



[2018] JMSC Civ. 11

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. S-189/1996

BETWEEN	ELGIN SWAPP	CLAIMANT
AND	THE ATTORNEY GENERAL OF JAMAICA	1st DEFENDANT
AND	SUPERINTENDENT REGINALD GRANT	2nd DEFENDANT

IN OPEN COURT

Carlton Williams and Cavelle Johnston instructed by Williams, McKoy & Palmer for the Claimant.

Michele Shand-Forbes and Marlene Chisolm instructed by the Director of State Proceedings for the Defendants.

Heard: 8th, 9th & 10th June, 2009 & 30th January, 2018

False Imprisonment – Malicious Prosecution – Reasonable and Probable Cause – Whether the Captain of a ship is deemed to be in custody and control of the entire ship including its cargo.

Cor: Rattray, J.

[1] On the night of the 15th August, 1995, Elgin Swapp, the Captain of the M/V Pilar de Caribe was detained by police officers who boarded the said vessel in search of illicit drugs. The M/V Pilar de Caribe was owned and operated by CEA Lines and at the time of Captain Swapp's detention was docked at the Kingston

Harbour in Jamaica. It was a general cargo ship which carried approximately 1,500 tons of cargo.

- [2]** Seventeen persons in total were employed on the vessel which had three distinct departments; the deck department, the engine department, and the gallery or catering department. The deck and gallery departments were each headed by a chief officer, who also had a junior officer operating with him. The engine department, however, was the direct responsibility of the chief engineer.
- [3]** As Captain of the vessel, Mr. Swapp was responsible, inter alia, to ensure its safety, proper navigation, and prevention of pollution. Although the general safety of the vessel rested with the Captain, its safety during passage was dependent upon the proper functionality of the machines operating it, which was the sole responsibility of the chief engineer.
- [4]** In the evening of the 14th August, 1995, Captain Elgin Swapp, was advised for the first time of illegal drugs being on board the ship, in the presence of Peter Hargitay, the General Manager and Owner of CEA Lines, Fayyaz Ahmad and Ian Haughton. Mr. Haughton, to Captain Swapp's knowledge was an undercover special investigator with the Drug Enforcement Agency (DEA) assigned to the vessel as an oiler. As such, he was assured that Mr. Haughton would report the matter to the relevant authorities.
- [5]** The police authorities, on the afternoon of the 15th August, 1995, boarded the ship and searched the entire vessel for approximately three (3) hours in Captain Swapp's presence for illegal drugs, but without success. After their departure, Elgin Swapp contacted Wadi Crawford, a member of the Drug Enforcement Agency, to advise him of the search by the police and requested that he ascertain from Ian Haughton the precise location of the illegal drugs. On receipt of that information from Ian Haughton, Captain Swapp passed the information on to Wadi Crawford and instructed him to advise the police officers of the whereabouts of the drugs.

[6] On their return at approximately 10pm that night, the police officers specifically requested to search the engine room of the vessel. On this occasion, their search successfully located sixteen (16) wrapped packages of cocaine in one of the boilers, and Captain Swapp was subsequently detained for questioning. He was taken to the Narcotics Division at the Spanish Town Police Station, where he spent the night in the custody. In his evidence in chief, Captain Swapp stated “I was interrogated by Superintendent Reginald Grant, who repeatedly informed me that he would ‘lock me up’ ”. At the conclusion of that interrogation on the 16th August, 1995, he was charged with:

- (i) Possession of cocaine*
- (ii) Dealing in cocaine*
- (iii) Importing cocaine, and*
- (iv) Conspiracy to import cocaine.*

[7] He was tried in the Resident Magistrate Court (now Parish Court) for the Corporate Area, and was subsequently acquitted of the charges. In light of his acquittal, Captain Swapp instituted this action contending that he was falsely imprisoned and maliciously prosecuted by Superintendent Reginald Grant.

[8] Captain Swapp in his evidence consistently maintained that he did not have custody and/or control over any cargo on the said vessel, nor did he have any operational duties in the engine room. Those responsibilities, he indicated, fell within the purview of the Chief Officer and the Chief Engineer respectively.

[9] The Second Defendant Reginald Grant, now retired Assistant Commissioner of Police, gave evidence in his defence that in 1995, he was a Superintendent of Police. On the 14th August, 1995, he received a report of cocaine transaction on a ship named “M/V Pilar de Caribe” docked in the Kingston Harbour. At about 10am on the following day, he instructed Sergeant Edwards to board the vessel and to commence investigations.

- [10] Pursuant to those instructions, Sergeant Edwards along with his team boarded the vessel at about 4pm that day. They conducted an investigation of various sections of the vessel and searched for cocaine but to no avail. He subsequently reported the results of his investigation to his superiors before they departed the vessel. Later that night at about 7pm however, Sergeant Edwards and his team returned to the vessel to conduct a second search of the interior of the ship.
- [11] On this occasion, Sergeant Edwards met Captain Swapp. He told Mr. Swapp that they wished to search the boiler room and he escorted them there. While they were inside the boiler room, they concentrated their search on the Starboard boiler. Sergeant Edwards noted that the inspection cover of that boiler was very clean in comparison to the other boilers. At this point, Mr. Swapp informed them that the boilers were not operational and has been out of use for a while. They requested a wrench from the engineers to pull the inspection cover which was secured onto the boiler. After the bolts were pulled and the inspection cover removed, they searched the boiler to ascertain its contents. Aided by their flashlights, they observed plastic packages packed inside the boiler. Sergeant Edwards removed the packages and handed them to Detective Corporal Phillip Pingue. There were sixteen (16) packages in total.
- [12] Detective Corporal Pingue pierced one of the packages to examine its contents and found a white powdery substance. Holding up a small sample of the substance, Sergeant Edwards indicated to Elgin Swapp that the substance was cocaine. Mr. Swapp made no comment, and Detective Corporal Pingue subsequently contacted the Second Defendant to take charge of the investigation.
- [13] The Superintendent Grant and his team arrived at the vessel soon after. While there, he met Elgin Swapp and Sergeant Edwards who both escorted him to the engine room. He was shown sixteen brown packages; some of which had the word "KOOL" written on them, while others were marked with the letter "R". He ordered that the packages were to be taken into custody and Captain Swapp,

along with other members of the crew to be detained for questioning. The Second Defendant said further that he knew Ian Haughton. He took his statement the same day he laid charges against Mr. Swapp, that is, on the 16th August, 1995.

- [14]** Before the charges were laid against Captain Swapp, he underwent a question and answer session with the Second Defendant. He was asked thirty one (31) questions in total by Superintendent Grant and was given the opportunity to correct any of his answers before he signed the document. Following that session, criminal charges were laid against Captain Swapp. On the 18th August, 1995, the Second Defendant took the packages to the forensic laboratory to be examined. This was conducted by the Fitzmore Coates, the Chief Forensic Officer attached to the Government Forensic Laboratory.
- [15]** The results of Mr. Coates' examination showed that fifteen (15) of those packages contained cocaine hydrochloride, a central stimulant. The remaining package contained both cocaine hydrochloride and sucrose. He described the sucrose content as a carbohydrate. In all these packages, cocaine hydrochloride is a salt of cocaine. Mr. Coates compiled these results on the 21st August, 1995, and on that day, Captain Swapp was brought before the Court.
- [16]** Counsel for Captain Swapp, Mr. Carlton Williams submitted that his client had no knowledge of the presence of cocaine on board the vessel. He further submitted that his client's ignorance of the presence of cocaine was exemplified in various ways. These were: (i) He was informed by Ian Haughton on the 14th August, 1995 that cocaine was on board the vessel, (ii) He subsequently gave instructions that the police authorities were to return to the vessel to conduct another probe for the cocaine, and (iii) He assisted the police authorities in their probe on the vessel.
- [17]** Counsel argued that, on those facts, Captain Swapp's arrest and detention was done without reasonable or probable cause. Further, Counsel argued that there

was no evidence of investigation carried out by the police authorities to determine whether another member of the crew was responsible for the cocaine finding. He submitted that the police authorities ought to have satisfied themselves of Captain Swapp's guilt before they arrested him.

[18] There was unchallenged evidence, Counsel continued, that the boiler room was the responsibility of the Chief Engineer, who had a team of personnel who reported to him. He therefore argued that it cannot be concluded that Superintendent Grant honestly believed that there was a proper case against Elgin Swapp. The test he maintained is a subjective one and Superintendent Grant did not honestly believe that there was a proper case against his client.

[19] Counsel posited that no evidence was led as to what Superintendent Grant believed, and neither could his belief be reasonable inferred from the evidence. It was insufficient, Counsel argued, that the captain should be held responsible for the mere fact of the presence of illicit substances on the vessel. This was essentially the thrust of the Defendants' case.

[20] Counsel continued that it was clear from these facts that Superintendent Grant was not interested in prosecuting the true responsible person. He was focused on prosecuting Elgin Swapp. Counsel relied on the case of ***Glinski v McIver*** (1962) 1 AER, 696, with respect to dicta that "malice" also covers any motive other than a desire to bring a criminal to justice. He also placed reliance on ***Earl Hobbins v AG and Constable Mark Watson*** (2007), delivered on 29th January, 2007, and submitted that a police officer acted without reasonable and probable cause where he caused an innocent person to be prosecuted.

[21] Finally, Mr. Williams submitted alternatively that Mr. Swapp suffered unjustifiable and unlawful delay before he was brought to court. He was:

(i) detained on the 15th August, 1995,

(ii) charged thereafter on the 16th August, 1995, and

(ii) brought before the court on 21st August, 1995.

This period, counsel argued, was unreasonable and the Defendants are liable for false imprisonment and malicious prosecution.

- [22] Mrs. Shand-Forbes for the Defendants submitted that the police authorities had a statutory duty to arrest Mr. Swapp. She relied on sections 13 and 15 of **The Constabulary Force Act** and submitted that the police are under a duty to apprehend, without a warrant, any person they reasonably suspect of having committed an offence. She further relied on **Peter Flemming v Det. Cpl. Myers and The Attorney-General** (1989) 26 JLR 525, where it was held that: "false imprisonment arises where a person is detained against his will without legal justification."
- [23] Counsel argued that the police had legal justification to detain Mr. Swapp, as he was the captain of the vessel on which sixteen (16) packages of cocaine were found. Further, at the time of the discovery of those packages, the captain was present on the vessel. Since unlawful possession of cocaine is an offence punishable under the **Dangerous Drugs Act**, she contended that the police were under a statutory duty to arrest him and the arrest was therefore lawful.
- [24] Mrs. Shand-Forbes argued that Mr. Swapp, as captain, cannot limit his responsibility. He must be deemed to be in control and custody of the entire ship. She concluded this point by submitting that the police had reasonable and probable cause to arrest Mr. Swapp as the captain of the vessel. Counsel further argued that there was no evidence that the arrest of Mr. Swapp was actuated by malice, as there was no improper motive on the part of the Second Defendant when he arrested him.
- [25] She made the argument that Mr. Swapp's detention was not unreasonable and placed reliance on Peter **Flemming v Det Cpl. Myers & The Attorney General** (supra) to submit that the circumstances of the case must be assessed to ascertain the reasonableness of the time that elapsed. She submitted that in

these circumstances, Elgin Swapp was taken before the Court on the same day it was confirmed that the substances were cocaine.

[26] The Claimant Elgin Swapp sought damages for false imprisonment and malicious prosecution. The action of false imprisonment arises where a person is detained against his will without legal justification. That legal justification may be pursuant to a valid warrant of arrest or where, by statutory powers, a police officer is given a power of arrest in circumstances where he honestly and reasonably believes a crime has been committed: **see *Flemming v Det. Cpl. Myers & AG supra***, at page 527.

[27] It follows ineluctably that there can be no false imprisonment where there is a lawful arrest. It was undisputed that the police authorities in the present case arrested Mr. Swapp without a warrant. Indeed, Counsel for the Defendants argued that the police were justified in arresting Mr. Swapp, pursuant to the power conferred upon them by section 15 of ***The Constabulary Force Act*** which reads:

“It shall be lawful for any Constable, without warrant, to apprehend any person found committing any offence punishable upon indictment or summary conviction and to take him forthwith before a Justice who shall enquire into the circumstances of the alleged offence, and either commit the offender to the nearest jail, prison or lock-up to be thereafter dealt with according to law, or grant that person bail in accordance with the Bail Act.”

[28] The police officer’s power of arrest is statutorily held in check by section 13 of ***The Constabulary Force Act***. The relevant portion of that section reads:

“The duties of the Police under this Act shall be to... apprehend or summon before a Justice, persons found committing any offence or whom they may reasonably suspect of having committed any offence, or who may be charged with having committed any offence...”

The word ‘reasonably’, as used in section 13 of the statute imposes a subjective as well as an objective element. The test for the purposes of section 13 is therefore partly subjective and partly objective. See: ***The Attorney General v Glenville Murphy*** [2010] JMCA Civ. 50, paragraph 13, per Harris JA.

- [29] The question as to whether the Second Defendant had a genuine belief that Elgin Swapp had control and custody of the cocaine ought to be the first step in determining whether the arrest was justified. The issue as to the existence of an honest belief on the part of the Second Defendant of Mr. Swapp's guilt must ground the foundation of the subjective test.
- [30] If it is found that Mr. Swapp had control and custody of the cocaine, then no liability could be ascribed to the Defendants. However, if it established that the Police could not have had any genuine suspicion that he had control and custody of the cocaine, then the objective test comes into play. See: ***The Attorney General v Glenville Murphy supra***, paragraph 14 per Harris JA. Consideration would have to be given as to whether there were reasonable grounds for the police to have reasonably suspected that Elgin Swapp committed the offence.
- [31] Mr. Swapp's unchallenged evidence, which I accept, was that he was not aware of the packages of cocaine in the boiler room, although he was made aware of the presence of cocaine the day preceding the first search by the police authorities. In the case of ***Ortiz et al v The Police*** (1993) 45 WIR 118, cited by Counsel for the Defendants, the captain of the motor vessel Magellenes V was held to be in possession of cocaine found on board his ship. The learned Chief Justice at page 121 of the decision of the Court of Appeal of The Eastern Caribbean States opined:

"There can be no doubt that the comprehensive physical custody or control of a ship and her cargo is vested in the captain of the ship. The cocaine must therefore be deemed to have been in the physical custody or control of Captain Ortiz."

Counsel for the Claimant raised no challenge to this principle nor to the authority cited. I am therefore satisfied that Captain Swapp was in possession of the cocaine found aboard his vessel, not only in light of the **Ortiz** case, but also based on the evidence of Captain Swapp himself that he was aware that cocaine was aboard his ship, prior to either of the visits by the police officers.

- [32]** Additionally, Mr. Swapp's evidence was that he assisted the police where he could. However, he did not give any evidence as to how specifically he rendered that assistance to the police. Did he assist the police by manually removing objects which would impede their searches? Did he assist them by providing the tools necessary to aid their search? Did he notify the officers that he had recently been advised that the cocaine was on board the vessel, but was unaware of its actual location? At no time did Elgin Swapp attempt to contact Mr. Haughton while the police were searching the vessel so as to assist their investigations. He in fact gave no evidence of the extent of his assistance. I therefore do not accept his evidence that he provided any assistance to the police.
- [33]** He made no other attempts to personally contact the police authorities when he learnt of the presence of illicit substances on the vessel. The police authorities had no interaction with him prior to their arrival on the vessel, and had no idea of his position in relation to the packages. He made little to no interaction with them throughout their probe of the vessel, and made no response to the discovery though he was in the room with them. There was no action on his part to properly convey his lack of guilt to them.
- [34]** The police acted on information relating to the presence of cocaine on the M/V Pilar de Caribe and that the cocaine was located in the boiler room. They boarded the vessel and in fact found the said cocaine in that location. I am not satisfied on the evidence before the Court that the police acted unlawfully or maliciously in detaining members of the crew on that ship. I find therefore that his initial detention and arrest was lawful.
- [35]** However, although there was legal justification for his initial detention and arrest by the Second Defendant, false imprisonment may still arise subsequently. Where a person's period of detention was unduly lengthy or unexplained, an evidential burden would be shifted to the Defendants to show that the period was reasonable. A failure on the part of the Defendants to show that that period was

reasonable will result in a finding of false imprisonment against them. See ***Flemming v Det Cpl. Myers & The Attorney General*** *supra*.

[36] In ***Flemming v Det Cpl. Myers & The Attorney General*** *supra*, the appellant spent thirteen (13) days in custody before he was brought before the Court. No reason was posited in that case for the delay in putting him before the Court. The following are the findings of their Lordships:

Carey, P. (AG), at page 530:

“In the present case, no evidence whatsoever was led by respondents which explained the delay in putting the appellant before the court. Was the delay caused by further investigations? We know not... I would hold that the period of thirteen days before the appellant was placed before the court was unreasonable and accordingly the appellant’s claim for false imprisonment succeeds and he is entitled to damages thereon.”

...

Forte, J.A, at page 534:

“In my view, having regard to the evidence that the appellant was detained for 13 days and in the absence of any explanation for the apparently long delay, the court ought to have found on a balance of probabilities that the defendant had no reasonable or probable cause to detain him for such a long period of time, albeit that the initial arrest was indeed lawful”.

...

Morgan, J.A, at page 538:

“In this case no evidence whatsoever was offered to explain why the appellant was not taken before a Justice of the Peace or a Resident Magistrate within the period he was held... In my view, however, that it is sufficient for the appellant to state the length of time he was in custody before being brought before the Resident Magistrate and it is only if the tribunal considers the time unreasonable that the reason preferred for the delay will be taken into account. In my view the time lag is unreasonable. This period of detention then amounts to false imprisonment and no reasonable and probable cause has been shown.”

The principle to be gleaned from the speeches of their lordships as palpably clear is that there must be an explanation for the delay in putting an accused before the Court. Failing this, the period of detention will amount to false imprisonment.

- [37] In the case at bar, Elgin Swapp was detained on the 15th August, 1995 and was brought before the Court on the 21st August, 1995. Unlike **Flemming** above, Mr. Swapp's detention was not without reason. He underwent a question and answer session on the 16th August, 1995 and pursuant to that session, charges were laid against him. On the 18th August, 1995 the forensic officer received the packages for testing, and on 21st August, 1995, he confirmed the contents as containing cocaine. Mr. Swapp was brought before the Court on the same day this was confirmed.
- [38] In the circumstances of the present case, I am satisfied that there was sufficient reason for Mr. Swapp's detention. His period of detention was solely in furtherance of investigations being carried out by the police. He was properly brought before the Court on the 21st August 1995, when forensic tests confirmed that the packages contained cocaine. To my mind, had the police authorities detained him for any protracted period beyond that date, an argument could be advanced that the period could have amounted to false imprisonment.
- [39] In the present case, Elgin Swapp was promptly brought before the Court at the conclusion of the forensic tests. In those circumstances I find that his period of detention did not amount to false imprisonment. The other contention raised in this matter was whether the Second Defendant was guilty of malicious prosecution.
- [40] In the case of **Glinski v Mclver** (1962) 2 WLR 832 at page 856, Lord Devlin in his speech affirmed that at common law in order to succeed in an action for malicious prosecution:

"...the plaintiff must prove both that the defendant was actuated by malice and that he had no reasonable and probable cause for prosecuting..."

However, by virtue of section 33 of the **Constabulary Force Act** in Jamaica, a plaintiff suing a police officer for malicious prosecution as a result of an act done in the execution of his duty, is required to prove that the defendant acted *either*

maliciously *or* without reasonable and probable cause. The burden of proof in this regard rests solely on Elgin Swapp.

- [41] Did the police authorities, through the Second Defendant, act maliciously or without reasonable and probable cause in setting the law in motion against Mr. Swapp? Malice covers not only spite and ill-will but also any motive other than a desire to bring a criminal to justice: *Glinski v McIver supra*, per Lord Devlin page 696.
- [42] In my view, there is no evidence which establishes on Mr. Swapp's case, any spite or ill-will on the part of the Second Defendant. There was also no evidence to show that the Second Defendant acted with any motive other than to bring a suspected offender to justice. On the contrary, the evidence on behalf of the Defendants establish that the police authorities acted on the information of others by searching the boiler room on the vessel and in fact found cocaine in packages.
- [43] At the time of Mr. Swapp's arrest and during his detention, he was never ill-treated as the Claimant in *Flemming* above. There, the Claimant suffered from multiple assaults to the sole of his feet with a stone hammer by the police. In the present case, Mr. Swapp's complaint related to the cell in which he was confined in light of his height and that the Second Defendant repeated to him that he would lock him up.
- [44] To my mind, those issues without more would be insufficient to ground a belief of malice on the part of the police. Having regard to their seizure of cocaine on the vessel, it would be reasonable for the investigators to be suspicious that members of the crew and the captain alike, were responsible for it. The only reasonable intention of the Second Defendant that I have observed from the evidence presented, was an intention to bring a likely offender to justice.

- [45]** I am satisfied on the evidence before the Court that the police, through the Second Defendant, had reasonable and probable cause in arresting Mr. Swapp. Mr. Swapp as the Claimant has the burden of proving that the police authorities, through the Second Defendant prosecuted him without reasonable and probable cause.
- [46]** It is the act of “prosecution” and not of imprisoning or detaining as in false imprisonment which must have been done without reasonable and probable cause. The prosecution of Mr. Swapp, as testified by Superintendent Grant, was as a result of information received by him. Included in that information was the precise location of the cocaine, and a statement he took from the Drug Enforcement Agent, Ian Haughton.
- [47]** Apart from his imprisonment and subsequent acquittal, Mr. Swapp has advanced no evidence to show that the Second Defendant acted without reasonable and probable cause for setting the law in motion against him.
- [48]** In light of my findings in this matter, the claim for damages brought by Elgin Swapp against the Defendants is denied. Costs are awarded to the Defendants, such costs to be taxed if not agreed.