

Sc 5B

SUPREME COURT LIBRARY
KINGSTON
JAMAICA

Judgement Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

SUIT NO. C.L. 2000/G-124

BETWEEN	JOHN GAYNOR	CLAIMANT
AND	CABLE & WIRELESS JAMAICA LIMITED	1 ST DEFENDANT
AND	SUPERINTENDENT G.C. GRANT	2 ND DEFENDANT
AND	THE ATTORNEY GENERAL	3 RD DEFENDANT

Arthur Kitchen and Roderick Gordon for claimant.

Christopher Kelman instructed by Myers Fletcher & Gordon for 1st defendant

Dionne Maylor-Reid and Garfield Haisley instructed by the Director of State Proceedings for 2nd and 3rd defendants

Heard: July 21, 22 and December 1, 2005

JONES, J.

[1] His words slowed to suggest painstaking sincerity, John Gaynor once again faced his accusers. In this case, though, it was not he but his accusers that were on trial. Some seven years ago, February 8, 1998, he was arrested and charged on an indictment with larceny of telephones belonging to his employer, Cable & Wireless Jamaica Limited. As a result of these charges, he was dismissed from his employment as a cable technician with the company, and later tried and convicted of the charge before the Resident Magistrate's Court for the Parish of St Catherine. His conviction was afterwards overturned on appeal.

[2] So it is then, that John Gaynor brought an action in this court against Cable & Wireless Jamaica Limited, Superintendent G.C. Grant, and the Attorney General of Jamaica claim-

ing damages for wrongful dismissal, false imprisonment and malicious prosecution. He declared, then and now, that he is innocent; a victim, he says, of circumstances. He protested that although he may have made an error in judgment with his choice of friends, all his actions had been legal. His detractors remained unconvinced and say that there is more than enough evidence that he is probably guilty of the charge, in addition to which, he had a duty to render good and faithful service to his employer and he did not.

[3] The issue raised in this action, however, is not whether or not John Gaynor is guilty or innocent of the charge of larceny of the telephones, as that has already been determined in his favour. The questions raised in this action are:

- a) Was John Gaynor wrongfully dismissed from his employment with Cable & Wireless Jamaica Limited?
- b) Did Superintendent G.C. Grant have reasonable and probable cause to arrest and charge John Gaynor. If so, was John Gaynor taken before the court within a reasonable time?
- c) Was there reasonable and probable cause to prosecute John Gaynor or was it actuated by malice?

Was the dismissal of John Gaynor wrongful?

[4] In the absence of a contractual or statutory requirement, a contract of employment can be terminated by either party giving reasonable notice. Where notice is provided for by contract, the period of notice is usually set out; and in any event, it must be reasonable.

Where an employer pays wages in lieu of notice, it is compensation in full and will take the form of damages for dismissal.

[5] On March 2, 1998, John Gaynor was suspended from his employment with Cable & Wireless Jamaica pending the outcome of a disciplinary hearing set for March 12, 1998. On April 29, 1998, he was dismissed from the employment of the company for his involvement in the larceny of telephones, the illegal connection of telephone lines to premises at 29 Violet Avenue in St Catherine and misusing his company vehicle to make an unauthorized visit to the same premises. His contract of employment called for him to be given four weeks' notice for termination or pay in lieu of such notice. His termination letter from Cable & Wireless gave him four weeks' pay in lieu of the required notice. So then, even it can be urged that his dismissal was wrongful; the payment in lieu of notice represents compensation in full for the dismissal. In view of that, the claim for wrongful dismissal fails. Any claim for unjustifiable dismissal is by way of complaint to the Industrial Disputes Tribunal under the relevant statutory provisions and not to this court.

Did Superintendent G.C. Grant have reasonable and probable cause to arrest and charge John Gaynor, and if so, was he taken before a court within a reasonable time?

[6] False imprisonment arises where a person is arrested, imprisoned or otherwise prevented from exercising his right of leaving the place in which he is, without any lawful justification. In Jamaica, an evidential burden is placed on a claimant by section 33 of the Constabulary Force Act, which provides that a person suing a police officer for false imprisonment or malicious prosecution as a result of an act done in the execution of his duty is required to prove that the officer acted either maliciously or without reasonable and probable cause.

[7] In **Peter Fleming v Det. Cpl. Myers & the Attorney-General of Jamaica**¹ the appellant was arrested for murder and taken to the police station where he remained in custody for thirteen days before being taken to court. He brought an action against the arresting officer and the Attorney General claiming false imprisonment, malicious prosecution and assault. Evidence on behalf of the officer established that he acted on the information given by other persons when he arrested and charged the appellant for the offence of murder. The court recognized that at common law a police officer has the power to arrest, without warrant, a person suspected of having committed a felony. However, the officer was compelled to take the person arrested before a Justice of the Peace or Resident Magistrate within a reasonable time. The court said that all the circumstances should be examined to determine whether the accused was brought before the court within a reasonable time. Where the delay is unreasonable, this will result in liability for false imprisonment.

[8] The court in **Fleming's** case considered the reasonableness of the delay in light of the provisions of the section 15 (3) of the Constitution of Jamaica which provides that:

"Any person who is arrested or detained:

- (i) for the purposes of bringing him before the court in execution of the order of a court or;
- (ii) upon reasonable suspicion of his having committed or being about to commit a criminal offence; and who is not released shall be brought without delay before a court."

[9] Forte J.A (as he then was) in commenting on this provision in the Constitution of Jamaica said²:

¹ [1989] 26 J.L.R 525

² Already cited at page 533

"It is my view, therefore, that the words "without delay" as used in section 15 (3) ought to be construed in the light of the common law right which had previously existed and in arriving at the appropriate period which would constitute action "without delay", all circumstances of the particular case should be examined in order to determine whether the person arrested was brought before the Court within a reasonable time".

[10] In this case, John Gaynor says that on February 8, 1998, after completing his work assignment for the day, he drove to Hamilton Gardens in Spanish Town to visit with Norman Scott and to ask him to make contact with a mutual friend. While there, he was arrested by Superintendent G.C. Grant, and charged with the larceny of telephones and with breaches of the Public Utilities Protection Act. After his arrest, he was taken to the Bridgeport Police Station, St. Catherine, kept in custody, and later taken before the Resident Magistrate's Court for the Parish of St. Catherine on February 12, 1998.

[11] On the other hand, the story told by Superintendent G.C. Grant was that on February 6, 1998, he received information regarding a fraudulent visa racket involving Norman Scott and Ann-Marie Cunningham both residing at #29 Violet Avenue, Hamilton Gardens in Spanish Town, St. Catherine. As a result of this information, he obtained a search warrant and visited the premises on February 8, 1998.

[12] He said when he arrived at the premises, he saw and spoke to Ann-Marie Cunningham informing her of his purpose, which was to search the premises. During the search he found ninety-three (93) Jamaican passports, four (4) British passports, one (1) Dominican passport and Jamaican, American, British and Canadian immigration stamps. He also found three telephones in the house and enquired about them. Ann-Marie Cunningham told him that she did not have a bill for the telephones as they were installed by John Gaynor a telephone technician, at the request of Norman Scott. He said that Miss Cun-

ningham also told him that John Gaynor visited the premises on a monthly basis to collect money for installing the phones. If the money was not paid, John Gaynor would disconnect the phones.

[13] Superintendent G.C. Grant said he called the Cable & Wireless Network Fraud Department and requested a telephone technician to visit the house. At the same time, a man who was pointed out to him as John Gaynor, the telephone technician, walked into the premises. Superintendent Grant identified himself to John Gaynor and told him that he had information that he was the person that installed three phones at the premises and that he collected money every month from Norman Scott for the use of the phones. John Gaynor made no reply. He said that Anne-Marie Cunningham repeated her allegations against Gaynor in his presence and again he made no statement.

[14] Wendell Townsend from the Network Fraud Office arrived at the premises and after inspecting the instruments identified them as being the property of Cable & Wireless Jamaica Limited and which were stolen from the department where John Gaynor worked. Superintendent Grant later informed John Gaynor of the information received from Wendell Townsend and arrested and charged him, together with Anne-Marie Cunningham and Norman Scott, with larceny of the telephone units found on the premises. In addition, Norman Scott and Ann Marie Cunningham were charged with the sale of fraudulent visas and other fraudulent documents. Superintended G.C. Grant said that he kept John Gaynor in custody for 4 days pending the outcome of his investigations into his role in the fraudulent visa case.

[15] I find as a fact that the information provided to Superintendent G.C. Grant by Ann-Marie Cunningham and Mr. Wendell Townsend from the Network Fraud Office, on balance, appeared credible and would provide reasonable suspicion that a crime had been committed. Clearly then, this would be a sufficient basis for the later arrest and charge of John Gaynor for larceny of the telephones. The issue raised here is this. Having made a lawful arrest, did Superintendent GC Grant detain John Gaynor in custody for an unreasonable time before taking him before a Justice of the Peace, offering him bail or taking him to court?

[16] Superintendent Grant says that he objected to bail being offered to John Gaynor as he intended to hold an identification parade for him with respect to his involvement in the visa fraud racket. This explanation was curiously unsatisfying, as there was no evidence of John Gaynor's involvement in any visa racket, nor was he ever charged for it. The only connection between John Gaynor and the fraudulent visa case were photographs of him found at the premises at 29 Violet Avenue in Spanish Town. Indeed, he was taken to his own house and a search was conducted. Nothing incriminating was found after the search. This, evidently, was not a proper reason for the detention of John Gaynor without bail.

[17] It is instructive to note that all the evidence in respect to the larceny of the telephones had been received prior to John Gaynor's arrest and Superintendent Grant gave no reasons to suggest that there was a risk that John Gaynor would have absconded or committed further offences if he were granted bail. In these circumstances, I find that the lawful arrest was later made unlawful by the unreasonable detention of John Gaynor for four days. It is obvious that any further detention of John Gaynor beyond the date when he

was brought to court cannot be the responsibility of Superintendent Grant. The court concluded that the main item of damage done to John Gaynor in respect of his false imprisonment was the loss of his liberty for four days. I accordingly, assess damages for that in the sum of \$120,000.00.

Was there reasonable and probable cause for the prosecution of John Gaynor or was it actuated by malice?

[18] While John Gaynor was successful in his claim for false imprisonment, he is less than wholly convincing in his claim for malicious prosecution. In **Wills v Voisin**³ a case from Trinidad, Wooding J.A said that in an action for malicious prosecution the claimant must, in order to succeed, prove:

- (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 the prosecutor set the law in motion without reasonable and probable cause; and,
- (iv) That in so setting the law in motion the prosecutor was actuated by malice.
- (v) That he suffered damage as a result.

[19] In Jamaica, this position is modified by virtue of section 33 of the Constabulary Force Act, which provides that where a police officer is sued for malicious prosecution for an act

³ [1953] 6 W.I.R 50

done in the execution of his duty as a constable the claimant must prove that he acted either maliciously or without reasonable and probable cause.

[20] At common law, the onus of proving the absence of reasonable and probable cause is on the claimant. In the absence of such evidence, judgment ought to be for the defendant: see **Abrath v N.E Railway**.⁴ In **Hicks v Faulkner** Hawkins J defined reasonable and probable cause as⁵:

“...an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. There must be: first, an 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 the 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 ground for belief in the guilt of the accused.”

[21] After attending court on several occasions, Norman Scott and Ann Marie Cunningham absconded from bail and have not been seen or heard from to this day. On October 19, 1999, John Gaynor was tried for simple larceny before Her Honour Ms. Jennifer Straw, Resident Magistrate for the Parish of St. Catherine. On November 4, 1999, John Gaynor was found guilty, convicted on three counts of larceny and sentenced to nine months hard labour. On April 10, 2000, the case went before the Court of Appeal; the appeal was al-

⁴ [1883] 11 Q.B.D 440

⁵ [1878] 8 Q.B.D 167

lowed, an order made that the convictions be quashed and the sentence set aside. On April 11, 2000, the charges under the Public Utilities Protection Act were withdrawn.

[22] The prosecution of John Gaynor for the offence of simple larceny of the telephones was based on statements given by Wendell Townsend and Anne-Marie Cunningham. It is the prosecution of John Gaynor that has to be done without reasonable and probable cause or with malice. I find that by virtue of section 33 of the Constabulary Force Act as well as the case law, John Gaynor has not discharged his evidential burden showing the absence of reasonable and probable cause or the existence of malice in his prosecution before the court. The mere fact of him being tried and convicted and a successful appeal against the verdict of the Resident Magistrate's Court cannot by itself establish lack of reasonable and probable cause or the existence of malice. Accordingly, the claim for malicious prosecution also fails.

[23] For these reasons, there shall be judgment for John Gaynor in respect to his claim for false imprisonment in the sum of \$120,000.00. There shall also be judgment for Cable & Wireless Jamaica Limited in respect of the claim for wrongful dismissal. There shall also be judgment for Superintendent G.C. Grant and the Attorney-General of Jamaica with respect to the claim for malicious prosecution. In view of the conclusions that I have arrived at in this matter, each party shall bear their own cost.