IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007HCV01090

BETWEEN	**ROBERT SALMON**	**CLAIMANT**
AND	**SENIOR SUPERINTENDENT ELAN POWELL**	**FIRST DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**SECOND DEFENDANT**

Mr. Sean Kinghorn & Mrs. Nicole Gordon-Haynes instructed by Kinghorn & Kinghorn for the claimant

Mr. Garcia Kelly, Ms. Stacy McLean, Miss Sherry-Lee Bolton & Ms. Deidre Pinnock instructed by the Director of State Proceedings for the defendant

Heard: September 28 and 30, November 28, 2011 and February 15, 2012

SIMMONS, J.

[1] This matter arises out of the seizure of the claimant's motor vehicle registration number PA 8055 on the 22nd June 2006 along Aberville Avenue, Patrick City in the parish of St. Andrew by the first defendant. At that time the claimant was a member of the Jamaica Constabulary Force as was the first defendant who was acting as an agent or servant of the Crown.

[2] On the 23rd June 2006 the claimant was charged under section 63 (8) of the Road Traffic Act for operating contrary to the terms of his road licence. By letter dated the 27th June 2006 the claimant through his Attorneys-at-law requested that the police return the vehicle. The said vehicle was released by order of the court on the 18th July

2006, some thirty days after its seizure. On the 9th January 2007 the charges were dismissed for want of prosecution.

The Claim

[3] On the 8th March 2007, the claimant filed an action in which he claimed damages for malicious prosecution and the wrongful seizure and/or detention of his vehicle. It was alleged that on the day in question the first defendant acted maliciously and/or without reasonable and/or probable cause. Special Damages were also claimed as follows:-

i.	Loss of earnings for thirty days ($20,000.00 per day)	$600,000.00
ii.	Legal fees	$120,000.00
iii.	Storage fees	$ 6,900.00

The Defence

[4] The defendants denied that the first defendant acted maliciously and/or without reasonable and probable cause and maintain that the claimant's vehicle was seized in accordance with the provisions of the Road Traffic Act. It has not been denied that written requests were made for the return of the vehicle prior to the 18th July 2006 when an order was made by the court.

[5] The defendants made no admission in relation to the particulars of special damages.

Issues

[6] The issues which arise are:-

i. Whether the first defendant acted without reasonable and/or probable cause when he charged the claimant for operating contrary to the terms of his road licence;

ii. Whether the first defendant acted without reasonable and/or probable cause when he seized the claimant's motor vehicle; and

iii. Whether the defendant had the authority to release the claimant's vehicle at the time when the request was made for its return.

Claimant's evidence

[7] The claimant's evidence is that on the day in question at about 7:30 a.m. he and his mechanic Mr. Linton Brown were travelling in his mini bus en route to the garage, when he was stopped by the first defendant on Benbow Crescent. He stated that the mini bus was not being operated as a public passenger vehicle as his road licence had expired from the 31st March 2006. He also stated that he and Mr. Brown were the only persons in the vehicle. He indicated that an application for the renewal of the licence had been made and he was in possession of a receipt from the Transport Authority evidencing payment of the relevant fees.

[8] The vehicle was seized and taken to the pound at Lyndhurst Road and charges laid against the claimant. On the first court date, he and the first defendant were bound over to attend on a subsequent date. The first defendant failed to attend court on three other occasions and the matter was ultimately dismissed for want of prosecution. The vehicle was returned to the claimant by order of the court some thirty days after its seizure.

[9] In cross examination Mr. Salmon agreed that the receipt was not equivalent to a road licence and as such did not permit the operation of the vehicle as a public passenger vehicle. He also stated that he was licensed to operate a rural stage carriage between Point Hill and Kingston and that Duhaney Drive and Half Way Tree were not on his route. The claimant denied that the first defendant had stopped him in Half Way Tree prior to June 2006. He disclosed that the first defendant had spoken to him on a previous occasion about operating a public passenger vehicle whilst being a member of the Jamaica Constabulary Force. The claimant's road licence was renewed with effect from the 27th June 2006.

Defendants' evidence

[10] Evidence was given by Senior Superintendent Ealan Powell, Andrine Jackson-Scott, Alethia Dennis and Leophre Lindo.

[11] Senior Superintendent Powell stated that on the day in question whilst on a special operation in the Washington Boulevard area, he saw a minibus and signaled for it to stop. It did not and he gave chase. The bus stopped in the vicinity of a garage and he asked the passengers to disembark. They complied. Whilst proceeding towards Duhaney Park he saw a Toyota Coaster registration number PA 8055 coming towards him. He observed that the vehicle, which was being driven by the claimant had stopped to pick up the passengers from the other bus.

[12] The first defendant did not recall whether he asked to the claimant to produce his road licence and stated that his knowledge of the claimant's route was based on information that he had obtained previously. He also stated that he had warned the claimant on previous occasions with respect to his operating contrary to the terms of his road licence. In particular, he referred to an occasion when he spoke to the claimant in his office about the same subject and the claimant's failure to provide an explanation for operating in an area which was not covered by his road licence.

[13] With respect to the seizure of the vehicle the first defendant indicated that his action was lawful as the claimant was charged under sections 63 (8) and (15) of the Road Traffic Act. He also stated that he had no power to release the vehicle in the absence of an order from the court.

[14] Senior Superintendent Powell confirmed that he written a statement in relation to the matter which was before the Traffic Court but gave no explanation for his failure to attend court to prosecute the matter.

[15] Mrs. Andrine Jackson-Scott the Manager for the Research and Statistics Department at the Transport Authority gave evidence pertaining to the "*via"* points and the stopping points for the Point Hill to Kingston route. These points are noted on each road licence. The area in which the claimant's bus was seen is not one of those points.

[16] The witness confirmed that the claimant's Rural Stage Carriage Licence for the Point Hill to Kingston route issued on the December 16, 2003 had expired on March 31, 2006. She stated that a subsequent licence was issued to him for the period June 27, 2006 to March 31, 2010. Mrs. Jackson-Scott also indicated that applications for renewal are to be submitted from February 15 of the year in which the licence expires and that renewal is not automatic. The receipt it was stated did not operate as a road licence and the claimant's application for renewal was not submitted until the 23rd June 2006.

[17] In cross examination, a manual receipt dated the 26th May 2006 was produced and admitted in evidence as exhibit 4. The witness explained that the 23rd June 2006 was the date entered in the Transport Authority's system although payment was received on the date of the issue of the manual receipt. She also indicated that the renewal process is started early to ensure completion by the 31st March as it was not the policy of the Authority to allow persons to operate before the date of renewal.

[18] Miss Alethia Dennis who was a Deputy Clerk of the Court assigned to the Traffic Court in 2006 gave evidence in relation to the proceedings before that court. She stated that the matter was first listed on the 18th July 2006 and on that date, the court made an order for the return of the bus to the claimant. The matter was set for trial on the 10th October, 16th November 2006 and the 9th January 2007. On the 10th October the defendant was not properly dressed and on the 16th November he was absent and a bench warrant was ordered and stayed until the 9th January 2007.

[19] In cross examination, she stated that on the 27th July 2006 a subpoena was issued for the first defendant to attend court on the 10th October 2006. The endorsement indicates that it was personally served on the 15th August 2006. On the 10th October the matter was adjourned to the 23rd October 2006 when a subpoena was issued for the first defendant to attend court on November 16, 2006. The endorsement indicates that it was personally served on the 2nd November 2006.

[20] Mr. Leophre Lindo, retired Inspector of Police gave evidence that he received two summonses from Inspector Coubrie for service on the claimant in relation to the matter

which was before the Traffic Court. The said summonses were served by him on the 14th July 2006.

Defendants' submissions

[21] Mr. Kelly submitted that the issue of credibility is critical to the determination of this matter. The court's attention was directed to those aspects of claimant's evidence in which he denied being absent or improperly dressed for court and the inconsistencies in his evidence as to whether he could operate on the basis of the receipt for the road licence.

[22] With respect to the failure to disclose the statement in relation to the case that was presented to the Traffic Court, counsel asked the court not to draw any negative inference against the first defendant as it was not his duty to make that disclosure and accepted full responsibility for the matter.

[23] With respect to the claim for malicious prosecution, counsel relied on the case of ***Keith Nelson v. Sergeant Gayle and the Attorney General of Jamaica*** Suit No. C.L. 1998/N 120 delivered on the 24th April 2007 in which Brooks, J. set out the criteria required to prove this tort. He said:-

> *"In an action for malicious prosecution, in order to succeed, the claimant must prove on a balance of probabilities the following:*
>
> *(i) That the law was set in motion against him on a charge for a criminal offence;*
> *(ii) That he was acquitted of the charge or that otherwise it was determined in his favour;*
> *(iii) That when the prosecutor…set the law in motion he was actuated by malice or acted without reasonable or probable cause;*
> *(iv) That he suffered damage as a result."*

[24] It was submitted that in order for the claimant to succeed he must meet all of the above criteria. With respect to the standard to be applied by the court in its assessment

of whether or not there was reasonable and probable cause, counsel referred to the judgment of Lord Devlin in ***Glinski v. McIver*** [1962] 2 WLR 832 at 857 where it was stated:

> *"This does not mean that the prosecutor has to believe in the probability of conviction….The prosecutor has not got to test the full strength of the defence; he is concerned only with the question of whether there is a case fit to be tried. As Dixon J. (as he then was) put it, the prosecutor must believe that "the probability of the accused's guilt is such that upon general grounds of justice a charge against him is warranted'.*

[25] Counsel also referred to the definition of the term reasonable and probable cause in ***Hicks v. Faulkner*** (1881-1882) 8 Q.B.D. 167 at 171. Hawkins, J. stated :

> *"There must be: first, honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of circumstances which led the accuser to that conclusion; thirdly, such secondly-mentioned belief must be based upon reasonable grounds; by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as amount to reasonable grounds for belief in the guilt of the accused."*

He submitted that whilst it could not be disputed that the law was set in motion by the first defendant and that the matter was determined in the claimant's favour, the claimant had failed to establish that the first defendant was either actuated by malice or in the absence of reasonable or probable cause. In this regard he referred to the first defendant's evidence that he saw passengers in the claimant's bus and urged the court to find that he was a witness of truth and that he had an honest belief that the claimant was in breach of his road licence. In those circumstances it was submitted that unless the claimant proves that he was in possession of a road licence at the material time, his claim should fail. Reference was also made to ***section 13 (2)*** of the ***Transport Authority Act*** which gives to a Constable the power to seize a vehicle that is being

operated as a public passenger vehicle without a licence or contrary to the terms of such a licence.

[26] With respect to the claim in detinue, it was submitted that the detention of the claimant's vehicle was not unlawful as it was seized under ***section 13*** of the ***Transport Authority Act***. It was argued, that in order for a claim in detinue to succeed the claimant must have an immediate right to possession and in this case there was no such right as the case was before the court. It was stated that for this reason, the officer despite the request for the return of the vehicle had no power to accede to that request. In support of this assertion, counsel relied on the case of ***B & D Trawling limited v. Cpl. Raymond Lewis and others*** Suit no. C.L. 2001/B 015, delivered January 6, 2006. In that case two vessels were seized by the defendants under the ***Fishing Industry Act***. There was no application to the court for the release of their release although a demand had been made to the Commissioner. It was held that the matter was out of the Commissioner's hands and the claimant ought to have taken steps to mitigate his loss.

[27] With respect to special damages it was submitted that based on ***Murphy v. Mills*** (1976) 14 J.L.R. 119 the claimant was required to specifically prove such damages and had failed to do so. Counsel argued that this was not a case such as ***Desmond Walters v. Carlene Mitchell*** (1992) 29 J.L.R. 173 in which the court adopted a less strict approach based on the particular circumstances. Reference was also made to the case ***Owen Thomas v. Constable Foster and the Attorney General of Jamaica*** suit no. C.L. 1999/T 095 delivered on the 6th January 2006, in which Sykes, J. examined the local case law in this area in some detail. In that case the claimant unlike the push cart vendor in ***Desmond Walters*** paid income tax and was therefore found to have kept a proper record of his earnings. The learned Judge was of the view that the issue of whether or not the requirement of strict proof should be relaxed is dependent on the circumstances of each case. He stated:-

> *"In my view justice demands that the claimant, in this case, strictly proves his claim for special damages if the circumstances suggest he is able to do so. I do not share the view that judges ought to conjure up some appropriate figure in the*

name of justice where the claimant has a legal obligation to prove his case and fails to do so without satisfactory explanation."

It was argued that the claimant failed to specifically prove his loss of earnings and the sum claimed for legal fees and as such no award should be made in respect of those items. Counsel accepted that in light of the documentary evidence which was presented the sum paid as storage fees of six thousand nine hundred ($6,900.00) had been proved. It was also submitted that in these circumstances a reasonable daily rate of earnings would be $5,000.00 for 14 days. The court was also asked to bear in mind the claimant's refusal to state whether or not he paid taxes. It was submitted that legal fees of $30,000.00 would be reasonable in the circumstances.

[28] With respect to general damages it was submitted that the sum of one hundred thousand dollars ($100,000.00) would be appropriate based on the cases of ***Devon White v. Attorney General*** claim no. 2006HCV0787, delivered on April 2, 2009, ***Maxwell Russell v. Attorney General of Jamaica*** claim no. 2006HCV4024, delivered on the 18th January 2008 and ***Conrad Gregory Thompson v. Attorney General of Jamaica*** claim no. 2008HCV02530, delivered on the 31st May 2011.

Claimant's submissions

[29] In relation to the claim for malicious prosecution, counsel pointed out that there is no dispute that the charges against the claimant were instituted by the first defendant and that the matter was determined in his favour. With respect to whether the first defendant acted either maliciously or without reasonable or probable cause, the court's attention was directed to the summons in the matter which came before the Traffic Court. It reads:-

"Being the holder of a Road Licence to operate Stage Carriage registered PA 8055 to operate route Kingston to Point Hill did use the said vehicle along Duhaney Drive in the parish of St. Andrew willfully failed to comply with condition attached to the said licence in contravention of section 63 (8) of the Road Traffic Act.

Contrary to section 63 (15).”

Reference was also made to section 63 (15) of the Road Traffic Act which states:-

> *“If any person uses a public passenger vehicle or causes or permits it to be used in contravention of this section or, being the holder of a road licence of any class, willfully or without reasonable cause fails to comply with any of the conditions attached to that licence he, subject to subsection (16), is guilty of an offence and is liable on summary conviction before a Resident Magistrate to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding three months or to both such fine and imprisonment and in respect of a second or subsequent conviction the court may, upon application by the Transport Authority revoke the road licence.”*

[30] With respect to the seizure of the claimant’s vehicle counsel referred to section 13 (2) (a) (i) of the Road Traffic Act which states:-

> *“(2) An Inspector or a Constable shall have power-*
>
> *(a) To seize any vehicle which-*
>
> *(i) is licensed as a stage carriage, express carriage or route taxi and is not being operated on the route for which it is licensed to operate;”*

[31] It was submitted that in order for the defendants to escape liability it must be established that the first defendant had an honest belief that the claimant may be guilty of the offence charged. In support of this point he referred to ***Greg Martin v. Detective Sergeant Halliman and the Attorney General*** Claim No. 2007HCV01096 delivered on September 19, 2011 and ***Glinski v. McIver*** (supra).

[32] Mr. Kinghorn argued that since the claimant was not in possession of a road licence there was no basis in law to charge the claimant under the above section or to have seized his vehicle as even on the defendants’ case, the claimant was not licensed at the time when the charge was laid. In this regard, he directed the court’s attention to

the evidence of Mrs. Andrine Jackson-Scott which confirmed that the defendant was not licensed for the period April 1 to June 26 2006.

[33] Counsel also submitted that had the first defendant carried out investigations he would have discovered that the claimant had no road licence at the time when the offence was allegedly committed. In those circumstances, it was argued, he would not have charged him with operating contrary to the terms such licence. Reference was also made to the evidence of the first defendant in which it was stated that he saw passengers going into the claimant's bus and formed the honest belief that the claimant was operating contrary to the terms and conditions of the licence. Mr. Kinghorn submitted that in the particular circumstances of this case, the first defendant's honest belief was not based on reasonable grounds.

[34] Mr. Kinghorn also asked the court to infer from the first defendant's failure to attend court after the first day, that he had no reasonable and probable cause to charge the claimant or seize his vehicle. He also urged the court to find that based on the discrepancies in the evidence as to how the first defendant came to have charged the claimant that he had no legitimate basis for laying the said charge.

[35] Counsel proceeded to address the issue of malice. He referred to the case of ***Flemming v. Myers*** (1989) JLR 525 in which Lord Devlin's definition of malice in ***Glinski v. McIver*** (supra) was adopted by the court. It is as follows:-

> *"For the purpose of malicious prosecution "malice" covers not only spite and ill-will but also any motive other than a desire to bring a criminal to justice."*

He then referred to paragraphs 7 and 8 of the first defendant's witness statement as evidence that the first defendant may have been motivated by some other reason than his desire to bring a criminal to justice. In those paragraphs evidence was given that the first defendant had warned the claimant "at least five times about operating his bus contrary to the terms and conditions of his road licence" and that he had spoken to him

about the matter in his office. Counsel also asked the court to consider that evidence in the context of the first defendant's failure to attend court to prosecute the matter.

[36] With respect to the claim in detinue, it was submitted that the defendants had failed to show that the first defendant's detention of the vehicle was grounded in law. He argued that the burden of proof is on the defendants to justify the seizure once it was alleged by the claimant that their actions were unlawful. It was further submitted that if the court finds that the charge was misconceived the substratum of the seizure would also fail. In this regard the court was reminded that although the defendants have stated that the claimant did not have a road licence at the time of the alleged offence he was never the less charged with a breach of the conditions of such a licence.

[37] With respect to the issue of whether or not a demand was made for the return of the vehicle counsel directed the court's attention to paragraph 6 of the defence which contains an admission that the demand was in fact made.

[38] With respect to the measure of damages for detinue, counsel submitted that the failure of the claimant to provide documentation in support of his claim is not fatal. He referred to the case of ***Strand Electric and Engineering Co. Ltd. v. Brisford Entertainments Ltd.*** [1952] 1 All E.R. 796 in which the Court of Appeal held that the owner of the goods was entitled to a reasonable charge for their hire from the date of detention to the date of release. Reference was also made to ***Workers Savings and Loan Bank v. Horace Shields*** Supreme Court Civil Appeal 113/98 delivered on December 20, 1999 in which Harrison, J.A. stated that damages in a claim for detinue are neither special or consequential and do not require strict proof.

[39] In the absence of any documentary evidence counsel submitted that the claimant should be awarded $14,500.00 per day for twenty two days (28th June - 19th July 2006) which totals $319,000.00 for loss of earnings. This was stated to be a median figure between the claimant's evidence that he earned up to twenty one thousand dollars ($21,000.00) per day and that given by Miss Andrine Jackson-Scott that the net projected earnings for that route would be approximately seven thousand six hundred and forty six dollars and eighty cents ($7646.80).

[40] With respect to malicious prosecution, it was submitted that based on the case of ***Greg Martin v. Detective Sergeant Halliman and the Attorney General of Jamaica*** (supra) the sum of one million dollars ($1,000,000.00) would be an appropriate award.

[41] Counsel also argued that the sum claimed for legal fees was both necessary and reasonable.

Malicious prosecution

[42] There being no dispute that proceedings were commenced against the claimant and that they were determined in his favour, the only issue which needs to be resolved is whether the first defendant acted maliciously or without reasonable or probable cause when he instituted the said proceedings in the Traffic Court. The resolution of this issue lies in the answer to the question of whether the claimant could properly have been charged with the particular offence at that time.

[43] The claimant was charged under section 63 (15) of the ***Road Traffic Act.*** The particulars of the offence are that he was operating along Duhaney Drive which was not a part of his designated route. This presupposes that he was the holder of a road licence and was operating contrary to its terms.

[44] In ***Greg Martin v. Detective Sergeant Halliman and the Attorney General*** Sykes, J. in reference to ***Flemming v. Myers*** said:-

> *"Flemming's case has authoritatively interpreted section 33 of the Constabulary Force Act. To succeed in a claim for malicious prosecution, the claimant must prove that the prosecution was either malicious or without reasonable and probable cause. It is well established in Jamaica that a police officer, while not required to believe that a person is guilty, must have an honest belief founded on reasonable grounds that the person charged or about to be charged may be guilty of the offence charged or about to be charged…There must be the actual belief by the police officer and that belief must be reasonable."*

His lordship went on to quote Lord Denning in ***Glinski v. McIver:***

"Honest belief in guilt is no justification for a prosecution if there is nothing to found it on. His belief may be based on the most flimsy and inadequate grounds, which would not stand examination for a moment in a court of law. In that case he would have no reasonable and probable cause for the prosecution. He may think he has probable cause, but that is not sufficient. He must have probable cause in fact."

[45] There is no dispute that on the 22nd June 2006 the claimant was not in possession of a road licence. The question then arises as to the basis on which the first defendant charged the claimant with the particular offence. Did the first defendant have sufficient information on which ground the offence? The first defendant's evidence in relation to this issue is that he did not recall whether or not he asked the claimant to produce his road licence that morning. The witness also gave evidence that he had had previous discussions with the claimant with respect to his operating in contravention of the terms of his licence and also the potential conflict with his employment as a police officer.

[46] Having assessed this evidence it is reasonable to infer that the first defendant did not examine the claimant's road licence or request it's production before laying charges in respect of the alleged breach of the said licence. I have also found that the first defendant's belief that the claimant had committed an offence was based solely on his prior knowledge of the claimant's operations.

[47] In light of the fact that the claimant was not in possession of a road licence, could he properly be charged with operating contrary to its terms? The answer to this question must be in the negative. The issue of whether the first defendant had an honest belief in the guilt of the accused must be considered in the context of his failure to ascertain whether the claimant was the holder of a road licence and his subsequent failure to prosecute the matter before the Traffic Court. These two factors when considered together raise serious doubt as to whether he had an honest belief in the guilt of the claimant. I have found that the first defendant's belief in the guilt of the claimant was not

founded on reasonable grounds and as such he acted without reasonable or probable cause when he laid the charges against him and seized his mini bus.

Detinue

[48] Having found that the seizure of the claimant's vehicle was unlawful the issue of damages must now be considered. Where a claim is made in detinue, it must be proved on a balance of probabilities that the claimant's chattel was wrongfully taken and not returned within a reasonable time of a demand being made by him. In the case of conversion, there must also be an intention to exercise control in a manner that is inconsistent with the claimant's ownership of the chattel. In ***Smith v. Ingram & anor.*** Claim No. 2005HCV00723, delivered on the 28th September, 2009 Mangatal, J. stated that *"…detention as a remedy has largely fallen by the wayside in most cases."* The learned judge went on to quote ***Bullen & Leake & Jacob's Precedents of Pleadings,*** 13th edition, page 953. The passage reads:-

> *"The distinction between detinue and conversion used to be that with the former mere possession adverse to the rights of the person entitled to possession was sufficient and it was unnecessary to show any intention to deal with the goods in a way inconsistent with those rights. In practice, however, a demand by the person with possessory title followed by an unjustified refusal to delivery up was treated as a conversion, thus rendering detinue largely otiose before its abolition in 1977."*

[49] In ***George and Branday Ltd. v. Lee*** (1964) 7 W.I.R.275, Waddington, J.A. said that *"the gist of the cause of action in detinue is the wrongful detention, and in order to establish that, it is necessary to prove a demand for the return of the property detained and a refusal, after a reasonable time to comply with such demand".*

[50] It is not disputed that the claimant made oral as well as written demands for the return of the vehicle. The written demand was addressed to the Commissioner of Police and there is no evidence that there was any response to that correspondence. It is also not disputed that the claimant is the owner of the vehicle and that at the time it was in

the possession of the State. Counsel for the defendants has submitted that the claimant has failed to establish his claim in detinue as the person to whom the demand was made had no power by virtue of section 16A of the ***Transport Authority Act*** to release the vehicle. The section states:-

> *" (1) Where a vehicle is seized in the circumstances specified in section 13(2) (a) (i), (ii), (iii) or (iv), the Court may, on application made by its owner, release the vehicle to the owner, or operator before the matter is determined if the owner has-*
>
> *(a) paid to the Authority fees for the removal and storage of the vehicle; and*
>
> *(b) submitted to the Court, a bond, with such sureties as the Court may determine, in an amount not less than the minimum fine prescribed in respect of an offence under section 61 (5) of the Road Traffic Act".*

[51] In order to resolve the issue of whether the Commissioner had the power to release the vehicle, the above section and the relevant case law need to be examined..

[52] Counsel for the claimant as well as counsel for the defendants relied on the case of ***B & D Trawling Ltd. v. Lewis and the Attorney General***. In that case the claimant sought to recover damages for malicious prosecution and detinue arising out of his prosecution and the seizure of his boat under the ***Fishing Industry Act***. The matter was adjourned sine die and the court found that this was a determination of the matter in the claimant's favour. Sykes, J. in considering the issue of whether the claimant had established the claim in detinue stated that *"the ability of law enforcement officials to seize and detain items is not unlimited. There is no law that confers on any law enforcement personnel indefinite powers of indefinite detention of property".*

[53] The learned Judge also referred to the cases of ***Francis v. Marston*** (1965) 8 W.I.R. 311, ***Ghani v. Jones*** [1970] Q.B. 693 and ***Regina v. Commissioner of Police of the Metropolis*** [2002] 2 A.C. 692 which dealt with the power of the police to seize

and retain property which they anticipate will be needed as evidence in the matter. In ***Francis v. Marston*** Lewis, J.A. set out in very clear terms, the circumstances in which property may be seized and the limitations imposed on the police in relation to their retention of such property. He stated as follows:

> *"There is no doubt that at common law the police have in certain circumstances power to seize and retain property which may afford* ***evidence*** *of the commission of a crime. The cases show that on the lawful arrest of a person the police are entitled to take and detain property in the possession of the arrested person which may form* ***material evidence*** *on the prosecution of any criminal charge;…****The basis of these powers is the necessity of ensuring that material evidence is available on the prosecution of the person charged and that his trial is not rendered abortive by the inability to produce such evidence as may be in his possession"*** [emphasis mine].

[54] In ***Ghani and others v. Jones*** the court held that the police could not keep property for a longer period than is reasonably necessary to complete their investigations or to preserve it for evidence. Lord Denning M.R. stated that such items should be returned as soon as the case is completed or a decision is made not to proceed with the matter. In that case, the police who were investigating the disappearance of a woman seized the plaintiffs' documents including their passports. The plaintiffs wished to travel and requested the return of the passports. Their request was denied and they brought a suit in detinue. The defendants sought to justify the retention of the documents on the basis that they would be of evidential value in the event that charges were laid for murder. No one was arrested or charged. The court held that the documents should be returned as the police had not shown reasonable grounds for believing that they would be material evidence to prove the commission of a murder. Lord Denning M.R. also addressed the situation where the property seized belongs to a person who has been charged with an offence. He stated:

"I take it to be settled law, without citing cases, that the officers are entitled to take any goods which they find in his possession or in his house which they reasonably believe to be material evidence in relation to the crime for which he is arrested or for which they enter. If in the course of their search they come upon any other goods which how him to be implicated in some other crime, they may take them provided they act reasonably and detain them no longer than is necessary".

[55] Section 50 E of the ***Constabulary Force Act*** which deals with the detention and release of items seized by the police during a curfew or where a cordon has been established encapsulates the common law position in relation to this issue. Subsection (2) states:-

"Where the officer referred to in subsection (1) has reasonable grounds for believing that any article being detained is of no evidential value in any criminal proceedings arising from or in connection with a search, that officer shall forthwith return the article to the owner …"

[56] It is beyond dispute that the State should not deprive a citizen of his right to the enjoyment of his property without good reason. Such reasons could be that the item was being used or is likely to be used in the commission of an offence. The possession of the item could also be illegal by virtue of a statute. The above cases it would seem recognize this right, and have sought to define the parameters in which property can be detained. It therefore appears that an important consideration where the seizure and detention of property by the police is concerned is its preservation as evidence.

[57] Having considered the various offences listed in section 13, I am of the view that the production of the vehicle would not be required in order to prosecute the case. However, unlike the situation in the cases which were referred to above, the claimant's vehicle was seized in accordance with a statutory power. This provision in my view was intended to act as a deterrent to potential offenders who would be faced with the loss of

income as well as the payment of the prescribed fine in the event that the offence is proved. The statute also provides a remedy to the owner of the seized vehicle and the claimant was aware of the existence of this remedy. It is to be noted that section 16 confers on the Court, the discretion to release the vehicle before the matter is determined and subsection (b) requires that the owner enter into a bond as a condition for its release. This in my view would be inconsistent with any authority being vested in the police to return the vehicle to the claimant without the court's intervention. As stated previously, in order to prove a claim in detinue there must be an unlawful detention of the chattel after the demand was made for its release. Having found that the first defendant had no authority to release the claimant's vehicle, its detention cannot be described as unlawful. I have therefore found that the claimant has failed to establish his claim in detinue.

Seizure of the mini bus

[58] The claim in respect of the vehicle is not limited to damages for its detention. Damages have also been claimed for the wrongful seizure of the said vehicle. Having found that the first defendant acted without reasonable or probable cause when prosecuted the claimant, it follows that the seizure of the bus was in the circumstances, unlawful. This falls within the ambit of trespass. In such an action, the claimant is entitled to recover damages for any loss sustained by him as a result of the seizure.

[59] In this matter, there is no dispute that the claimant did not have access to his vehicle for twenty seven days. It was also agreed that he was not in possession of a Road Licence for five of those days and as such the vehicle could only be legally operated as a public passenger vehicle for twenty two days. He has claimed the sum of six hundred thousand dollars ($600,000.00) as loss of earnings for thirty days. Counsel in his submissions revised that figure to three hundred and nineteen thousand dollars ($319,000.00) for twenty two days.

[60] The claimant has failed to provide any documentary proof of his income and expenditure and has invited the court to make an award based on an average between

the figure presented by him and the evidence of Andrine Jackson-Scott of the Transport Authority. Counsel has urged the court to adopt the approach which was taken in the case of ***Desmond Walters v. Carlene Mitchell***. In that case the claimant who was a sidewalk vendor was unable to provide documentary proof in support of her claim for loss of earnings. An award was made and on appeal, the court agreed with the general principle in ***Ratcliffe v. Evans*** [1892] 2 Q.B. 524 where Bowen, L.J. stated:

> *" As much certainty and particularity must be insisted on in proof of damage as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which damage is done. To insist upon less would be to relax old and intelligible principles. To insist on more would be the vainest pedantry."*

However Wolfe, J.A. was of the view that *"…to expect a sidewalk or a push cart vendor to prove her loss of earnings with the mathematical precision of a well organized corporation may well be what Bowen, L.J. referred to as 'the vainest pedantry'.*

[61] In this matter the claimant is a police officer and the operator of a mini bus. His evidence is that he employed a driver and a conductor who he paid on a weekly basis. He also stated that the business was thriving and that as an operator of a business he was concerned with making a profit. In addition, the claimant was able to state the approximate number of trips that the minibus would make each day and even gave evidence that the mini bus was cleaned each day. Having assessed the evidence, it is my view that the claimant in this case is not in a similar situation as the sidewalk vendor in the ***Desmond Walters*** case. In the circumstances I accept the submissions of the defendant that the court should be guided by the evidence of Mrs. Jackson-Scott which gave the projected net daily income for the claimant's route as seven thousand six hundred and forty six dollars and eighty cents ($7,646.80). This rate was based on the findings of the Research and Statistics Department of the Transport Authority in its assessment of the Point Hill to Kingston. There was no deduction for income tax in the computation of this sum. When income tax is deducted the sum is reduced to five thousand nine hundred dollars ($5,900.00) per day.

[62] In considering the period for which damages ought to be awarded the issue of mitigation must be examined. In ***British Westinghouse Co. v. Underground Ry*** [1912] A.C. 673, Viscount Haldane L.C. stated that whilst a claimant is entitled to compensation for pecuniary losses which flow from the defendant's breach *"…this first principle is qualified by a second, which imposes on a claimant the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps".* The onus of proof in relation to the issue of mitigation is on the defendants. Having found that the defendants could not release the vehicle to the claimant at the time when the demand was made and the claimant having failed to make an application to the court before the first court date, it is my view that the claimant failed to mitigate his loss.

Damages

[63] With respect to the sum of one hundred and twenty thousand dollars ($120,000.00) as legal fees, the claimant has neglected to provide any documentary proof and has offered no explanation for not having done so. This figure has simply been *"thrown"* at the court. Counsel for the defendants in their generosity, have submitted, that the sum of thirty thousand dollars ($30,000.00) would be appropriate. I accept that submission.

[64] In light of the claimant's failure to mitigate his loss, I now have to consider the time period for which he ought to be compensated. I bear in mind that he may have had to obtain the services of Counsel and a date would have to be obtained for the hearing of the application for the release of the vehicle. It is my view that fourteen days would have been sufficient. I therefore award the sum of eighty two thousand six hundred dollars ($82,600.00) for loss of earnings.

[65] Storage fees in the amount of six thousand nine hundred dollars ($6,900.00) have been proved.

[66] Where general damages arising out of the claim for malicious prosecution are concerned, the claimant has relied on the case of ***Martin v. Halliman and the Attorney General*** and has submitted that an award of one million dollars ($1,000,000.00) would be appropriate. In that case the claimant was charged with the offences of possession of cocaine, dealing in cocaine, attempting to export cocaine and conspiracy to export cocaine where no cocaine had been recovered. The prosecution lasted for nineteen months. He was awarded the sum of one million five hundred thousand dollars ($1,500,000.00) in damages for malicious prosecution.

[67] The defendants have submitted that the sum of one hundred thousand dollars ($100,000.00) would be appropriate based on the cases of ***Devon White v. Attorney General, Maxwell Russell v. The Attorney General of Jamaica*** and ***Conrad Gregory Thompson v. The Attorney General of Jamaica.***

[68] In the ***Devon White*** case, the claimant was shot by the police and subsequently charged with shooting with intent, illegal possession of firearm and ammunition and shop-breaking and larceny. The matter was before the court for approximately three years. The claimant attended court on twenty one occasions. In April 2009 the sum of three hundred and eighty thousand dollars ($380,000.00). This updates to seven hundred and sixty thousand dollars ($760,000.00).

[69] In January 2008 an award of two hundred and eighty seven thousand sixty dollars and twenty nine cents ($287,060.29) was made in ***Maxwell Russell v. The Attorney General of Jamaica.*** The claimant in that case was charged with assault at common law and the prosecution lasted for approximately ten months. This award when updated amounts to seven hundred and seventy four thousand one hundred and twenty one dollars ($774,121.00).

[70] In the case of ***Conrad Gregory Thompson v. The Attorney General of Jamaica*** the claimant was charged with shooting with intent and illegal possession of

firearm. The matter was before the court for approximately three years before it was determined. The sum of four hundred thousand dollars was awarded in May 2011.

[71] In this matter the claimant's case was before the court for approximately seven months. Unlike in the ***Martin*** case the offence was in the general scheme of things, a relatively minor one. I do however bear in mind that the claimant was a police officer. The offences with which the claimants in all of the authorities cited by Counsel are by far much more serious than that which the claimant in this matter had faced. Unfortunately, I have been unable to locate any case in which the prosecution involved a traffic offence. The ***Maxwell Russell*** case is of some assistance in that bears some similarity to the instant case in so far as the length of time of the prosecution is concerned. Having considered the matter I find that an award of five hundred thousand dollars ($500,000.00) would be appropriate in the circumstances of this case.

[72] In light of the foregoing, there will be judgment for the claimant as follows:

(i) General Damages for malicious prosecution in the sum of $500,000.00 with interest at the rate of 3% per annum from the 22nd March 2007 to the 15th February 2012.

(ii) Special Damages in the sum of $119,500.00 with interest at the rate of 3% per annum from the 22nd June 2006 to the 15th February, 2012.

(iii) Costs to the claimant to be taxed, if not agreed.