[2012] JMSC Civ 189

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2006 HCV 01625

BETWEEN	**KIRK LOFTERS**	**CLAIMANT**
A N D	**ATTORNEY GENERAL**	**1ST DEFENDANT**
A N D	**DEPUTY SUPERINTENDENT CLEON MARCH**	**2ND DEFENDANT**

Angela Cousins Robinson, Gilda Daley and Crishina Richards instructed by Keith Smith & Company for the Claimant

Harrington McDermott instructed by Director of State Proceedings, for the Defendants

***Trespass to goods – Detinue – Measure of Damages for trespass to goods – Power of Search and seizure – Absence of reasonable or probable cause* – Need to particularize Malice**

HEARD: May 24 & 25, November 29 & December 20, 2012

ANDERSON, K., J.

[1] This matter relates to a situation in which, on the 26th day of September 2003, the Claimant's motor vehicle, which is a 1992 Bluebird Sedan motor car, was seized by the police, allegedly for the purposes of safekeeping and without a warrant, in circumstances wherein that vehicle was then located/situated on private property and the owner of the vehicle, being the Claimant was, at that time, nowhere to be found. The Defendants have contended that at the material time, the Second Defendant had formed the view, based on

information which he had received, that the relevant vehicle may have been stolen as gunmen were seen on the premises where the vehicle was then situated. Those gunmen had allegedly hastily left that scene when the police arrived there. The owners of the home on said premises were away from that home at that time and it was believed by the Second Defendant that those owners were then, abroad.

[2] Based on all the information received by the Second Defendant, he formed the view that that car had never been seen at that premises, prior to that date – 26th September 2003.

[3] The Claimant has contended that the said vehicle's engine had broken down while he had been driving it on that day and he had therefore left the vehicle there. No evidence was given as to whether there was any particular reason as to why the Claimant chose to leave his vehicle at that particular location at the material time.

[4] All of the aforementioned constitutes undisputed evidence and arising from this Court's view that the same is credible, the Court accepts the same as being truthful. This Court also accepts as being truthful, the evidence as given to this Court by the Second Defendant, that he had directed officers then under his command, to remove the vehicle from said premises and detain the same for safekeeping, until the owner thereof, contacted him. The Second Defendant was unable to verify whether the car was stolen. According to his evidence, at the time when that vehicle was, as he in oral evidence given to this Court testified, 'detained - for safekeeping purposes', as distinct from 'seized' – the latter having been a phrase which had been used by him when he had signed to his Defence, certifying the truth thereof, this prior to such wording having been amended pursuant to an Order made very close to the end of the trial of this Claim, the Police Control's computer system was down and so it could not then be verified whether the car was stolen or not.

[5] Thus, the said vehicle was then, 'detained for safekeeping purposes' and this was done on the instructions of the Second Defendant, acting at the material time as the servant or agent of the Government of Jamaica, whose legal representative is the First Defendant and that was done, as aforementioned, without there being at any time, any search warrant or Court Order authorizing same.

[6] There is no doubt in this Court's mind, that the police in Jamaica, have no power under any statute, or at common law, to detain private property found on private premises, for safekeeping purposes. If there had existed reasonable grounds to believe, at the material time, that said vehicle was stolen, then a search warrant for same ought to have been obtained. If such had been done, then by virtue thereof, upon the execution of same, the vehicle could have been seized. In the absence of the existence of same, such detention for safekeeping, although perhaps morally justified, was legally unjustified and unjustifiable, since it cannot be forgotten, that the right of a person to freedom from unlawful search and seizure is an important aspect of a person's right to property and also, right to privacy. These are constitutional rights which have existed in Jamaica ever since 1962 and are rights which have existed at common law, even before then. If such rights are to be interfered with, then it is a Court or judicial officer that must authorize such interference and the precise extent thereof. This is the reason why a search warrant would be necessary, in the absence of a Court Order.

[7] In the circumstances, the Claimant has brought Claim against the Defendants for trespass to property. In his amended Particulars of Claim and also in his Claim form, it has never been alleged that at the time when said vehicle was taken away from the private premises for the purposes of safe-keeping, the Second Defendant was acting on his own behalf. As aforementioned, it is alleged that at the material time, he was acting as servant or agent of the Crown. In the circumstances, this Court must come to the conclusion and does so come, that the Second Defendant ought never to have been made a Defendant to this Claim, since if liability does exist, that liability must lie only on the shoulders – the very broad shoulders, of the First Defendant – being the legal representative of the Crown. As such, the Second Defendant is awarded Judgment in his favour, on the Claim.

[8] The fact that this Court has concluded that the Second Defendant, as a Crown servant or agent, acted unlawfully in having detained for safe-keeping purposes, as, when and how he did so, through other police officers then acting on his direction to them, can by no means, automatically result in a Judgment being rendered in the Claimant's favour, on the Claim for trespass to goods, as against the First Defendant.

[9] Trespass to goods is a tort that has long existed at common law, to provide compensation to persons, the possession of whose chattel has been directly interfered with. Trespass to goods is actionable *per se*, or in other words, without proof of any actual damage to the chattel. See paragraph 22 – 02 of the text **- Clerk and Lindsell on Torts**, 16th ed. [1989]. There is no doubt that in this particular case now at hand, the First Defendant has committed that which is recognized at common law, as constituting a trespass upon the Claimant's goods, being for the purposes of this Claim, a 1992 Bluebird Sedan motor car, which the Claimant had, as the admitted owner thereof, a right to the possession of. The unlawful detention of same, whether for safe-keeping or for any other purpose, amounts to a trespass to goods. The position would have being different if it had been the case, that the car belonged to a person who was, as of 26th September 2003, deceased and the same was then detained for safe-keeping by the executor of his estate. See **Kirk, Executor v Gregory and wife** – [1876] 1Ex. D. 55. That however, is not, by any means, resembling in any respect, the particular facts of this particular case now at hand.

[10] Even so however, the Claimant is still not, without more, entitled to Judgment against the First Defendant on his Claim for trespass to goods. This is because, by virtue of the provisions of Section 33 of the Constabulary Force Act, the Claimant must also establish that the relevant tort-trespass to goods was committed by the Crown servant or agent, being the Second Defendant, a police officer, either with malice or without reasonable or probable cause. If the Claimant fails to establish this, then Judgment must be entered in favour of the Second Defendant. See **Chong v Miller** – [1993] J.L.R. 80.

[11] If, as it was, malice was being alleged and seriously being pursued by the Claimant, then Particulars of Malice ought to have been set out in the Claimant's Amended Particulars of Claim. This is because the nature of an averment of malice is such that a party who may be required to respond to same for example, for the purposes of a Defence, would require particulars of same to be provided, so as to properly be in a position to respond to same. See Civil Procedure Rules (CPR) 8.9 and 8.9A. At this juncture however, it really matters not that the Claimant failed to provide such Particulars, since clearly, the Claimant is not seriously relying on that particular aspect of his averments. No evidence whatsoever has

been led from which malice on the part of the Second Defendant can even remotely be inferred. Furthermore, it was never once suggested to the Second Defendant while he was under cross-examination, that he had acted maliciously. Additionally, in closing arguments before me, the Claimant's counsel had submitted that the Second Defendant had acted, without reasonable or probable cause. Let us therefore next turn to that.

[12] In determining whether the Claimant acted without reasonable or probable cause, what this Court must consider is whether the Second Defendant had at the material time, honestly believed in a state of facts, which if it had existed, would have given him lawful justification to have acted as he did. On this point, see **Chong v Miller** (op.cit.) at p. 86.

[13] The Second Defendant has given evidence which this Court accepts as being truthful, that at the material time he believed that the property may have been stolen, this although as a matter of both fact and law, he had no reasonable legal basis for having so believed. Nevertheless, for the purpose of determining whether he acted without reasonable and probable cause at the material time, it is based on that which this Court determines as being his honest belief, that he must be judged. In any event though, the Second Defendant's honest belief will not avail him on this point, since, having believed either that the vehicle was stolen or even if not stolen, in any event, needed to have been safeguarded by the police at an appropriate police location, all that the Second Defendant could lawfully have done in order to remove said vehicle from the premises where it was then lodged, was to have obtained a search warrant for that vehicle, an incidental power to which, would have been the power to seize the same. Alternatively, the Second Defendant could have sought a Court Order authorizing him to detain the said vehicle for safe-keeping purposes, until the owner thereof could have been located. The Second Defendant did neither of these things and having failed to so do, acted unlawfully and as a servant or agent of the Crown, committed a trespass upon the Claimant's vehicle.

[14] The measure of damages in that regard, would be the economic value to the Claimant of the daily use of same, up until the time when he was, if he ever was (which is an issue in this case) authorized by the police to retrieve the same. See **Inverugie Investments Ltd. v Hackett** (P.C.) [1995] 1 W.L.R. 713. This Court will address this point later on in this

Judgment, since there is dispute as to when, if at all, the Claimant was actually authorized to retrieve the said vehicle.

[15] The Claimant has also, in his Claim, claimed against the Defendants for damages for detinue, this arising from the unlawful detention of his vehicle. From that which I have set out earlier on in this Judgment, it can clearly be recognized that the Crown did indeed detain the relevant vehicle without any lawful justification. That is not though, the end of the matter, insofar as the proof by the Claimant as against the First Defendant, of his Claim in detinue, is concerned. This is because, in order to prove a Claim in detinue, the Claimant must prove that there was an unconditional demand for the return of the relevant property to him and that there was a refusal, after a reasonable time to comply with such a demand. There must also be proven, that at the material time, the Crown's servants or agents, acted either with malice or without reasonable or probable cause. See **George & Branday v Lee** [1964] 7 W.I.R. 275, at p. 277, per Waddington, J.A. and **Hosiery v Brown** [1970] 1 Q.B. 195; and **Rushworth v Taylor** (1892) 3 Q.B. 699.

[16] The Claimant has contended throughout the trial of this Claim that he was never told to remove his vehicle from the Spanish Town Police Station. On the other hand, the Second Defendant, in his evidence as given while under cross examination, has stated that he 'returned' the vehicle to the Claimant on the 10th October 2003. By 'returned' it is clear to this Court that he meant that he had authorized the Claimant to retrieve the vehicle as of and from that date. This claimant's understanding of the term – 'returned', must be so, since it is not in dispute, that ever since the said vehicle has been in the possession of the Crown, through police personnel, it has never physically been in the actual possession of the Claimant. Furthermore, the Second Defendant testified under cross-examination, that the said vehicle could not have been released to the Claimant without there having been, prior thereto, a release form signed to by the Claimant. He went on to testify that no such release was ever signed – this presumably by him, so as to duly authorize the release of same, because the Claimant refused to sign the same. The Claimant accepts that the first time he saw the vehicle after it had been, as alleged, detained for safekeeping, was on the 10th October 2003, that being the same date when he went to the police station at Spanish Town and provided proof to then Deputy Superintendent March, that he was the lawful owner of

said vehicle. There is also no dispute that since then, several demands were made by the Claimant for the return of the vehicle. The Claimant's evidence though, is that to date, said vehicle has not been 'returned' to him.

[17] This Court does not accept the Claimant's evidence that the vehicle was not 'returned' to him on the 10th October 2003, as the Defendants have claimed. The Claimant's credibility was, to this Court's mind, successfully called into serious disrepute by Defence counsel, on more than one occasion during cross-examination. The Court is of the view that the Claimant refused to retrieve the vehicle and sign for the release of same, even when its return was offered to him on the 10th October 2003.

[18] Thus, this Court takes the view that the Claimant was without the use of his vehicle from the 26th September to the 10th October 2003 – that being fifteen (15) days. The Claimant would therefore be entitled to recover damages for loss of use for 15 days. The Claimant has claimed for loss of use of said vehicle for 84 weeks at $3,500.00 per week. This would be equivalent to $500.00 per day. This seems to this Court to be a reasonable figure and not to be one in respect of which documentary proof needs to have been given. See **Desmond Walters v Carlene Mitchell** – Supr. Ct. Civil Appeal No. 64/91. The Claimant is not however, entitled to recover for the entire value of the said motor car, or for loss of income as a salesman, since he could have hired either a taxi or a vehicle by rental during the relevant 15 day period. He did neither of these things. Instead, he chose to 'sit on his rights.' In the circumstances, he has failed to sufficiently mitigate his losses. Whilst the burden of proof rests on the Defendant to prove that the Claimant has failed to adequately mitigate his losses, to this Court's mind, the Defendant has discharged that burden, by means of the evidence on the matter of damages which was derived through evidence gathered during cross-examination of the Claimant. See **Geest plc. v Lansiquot** – [2002] 61 W.I.R. 212 and **McGregor on Damages,** 16th ed. 1997, at p. 190 – which state that the burden of proof lies on a Defendant to prove that a Claimant/Plaintiff has failed to adequately mitigate his loss.

[19] Thus, whilst there was no lawful basis for the detention of the vehicle by the Crown and there was request for the return of same, there has not been proven that there was a

failure to return the vehicle and its contents, to the Claimant within a reasonable time after such request was first made. That first request was made on the 10th October 2012. This Court concludes that the vehicle was 'returned' to the Claimant on that same day.

[20] Additionally though, this Court is not of the view, from the evidence as presented at trial, that an unconditional demand for the return of the vehicle was ever made by the Claimant. Correspondence written to the Commissioner of Police by the Claimant's attorney, which was admittedly written on the Claimant's instructions and also, copied to him, suggest otherwise. In the circumstances therefore, the Claimant's Claim for damages for detinue must fail.

[21] One final thing must be set out herein, on the issue of liability, and it is that it cannot be disputed that where a police officer comes upon that which appears to be a crime scene, that officer can seize, without the need for a warrant, any item which he or she believes may provide evidence in relation to that crime. That however, is not what happened in this case. According to the Second Defendant, he detained the vehicle for safe-keeping. He had, at the material time, no reasonable legal basis for believing that said vehicle was stolen. Even if gunmen were present around the vehicle sometime during the 26th September 2003, that could not, in and of itself, provide a reasonable basis for believing that the said vehicle was stolen.

[22] The Claimant has contended and indeed, given unchallenged evidence before this Court, that he had left items of clothing and other personal items in the car and that when he went to see the vehicle on the 10th October 2003, that pursuant to the permission which had been given to him to do so, by the Second Defendant, those items were missing and the vehicle had been damaged. He gave evidence that he basically estimated the value of each of those respective items of clothing and other personal accessories and same were respectively itemized in the Claimant's Amended Particulars of Claim and has estimated the aggregate value of same as being $86,800.00. This Court has no reason to disbelieve this particular aspect of the Claimant's evidence, which was unchallenged in every respect other than as to the aggregate quantification of value. This Court is satisfied that the aggregate value of the several items of clothing and other personal accessories is not unreasonable

and should be awarded to the Claimant as against the First Defendant, arising from the Claimant's Claim for damages for trespass to goods. This is because the Claimant had, even as early as 15 days after the relevant vehicle was detained by police personnel, permanently lost the use and benefit of any of those items as none of them were, as of the 10th October 2012, any longer in the Claimant's vehicle.

[23] This Court therefore Orders as follows:

1. Judgment on the Claimant's Claim against the First Defendant for damages for trespass to goods, is awarded to the Claimant.

2. Judgment on the Claimant's Claim against the First Defendant for damages for detinue, is awarded in favour of the First Defendant.

3. Judgment on the Claimant's Claims for damages for trespass to goods and detinue, as against the Second Defendant, is awarded to the Second Defendant.

4. The Claimant is awarded damages in the sum of $7500.00 (15 x $500) plus $86,800.00 - $94,300.00, plus interest at the rate of 3% with effect from the date of service of the Claim – 3rd July 2006 up until the date of this Judgment – 20th December 2012.

5. The Claimant shall be entitled to recover his motor vehicle, being a 1992 Bluebird Sedan licenced No. 2189DN, at any time within four weeks of the date of delivery of this Judgment. If the Claimant shall not exercise that option within that time period as stipulated, then the Crown shall be entitled to dispose of said vehicle by whatever means they may then choose to do so.

6. Each party shall bear their own costs with respect to this Claim.

7. The First Defendant shall file and serve this Order.

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Hon. K. Anderson, J.