

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

SUIT NO. C. L. 1977/M271

BETWEEN	MARGARET MARSHALL	FIRST PLAINTIFF
AND	STAFFORD MARSHALL (by next friend Margaret Marshall)	SECOND PLAINTIFF
AND	THE ATTORNEY GENERAL	FIRST DEFENDANT
AND	KENNETH NEWMAN	SECOND DEFENDANT

John Vassell for both plaintiffs.

Neville Fraser of the Attorney General's Department for first
named defendant.

Karl Thomas for the second named defendant.

1980: October 2, 3; December 19

Wolfe J. (Ag.):

The plaintiffs sought to recover damages against the first
and second named defendants for that -

" On the 2nd day of April 1977, Police Constables,
purporting to act in the course of their duties
wrongfully, maliciously and without reasonable
and probable cause arrested the plaintiffs and
took them into custody at Linstead Police
Station where they were detained and kept in custody
for a period of three days. "

The plaintiffs further alleged that -

" the said arrest was procured by the second
Defendant who wrongfully and maliciously caused
the Police Constables to arrest the plaintiffs
and take them into custody on a charge made by
the second Defendant that the plaintiffs had
stolen fowls from him; further or alternatively,
the said wrongful arrest was made by the Police
Constables exercising their own discretion and
maliciously and without reasonable or probable
cause.

The first named plaintiff further sought to recover
damages for trespass against the second named defendant for that -

" on the 2nd day of April 1977, the second
Defendant along with his servants and/or agents

" wrongfully entered upon the said land and premises mentioned in paragraph one (1), and broke and entered the first named plaintiff's poultry house situated thereon and seized and carried away therefrom fowls belonging to the first named plaintiff in consequence whereof the first named plaintiff has suffered loss and damage and incurred expense. "

Before adverting to the evidence adduced, I would like to deal with a preliminary point which arose when counsel for the plaintiffs sought to amend the plaintiffs' statement of claim by adding (1) paragraph 5a. The proposed amendment reads as follows:

" That the plaintiffs were tried on the said charge in the Resident Magistrates' Court, St. Catherine, holden at Linstead and were both acquitted. "

(2) Under Particulars of Special Damages to add:

" No. 3. Counsel's fee for appearance in Resident Magistrates' Court \$250.00. "

The amendments were opposed by both defendants on the ground that the plaintiffs having endorsed the writ of summons with a claim for malicious prosecution and having failed to plead same in their statement of claim were deemed to have abandoned their claim for malicious prosecution.

The defendants relied upon Order 18 rule 15(3) of the Rule of the Supreme Court.

It was further urged by the defendants that if the amendments were granted it would necessitate an amendment of the defence and the taking of further instructions which might occasion delay in the trial.

Mr. Vassell, for the plaintiffs, in pursuance of the amendment, relied upon Order 20 rule 5 of the Rules of the Supreme Court.

The defendants' reliance upon Order 18 rule 15 is based upon a footnote thereof which states as follows:

" A claim in the writ not repeated in the statement of claim is treated as abandoned. "

Order 20 rule 5, which is repeated in section 259 of The Judicature (Civil Procedure Code) Chapter 177 of the Laws of Jamaica Revised Edition 1953, states as follows:

" The court may at any stage of the proceedings allow the plaintiff to amend the writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct. "

It is clear to my mind that the amendment sought by the plaintiffs was within the ambit of section 259 of The Judicature (Civil Procedure Code), consequently, the amendment was granted as prayed.

I was fortified in this ruling by the observations of Lord Justice Bowen in Cropper v. Smith (1884) 26 Ch.D. at pages 710-711:

" It is a well established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace. It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right. "

I am satisfied that the amendment could be made without injustice to the defendants and that the grant of the amendment would lead to a determination of the real issues between the parties.

Having granted the amendment, the defendants were offered the opportunity of an adjournment to take further instructions and to take such further steps as they deemed necessary, consequent upon the grant of the amendment. The offer was declined and the defendants elected to proceed with the trial of the action.

For purpose of ease, I shall deal first with the second plaintiff's evidence.

The second plaintiff is an infant who sues by his next friend, the first plaintiff. He testified that on the 2nd day of April, 1977, at about midday, he was standing at a Jack fruit tree near to his mother's fowl coop, when Detective Acting Corporal

Pennycooke and another police officer came to the premises and questioned him as to the ownership of the chickens which were in the coop. He advised Pennycooke that the chickens belonged to his mother and that she had bought them from three different sources, namely, Mr. Ranger, Mr. Lemonious and from a business place in Spanish Town. At the request of Pennycooke, he sent someone to call his mother, the first named plaintiff, who arrived on the scene and was duly questioned by Pennycooke as to **how she** had come into possession of the chickens. The first named plaintiff, in response to Pennycooke's question, gave substantially the same answers as the second named plaintiff.

It is of interest to note that Pennycooke's evidence in this regard is supportive of the plaintiffs' testimony.

Notwithstanding the answers given and without taking steps to verify the truth or otherwise of the plaintiffs' answers, Pennycooke arrested both plaintiffs and placed them in custody at Linstead Police Station until the following Monday, when they were both released on bail.

Both plaintiffs testified that they were tried in the Resident Magistrates' Court, holden at Linstead and were acquitted.

The plaintiffs were unable to say for what offence they were charged as they had never been told, but it emerged from Pennycooke's evidence that they were both charged with unlawful possession of property.

The case for the first named plaintiff was substantially the same as the case for the second named plaintiff and her evidence was substantially the same as that of the second named plaintiff.

In support of her case, the first named plaintiff called as her witness, her husband, Ernest Marshall, whose evidence was relevant only to the claim for trespass brought by the first named plaintiff, against the second named defendant.

This witness testified that on the 2nd April, 1977, he received certain information from one Mr. Perkins and acting thereupon he left his cultivation and went towards the site of the fowl

coop, where he observed the second named defendant driving into his premises. The second named defendant alighted from the vehicle along with Special Constable Rogers and two other men, Lincoln Ramaran and a man known to him only as Wellesley.

The second named defendant thereupon ordered the men to remove the chickens from the coop and place them into plastic bags, which had been taken from the second named defendant's jeep. Wellesley, he contended, told the second defendant that the chickens did not belong to him as he Wellesley knew when the first named plaintiff purchased the chickens. Notwithstanding this, second defendant insisted that the chickens should be removed. Wellesley and Ramaran duly obliged.

During all this witness remained silent, taking cover behind a banana tree, fearing for his safety as the Special Constable was armed with a gun and had issued threats to shoot any member of the Marshall family who appeared in sight.

The chickens having been removed from the coop, they were placed into the jeep and taken away. The witness then set out to the Linstead Police Station, where he sought bail for his wife and son, but to no avail, as Pennycooke informed him that bail would not be offered until the following Monday.

Let me state at this point that I find it difficult to accept that Mr. Marshall, then a District Constable, attached to the Linstead Police Station, would have seen his wife's chickens being removed by these men and for fear of an armed Special Constable, whom he knew, would have remained silent in hiding.

I find as fact as the defence contends that Mr. Marshall never witnessed the removal of the chickens from the coop.

It seems to me that Mr. Marshall was made aware of the fact of the removal of the chickens and of the arrest of the plaintiffs by Mr. Perkins, whereupon he hastened to the Linstead Police Station to investigate what had taken place.

As to the circumstances surrounding the removal of the chickens, I unhesitatingly accept the account given by the second named defendant when he testified that he had been requested by the police to assist them in transporting the chickens. It is understand-

able that the second defendant having been a victim of the theft of chickens gladly embraced the opportunity to assist in what he might have thought was the apprehension of the villain.

I find as a fact that Special Constable Roberts was in charge of the operation of the removal of the chickens and that when Ramasaran and Brown removed the chickens from the first named plaintiff's coop, they were acting on behalf of the police and were not acting as the servants and/or agents of the second named defendant. I further find as fact that the second named defendant never entered upon the premises of the first named plaintiff, neither did he participate in the actual removal of the chickens from the first named plaintiff's premises other than by driving the jeep which conveyed the chickens to the Linstead Police Station.

En passe, the provisions of section 12 of the Unlawful Possession of Property Act are worthy of note. Section 12 states as follows:

" .. A constable or authorised person may call upon any person to aid and assist him in the execution of his duties under this Act, and if any person so called upon neglects or refuses without lawful excuse to aid and assist the constable or authorised person he shall be guilty of an offence against this Act and shall, on summary conviction before a Resident Magistrate be liable to a fine not exceeding fifty dollars and in default of payment thereof to imprisonment for a term not exceeding three months. "

Accordingly, the first named plaintiff's claim for trespass against the second named defendant fails.

Let me quickly dispose of both plaintiffs' claims against the second named defendant for **"wrongfully and maliciously procuring their arrest, thereby causing them to be taken into custody on a charge made by the second named defendant that the plaintiffs had stolen fowls from him."** It is the evidence of the first named plaintiff that upon being requested by Pennycooke to accompany him to the station, she enquired of him to what end and Pennycooke informed her that he was going to arrest them, whereupon one of his colleagues asked him for what was he arresting the plaintiffs and Pennycooke replied "Mr. Newman told me to arrest them." This was denied by Pennycooke.

In this regard I accept Pennycooke's evidence to that of the first named plaintiff. It is noteworthy that the first named plaintiff is not supported by the second named plaintiff on this point.

The court accepts as true Pennycooke's account of the report made to him by the second named defendant concerning the loss of chickens. Obviously if the second named defendant had reported to Pennycooke that the plaintiffs had stolen his chickens Pennycooke's investigations would have resulted in the plaintiffs being charged with larceny of chickens from the second named defendant. The court accepts the evidence of the second named defendant when he said, under cross-examination by Mr. Vassell, "I never told any police officer that plaintiffs had stolen my chickens."

Accordingly, the plaintiffs' claims against the second named defendant for wrongfully and maliciously procuring their arrests fail.

I turn now to what may be regarded as the more complex area of the plaintiffs' claims, namely, the action for false imprisonment and malicious prosecution against the first named defendant.

Having already summarized the plaintiffs' evidence, I shall proceed to summarize the evidence of Detective Acting Corporal Pennycooke, the arresting officer.

Pennycooke testified that on the 29th March, 1977, he received a report from the second named defendant relative to the loss of chickens belonging to the second named defendant. Pursuant to this report, he began investigations and acting upon information received, he procured a search warrant under the hand of a Justice of the Peace for the parish of Saint Catherine and under the Unlawful Possession of Property Law to search the premises of the first named plaintiff at Wakefield in the parish of Saint Catherine. This warrant dated 2nd April, 1977, was admitted in evidence as Exhibit 1.

Armed with the warrant, Exhibit 1, along with other police officers, he proceeded to the plaintiffs' premises at Wakefield where he saw the second named plaintiff and to whom he identified himself and told him that he had a warrant to search the premises for chickens, whereupon the second named plaintiff responded: "See me have some chickens over there sir."

Upon an examination of Pennycooke's evidence, I am constrained to reject this portion of his testimony as the information which he received concerning chickens which were lodged upon the premises at Wakefield related to the first named plaintiff. His evidence as to the information he received and which caused him to procure the warrant related to the first named plaintiff offering to sell chickens to one Vashtina English of Princessfield in Saint Catherine. I do not accept that he would have told the second named plaintiff who was then only fourteen years of age that he had a warrant to search premises for chickens.

I accept the evidence of the second named plaintiff when he testified that Pennycooke asked him to whom the chickens belonged and that he told Pennycooke that his mother was the owner of the chickens and that she had bought some from Mr. Ranger, some from Mr. Lemonious and some in Spanish Town.

Pennycooke continued that the first named plaintiff arrived and I find as fact that it was he who sent to fetch the first named plaintiff as testified to by the second named plaintiff. The first named plaintiff having arrived on the scene Pennycooke told her of his mission and read the warrant, Exhibit 1, to her. This I accept as true. I reject the plaintiffs' evidence that no warrant was read.

The first named plaintiff is then questioned by Pennycooke as to how she came in possession of the chickens. Both Pennycooke and the second named plaintiff are ad idem as to the answers given by the first named plaintiff which answers agree with answers given by the second named plaintiff.

A dialogue ensued between Pennycooke and the first named plaintiff as to how long she had acquired all the chickens and if she had acquired all the chickens on the same occasion, and if they were

acquired young. The details of this dialogue are of the utmost importance in deciding whether or not reasonable and probable cause existed for the arrest and prosecution of the plaintiffs.

It is the evidence of Pennycooke that the adult plaintiff told him that she had not purchased all the chickens on the same occasion but had purchased them about two weeks apart and that she was unable to find her receipts which she had received upon the purchase of the chickens. He said he noticed that the earth had been freshly dug as a result he asked plaintiff how long she had constructed the coop. She replied about six months. He said he noticed fowl droppings which could not have been deposited there for as long as six months. This observation on his part shows a complete misunderstanding of the plaintiff's answer as the plaintiff had not said that the chickens had been in the coop for six months but that the coop had been erected six months ago. In any event he had earlier testified that the plaintiff had told him that she had purchased the chickens about three weeks before.

Pennycooke thereupon told plaintiffs that he did not believe their stories and arrested both of them for Unlawful Possession of Property.

At this stage, dealing with the infant plaintiff, it escapes me upon what reasonable and probable cause he arrested the infant plaintiff. There is not one iota of evidence that the infant plaintiff was in possession of the chickens or was privy to their being placed there. On the contrary, the evidence of Pennycooke is supportive of the evidence of the infant plaintiff that he told Pennycooke that the chickens belonged to his mother, the first named plaintiff, and this was verified by the mother.

Having arrested the plaintiffs, they are cautioned and the infant plaintiff upon being cautioned exclaims, "Mama tell the police the truth that a somebody bring them come here the other night!" This I reject as being untrue. I find that the infant plaintiff used no such words.

I further reject that upon caution the adult plaintiff said; "Officer a mi son den chicken."

The first named defendant says that the constable having acted upon the authority of a warrant he is absolved from liability by virtue of section 34 of the Constabulary Force Act.

The warrant having been issued under the Unlawful Possession of Property Act, the court must examine the relevant provisions of that Act to see with that authority the constable is clothed.

Section 8(1) of the Act states as follows:

" If information is given on oath to any Resident Magistrate or Justice that there is reasonable cause for suspecting that anything stolen or unlawfully obtained is concealed or lodged in any house, store, yard or other place, or on any land (whether enclosed or not) or in any vessel, the Resident Magistrate or Justice may, by warrant under his hand directed to any constable, cause the house, store, yard, place, land or vessel to be entered and searched at any time of day or, if the warrant so authorises, by night. "

It is clear that all section 8(1) authorises is the entry and search.

The Power of Arrest under this Act is given by section 8(3) which reads as follows:

" If upon search made in accordance with the provisions of subsections (1) and (2), anything which the constable has reasonable cause to suspect to have been stolen or unlawfully obtained is found, the constable shall arrest and bring before a Resident Magistrate

(a) the person in whose house, store, yard, place or vessel or on whose land such thing is found; and

(b) any other person found in such house, store, yard, place or vessel or on such land,

if the constable has reasonable cause to suspect that such person placed or was privy to the placing of the thing in such house, store, yard, place or vessel or on such land knowing or having reasonable cause to suspect the same to have been stolen or unlawfully obtained. "

It is a condition precedent to arrest under section 8(3) that the constable must have reasonable cause to suspect that the goods found were stolen or unlawfully obtained. He must also have reasonable cause to suspect that the person placed or was privy to the placing of the thing in such house knowing or having reasonable cause to suspect the same to have been stolen or

unlawfully obtained.

It is convenient at this point to refer to section 33 of the Constabulary Force Act which makes it obligatory for plaintiffs in actions against police officers acting in the execution of their duties to plead that such acts were done either maliciously or without reasonable and probable cause. Section 33 of this Act therefore places a burden upon the plaintiffs to prove malice or the absence of reasonable and probable cause.

Malice was defined by Barry J. in Pike v. Waldrum /1952/ 1 Lloyd's Rep. 431 as "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."

Hawkins J. in Hicks v. Faulkner /1878/ 8 Q.B.D. 167, 171, defined reasonable and probable cause as "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 them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accused, to the conclusion that the person charged was probably guilty of the crime imputed."

This definition was approved by Lord Atkin in Herriman v. Smith /1938/ A.C. 305, 316.

Pennycooke in his evidence stated that the adult plaintiff informed him of the source from which she had purchased the chickens, however, he further stated that he noticed that the ground was freshly dug in the area of the chicken coop and further that he noticed chicken droppings which could not have been there for six months. The purpose of this evidence, one can conclude, was designed to discredit the plaintiff's answer that she had erected the coop about six months before. However, the plaintiff's evidence was that her chickens were about eight weeks old and that this was the first set of chickens that was being housed in the coop.

Upon arrest and after caution, it is alleged that the infant plaintiff said: "Mamma tell the police the truth that a some-

body bring them come here the other night" and that the adult plaintiff said: "Officer a mi son dem chickens."

As indicated earlier on, I rejected Pennycooke's evidence relative to his observations and as to the statements made by the plaintiffs upon arrest. I find that these bits of evidence were invented by Pennycooke in an effort to justify his arrest and subsequent prosecution of the plaintiffs. I find that the inventions were designed to move the court into so believing.

Mr. Fraser, for the first named defendant, argued that the failure of the plaintiffs to produce the information or informations upon which they were charged was fatal to the claim in malicious prosecution. He cited and relied upon the cases of Prendergast v. Smith [1879] S.C.J.B. Vol. 2 p. 356, in which Lucie Smith, C.J., referred to the judgment of Bayley, J. in Smith v. Walker, York Summer Assizes, 1821, where evidence of an admission by the defendant that he laid an information before a Magistrate was held not to dispense with the necessity of proof of the information itself.

It is demonstrably clear upon examination of Prendergast's case that the point under consideration was the admissibility of an information in evidence without proper proof.

The decision cited is certainly no authority for the proposition put forward by Mr. Fraser.

Without enumerating them, one can readily think of a number of situations in which a plaintiff may be unable in an action for malicious prosecution to produce in evidence the information upon which he was charged. Does this mean that because of such a technicality a genuine claim would be defeated? Certainly not.

Even if I am wrong in so holding, the admission by Pennycooke that the plaintiffs were tried and acquitted would be proof of that fact.

Finally, the first named defendant pleaded that he was protected by section 34 of the Constabulary Force Act which reads:

" Where any action shall be brought against any Constable for any act done in obedience to the warrant of any Justice, the party against whom such action shall be brought shall not be responsible for any irregularity in the issuing of such warrant or for any want of jurisdiction of the Justice issuing the same

" but may plead the general issue and give such warrant in evidence at the trial; and on proving that the signature thereto is the handwriting of the person whose name shall appear subscribed thereto and that such person was reputed to be and acted as a Justice for the parish and that the act or acts complained of was or were done in obedience to such warrant, there shall be a verdict for the defendant in such action who shall recover his costs of suit. "

In the instant case, the constable purported to act by virtue of a search warrant issued under the Unlawful Possession Act. It must be noted that the warrant is not a specified warrant. The draftsman of the warrant attempted to embrace therein the provisions of section 8(3) of the Act, but in so doing he did violence to the Act in that he omitted a vital portion of the provisions of section 8(3).

The relevant portion of the warrant reads thus:

" and if the same, or any part thereof, or any other thing which there shall be reasonable cause to suspect to have been stolen, or unlawfully obtained, shall be found upon such search, that you bring the goods so found and also the body of the said."

Whereas section 8(3) authorises arrest only -

" if the constable has reasonable cause to suspect that such person placed or was privy to the placing of the thing in such house, store, yard, place or vessel or on such land knowing or having reasonable cause to suspect the same to have been stolen or unlawfully obtained. "

The format of the warrant makes the arrest by the constable the execution of a judicial act but section 8(3) makes arrest by the constable a matter entirely for the exercise of the constable's discretion. The discretion of the constable to arrest based upon the authority to search and the authority to arrest.

Section 34 of the Constabulary Force Act will avail a constable where the constable acts in obedience to the warrant.

It is my view that section 34 of the Constabulary Force Act is only applicable where the constable acts in good faith in executing a warrant, which later turns out to be defective whether from any irregularity in the issuing of the warrant or for want of jurisdiction in issuing same.

False Imprisonment

In relation to the infant plaintiff, the second plaintiff, the warrant did not authorise his arrest and on the explanation given by the infant plaintiff as to the presence of the chickens on the premises, it cannot, in my view, be said that the constable acted with reasonable and/or probable cause in arresting him.

I further hold that in arresting the second named plaintiff Acting Corporal Pennycooke was not acting in obedience to the warrant and the protection of section 34 will not avail him.

However, in relation to the first named plaintiff, he did no more than the warrant authorised him to do, namely, to search for chickens and to bring such chickens and the body of Margaret Marshall before a Resident Magistrate.

As Wooding C.J. said in Willis v. Voisin [1963] 6 W.L.R. 50 at p. 61, a case decided under provisions identical to section 34 of the Constabulary Force Act:

".... that was his mandate, and it was also his duty. He was authorised and required so to do."

Malicious Prosecution:

As indicated earlier, I find that Detective Acting Corporal Pennycooke acted without reasonable and probable cause in arresting the second named plaintiff. The total lack of reasonable and probable cause and the invention by him of evidence to justify the arrest of the second plaintiff are circumstances from which malice can be inferred and I do so infer. Consequently, I find that his subsequent institution of criminal proceedings against the second named plaintiff was malicious and without reasonable and probable cause.

As regards the first named plaintiff, the report received from the second named defendant, coupled with information received from Bashtina English, entitled him to obtain the warrant. I find that he acted in accordance with the provisions of the warrant and notwithstanding his fabrications, he is protected by section 34 of the Constabulary Force Act.

Accordingly, there will be judgment for the defendants

