



[2016] JMSC Civ 202

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN THE CIVIL DIVISION  
CLAIM NO. 2006 HCV 02605**

<b>BETWEEN</b>	<b>DENTON LEWIS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>CONSTABLE DONALD DINGWALL</b>	<b>1<sup>ST</sup> DEFENDANT</b>
	<b>CONSTABLE OREL ISRAEL</b>	<b>2<sup>ND</sup> DEFENDANT</b>
	<b>ATTORNEY GENERAL OF JAMAICA</b>	<b>3<sup>RD</sup> DEFENDANT</b>

**Assault – False Imprisonment – Malicious Prosecution – Whether reasonable and probable cause – Whether shooting in self defence – Whether warrant in possession of police – Acknowledgment of Service entered for 3<sup>rd</sup> Defendant only – Whether other Defendants undefended – Damages.**

Appearances: Sharon Gordon instructed by Gordon & Watson for the Claimant  
Gail Mitchell instructed by the Director of State Proceedings for the Defendants

**Heard: 28<sup>th</sup> February 2013, 1<sup>st</sup> March 2013 and 8<sup>th</sup> November 2013**

**CORAM: BATTS J.**

- [1] This judgment was orally delivered on the 8<sup>th</sup> November 2013. There is in this case no dispute that the Claimant was shot. Nor is there any dispute that the police fired at the Claimant. It is common ground that no firearm or any other weapon was recovered by the police. There is also no dispute that the Claimant was attempting to avoid capture by the police officers at the time he was shot.
- [2] The factual issues for my determination, and obviously the points at which accounts diverge, concern how and why the Claimant was shot. Did he, as the Crown's

witnesses contend, along with another, open fire at the police as they attempted to apprehend him or; did they shoot him as he fled unarmed from men in plain clothes. There are other peripheral issues of factual dispute such as whether a warrant was issued for the Claimant's arrest and was it read to him as he lay in his hospital bed. These as I say are peripheral to the real question which is; did the police have reasonable cause to shoot at the Claimant on the day in question.

- [3]** I have carefully reviewed all the evidence and my initial point of view at the time I saw and heard the witnesses give evidence has not changed.
- [4]** I accept the Claimant, Mr. Denton Lewis as a witness of truth. His demeanour impressed me and he was generally sure of what had occurred. He was not afraid where necessary to say he could not recall. He answered accurately about the other case he had before the court and admitted that he had not returned after repeatedly going to court on the matter. This incidentally would explain the warrant which the police say had been issued. On the other hand the Defendants' witnesses did not impress me. I formed the view that their account about another shooter was contrived.
- [5]** This view of the witnesses' demeanour and truthfulness has been buttressed by my analysis of the evidence which I will refer to only to the extent necessary to indicate the reasons for my findings. The Defendants say they attended to arrest the Claimant with respect to a warrant that was outstanding. This warrant was "called in" and was not in their possession at the time of the incident. The warrant was never produced to this Court. They say it was read to the Claimant while he was in hospital.
- [6]** The witnesses for the Crown describe entering the premises and being shot at as two men, one of whom was the Claimant, ran away. They returned the fire. One of the officers entered premises next door. All three gave chase to the men who ran into bushes. After a search they found the Claimant suffering from gunshot wounds. It seems to me that had the Defendants been chasing the Claimant, as they say they were, his opportunity to discard the weapon ought to have been rather limited. It does on their account seem improbable that no weapon was located.
- [7]** On the other hand the Claimant's account was internally consistent. He stated that on the day in question he saw men with guns enter his gate. His sister shouted a warning

and he decided to run. He thought they may have been gunmen as there was a political rally in the vicinity that day and the party holding it was not the party that the persons in his community supported. He said his brother in law who was present also ran but ran in a different direction. The Claimant says he ran through the house and jumped through a window in an effort to escape. After getting shot he recognized Constable Israel and Detective Constable Percival Tomlinson (whom he knew before). He says they were not wearing police vests. He also recognized Constable Dingwall and identified him as the person who shot him.

**[8]** It is also of interest that on the Defendant's account they travelled in Det. Cpl. Israel's private motor car when going to the Claimant's premises. This concern with travelling incognito is consistent with the Claimant's assertion that they were not wearing police uniforms or vests. Indeed it is therefore also quite possible they did not identify themselves as police officers before he started to run.

**[9]** Strangely in cross examination Det. Cpl. Israel denied that the purpose of the visit was to execute a warrant on the Claimant. Yet he stated that he went to the premises to look for Mr. Denton Lewis because he knew there was a bench warrant out for him. Mr. Israel explained in his written statement dated 27<sup>th</sup> October 2010 that at 3:45p.m. on the 7<sup>th</sup> October 2002 Cpl. Encil Bent reported receiving a call from an anonymous caller that Denton Lewis otherwise called "Copper" was at his house in Mount Rosser District. He says he was also told there was a bench warrant for felonious wounding or wounding with intent and that he was a person of interest for robbery with aggravation.

**[10]** In his witness statement Det. Cpl. Israel said that on arrival at the premises the Claimant's sister who he knew before shouted "Copper police". He ran to the right of the building and came upon a "barb" wired fencing. He therefore came out of the yard and ran to the premises next door. He then went on to these premises and tried to get a clearer view of where he had heard glass breaking. He saw two men one of whom he recognized as the Claimant. The other man had a plaited hairstyle and was holding a firearm which he pointed in the witnesses' direction. Cpl. Israel heard two explosions as he dived to the ground and discharged two rounds from his service pistol. He says he saw the men run to the back of the premises "in different directions". He stated that "the men" were armed. This is interesting as he only saw one man with a firearm.

- [11] Det. Cpl. Israel then heard several other explosions. He proceeded further down onto the neighboring premises and as he approached the bushes to the rear he heard crying sounds. He then found the Claimant lying down with a gunshot wound. Eventually the Claimant was charged with shooting with intent and illegal possession of a firearm. He said both Cons. Dingwall and himself gave evidence at his subsequent trial in 2003. The Claimant was found not guilty of shooting with intent and illegal possession of a firearm.
- [12] When cross examined Det. Cpl. Israel could give no account for the warrant, indeed none of the officers who gave evidence could. No copy of the warrant was produced. This was explained in the course of cross examination by the fact that the Spanish Town Court had had a fire and documents were destroyed. Interestingly Det. Cpl. Israel said that when the men were running they were facing Cons. Dingwall but their backs were to him. They would have been running past Cons. Dingwall. He recovered no spent shells nor were they able to find any firearm.
- [13] The officers could give no reason why a warrant to enter the premises and search for the Claimant was not obtained. He stated that they had been looking for the Claimant some 2-3 months prior to 7<sup>th</sup> October 2002. He says he had been to the house some two or three times in search of the Claimant.
- [14] Det. Cpl. Dingwall's evidence in chief was to the same general effect as Det. Cpl. Israel's. He however did not know the Claimant before but had "heard" he was wanted. He was armed with a M16 rifle and said he was dressed in blue denim. He says he heard Constable Israel shout that the men were armed. This occurred before he heard four explosions which sounded like gunshots.
- [15] He says that he saw both men running on the neighbouring premises one slightly ahead of the other. He saw one of the men who he describes as being of light complexion with an object resembling a firearm in his hand. He said later that the man of dark complexion pointed an object resembling a firearm in his direction. He said,
- "I then heard an explosion. Immediately I took cover by crouching on the ground because I was in fear of my life and returned fire by discharging two cartridges from my M16 rifle in the direction of the two men."

He then described the two men as running down a slope into bushes.

**[16]** The significance of this evidence is that it gives the impression that the men were running together. However, Det. Israel said that the men ran in different directions when they fled on to neighbouring property. Also Det. Israel observed no firearm in the Claimant's hand.

**[17]** In cross examination the following exchange is, I think, significant,

*“Q: Who shot Denton Lewis?”*

*A: I have no idea.*

*Q: Suggesting you shot Denton Lewis.*

*A: I cannot answer with certainty. It could have been me because I fired in direction where he and the other man was.”*

This reticence of this police officer to admit to shooting the Claimant is troubling. He was the only one of the three police officers armed with a M16 that day. When I come to review the medical evidence we will see that it is consistent with injury by a high powered weapon. Furthermore, the Claimant's entry wound to the front side is consistent with the account of Mr. Israel and Mr. Dingwall, in that whereas Mr. Israel was behind the men, Mr. Dingwall was to one side as the Claimant ran past.

**[18]** In answer to this Court Mr. Dingwall stated that the two men were running in the same direction, his exact words were,

*“Same direction. I was seeing their left side. Possible they went in different directions at a later stage when pointing at me they were together.”*

As we have seen Det. Cpl. Israel says he saw the men run in different directions on the neighbouring property.

**[19]** Det. Sgt. Colin Myers gave evidence to establish that a warrant was executed on the Claimant whilst he was at the Linstead Hospital. He states in his witness statement dated 7<sup>th</sup> October 2010 that he has been in the police force for 33 years and 8 months. The germane part of the evidence is as follows:

*“12. When I saw Lewis in the casualty ward of the Linstead Hospital, he was conscious and lying on a stretcher. I noticed that he had a bandage on his abdomen and questioned him briefly as to why he was there. He said he had been shot by police and was taken to the hospital. I then told him that I was there to execute a warrant on him for the offence of attempted murder. I also informed him that he would be charged for the incident in which he had been shot. He was cautioned, to which he said “mi nuh fire no gun.”*

*13. I produced the warrant and showed and read it to him to which he said, “nuh bodi nah com a court.” I also informed him of the charges of shooting with intent, illegal possession of firearm and when cautioned he said “mi nuh fire no gun.”*

For what it is worth the Claimant’s responses are consistent with the position he maintains today, even in regards his explanation for not going back to court on the original charge. It is interesting also that this Detective attended the scene of the incident on the 8<sup>th</sup> October as he said to investigate. However, save for observations made about the broken glass and blood stains he reports on no efforts to obtain statements from the persons who were reportedly present and in particular the Claimant’s sister.

**[20]** When cross examined as to the whereabouts of the warrant he gave the following rather surprising reply,

*“Q: Where is the warrant that you said you executed?”*

*A: Bench warrant, it was endorsed and placed on file before RM Court in Linstead. Not sure where it is.*

*Q: Did you try to retrieve it or a certified copy?*

*A: No.”*

To his credit this witness did not try to suggest it had been destroyed in a fire.

**[21]** The Claimant’s account as related in his written statement has a decidedly truthful ring. I will give an example from paragraph 14,

*“14. When mi de ah Linstead the police dem say them have a warrant fi me. Me say warrant out fi mi and everyday me pass Ewarton Police Station and the police dem also pass my area everyday and dem no lock me up. Den me remember that me did have a attempted murder and robbery case but de case drop to wounding and robbery. The complainant stop come court after the first day. Me go court 5 times and dem call me name. Den the next time me go to court and me no hear me name. Me sit down in court until court over. Me talk to a Special Constable and him say me must come back the next day and sit down and still don’t hear me name. Me see a Sergeant whey me did know. Me tell him me no hear me name. Him say go down to the Court’s Office. Me go to the Court’s Office wid me sister and talk to a woman in the Court Office whey me know and she say me must come back. Me go back the Friday but did not see her. A fat man tell me say me must go upstairs to the Court Clerk. Me go upstairs and dem say must go to the original court where me was in. Me go and me no hear me name. Dem just have me ah go back and fort (sic) so me go home after court over.*

*15. In December 2002 dem carry me to court for that case and the witness tell the court he did not know who hurt him so me neva have fi talk.”*

**[22]** The Claimant it is fair to say also made an impressive witness under cross examination. He explained his nickname “Copper” as related to his skin colour. Much effort was spent by the cross examiner to get the witness to admit that the policemen identified themselves as police and were wearing uniforms. He maintained his position. Ultimately however and because of the view I take of the facts, whether they identified themselves as police officers or not, and whether the Claimant was wanted on a warrant or not will not affect the findings on liability.

**[23]** As was agreed at the commencement of the trial the doctor’s evidence was interposed while the Defendant’s case was being presented. Dr. Hugh Barned is a consultant surgeon at the Spanish Town Hospital. He indicated that the Claimant’s medical records could not be located. A copy of the medical report dated 31<sup>st</sup> May 2005 was admitted as Exhibit 4. The doctor made a correction and stated that what was described as the entry wound in the report should be described as the exit wound and

vice versa. He said that the left hypochondrium is the area of left costal margin (the rib cage). This he said was the entry wound.

**[24]** When cross examined the doctor stated that no bullet was recovered. The doctor gave further details of the movement of the projectile through the body and the damage it did. It appears to the court that the location of the injury and the fact that the bullet passed through the Claimant were consistent with injury from the M16 fired by Cpl. Dingman and consistent with the position of the Claimant in relation to Cons. Dingwall and as related by Cons. Dingwall i.e. to the left.

**[25]** In the result I make the following findings of fact:

- a) On the 7<sup>th</sup> October 2002 the defendant police officers along with another officer entered the premises at which the Claimant resides.
- b) They attended those premises because they had instructions to apprehend the Claimant for whom a bench warrant had been issued by the Linstead RM Court.
- c) The police officers did not have a bench warrant or any warrant in their possession.
- d) In order to approach unannounced the police officers travelled in a private motor car which belonged to one of them and were not in uniform, nor were they clearly identifiable as police officers.
- e) Upon their arrival the complainant's sister alerted the complainant to their presence and herself as well as another gentleman present fled.
- f) The Claimant once alerted also ran. Although it is not very relevant I find that he was not aware that the men were police officers.
- g) The Claimant jumped through a window onto premises next door and while running away he was shot.
- h) The 1<sup>st</sup> Defendant fired the bullet that hit the Claimant.
- i) The Claimant was unarmed and was not in the company of anyone else who was shooting at the police.
- j) No one fired at the police on the day in question.

k) The Claimant was taken to hospital for treatment where the warrant for his arrest was read to him while he was undergoing treatment. It is not therefore surprising that he was not aware or appears not to recall the execution of the warrant on him.

**[26]** On the facts therefore there was no reasonable or probable cause for the use of a firearm on the day in question. The 1<sup>st</sup> Defendant is therefore liable for Trespass to the person and the 3<sup>rd</sup> Defendant is vicariously liable for his act.

**[27]** I however do not find the Defendants liable for False Imprisonment because there was a warrant out for the Claimant prior to the 7<sup>th</sup> October 2002. It is, I believe impossible and impractical to separate his detention for the charge related to the incident on the 7<sup>th</sup> October 2002 and his incarceration consequent on the execution of the warrant.

**[28]** The warrant was not produced to this court and its absence has been insufficiently explained. However the Claimant admits the existence of the earlier charge and that he stopped attending court. It is a reasonable inference and more probable than not, that there was a bench warrant issued. The charges related to that were eventually dismissed in December 2002.

**[29]** I do find the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants liable for Malicious Prosecution with regard to the incident on the 7<sup>th</sup> October 2002. They knew the Claimant was unarmed and knew he was wrongfully shot. The charges were therefore maliciously laid and ultimately dismissed after a trial. The evidence suggests this acquittal may have been in 2003.

**[30]** As regards damages I have considered the several authorities cited. In relation to pain, suffering and loss of amenities consequent on the assault (gunshot wound), I rely on Renford Barrocks v Oral Israel et al Khan's Vol. 6 p 152. The award I make for pain, suffering and loss of amenities is \$3,000,000.00.

**[31]** As regards the malicious prosecution I considered and relied upon:

a) Kerron Campbell v Kenroy Watson Suit CLC 385 of 1998 Judgment (unreported) 6 January 2005 of Sykes J. The award was \$90,000.00 for malicious prosecution, updated it approximates to \$200,000.00.

b) Allen v JPS 2006 HCV 566 Unreported judgment dated 10 April 2008 of Thompson-James J (Ag.). \$350,000 was the award and the court had regard to the fact that the Claimant was a businessman in good standing whose reputation was affected. When updated that award approximates to \$540,000.00.

**[32]** The guidance on the matter of damages for malicious prosecution is, as Sykes J indicates in his judgment, rather inadequate. I shall however do my best. I bear in mind the fact that the Claimant may not have been a model citizen. On the other hand he was forced by this wrongful prosecution to be before the court for several months falsely accused. In all the circumstances and when regard is had to the authorities cited I award \$250,000.00 for this head.

**[33]** The Claimant seeks exemplary damages. I however respectfully decline the award. The Claimant was shot while fleeing the police who had a lawful reason to detain him. They prevented his flight in an entirely unlawful and improper way. However, it is not the type of abuse of power or authority that I consider deserving of exemplary damages. The Claimant will be compensated by his compensatory award. I decline to award a punitive element on the facts and in the circumstances of this case.

**[34]** In relation to Special Damages. I find the following proved and therefore award:

Cost of Hospital	\$20,350.00
Cost of Medical Certificate	\$2,000.00
Attorneys fees in connection with his representation before the criminal courts	<u>\$170,000.00</u>
	\$192,350.00

I make no award for loss of income as I was not satisfied with the evidence in that regard.

**[35]** In the result there is judgment for the Claimant against the 1<sup>st</sup> and 3<sup>rd</sup> Defendants for Assault and Battery.

a) Damages are awarded in the amount of \$3,000,000.00 for the pain, suffering and loss of amenities.

b) Special Damages \$192,350.00

There is judgment for the Claimant against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants for Malicious Prosecution. Damages in that regard are awarded of \$250,000.00.

c) Costs to the Claimant to be taxed if not agreed.

Interest will run at 3% on the general damages from the 7<sup>th</sup> October 2002 until the date of judgment and at 3% on the special damages from the date the Particulars of Claim were served, 8<sup>th</sup> August 2006, to date of judgment.

**[36]** In this matter counsel for the Attorney General attended and argued on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Indeed in the course of trial I understood her to represent all three. However the records indicate that no acknowledgement of service had been filed on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Further the only Defence filed has been on behalf of the 3<sup>rd</sup> Defendant and this was amended once with the leave of the court. The various minutes of Orders on the court's file shows the Attorney General at each stage appearing only for the 3<sup>rd</sup> Defendant.

**[37]** Technically this means that the Claimant will have been entitled to judgment in default of acknowledgement and Defence against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as each was personally served with the Claim. There are affidavits of service on each. The trial therefore would have been an assessment of damages in relation to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and a trial on the merits in relation to the 3<sup>rd</sup> Defendant. Such a scenario would of course be absurd because:

a) It might lead to the employer being found not liable while the employees remain liable by a judgment in default

b) More problematically the judgment in default on liability would render the employer (the Crown) vicariously liable. The idea of a trial in relation to the 3<sup>rd</sup> Defendant would be redundant.

**[38]** In the result I treated this as a trial on the merits against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants would I believe be astounded to hear that the attorneys for the 3<sup>rd</sup> Defendant were not representing them. Indeed their willingness to cooperate and give witness statements is testimony to that. In future I hope better care is taken to ensure acknowledgements of service and Defences are appropriately filed and entitled.

**David Batts**  
**Puisne Judge**  
**8<sup>th</sup> November 2013**