



[2022] JMSC Civ.34

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013HCV03198

BETWEEN **JASON KONG** **CLAIMANT**
AND **THE ATTORNEY GENERAL OF JAMAICA** **DEFENDANT**

Mr. Aon Stewart instructed by Knight Junor Samuels for the Claimant

Ms. Kristina Whyte instructed by The Director of State Proceedings for the Defendant

Heard: January 24 and 25, 2022 and March 25, 2022

Tresspass – Wrongful Detention – Negligence – Breach of Section 15 of the Constitution

CARR, J

Introduction

[1] Jason Kong averred that on the 27th day of April 2010 he was the victim of an unlawful entry upon his premises by police officers. He alleges that he was at his place of business when he received a call from his son. He left immediately and went to his residence located at 9 Shenstone Drive, Kingston 6. Upon his arrival a team of police officers was seen, he cannot recall if they showed him any documents. He was asked to permit them entry to his home and he initially refused, however the Inspector called the fire brigade and in an effort to prevent damage to his property he acquiesced. The police conducted a search of his residence and

seized a quantity of cigarettes and bottles of roll on, as well as a motor vehicle registered 8019 FL.

- [2] Despite repeated requests for the return of his vehicle he was unable to recover the same. He applied to the court and obtained an order for release on the 25th of May 2011. The order was served on the police between the 7th and 8th of June 2011. The vehicle was not released until the 10th of June 2011. The Claimant alleges that upon receipt he noticed damages to the vehicle. He now claims for trespass, wrongful detention, negligence and breaches of his constitutional rights under Section 15 (1) of the Constitution.

Issues

- a) Whether the police, on the 27th of April 2010, had reasonable or probable cause to enter upon the premises located at 9 Shenstone Drive Kingston 6 and detain motor vehicle registered 8019 FL, sticks of cigarettes and bottles of roll on.
- b) Whether the Defendant was negligent in the handling of the motor vehicle registered 8019 FL while it was in police custody, resulting in damage to the vehicle, thereby entitling the Claimant to an award in damages.
- c) Whether the actions of the police breached Section 15 (1) of the Constitution.

Submissions on behalf of the Claimant and the Defendant

Claimant

- [3] The Claimant in his particulars of claim listed the particulars of trespass as follows:
- a) Maliciously or without reasonable cause taking the Claimant's goods without reasonable or probable cause.
 - b) Maliciously and without reasonable or probable cause refusing to return the Claimant's goods.
- [4] In outlining the particulars of wrongful detention the following was pleaded:

- a) Failing, refusing and/or neglecting to heed the Claimant's unconditional requests for the return of his said motor vehicle.
- b) Maliciously or without reasonable or probable cause detaining the Claimant's motor vehicle.
- c) Maliciously or without reasonable or probable cause detaining the Claimant's motor vehicle for a further ten days, despite having been ordered by a court of competent jurisdiction to do so.
- d) Maliciously or without reasonable or probable cause detaining the Claimant's motor vehicle for a period of 58 ½ weeks.
- e) Maliciously or without reasonable or probable cause taking 54,980 sticks of cigarettes owned by the Claimant.
- f) Failing, refusing and/or neglecting to heed the Claimant's unconditional requests for the return of 401,250 sticks of cigarettes belonging to the Claimant.
- g) Maliciously or without reasonable or probable cause detaining the said 401,250 sticks of cigarettes until they were expired and no longer fit for sale.

[5] Counsel for the Claimant in his submissions joined the issue of trespass with that of wrongful detention. He submitted that the Claimant's evidence was that he did not see a warrant. Further the Claimant had receipts to prove his legitimate purchase of the items that were seized, which was dated some thirteen days prior to the search and seizure.

[6] It was also argued that there was no explanation given as to why the motor vehicle registered 8019 FL was seized as opposed to other vehicles that were on the premises that day.

[7] Counsel argued that the vehicle was released pursuant to a court order and that despite several requests for its return there was no immediate response by the authorities. It was therefore submitted that the police officers had no reasonable or probable cause for carrying out their actions on that fateful day.

Defendant

- [8]** In response Counsel for the Defendant argued that the officers had reasonable and probable cause to seize the goods as they were suspected to be counterfeit and uncustomed goods. It was further submitted that the police had reasonable and probable cause to seize the motor vehicle registered 8019 FL arising from the belief that it was criminal property under the Proceeds of Crime Act. The evidence when taken as a whole did not support a finding that the officers acted with malice and without reasonable or probable cause.
- [9]** Counsel also took issue with the pleadings. She submitted that the Claimant had failed to plead detainment and/or conversion. She submitted that it was open to the court to find that since neither was pleaded there should be no determination on that issue.
- [10]** It was also submitted that there was insufficient evidence to prove that the alleged damage to the motor vehicle arose from the negligence of the police. There was no description of the nature of the damage nor the condition of the vehicle before seizure and no documentary evidence was provided to substantiate the damage.
- [11]** Counsel also made submissions on the quantum of damages. It was asserted that there was no evidence of the value of the vehicle at the time of seizure nor its current value. As a result, no award can be made for detainment. The costs of the cigarette and roll was thrown at the court and must be disregarded. Additionally, the sums stated for loss of use of motor vehicle, cost of repair, assessor's report, cost for cigarettes and roll on are bald assertions and no award can be made as these special damages were not specifically proved.
- [12]** Finally, section 15(1) of the Constitution was not invoked as there was no attempt by the officers to acquire the property and they were acting in lawful execution of their duty.

Analysis and Discussion

Whether the police, on the 27th of April 2010, had reasonable or probable cause to enter upon the premises located at 9 Shenstone Drive Kingston 6 and detain motor vehicle registered 8019 FL, sticks of cigarettes and bottles of roll on.

[13] Trespass to goods is defined as an act of intentional and direct interference with another person's personal property/goods. In defence of such a claim a defendant can plead that the act was lawful. Additionally, in cases involving the police statute provides protection to the officer, as it is for the Claimant to prove that his/her actions were malicious or without reasonable cause. This principle is encapsulated in Section 33 of the Constabulary Force Act which provides:

“Every action to be brought against any Constable for any act done by him in the execution of his office, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done either maliciously or without reasonable or probable cause - and if at the trial of any such action the plaintiff shall fail to prove such allegation he shall be non-suited or a verdict shall be given for the defendant.”

[14] The crux of the matter therefore is whether the Claimant can show on a balance of probabilities that the action of the police officers on the 27th of April 2010 was malicious and without reasonable or probable cause. If they fail to satisfy the court as to that fact, then judgment should be entered for the Defendant.

[15] Counsel for the Claimant relied on the authority of **Hicks v. Faulknor**¹ to define the term reasonable and probable cause. Reference was made to the judgment of Hawkins J,

¹ (1878) QBD 167

“I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds, of the existence of the state of circumstances which assuming them to be true would reasonably lead any ordinary prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.”

[16] The essence of that statement is that a court will look at all the circumstances of the case to determine whether a reasonable inference can be drawn from proven facts to establish the basis for a charge.

[17] The Claimant filed a witness statement in the matter and he was cross examined. He indicated that on arrival at his residence that morning the officers requested entry to the premises which he refused. He stated that he asked to see a warrant but none was forthcoming.

[18] In cross – examination he was asked if he recalled that Inspector Roofe was a part of the police team that day, he agreed, he was then asked:

“Q. Isn’t it true that she showed you a search warrant?”

Answer: Yea

Q. After that you permitted the police to enter your house, correct?

Answer: Yes”

[19] It is plain, from that answer, that the Claimant was shown a warrant on the day in question. This is inconsistent with the evidence as set out in the witness statement. He was never re-examined on the point and as such that is the accepted answer. Mrs. Patricia Robinson Brown gave evidence for the Defendant and confirmed that Inspector Roofe executed a search warrant on the Claimant prior to the entry on to the premises. I find as a fact therefore, that a search warrant was executed on the Claimant on the day in question.

- [20] The Claimant however did not stop there. He averred in his particulars of claim that the officers maliciously and without reasonable cause ceased his goods and his motor vehicle. He further indicated that the goods were legitimately acquired and that he paid the requisite taxes for them. In cross-examination however he conceded that he was arrested and charged for possession of uncustomed goods.
- [21] He admitted that he had a duty as an operator of a wholesale to prove that customs duties had been paid on any imported goods. He further agreed that on the day of the seizure he did not provide any proof to the police team that duties were paid on the goods found at his house. Subsequently he was asked whether he provided proof after the seizure to the police and he said **“no me no provide any proof”**.
- [22] Among the exhibits that were agreed was a receipt from Papine Wholesale Liquor (**Exhibit 5**). The receipt bears a sum of \$2,514,664 and has items including cigarettes. There is no reference to this receipt in the witness statement of the Claimant. He did make mention in paragraph 11 that he had a receipt to prove his purchase of the items, however there was no specific mention of this document or its relevance to these proceedings. Despite exhibiting the receipt in these proceedings, the evidence is that he never presented them to the police.
- [23] On an assessment of the Claimant's case I find that the Claimant was shown a search warrant. The police, therefore, lawfully entered his premises. Upon entry a large quantity of cigarettes and roll on was found and seized. He provided no document to prove that he purchased the items legitimately and he did not provide any proof that he paid the requisite duties on the items. He was aware that he had a duty to satisfy the authorities that he had in fact paid duties on the items. On the Claimant's own evidence there was something suspicious about the presence of the quantity of cigarettes and roll on found on the premises that day.
- [24] The defence, through its witnesses, provided further details in support of their case. Mrs. Dionne Moore gave evidence that she was employed to the Jamaica Customs Department and was present on the operation at Shenstone Drive. It was

her evidence that she was a member of a team that went to the home of the Claimant as he was suspected of harbouring infringing goods.

- [25]** She made observations upon her entry to the premises. During the search she saw a variety of cigarettes including Newports, More Filters, Rothmans, Matterhorn, Marlboro, Craven A, Benson and Hedges and Kool. She also observed an extensive number of alcoholic beverages which were being hoarded. An excessive amount of cash was also seen, the cash comprised both local and foreign currencies. The monies were found in almost every room in various places. Based on her training she observed that the cigarettes did not conform with the labelling standards as stipulated by the Bureau of Standards. The Claimant was also unable to provide any customs documents relating to the importation of the seized goods. In light of her findings she indicated that she had reasonable grounds to believe that the goods were uncustomed goods and that they were smuggled into the country without the requisite duties and taxes having been paid.
- [26]** In cross – examination she was asked if she had made a request of the Claimant to provide proof of his purchase of the goods, she agreed that she did not. She however denied suggestions that the team did not have reasonable or probable cause for seizing the goods and she denied that the entry on the premises was without reasonable or probable cause.
- [27]** The evidence of Mrs. Robinson Brown was that she was a part of the search operation inside the house. She advised the court that the items were seized based on the suspicion that the goods were contraband and infringed the requirements of the Bureau of Standards and the Trademark Act and were uncustomed goods in breach of the Customs Act. The Claimant was arrested and charged for offences under the Trade Mark Act and the Customs Act.
- [28]** During the operation the vehicle registered 8019 FL was also seized on reasonable suspicion that it was criminal property. In cross – examination Mrs. Robinson Brown was asked the basis for her belief that the motor vehicle was criminal

property. She indicated that this was so because they found uncustomed cigarettes, and she believed that the vehicle was bought with money gained from uncustomed cigarettes and trade mark infringement. She denied that the motor vehicle was seized without reasonable or probable cause.

[29] The evidence of the defence witnesses as to the items and the cash found has been unchallenged. There is no question that the cigarettes found did not meet the standard required by the bureau of standards. There is also no evidence to refute the fact that based on the evidence of the officers the Claimant was charged for uncustomed goods. That the Claimant came to an agreement with the Customs agency and paid a penalty for the said uncustomed goods, is also irrefutable. Having regard to the evidence, there is no basis upon which the court could find that the officers who conducted the search and seizure acted without reasonable and probable cause.

[30] I find as a fact that the officers were armed with a search warrant on the day in question which was executed on the Claimant. He permitted them entry on to his premises, and following a search, a large quantity of cigarettes, roll on and cash was found on the premises. I accept the evidence of the two witnesses for the Defendant that based on their observations they had reasonable and probable cause to find that the items were in breach of the Customs and Trade Mark Act. I accept that their actions were not mired in malice and that they were within their authority to seize the said items.

[31] Given the quantity of cash found as well as the uncustomed items which were seized, I also accept that the officers had reasonable and probable cause to seize the motor vehicle registered 8019 FL. The preponderance of evidence upon which the officers relied, if accepted as true, would suggest that the motor vehicle was purchased using the proceeds of the unlawful activity of the sale of uncustomed goods. The seizure of the motor vehicle was therefore not unreasonable in the circumstances.

- [32] The Claimant has failed to prove on a balance of probabilities that the officers acted unlawfully or maliciously in the detention of the goods and the motor vehicle.
- [33] The finding that the officers did not act maliciously is sufficient to defeat the entire claim, however it is still useful to address the issue of detinue. I do not accept the submission that detinue was not specifically pleaded. The Claimant pleaded wrongful detention which is in fact detinue. It is the wrongful detention of the vehicle by the defendant, in combination with a demand for its return, and the refusal to do so, which constitutes detinue in law. The pleadings filed outline all the steps indicated even though the word detinue was not used. In the circumstances therefore, that submission is moot.
- [34] It is the undisputed evidence that the order of the court for the release of the motor vehicle was made on the 25th of May 2011. A letter was written to the Sub Officer in Charge of the Organized Crime Division (**OCID**) dated the 3rd of June 2011 advising of the order of the court. The vehicle was returned according to the evidence of the Claimant on the 10th of June 2011.
- [35] The Claimant must first show that a demand was made by him and that there has been a refusal of that demand after a reasonable time has been given for compliance. The demand must be unconditional and specific.
- [36] One element of detinue is that there must be categorical refusal and, *“if qualified for a reasonable and legitimate purpose, without expressing or implying an assertion of dominion inconsistent with the plaintiff’s rights, it amounts to neither detinue nor conversion. One does not always act unreasonably in refusing to deliver up property immediately on demand but may inquire first into the rights of the claimant.”*².

² The Law of Torts 8th ed. p. 58

- [37] The evidence of a demand for the delivery up of the motor vehicle was contained in a letter which was Exhibit 4. The contents of the letter are set out below:

“June 8, 2011

The Organized Crime Investigation Division

Shop 68

8-10 Ocean Boulevard

Kingston

To whom it may concern

Dear Sir/Madam:

**Re: The release of vehicle ordered by Justice Ellis on May 25th 2011 to
Jason Kong**

Reference is made to the captioned.

Kindly find enclosed the Order of Her Honour Justice Ellis which speaks for itself.

The order was made by Justice Ellis on the last court date – May 25, 2011 at the Resident Magistrate’s Court, Half Way Tree.

Yours faithfully,

Knight Junor and Samuels

- [38] The Formal Order of the court was attached to the letter and indicated that the motor vehicle was to be released immediately. The letter, apart from saying that the order speaks for itself is neither unconditional nor specific. It provides no details as to the date the vehicle is to be released nor does it indicate who the vehicle is

to be released to. It would therefore fail to meet the first test in a claim for detinue. In the event that this view is not accepted the law requires further that the Claimant must show that there is an “**unqualified, unjustifiable refusal to deliver.**”³

[39] In response to the “demand letter”, the Superintendent of Police for **OCID** sent a letter to the Financial Investigation Division, which was dated Tuesday June 7, 2011. The letter was marked for the attention of Mr. Stephens, and indicated the following:

Re: Release of 2006 Blue Toyota Ipsum Station Wagon motor vehicle registration plate #8019FI from your custody

Kindly cause the 2006 Blue Toyota Ipsum Station Wagon motor vehicle registration plate #8019FI to be released from your custody to Mr. Jason Kong of 31 East Queen Street, Kingston. This vehicle was seized on Tuesday April 27, 2010 at 9 Shenstone Drive, Beverley Hills, Kingston 6.

This request comes against the background of an order made by Corporate Area Resident Magistrate Her Honour Ms. Maxine Ellis, Resident Magistrate.

See copy of letter attached.

Thanks for your kind cooperation.

Senior Superintendent of Police
Organized Crime Investigation Division

³ Halsbury’s Laws of England, 3rd edition, Volume 38, page 64

[40] On this evidence there is nothing to indicate that there was an unqualified, unjustifiable refusal to deliver up the Toyota Ipsum. Having regard to the fact that the Claimant has not established the two elements necessary to establish a case of detinue, the claim would also fail.

Whether the Defendant was negligent in the handling of the motor vehicle registered 8019 FL while it was in police custody, resulting in damage to the said vehicle, and thereby entitling the Claimant to an award in damages.

[41] It is trite law that for a Claimant to prove negligence he must first establish that the Defendant owed him a duty of care, that the Defendant breached that duty, and that the result was damage.

[42] It is an accepted fact that the motor vehicle belonging to the Claimant was seized and kept in police custody up until the time of release. That the Defendant had a duty of care to the Claimant is also accepted, as having seized the vehicle, the Defendant had a responsibility to ensure that it was kept in good condition while in its custody. The sole issue on this point therefore is whether the Defendant breached that duty.

[43] The Claimant indicated in his witness statement that when he took possession of his motor vehicle on the 10th of June 2011 he noticed damages to it which he alleged were caused by the negligence of the Defendant's agents and/or servants. He does not go into details as to the damage he observed, and he does not speak to the condition of the vehicle prior to its detention. A report prepared by an assessor speaks to paint chips and scratches, paint which was oxidized, as well as a slight dent to the right rear door. Without information as to the condition of the motor vehicle prior to it being detained, it is difficult for a court to assess whether the damages described by the Claimant occurred before or after the vehicle was seized.

[44] There is also no evidence to support a finding that the damage was as a result of any act or omission of the Defendant's agents and/or servants. Neither is there a

nexus between the damage found on the vehicle and the Defendant's agents and/or servants.

- [45] The Claimant has failed to establish that the Defendants breached their duty of care or that there was any damage caused by the direct act of any servant and/or agent of the Defendant. This aspect of the claim must also fail.

Whether the actions of the police breached Section 15 (1) of the Constitution.

- [46] Section 15 (1) of the Constitution provides:

“No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under the provisions of a law that –

- a) Prescribes the principles on which and the manner in which compensation therefore is to be determined and given; and**
- b) Secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of –**
 - i) Establishing such interest or right (if any);**
 - ii) Determining the compensation (if any) to which he is entitled; and**
 - iii) Enforcing his right to any such compensation.”**

- [47] Simply put, the section provides for the protection of individuals from the compulsory acquisition of property without being afforded compensation. In this case there is no evidence to suggest that an attempt was made by the police to acquire the property belonging to the Claimant. The items were seized pursuant to the Customs Act as well as the Proceeds of Crime Act. In the event of a conviction or an application being made for forfeiture the items would be confiscated by the government and there would be no question of compensation. The section as pleaded by the Claimant therefore has no bearing on this matter.

Conclusion

[48] In summary the Claimant has failed to establish his claim on a balance of probabilities. The evidence, which is accepted, is that at the time of the detention of the goods and motor vehicle, the police were acting with reasonable and probable cause. There was no basis for a claim in negligence as the Claimant did not give details to support a finding that the Defendant breached their duty of care. Further the actions of the Defendant did not constitute a breach under Section 15 (1) of the Constitution.

[49] Having regard to the findings I make the following orders.

Order:

1. Judgment for the Defendant.
2. Costs to the Defendant to be agreed or taxed.