

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

SUIT NO. C.L. H180 OF 1992

BETWEEN LEONIE HOWELL PLAINTIFF
AND THE ATTORNEY GENERAL FOR JAMAICA FIRST DEFENDANT
AND ACTING CORPORAL BARRINGTON BROWN SECOND DEFENDANT

Mr. M. Frankson and Miss J. Cummings instructed by Gaynair and Fraser for Plaintiff

Mr. L. Robinson and Mr. C. Green instructed by Director of State Proceedings for Defendants.

HEARD: April 15, 16, 17, 18 and May 20, 1996.

JUDGMENT

BECKFORD J. AG.

By Writ and accompanying Statement of Claim dated 2nd September, 1992 the Plaintiff sought to recover damages as against the first Defendant by virtue of the Crown Proceedings Act and against the second Defendant as servant and/or agent of the Crown for false imprisonment and/or assault.

The defence to the action was filed on the 20th January, 1993.

The Plaintiff alleges that on or about the 30th June, 1990 the second Defendant maliciously and without reasonable and/or probable cause falsely arrested and assaulted and/or maliciously prosecuted the Plaintiff on a false charge, to wit: unlawfully cultivating ganja.

On the 10th April, 1996 the Defendant filed a Notice of Intention to amend the defence seeking to rely on the Public Authorities Protection Act.

On the 15th April, 1996 the matter came on for hearing and the application to amend was vigorously opposed on the grounds, viz:

- i) That the discretion of the Court ought not to be exercised in favour of the Defendant based on the time when the amendment is being sought - some three years after the defence was filed;
- ii) That the discretion ought not to be exercised because of the nature of the application and;
- iii) That the discretion ought not to be exercised to deny the Plaintiff of a cause of action at this stage.

Section 259 of the Civil Procedure Code gives the Court discretion at any stage of the proceedings to allow either party to amend or alter his pleadings in such manner and on such terms as may be just. Lord Esher M.R. stated in *Weldon v Neal* (1887) 19 QBD 394.

"... amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments..."

Would the Plaintiff suffer prejudice? Undoubtedly! But so would the Defendant because the Act which repeals the Public Authorities Protection Act is not retroactive. It is settled law that the Court will not act to deny the Defendant the benefit of the Statute of Limitations.

Since it is the writ which commences the action the defence must be one which was available to the Defendant at the time the writ was filed. The acts complained of arose on or about the 30th June, 1990 and this writ was filed on the 2nd September, 1992 - more than two years after the cause of action arose. It follows that at the time the writ was filed the defence was available and therefore an amendment now could not prejudice the existing rights of the Plaintiff.

The amendment is granted as prayed.

The amendment having been granted Mr. Robinson made submission in limine in relation to the cause of action for false imprisonment and assault.

Miss Cummings argued that these matters must be determined by trial and not as a point taken in limine. She submitted that it is a triable issue whether the officer in the case was acting in lawful execution of his duty; whether the person or body claiming the protection of the Act is an authority within the meaning of the Act; whether the Act complained of falls within the protection of the Act and from what date the period indicated in the Act runs. For this she relied on *Hamlet Bryan v George Lindo* SCCA No. 22/85 (unreported).

Mr. Robinson submitted that the Plaintiff in her Statement of Claim alleges that the second Defendant was acting as a servant or agent of the Crown and in their Defence this allegation is admitted. He agrees that the Plaintiff has a cause of action but says there is a defence and that defence is the Public Authorities Protection Act.

The statute applies to acts done in the execution of the law such as the Dangerous Drugs Act. In the instant case the Defendant admits that the Plaintiff was arrested and charged for cultivating ganja albeit not in the manner related by the Plaintiff.

In *Lemuel Gordon v The Attorney General for Jamaica* SCCA No. 96/94

Carey, J.A. opined:

"In the instant case, the allegations contained in the statement of claim which have not been denied and must therefore be regarded as admitted, amount I suggest to acts done in pursuance of their lawful duty; the police officers were executing an arrest, albeit they did so in a manner that was plainly unauthorized. But it is just such conduct which brings the Public Authorities Protection Act into play. No triable issue therefore arises. No evidence need to led, the facts are all one way."

(emphasis mine).

I adopt the above and hold that in the instant case no evidence need be led in relation to the actions for assault and false imprisonment. The cause of acting having arisen on 30th June, 1990 and the writ having been filed on 2nd September, 1992 - more than twelve months after the cause of action arose the Defendant is entitled to rely on Section 2(1)(a) of the Public Authorities Protection Act. Since no issue arises on the pleadings in relation to the nature of the acts done by the second Defendant I ought not to allow the matter to go to trial as this defence as amended would be bound to succeed.

Section 237 of the Civil Procedure Code provides that if in the opinion of the Court any point of law substantially disposes of any distinct cause of action the Court may thereupon dismiss the action, or make such other order therein as may be just.

Accordingly I give Judgment for the defendant in relation to the actions for false imprisonment and assault.

On the 16th April, 1996 the trial in respect of the claim for malicious prosecution began.

The Plaintiff, Mrs. Leonie Howell, gave evidence that on Saturday 30th June, 1990 she went to work on the Monymusk Sugar Farm in Clarendon and left work for home at about 11.30 a.m.

On her way home she stopped at one Mr. George Morgan's field to buy bananas. Whilst she was there a party of five policemen including the second Defendant came there. The Plaintiff was left in the charge of one of the policemen whilst the others took Mr. Morgan and went off. One of the policemen took her "bill" (cutlass) from her bag without her permission and went away and when they all returned Mr. Morgan was carrying a bundle of ganja on his shoulder whilst the policemen carried water coconuts and plantains.

The policemen then told the Plaintiff to use her dress to tie up the ganja. She refused whereupon she was questioned about her husband mocked and jeered and told she was not co-operating. She was accused of being there to commit adultery. She was then taken to the Exeter Police Station where the second Defendant refused to release her saying to charge her would mean a "stripe" (promotion) and so he charged her for unlawfully cultivating ganja. From the Exeter Police Station the Plaintiff said she was taken to Lionel Town Police Station where she was kept until she was taken to the Resident Magistrate's Court and offered bail in the sum of \$4,000.00 and told to return to Court on the 27th July, 1990.

The Plaintiff said she returned to Court in excess of ten times to answer the charge. Her evidence at this point is instructive:

"One of the officers he came three times and then he don't come only Mr. Brown (second Defendant) was coming".

Eventually on the 3rd April, 1992 the Plaintiff was "sent home" by the presiding Judge and she contends that in all the circumstances the prosecution was malicious and without reasonable or probable cause.

On cross-examination the Plaintiff vehemently denied that Mr. Morgan had been taken to the Police Station with her and both of them charged with cultivating ganja. "They charged me - me alone - me Mrs. Leonie Howell - for cultivating ganja". She firmly denied any suggestion that Mr. Morgan and herself were before the Court on the same charge at any time.

The second Defendant gave evidence that acting on information he went to a section of the Monymusk estate where he observed the Plaintiff picking buds off ganja plants and Mr. Morgan digging the earth around the ganja plants. He said in this field he saw food crops like bananas and cassava and he saw coconut trees - these he said acted as cover for the ganja planted there. He denied using abusive words to the Plaintiff.

Corporal Brown said he attended Court in excess of ten (10) times but Constable Swaby who took the substance to the Analyst left the service and as a result the matter was adjourned sine die.

The Acting Deputy Clerk of Courts, for Clarendon tendered in evidence the Information on which the Plaintiff was charged together with the bail bond and Analyst Certificate in the matter. Further he testified that he had conduct of the matter on two occasions and both times the Plaintiff and Mr. Morgan were before the Court on the same information (Exhibit 1) charged with cultivating ganja.

The information and bail bonds for the Plaintiff and Mr. Morgan were tendered as exhibit one while the analyst's certificate naming Acting Corporal Swaby as the person from whom the ganja was received was tendered as Exhibit 2.

All these documents - which are records of the Court indicate that the Plaintiff was charged with Mr. Morgan for cultivating ganja. I also note in passing that the bail bonds showed that the Plaintiff was granted bail at the Police Station whilst Mr. Morgan was admitted to bail at the Resident Magistrate's Court.

On a charge of malicious prosecution the Plaintiff must prove:-

- (i) prosecution by the Defendant of a criminal charge.
- (ii) that the proceedings terminated the Plaintiff's favour;
- (iii) that the Defendant instituted proceedings maliciously;
- (iv) that there was absence of reasonable and probable cause and;
- (v) that the Plaintiff suffered damage.

It is indisputable that the Plaintiff was charged with a criminal offence to wit cultivating ganja and that she was incarcerated. Her liberty having been curtailed then damage is implied.

Did the proceedings terminate in the Plaintiff's favour? The defence submitted that the prosecution complained of was not terminated in the Plaintiff's favour and that adjourned sine die means that the matter may be brought back at any time. The facts are that the prosecution was instituted on the 6th July, 1990 in the Resident Magistrate's Courts and the Plaintiff returned to the Court on at least ten other occasions thereafter.

On the 3rd April, 1992 the matter was adjourned sine die on the ground that Constable Swaby (who had taken the substance to the Forensic Laboratory) had resigned from the Constabulary Force.

Since the 3rd April, 1992 the matter has not been brought back before the Court and in my view may properly be held to have been discontinued or abandoned.

".... it is enough if the proceeding has been abandoned without being brought to a formal end, though this cannot often happen in a Criminal prosecution".

See Clerk and Lindsell on Torts 14th Edition Paragraph 1897.

For a conclusive determination of the charge it would be necessary to locate Constable Swaby whose whereabouts were unknown in 1992 and with the effluxion of time the chances of locating him must now be even more remote.

I hold that even though this charge was adjourned sine die the circumstances are such as to amount to a sufficient determination of the matter to allow the Plaintiff the right to maintain her action. There is no likelihood of this matter being brought back at this or any future stage and there has been no judicial determination of her guilt. I find confirmation of this view. In the following passage from the Learned Editor of Salmond on Torts.

".... What the Plaintiff requires for his action is not a judicial determination of his innocence but merely the absence of any judicial determination of his guilt. Thus it is enough if the prosecution has been discontinued".

See Salmon on the Law of Torts Fifteenth Edition Page 559.

The malice must be proved to be actuated by spite or ill will. It is a question of fact.

Mr. Frankson submitted that the unchallenged evidence of the Plaintiff that the second Defendant had told her "oh Security guard nuh meck no money that is why you in shorty ground giving you husband bun" coupled with the behaviour of the police officers in laughing at the Plaintiff and saying "gwine send you to prison" amounted to malice.

As a rule it is correct that a crucial bit of evidence should be put to a witness or else it should be made plain to the witness in the box that his evidence is not accepted so that the witness may be given a chance to explain his statement.

In the instant case the evidence is that both the Plaintiff and Mr. Morgan were unknown to the second Defendant. Certainly the Plaintiff did not know the policemen.

On her evidence the Plaintiff was merely standing and talking with Mr. Morgan nothing more there seems to be no basis for the statement ascribed to the second Defendant.

The Plaintiff's narration lacks credibility. She vehemently denies that Mr. Morgan (whose field it was) was charged along with her for cultivating ganja. Yet both the deputy Clerk of Courts for Clarendon and exhibits 1 and 2 speak to both of them being so charged.

She said she was locked up until she was offered bail by the Court when her bail bond (Exhibit 1) showed that she was granted bail at the Police Station to appear in Court for the first time - the 6th July, 1990. It was Mr. Morgan and not the Plaintiff who was granted bail by the Court.

This Plaintiff would have the Court believe that the police came on a raid for dangerous drugs and went away with Mr. Morgan and came back and charged her - her alone - when it was Morgan who came back bearing the ganja.

Even in examination in chief she sought to contradict herself as to whether she had told the officer it was the first time she was going to Mr. Morgan's field.

I did not believe the Plaintiff so that even though the particular piece of evidence was unchallenged, her entire evidence was so manifestly unreliable that it would be unsafe to accept her as truthful on that particular point.

On the other hand Corporal Brown was forthright and was unshaken on cross-examination. I accept him as a truthful witness and accept his evidence that he did not use the words complained of to the Plaintiff.

I do not find the malice proved.

I accept the evidence of Corporal Brown that he went to the ganja field where he saw both the Plaintiff and Mr. Morgan tending ganja plants for cultivating ganja.

I believe that Corporal Brown was present on almost all occasions on which the charge was brought before the resident Magistrate's Court as evidence by Exhibit 2. That the Analyst's certificate bearing Swaby's name shows that his evidence is a vital link in the chain in determining that the ganja is the same one complained of.

The fact that Corporal Brown attended Court on almost every occasion leads me to draw the inference that he had an honest belief in the guilt of the Plaintiff. That he based this belief on his evidence that he watched the Plaintiff picking buds from the ganja. I find that he had reasonable and probable cause in all the circumstances to charge the Plaintiff for cultivating ganja.

Further the Plaintiff having failed to prove in accordance with Section 33 of the Constabulary Force Act that the Defendant acted either maliciously or without reasonable or probable cause I give judgment for the Defendant with cost to be taxed if not agreed.