

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 21/90

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

BETWEEN MICHELLE BROWN PLAINTIFF/APPELLANT
AND ENOS CLARKE DEFENDANT/RESPONDENT

Mr. Dennis Morrison for the Appellant

Respondent not present or represented

1st October, 1990

CAREY, J.A.

This is an appeal against a judgment of one of the Resident Magistrates for the parish of St. James, sitting in Montego Bay on the 14th of May, 1990 whereby he entered judgment for the plaintiff in the sum of Three Hundred Dollars (\$300.00) for assault and battery.

The plaintiff's claim was stated in the following form -

" The Plaintiff claims to recover from the Defendant the sum of Six Thousand Dollars (\$6000) as and for damages for ASSAULT & BEAT for that on the 18th day of June, 1990 at Gloucester Avenue in the Parish of Saint James the Defendant wrongfully and unlawfully assaulted the Plaintiff thereby causing bodily harm to the Plaintiff as a result of which the Plaintiff suffered pain in mind and body and was forced to incur expenses both medical and otherwise."

One of the first observations we would make is that on the record, there is a failure to note the defence of the party which is the required practice in the Resident Magistrate's Court. The law requires it and we would strongly recommend that Resident Magistrates should adhere to the rules of practice in that court.

See section 184 Judicature (Resident Magistrates) Act.

The defence should be stated orally as is required unless, of course, it is a special defence which must be in writing and would then be recorded in the notes of evidence.

So far as the circumstances of the case go, the plaintiff's evidence was to the effect that as she was walking on Gloucester Avenue at the material time in company with some other persons, she was approached by a uniformed police officer and this appellant who also is a police officer but who at the time was not in uniform. The uniformed police officer said that he had a bench warrant for her arrest, whereupon she asked him to show the document to her. He never complied with that request and thereafter there was a verbal passage-of-arms and a fracas in which the alleged assault took place. It is plain on that short outline of the evidence that at the time of the alleged incident the appellant was acting in the execution of his duty, at all events the purported exercise of his duty.

By virtue of the provisions of Section 33 of the Constabulary Force Act which states as follows:

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

certain allegations must be pleaded.

The short point taken this morning by Mr. Morrison and which was taken before the learned Resident Magistrate was that there was a failure to comply with the requirement of Section 33 as to pleading and the consequence of non-compliance.

The learned Resident Magistrate in his reasons declined to accede to the submission stating that -

"It is not every act committed by a police officer is committed in the execution of his office although he may be on duty. It is his duty to apprehend persons found committing any offence or whom may be charged with having committed any offence."

Then he went on to find in the end -

"At the time he was not acting in the execution of his office and therefore the plaintiff was not required to plea that he had acted maliciously or without reasonable or probable cause."

In my judgment, the learned Resident Magistrate fell into error. Execution of his office in this context means also purported execution of his office and there was no question on the facts of this case that this officer at least purported to be acting in the execution of his office, or he might well have been doing so improperly but the requirement is, so long as he is discharging his office whether wrongfully or not that declaration as it is called in the section, must be expressly alleged. If that is not done certain consequences follow and in our view the learned Resident Magistrate erred in not complying with the mandatory provision of the section.

In my view therefore, the appeal must be allowed and his judgment set aside. I would enter judgment for the defendant with costs and fix the costs of appeal in this court at \$350.00.

WRIGHT, J.A.

I concur with the decision of Carey, J.A., and need add nothing more.

GORDON, J.A. (AG.)

I also concur with the judgment of Carey, J.A., I have nothing to add.