude that this bit of the plaintiff's evidence seems to be at variance with the truth. Since it is the

plaintiff's refusal to purchase the cocaine coupled with his remarks which precipitated the shooting, I am not prepared to accept that evidence.

On the other hand Detective Corporal Fogarthy's evidence seems on a balance of probability the more likely.

Another portion of the plaintiff's evidence which leaves its veracity clouded in shadows is when he said that after he was shot several persons including J.U.T.A drivers looked at him but none came to his assistance. There were at least two persons there, who were well known to the plaintiff. Were these persons so indifferent to human suffering especially in the light of the plaintiff's account of the incident that they stood there and did nothing? Or is it that it is the account as given by Detective Corporal Fogarthy and Richard Clarke the more probable?

Having regard to the foregoing findings on the facts the plaintiff's case is doomed to failure.

The Law

Mr. Robinson submitted that the plaintiff failed to prove that there was a prosecution on a criminal charge which was determined in his favour. This failure he says is due to the non-production of a certified copy of the Court record of the criminal trial. In support he quoted from Halsbury's Laws of England, 4th Edition at paragraph 1357 reads:-

"Where it is necessary to prove the trial and conviction or acquittal of a person charged with an indictable offence, the record or a copy of it need not be produced, but it is sufficient to produce what purports to be a certificate, under the hand of the Clerk of the Court or other officer or other officer who has charge of the records of the Court of the indictment, trial, conviction or acquittal".

He also relied on Wills v. Voisin 1963 6 W.I.R. 50 where it was restated following the decision in Lea v. Charrington (1889) 5 T.L.R. 218 that the failure to put in the deposition in evidence was ground for non suiting the respondent.

I think that in the instant case there was evidence from both sides of the plaintiff's trial and acquittal thus rendering it unnecessary for further proof of that fact.

Turning now to the question of the action for malicious prosecution, it seems to me that there is a general belief that

once the person is acquitted on a criminal charge, this exposes the police to such action.

One of the charges on which the plaintiff was indicted and tried was for robbery with aggravation - committed against one Miss Burrowes. Detective Corporal Fogarthy testified that she made a report to Detective Corporal Simpson. Miss Burrowes testified at the preliminary inquiry but was off the island and did not give evidence at the trial.

The plaintiff in my opinion would have to show that the charging of the plaintiff for robbery with aggravation was a concoction between Miss Burrowes and Detective Corporal Fogarthy.

There is sufficient authority from the long line of decisions of the several Courts to demonstrate that where there has been a committal by a magistrate and the Director of Public Prosecutions has preferred an indictment which goes to trial before a jury there can be no want of reasonable and probable cause.

See Riches v. Director of Public Prosecutions 1973 WLR 1019
Herniman v. Smith 1938 A.C. 305.

Mr. Daly in his submissions relied on Glinski v. McIver 1962 1 AER 696 in particular Lord Denning's judgment at p.711.

In Glinski v. McIver the action was brought against a detective sergeant for malicious prosecution. The case was tried with a jury. One of the questions the judge left for the jury's consideration was: did the police officer honestly believe that the appellant was guilty of the offence of conspiracy to defraud? Their Lordship in the House of Lords held that the question should not have been left to the jury, because there was no evidence on which there could be founded a finding that the police officer did not honestly believe in his case.

In the instant case the plaintiff's evidence was unconvincing and it was the evidence tendered on behalf of the defendant which seemed more probable. The conclusion inevitably must be that on the facts accepted there was reasonable and probable cause.

For this and the foregoing reasons the action is dismissed and judgment is entered for the defendant with costs to be taxed if not agreed.