[2012] JMSC Civ. 82

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008 HCV 00498

BETWEEN	**MARCIA ELLINGTON**	**CLAIMANT**
A N D	**ATTORNEY GENERAL**	**1st DEFENDANT**
	CORPORAL N. BRYAN	**2nd DEFENDANT**
	CONSTABLE LINTON	**3rd DEFENDANT**
	DETECTIVE CPL. S. PINK	**4th DEFENDANT**
	CONSTABLE WILLIAMS	**5th DEFENDANT**
	INSPECTOR CAMPBELL	**6th DEFENDANT**
	DIST. CONS. C. WARD	**7th DEFENDANT**
	CONSTABLE AARONS	**8th DEFENDANT**
	CONSTABLE ROBINSON	**9th DEFENDANT**

Mr. Maurice Saunders appears for Claimant
Mr. Nigel Gayle & Mr. Dale Austin instructed by Director of State Proceedings for and on behalf of 1st Defendant.

HEARD: 25th, 26th, 27th April, 1st May & 30th November 2012.

Malicious Prosecution – False Imprisonment – Assault and Battery

GEORGE J.

[1] The Claimant in this action claims against the Defendants for malicious prosecution, false imprisonment, and assault. It is her claim that on the 14th January 2004, whilst she was in the Ocho Rios area, she was accosted by the 8th and 9th Defendants as being a woman, who had 2 weeks previously, entered a home in Ocho Rios, under false pretences and stole there-from, a number of items valued at about $35,000.00.

[2] She alleges that despite the fact that she had vehemently denied these allegations, she was taken into custody by the 8th and 9th Defendants. She was arrested and charged and detained for 55 days. Subsequently on the 12th May 2005, "No order" was made on the indictment and it is alleged that this amounted to the prosecution being withdrawn. This she claims is a determination in her favour.

[3] She also alleges that she was physically assaulted by the 2nd, 3rd, 4th and 6th Defendants on the 12th February 2004 at the Constant Spring Police Station. She further alleges that she was physically assaulted by the 5th and 7th defendants on the 10th March 2004 at the Discovery Bay Police Station.

The Defence

[4] The Defence contends that the claimant's arrest and imprisonment were in the circumstances justified. It is also their contention that the prosecution was also justified. Hence they say, the 1st Defendant is not liable in damages, for false imprisonment or malicious prosecution.

[5] They further contend that the Claimant's injuries were (i) not as extensive as she claims and (ii) were not sustained in the manner she claimed. They deny any liability for any of the alleged assaults.

The Issues

[6] The Claimant alleges that on the 14/1/04 when she was arrested by Constable Robinson and Aarons (the 8th and 9th Defendants) the circumstances were such that she believes that the arrest was unlawful and the subsequent prosecution malicious.

The legal issues for this court are:-

(i) W as the claimant falsely imprisoned by the Police (8th and 9th Defendants) or was her arrest lawful and justified and the period of detention reasonable in the circumstances?

(ii) W as the claimant maliciously prosecuted by the police, or were the actions of the Police in arresting and charging the claimant activated without malice and with reasonable and probable cause?

(iii) Did the police assault and batter the claimant or were their actions towards the claimant, done in lawful execution of their duties and was not excessive in the circumstances.

(iv) If a finding of liability is made against the 1st Defendant for one of the pleaded causes of action, what is a reasonable quantum of damages, in the premise for the cause of action(s) which the 1st Defendant is found liable?

Malicious Prosecution.

[7] I believe that it is difficult to consider the issue of false imprisonment in this case, without firstly making a determination as to the issue of malicious prosecution.

According to the authors of "Salmon on the Law of Torts" 17th edition, (at page414)-

"In order that an action shall lie for malicious prosecution … the following conditions must be fulfilled:

> **(i) The proceedings must have been instituted or continued by the Defendant;**
> **(ii) He must have acted without reasonable and probable cause;**
> **(iii) He must have acted maliciously;**
> **(iv) The proceedings must have been successful – that is to say, have been terminated in favour of the plaintiff now suing**

The proceedings must have been instituted or continued by the Defendants

[8] The proceedings complained of by the claimant must have been instituted and continued by the Defendants– so the 1st question for the court is whether the Defendants were responsible for setting the law in motion against the Claimant.

[9] It is not in dispute that the police received a report of a woman entering the home of Ms. Johnson; pretending to her helper, that she was a cousin and having gained entry stole items to the value of approximately $35,000.00. It is also not in dispute that Ms. Cowan's, the helper, thereafter pointed out the Claimant to the 8th and 9th Defendants as being the person responsible for this theft.

[10] She was then arrested and charged. It is clear therefore, that Ms. Cowans and the 8th and 9th Defendants did institute and continue these proceedings against the Claimant. Ms Cowans is not a party to these proceedings.

[11] **Reasonable and probable cause**

In **Gipinski v McIver** (1962), ALLER 696 at 709 Lord Denning made it clear that:

> ***"in order to succeed in an action for malicious prosecution, the plaintiff must prove to the satisfaction of the court that at the time when the charge was made there was an absence of reasonable and probable cause for the prosecution".***

[12] Therefore it is not sufficient to satisfy the court that any or all of the Defendants set the law in motion against the Claimant because they may have done so with reasonable and probable cause. The second question for the court is therefore, "did the Defendants or any of them, have reasonable and probable cause to set the law in motion against the Claimant? In other words, did the Defendants honestly belief in the charge they have brought against the Claimant? It is for the Claimant to prove that there was no reasonable or probable cause. She has to assert this in order to satisfy an essential ingredient of the tort and the court is bound to make a determination on the issue, before it can proceed to consider any of the other ingredients.

[13] There is no evidence that the police had any reason to believe that Ms. Cowans was deliberately telling a lie against the complainant. The Claimant alleges that the police had not investigated the matter as they had not visited the house where it is said the offence took place. To my mind a visit to the house would have made very little difference, in light of the evidence that not much would have been gained by any dusting for finger prints. The police later received a

statement from Mrs. Cowans. They had a positive identification of the person alleged to be the culprit and a statement. Their duty was to do as they did.

[14] It is significant to note that she did not know these officers before – neither did they know her – she admits that she had no previous encounter with any of the officers, joined as Defendants in this matter and has not given any clear evidence of them having any kind of grievance, ill motive or ill intent towards her; which might have motivated them in the arrest and charge against her. It is her evidence that she was charged on that day with larceny from the dwelling. When asked by counsel for the 1st Defendant, "on 14/1/2004 when you were detained by the police did they indicate that you were a suspect for larceny from the dwelling? She responded "no not suspect. I was charged. There was a witness an alleged witness. They read a statement that they say was given to them. This was at the police station". She went on further to state that at thi s point, Ms. Cowans was also there. It is clear from the evidence, that at the very least, the police had a report from the 31/12/2003 and that a statement was taken from Ms, Cowans on the 14/1/04.

[15] The Claimant attempts to prove malice and or lack of reasonable and probable cause-by alleging also that:

(i) As stated earlier that the police did not investigate – The only evidence put forward for this is that officer Robinson had said that he had not visited the dwelling where it is alleged that the theft/larceny took place. As stated earlier this by itself does not indicate that the

police did not investigate – Taking into account the allegations made, what useful purpose would such a visit make? In any event the Claimant conceded in her evidence that she was not in a position to know whether the police did any investigations or not but she knows that the 9th Defendant had not gone to the home of the complainant.

(ii) The description given in the statement was substantially different from how the Claimant looked – This was more in regard to height and complexion – This in my view is insufficient to impute malice or lack of reasonable and probable cause. On the face of it, there appeared to be some discrepancy as to whether fair or clear and whether she could be described as "tall". Whether she had spots on her face then. Sergeant Robinson indicated that she had spots on her face then although he sees none now. In fact whether she is described as tall or short might depend on whether she had on high heels or not or a person's own view of what is considered 'tall'. Having seen her in Court, it is clear that I would not describe her as short but also neither tall. Sergeant Robinson said he does not agree that she is "not of light complexion". I share his view. Of course there are others who are of lighter complexion but she is unlikely to be described as dark.

[16] However, persons differ in what they describe as clear or fair; I have always thought they were one and the same. Some are also better at estimating length, height and distance than others. The complainant was physically pointed out and

it is on this that the police acted. The position might have been different, if they were, being armed with a statement containing a particular description picked up a person and treat as a suspect although the description did not at all match. Could the police have said to Miss Cowan on the day, “No ma’am – you are mistaken – that is not the woman you described?” – They acted on the report and statements received. They acted on the pointing out and were well within their rights so to do; particularly as there appeared to be no significantly marked difference. It is for a tribunal of fact in a court of law, to determine whether there was a deliberate lie or an honest mistake or a correct identification, by the purported witness, Ms. Cowans. It is my view that the officers had a genuine belief based on reasonable grounds and therefore acted with reasonable and probable cause.

[17] The learned authors at page 416 **ibid** provides the following useful definition:

> ***“Reasonable and probable cause means a genuine belief, based on reasonable grounds that the proceedings are justified…. The Latin term, they say is “ probabilis causa’ – and probabiis means primarily provable- hence reliable, approved, right, good justifiable. Probabilis causa means a good reason- a ground of action which commends itself to reasonable man- Robinson v Keith 1936 s.c 25,48.***

[18] In considering the evidence on this aspect I accept that the Defendants are not required to decide on the guilt of the accused and that it is enough if they have a genuine belief based on reasonable grounds that the proceedings are justified. See also**Tempest v Snowden** (1952) 1kr.b. 130,135. The duty of the police officer

is not to decide whether or not an offence has been committed as this is a matter for the tribunal of fact. They are only to ensure that there is a reasonable cause for a prosecution. (See Herniman v Smith 1938 AC 305.) No doubt in determining whether there is reasonable cause for a prosecution, the facts upon which they act, must point to the possible guilt of the person accused. It is my view that the facts upon which the 8th and 9th Defendants acted were indeed such that pointed to the possible guilt of the Claimant.

[19] A clear and concise definition was provided by Hawkins J in Hicks v Faulkner (1878) 8.Q.B.D 167,171, where he said **"I should define reasonable and probable cause to be an honest belief in the guilt of the accused, based upon a full conviction, founded on reasonable grounds of the existence of a state of circumstances which, assuming to be true, would reasonably lead any ordinary prudent and cautions man, placed in the position of the accused to the conclusion that the person charged was probably guilty of the crime imputed".** The use of the word guilt can be described as misleading as the officers are not required to be satisfied as to guilt. The belief of possible guilt is not decisive, as it is dependent on the truth of the allegations and correct identification of the suspect. These are fully tested at trial. But if it can be reasonably assumed to be true, and lead the officers to believe that the person accused is probably guilty then if the reasonable hypothetical man would also come to that conclusion, the officers would have done nothing wrong. I believe that this is the case in this claim.

[20] Of course it is a difficult task for the Claimant to prove a negative against the Defendants i.e. that they had no reasonable and probable cause to prosecute her. She is however obliged to give some evidence from which the court can infer whether or not the Defendants honestly believed in the case they were making against her. This goes beyond trying to merely prove that the defendants had information which might or might not have led a reasonable man to form an opinion that she was guilty. This is because the evidence required to satisfy the court is that the defendants did not have an honest belief in the case against her (see Mitchell v Heine (John) and Son Ltd 19 (38) 38.S.R. (N.S.W .) 466. I do not accept that the differences that counsel sought to elicit through questions and suggestions, between the description given and the appearance of Claimant on the day in question is such as would significantly erode the reasonable man or the Defendants' honest belief in the prosecution.

[21] I am obviously mindful that even if the Defendants honestly believed that the proceedings against the Claimant were justified, any such belief, must be based on reasonable grounds. In considering this, I have examined the evidence as to the facts accepted by me as to what was actually known to the defendants at the time that they arrested, charged and subsequently proceeded with the prosecution against the Claimant. Based on the Claimants own admissions the officers had received a report that some-one had entered Ms. Johnson's house and stole jewelry, accessories, colognes, perfumes etc. It is in this context that the maker of this report, who was also a purported eye witness, pointed out the Claimant and this is how she later came to be arrested and charged.

[22] If it were that the 8th and 9th Defendants commenced this prosecution without any or little evidence, (even if they honestly believed the prosecution was justified) this would be strong evidence that they had no reasonable and probable cause – (See Titus v John Lewis and Co. Ltd (1951) 2K.B 459 472-474). This is not so in this case, although the Claimant appears to be contending otherwise.

[23] Additionally, it is not that the Defendants commenced prosecution with reasonable and probable cause, and nevertheless continued, after having discovered facts which led them to the view that there was no real foundation for the prosecution. If this was so, then this court would have held that they had no reasonable and probable cause. The Claimant denies that she was aware that the complainant had alleged that the person responsible for the theft had used the name Crawford. I do not accept this.

[24] Her evidence is that they had said the person responsible for the crime had used the name Marcia Ellington. She gave evidence that she had an I.D in her bag that she could have showed them. The inference being, had she known that the alleged perpetrator had used the name Crawford, she would have shown them her ID to prove that she was not 'Crawford' but 'Ellington'. To my mind it would have made little difference as to whether the police had seen her I.D or not. In fact they admit that they had. Criminals often use false names. This would not have assisted the officers in determining innocence (although this is not for them) nor does it show material sufficient for them to decide not to prosecute or discontinue prosecution.

[25] They would clearly be aware at the time, that the Claimant's name was Marcia Ellington. There is no allegation of her being charged in another name. It would have been their case that she had used a different name. This is quite plausible and reasonable. Is it likely that any culprit in the circumstances of this case would have used their correct name and what should the officers do, if confronted with this as an allegation? Should they have said "Ms Cowans you have the wrong person, this lady's I.D shows that she is Marcia Ellington, not Crawford"?

[26] In addition, although the matter was not taken off the court's list until May 2005, I do not accept that in the context of the administration of Justice in today's Jamaica, including long delays, that the officer in not getting Ms. Johnson's co-operation and getting plausible excuses for her non-attendance and yet the prosecution not having been stopped till almost a year and a half later is fatal to the defence. In practice, these decisions rest with the Director of Public Prosecutions who is not a party. Additionally, it is clear from the evidence that despite the excuses given by Ms. Johnson, the officer still had an honest belief that the prosecution was still reasonable as Ms. Johnson gave plausible excuses rather than indicated a lack of interest in the matter.

[27] It is also true that in having regard to the facts known to the Defendants, they must show good judgment and the use of reasonable care in evaluating and considering whether there are sufficient grounds to arrest, charge and prosecute the claimant. If they fail to show that they had use such good judgment and reasonable care then this can be imputed to them as a lack of reasonable or probable cause. – (See Phillips v Naylor 1859 53L Q.R. 12). I believe in these

circumstances, the officers could reasonable do no more than they did, prior to arrest and charge of the Claimant, and by continuing the prosecution. They cannot be faulted for the judgment they exercised, nor can it be said that they did not exercise reasonable care in these circumstances, before arresting, charging and continuing the prosecution of the Claimant.

Acted Maliciously

[28] The next issue for the court is that of malice. Section 33 of the Jamaica Constabulary Force Act speaks of lack of reasonable and probable cause or malice. Malice is simply some wrongful motive.

[29] Salmon on Tort (ibid) at paragraph 3 page 418 referred to the case of Sitre v Waldrum [1952] 'Lloyd's Rep 431, 451 in support of this statement :

> "***Malice means the presence of some improper and wrongful motive-that is to say, an intent to use the legal process in question for some other than its legally appointed and appropriate purpose".***

[30] In order to prove malice, the Claimant might either show what the motive was and that it was wrong, or that the circumstances were such that the only explanation for the prosecution by the Defendants was some wrong or improper motive towards her – **See Brown v Hawkres** [1891] 2 Q.B. 718,722. The Claimant has the burden of proving malice, although often (not always) the absence of reasonable and probable cause is itself sufficient evidence of malice.

[31] If there was a genuine belief in the accusations made, then the Claimant must provide the court with some independent evidence of malice – See **Glinski v**

McIver [1962] A.C. 726, 782. I do not find that the Defendants acted with malice, when they arrested, charged and prosecuted the Claimant.

Whether the proceedings terminated in the Claimant's favour

[32] The Claimant must also prove that the proceedings terminated in her favour – and so the 4th question for the court is "Did the prosecution terminate in favour of the Claimant?" I accept that there need not be any acquittal on the merits as in this case. The evidence is that the prosecution was terminated by the Crown requesting that "No order" be made on the indictment. Is this a determination in favour of the Claimant? If the prosecution has actually been determined in her favour, then it matters not how this came about.

> ***" What the plaintiff requires for his action is not a judicial determination of his guilt. Thus it is enough if the prosecution has been discontinued, or if the accused has been acquitted by reason of some formal defect in the indictment, or if a conviction has been quashed, even if for some technical defect in the proceedings". Salmond on Torts at page 420.***

[33] So In fact a question which arises for consideration is whether a "no order" is a termination for these purposes. It is my view that a "no order" after all of this time, is a form of discontinuation of the proceedings by the crown, even though the proceedings have not been stopped as with a "Nolle Procequi" – a no order on the indictment, even if not instantly, then upon expiration of a reasonable time to bring back the proceedings, is tantamount in our jurisdiction to a discontinuation of the

proceedings. It is an indication that the Crown will not or is unlikely to proceed with the indictment. In fact it is clear that it will not. If they attempted to bring this back after what would now be approximately 8 yrs from the date of the 'no order', I am satisfied that the Claimant could successfully plea an abuse of process and have the indictment quashed. It is therefore the view of the Court that the matter has in fact been determined in favour of the Claimant.

[34] However, despite this, the Claimant has not satisfied the Court, on a balance of probabilities, on all the ingredients of this tort, consequently, her claim for malicious prosecution fails.

False Imprisonment

[35] The Claimant asserts that she was falsely imprisoned by the Defendant and therefore she has the burden to prove this on a balance of probabilities. She does this by giving evidence of an unreasonably long detention before or without being brought before the Court, or an initial false arrest and or false imprisonment. The Defendants thereafter have an evidentiary burden to show that the detention was lawful. The claimant asserts that the imprisonment was false in the first place or alternatively although the initial imprisonment might be lawful it became wrongful as the period of detention without being brought before the Court was unreasonable.

[36] Counsel for the Claimant supports his submissions by relying on the locus classicus case of **Flemming vs Det Cpl Myers and the Attorney General** (1989) 25 J.L.R. 526 and the words of Carey J.A. at page 530 – **"In my respectful view,**

an action for false imprisonment lie where a person is held in custody for an unreasonable period after his arrest and without either being taken before a justice of the peace or a Resident Magistrate".

[37] In that case, the Claimant had been held by the police for 14 days before being brought before a Resident Magistrate or a Justice of the Peace. This time was expressed as being unreasonable and which amounted to false imprisonment. In that case there was no special reason for this lengthy detention and that is the main distinguishing feature between that case and the one before me.

[38] Counsel places reliance on this authority and indicated that he believed that it may be useful as given the circumstances of this case, the period of incarceration can be broken down into different time periods. So one period of imprisonment may be justified and therefore lawful, whilst another period might not be so.

[39] On the other hand the Defendants relies on another dictum of Carey, J.A. in the same case of **Fleming v Myers** and the Attorney General ibid which states that:

> ***" The action of false imprisonment arises where a person is detained against his will without legal justification. The legal justification may be pursuant to the valid warrant of arrest or where by statutory powers, a police officer, is given the power of arrest in circumstances where he honestly, and on reasonable and probable cause, believe a crime has been committed"***

[40] It is the contention of the Defence that the Defendant's arrest was lawful; as there was reasonable and probable cause and so they submit that Justice Carey made it quite clear in **Myers** case that "it follows ineluctable that there can be no false imprisonment where there is a lawful arrest…".

[41] It is clear from my findings so far that I am of the view that the initial arrest was made with reasonable and probable cause, that there was no malice and therefore this arrest on the 14.01.04, pursuant to the powers conferred on the 8th and 9th Defendants by the common law and section 13 of the Jamaica Constabulary Force Act, was lawful. However, as pointed out by counsel for the Claimant, an initial lawful arrest can become an unlawful one, amounting to false imprisonment. I have therefore gone on to consider the circumstances surrounding the whole period of detention.

[42] I accept that following the initial arrest, the Claimant was given some indication that she was to be placed on an I.D. parade. The Claimant admits that whilst she was at the police station, in St Ann she was advised that she was to be placed on an I.D Parade. This was for allegations made against her in several places, including Constant Spring. I accept that she might not have known that this was the reason (although she was aware of it) why she was not taken before the Court in the initial stages. I accept that she was not taken before the Court until the 27th February 2004.

[43] But I also find that the Claimant's file was taken before the court on the 29/1/2004, but, the Claimant herself was not taken, due to the belief of the officers

that she was required for an I.D. parade in Kingston and their unwillingness to "expose" her. She was remanded in custody in her absence. The matter was then given a date for the 3rd February and her file was taken as she was still awaiting an ID parade.

[44] I accept that the 8th and 9th Defendants had been advised by the Constant Spring police that she was required for an I.D. parade. It is not in dispute that no I.D parade was held. However what is clear is that whilst at the police station, the Claimant had been informed that an I.D parade was pending. In these circumstances, I do believe that this was in fact true. I am fortified in my view as she was subsequently arrested and charged in Constant Spring; It is said that the Constant Spring police had an interest in her based on the alleged "modus operandi" and "description" and I find this to be true. This was discovered by the St Ann police upon them calling police stations in the vicinity of the home address given to them by the Claimant.

[45] Clearly the type of allegation was likely to require support of identification on an I.D. parade before charge. It is the practice and a prudent course not to bring persons to court whilst awaiting I.D. parade for other matters. There is however a duty for officers to ensure the holding of a parade as soon as is practicable. She was in custody for 3 weeks before being taken to Constant Spring police station. Whether this is an unreasonable length of time, to the extent which makes the detention unlawful, to my mind, depends upon the circumstances. I accept that efforts were made to have the Constant Spring police collect her and that in the meanwhile her file was brought before the Court. The 8th and 9th Defendants were

awaiting the Constant Spring Police. It is not known why it took 3 weeks to fetch her and there is no evidence as to who was the person(s) with this responsibility.

[46] I have taken into account the fact that even if she had been physically brought before the Court, she was unlikely to get bail and would have still been detained, due to the allegations that she was wanted in several police areas for the same type of offence and that an ID parade was pending in Constant Spring. I do not believe that in those circumstances she suffered any greater prejudice by not having been physically brought before the Court for those 3 weeks or that the detention was unlawful.

[47] Following her arrival at the Constant Spring Police station, she was admitted to hospital for 4 days and thereafter granted bail on the 17/2/04 in relation to that charge, perhaps due to the lack of an identification parade and or the injuries she had received. The Claimant gave evidence that the Constant Spring charge had been 'stopped' as a result of the lack of identification parade. The Court is unable to make a finding as to whether this was so as her evidence amounted to hearsay i.e what she said she had been told by her lawyer. The reason is not material for the purposes of the issues before the Court and would amount to mere speculation.

[48] Having been given bail in the Constant Spring matter, it can be said that a fresh period of custody started to run as the difficulty which presented itself was that the Claimant was still remanded in relation to the initial matter. So she was again in the custody of the St Ann police (only whom the allegation of false

imprisonment is made against). There arose a fresh duty to have her brought before the Court as soon as possible. I accept that following the Court date of 3rd February, she was given a further date for the 20th February but she was not taken due to a problem with transportation and was given a further date of the 27th February on which date she appeared before the Court. Therefore, her case had the benefit of 'judicial review' pending her physical presence before the Court. On all the dates that the matter came up before the Court, with the exception of the 10th March 2004, she was remanded by the Court in her absence. Significantly, Sergeant Robinson indicated that he had the information n relation to the Court dates, with the exception of the February 27th date, recorded in his notebook. Significantly, this notebook was presented in Court for the benefit of Counsel for the Claimant.

[49] I accept that she did in fact appear in Court in St. Ann on the day of the 27th February and was remanded in custody. Subsequently, she was given a Court date for 10/3/04 and was given bail on this date. I found the officers more credible on this point. I do not believe that in the circumstances this was an unreasonably long time; such as is sufficient to turn a lawful arrest into an unlawful one, in circumstances where her case had been brought before the Court without her being physically present. I therefore find that in the circumstances of this case the Claimant's claim for false imprisonment fails.

[50] In relation to both malicious prosecution and false imprisonment, due to the fact and prevalence of "crime", the police must have the authority to apprehend investigate, charge and detain suspects. This of course must be in prescribed

circumstances and any arbitrary, wanton or unjustified use of that power should result in some form of remedy for any person aggrieved. This power is to be found at common law as well as the Jamaica Constabulary Force Act. May J in Wershof v Commissioner of police (1978) 3 Aller 510 at 551c considered that the purpose of such law is:

> ***"to balance and maintain the fundamental freedom of the individual, on the one hand, against the public interest of society at large, on the other, of apprehending wrongdoers and suppressing crime".***

[51] Similarly Bingham L.J. in R v. Lewes Crown Court ex parte Hill (1991) 93 Criminal Appeal R 60 at 65 in considering the Police and Criminal Evidence Act (PACE 1984) of England , in the context of dealing with the powers of the police had this to say:

> ***"The Police and Criminal Evidence Act governs a field in which there are two very obvious public interests. There is, first of all, a public interest in the effective investigation and prosecution of crime. Secondly, there is a public interest in protecting the personal property and rights of citizens against infringement and innovation. There is an obvious tension between these two public interest in protecting the personal and property rights of citizens against infringement and innovation. There is an obvious tension between these two public interests because crime could be most effectively investigated and prosecuted if the personal and property rights of citizens could be freely overriden and the total protection of the personal and property***

rights of citizens would make investigation and prosecution of many crimes impossible or virtually so".

[52] It is the reality, that this is very true and that this tension is very stark in today's Jamaica. The police have in fact been clothed with the authority to arrest, charge and prosecute. The citizen is protected to some extent (some would say too little) as these powers must be exercised with reasonable and probable cause or without malice but the citizen's protection cannot be all; the police must be able to arrest, charge and prosecute, even if at the end of the day, the citizen arrested is freed from all charges. The police must exercise their powers in a lawful way to gain the protection of the courts. There is a delicate balance of these two interests and for the court in this case, it is a difficult task.

Assault and Battery

12/2/04

[53] The Claimant has maintained throughout, and this court accepts, that she was physically assaulted by the 2nd, 3rd, 4th and 6th Defendants on the 12/2/04 at the Constant Spring Police Station after being taken there from the Discovery Bay Police Station.

[54] Although the relevant police Defendants deny this claim, the court finds that it is of much merit. I did not find the defendant's credible and find on a balance of probabilities that the Claimant's account is more likely to be true.

[55] I accept that at the Constant Spring Police Station whilst her hands were in handcuffs in front of her, the Claimant was told she was to be taken to Duhaney Park Police Station. The Claimant was told by the 2nd Defendant to take up her bag. She replied that she couldn't as her hands were in handcuffs. He then placed the bags on her hands. The contents of the bag spilled on the ground. The 2nd Defendant told her to take these up but she found this difficult due to the handcuffs. Perhaps she did not do so swiftly enough for the officers or maybe they were just having "a bit of fun" at her expense. Corporal Bryan kicked her as she was bending down to pick up the contents; kicked her in her stomach and she fell to the ground. The 3rd Defendant intervened and told her to get up and she didn't, whereby the 3rd Defendant kicked her all over her body. The 4th Defendant grabbed her blouse and started punching her. The blouse was torn. Inspector Campbell held her by her neck and pulled her up off the ground and dropped her on the bench.

[56] Regardless of the reason for these actions, they cannot be justified and could be nothing less than, humiliating and demeaning for the Claimant. It was after this that the 3rd and 4th Defendants took the complainant to Duhaney Park Police Station.

[57] In coming to this conclusion I considered the evidence as to what happened at the Central Village Police Station after being brought from Constant Spring police station, illuminating and compelling. Due to a lack of space the Claimant was taken to the Central Village Police Station. I accept that the reaction of the police at the Central Village Police Station is an indication of the state of the

Claimant when she was brought there – there were visible signs of injury. Hence they refused to accept her before she had been given medical attention. I agree with counsel for the Claimant, that a clear inference to be drawn from this is that they "did not wish to bear responsibility" for any injuries sustained outside of their custody and control. The Defendants responses to these allegations were bald denials.

[58] Detective Corporal Sophia Pink gave evidence that she heard loud noise in the holding area and when she went around there, she saw that it was the Claimant who was sitting on the floor, although there were chairs available. She said that the Claimant was cursing and behaving boisterously. She asked her to get up twice. There were at least 5 other officers in this area. One of the bags that the Claimant had burst and the contents fell to the ground. She said she was trying to get the Claimant to calm down and to stop the noise. They were telling the Claimant to get up and behave herself. This was for about 2 minutes that she sat on the floor behaving badly. W hen she got up Inspector Campbell came and gave them instructions to transport her to Duhaney Park Police Station pending investigations.

[59] According to Cpl. Pink, the Claimant got up on her own but whilst in the process of getting up her bag fell to the ground – Cpl. Bryan assisted her to pick up the items off the floor – she admits that throughout this Ms. Ellington's hands were locked in handcuffs but she saw no-one touch her. She noticed no bruise nor anything wrong with the Claimant, although she was part of the police party that escorted her from Constant Spring to Duhaney Park on to Central Village Police

Station and then to Spanish Town Hospital. She denies that Cpl Bryan kicked the Claimant in her stomach as she bent to pick up the things. In fact the said "he was nice to her" – She also denied that she refused to get up and that Cpl Linton kicked her all over her body. She denies grabbing Ms. Ellington's blouse and using her fists to punch her in the upper part of her body and although she said "counsel that is not my style – I do not operate that way". This did not ring as true.

[60] I found this officer's attitude to be abrasive and bordering on aggressive when she was giving her evidence. I had the opportunity to observe her demeanor and her body language as she gave her evidence. The behavior described by the Claimant did not seem inconsistent with the character with which this witness presented. She denied calling for a baton several times. The demeanor of this witness bordered on being contemptuous and clearly showed a lack of respect and sensitivity to the handling of suspects whom she described as "that's how them behave". She also denied that Inspector Campbell held the Claimant by the neck and pulled her up off the ground and dropped her on the bench. Yet she was present.

[61] Detective Cpl Linton said he saw her spit at an officer. This behavior angered him – But he didn't become so angry that he kicked her all over her body. He denies seeing anybody hitting her. None of the officers admitted to hitting or seeing any one hit the Claimant. In fact there is no evidence from them of any physical contact with Ms. Ellington apart from Detective Corporal Pink holding her when she was being taken to the vehicle to be transported from Constant Spring, although even this she denied.

[62] It is not even being suggested that the Claimant became physical with them so how can the medical report be explained? I accept that there were visible marks of injury to her and that is why she was not admitted at the Central Village Police Station. I also accept without a doubt that not only was there visible injuries, she was also in pain. It is as a result of this pain and these injuries that she was admitted to hospital for 4 days. She had been in custody of the police and these would have been sustained whilst in their care. There is no evidence that she arrived at Constant Spring police station with any injuries.

[63] The only explanation for these injuries is that given by the Claimant. I do not find the officers credible as to what happened at Constant Spring on that day. The injuries found by the doctor are consistent with the account of the Claimant. I find the Claimant credible on this point. I find that the 2nd, 3rd, 4th and 6th Defendants assaulted the Claimant in circumstances where they were not acting in lawful self-defence, nor lawful restraint. Neither were they acting in lawful execution of their duties. This is also clearly indicated by the Claimant being admitted to hospital for 4 days. Consequently I find these Defendants did Assault and batter the Claimant on the 12/2/2004.

Injuries Received

[64] I accept that as a result she suffered pain to her neck and stomach and all over her body – Dr. Paul Brown's medical report discloses superficial abrasion to her neck and tenderness to the abdomen. The Defendants claim that this report indicates, less severe injuries than her evidence had indicated. The main

complaint of the Claimant is the pain she felt. There is no better witness from which that can come than the Claimant herself as she is the one who would have felt this pain. She appeared credible on this issue and I have no difficulty in accepting her testimony in this regard.

Assault 2 – 10/3/04

[65] The Claimant asserts that she was physically assaulted by the 5th and 7th Defendants on the 10/3/04 at Discovery Bay Police Station after she had been offered bail by the court. She claims that the 5th Defendant grabbed her and slammed her against a wall so that her forehead hit the wall several times and she was knocked unconscious.

[66] Dr. Kurt W ard found on examination “swelling and tenderness over the right side of forehead associated with bruising” and diagnosed “soft tissue injuries to the forehead and cerebral concussion”. This report helps to support the claimant’s contention – I accept on a balance of probabilities that in fact she was injured and that she was injured by the 5th and 7th Defendants. The question therefore is, in what circumstances did she receive these injuries?

[67] According to the Defendant, the claimant charged with her forehead into the metal grill of the cell – This seems incredible and one would expect more than “bruising” to result. I did not accept the Defendant’s version and find a balance of probability that the Claimant’s account is more likely to be true. I do not accept that at the time she received these injuries the officers were acting in lawful self defence or lawful restraint.

[68] District Constable Lindsay W illiam was on cell guard duty 10/3/04. He denies grabbing the Claimant and slamming her against wall. Clearly Ms. Ellington was not feeling good about being in custody. I accept that after her return from Court on the 10/3/04, she wanted to wait outside of the cell until her bail was processed. The officers decided that despite her protestations she ought to go in the cells like all the other persons that were there and in custody. Ms. Ellington was defiant, insisting on being allowed to wait in the passage area. Thus District Constable Ward tried to get her in the cell by pulling "her towards the cell". District Constable Aarons became involved and the whole incident got out of hand.

[69] I accept that District Constable Aarons banged her into the wall in the passage, which resulted in her forehead hitting on the wall after which she fell and became unconscious for a little while – District Aarons by his evidence, would like the court to believe that she fell, she "makes one chuck on grill when Ms. W ard lock cell and go down and scream for murder and nobody never hit her". In other words she injured herself by deliberately chucking on the grill. The doctor confirms that it was her forehead which had bruises. If District Constable Aarons account was to be accepted, it would therefore mean, that this lady consciously and deliberately hit her head against the grill. I do not accept this and find the Claimant to be more credible on this point.

[70] It is his evidence that the Claimant had hit him on his jaw and that he had gone to the doctor the next morning – "yes I went to the doctor next morning. The swelling had gone down and me tell them me not going any further – going to look about the death of my wife". The officer appeared fumbling and evasive at this

point, so counsel pressed " Did you or did you not go to the doctor?' He answered "I did not go to the doctor – after change my mind when they want me to put it through court: when further pressed by counsel and asked "what is the truth?" His response was that "Ms. W ard said going to put it before the court so have to go to doctor **to assist her** as me get hurt and she get hurt – I went to Doctor and when I show doctor where I get hit he said I should have come same time. Dr. didn't see any swelling and that's why didn't bother with it. Doctor didn't confirm anything".

[71] I find it hard to believe that the Claimant behaved as badly as the court was told and that she had not been physically assaulted by District Constable Aarons, yet he did not go to the Doctor immediately and neither does it appear that he had charged her for the assault. He did say a case was taken out by Ms. W ard but the Claimant was not charged as Ms. W ard had died, he believes that same month. This seems strange. Would the assault on him not be separate and distinct? She was in their custody – would she not have been detained further? W ould she not have been charged with assaulting the officers before she left the police station on bail?

[72] I accept that at the Discovery Bay Police Station whilst waiting for bail she was told to go into the cell area. She didn't and the 7th Defendant pulled her by her waist band towards the cell and I find that the claimant resisted, asking to be allowed to wait for her friend to bail her. The 5th Defendant kept pulling her and grabbed her and slammed her against a wall so that her forehead hit the wall several times.

Injuries Received

[73] She was knocked unconscious woke up in cell and asked to see a doctor but this was not granted. Her forehead was swollen; she suffered pain, blurred vision. Subsequent to being bailed on the 12/3/2004 she went to Spanish Town Hospital and was treated.

Judgment for the Claimant against the 1st Defendant for Assault & Battery of 12/2/04 and 10/3/04.

Damages

[74] **Special Damages** awarded in the sum of $6,238.59

The damages claimed by the Claimant for loss of earnings was not proven satisfactorily. Therefore this is denied.

Assault & Battery 12/2/04

[75] Bruising to hand, neck and tenderness to abdomen – Persuaded by counsel for Claimant as to case of **Hugh Douglas v Morris Warp** – In this case a security guard was assaulted by a policeman and hit with rubber. He was also punched, kicked and hit with a baton. He received bruising to his right and left upper arms; tenderness of humerus; swollen and tender left forearm and thigh. – He was awarded $140,000.00 which equates to approximately $1,000,000.00 today. The injuries in this case before me are more serious, although there are some similarities, so I award $1,100,000.00. It is significant that in the case before me, the Claimant was hospitalized for 4 days. The behavior of the Defendants was in my view designed to cause humiliation and distress. They sought to demean the

Claimant by their actions and appear to lack any remorse. I believe that an award of $1,350,000,000 is appropriate as the behavior of the officers was such that it attracts an additional award of $250,000.00 for exemplary damages.

Assault and Battery 10/3/04

[76] I accept that the Claimant received swelling, tenderness over the right side of the forehead; soft tissue injuries and cerebral concussion. Similar injuries were sustained by the Claimant in Simpson v McMahon and he was awarded $180,000.00 which equates today to $1,240,000.00.

[77] Due to the circumstances and the nature of the assault, which is indicative of the behavior of the Defendants for this aspect of this head I make an award to include exemplary damages and make an award of $1,300,000 for the injuries sustained and award a further $300,000 making this a total of $1,600,000.00.

Therefore Damages are as follows:

(1) Special Damages $6,238.59 with interest at the rate of 6% from the 12th February 2004 to the 21st June 2006 , and at the rate of 3% from the 22nd June 2006, to the 30th November 2012.

(2) General Damages of $2,950,000.00 with interest at the rate of 3% from the 14th March 2008 (the date of service of Claim) to the 30th November 2012.

(3) Costs to the Claimants to be Agreed or Taxed