

Judgement Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. C.L. 1998/ N - 120

BETWEEN KEITH NELSON CLAIMANT
AND SERGEANT GAYLE 1ST DEFENDANT
AND THE ATTORNEY GENERAL
OF JAMAICA 2ND DEFENDANT

Mr. Carlton Williams instructed by Williams McKoy and Palmer for the Claimant

Mr. Brian Moodie instructed by the Director of State Proceedings for the Defendants

False Imprisonment – Malicious Prosecution – Complaint made to police officer - Whether officer acting reasonably in the circumstances – CPI may be used to update damages awards for these torts

April 16, 17 and 20, 2007

BROOKS, J.

On July 16, 1997, Mr. Keith Nelson was shot and injured by a licensed firearm holder. In addition to his woe, Mr. Nelson was also detained by the police and eventually arrested and charged with assaulting the firearm holder. He was acquitted of the charge, without the case being tried due to the failure of the firearm holder to attend the trial.

He has now sued the arresting officer, Sergeant (now Superintendent) Wilford Gayle, for compensation for what he says was a wrongful imprisonment and prosecution. In light of the change in rank, and to avoid

confusion, I shall refer to the officer as, "Mr. Gayle". No disrespect is intended. Mr Nelson claims that Mr. Gayle wrongfully executed his authority because of the police officer's improper bias towards the firearm holder, whom, it so happens, was a retired superintendent of police.

Mr. Gayle denies that he acted through any wrongful motive. He insists that he acted in accordance with a report made to him by the firearm holder and indeed Mr Nelson's own failure to give an account of the shooting when Mr. Gayle requested it of him.

The issues to be decided are; firstly, what occurred on that early morning between the police and Mr. Nelson and secondly, whether Mr. Gayle was motivated by anything other than a desire to bring an offender to justice. Although the issues do not strictly include Mr. Nelson's interaction with the firearm holder, there will be need to make reference to that interaction to assist in resolving them.

Mr. Nelson's account:

Mr. Nelson testified that he was, at the time of this incident, an architectural draftsman and a structural engineering technician. He says that he was then employed to a Mr. Glasford Christie, who, said he, conducted business under the style of G. Christie and Associates, at premises No. 4

Three Views Avenue. It is significant to note that the incident is agreed by both parties to have occurred at those premises.

In his testimony Mr. Nelson says that he was working late at the premises, on the evening of the 15th July and decided to take a break. He says that he went to a bar at the corner of Three Views Avenue and Red Hills Road and had alcoholic drinks. According to him he returned to No. 4 Three Views Avenue and decided to sleep in an old dilapidated Lincoln Continental motor-car which was in the yard there. While lying in the car he says that he heard an explosion and was shot in his left leg below his knee. He says that he got up, cried out and went to the rear of the premises where he sought refuge in a bathroom. He remained there, afraid to call for help, until about day-break when he heard someone calling out, "police". He then revealed his location and showed himself.

According to him, he told Mr. Gayle, who was among the police party that had attended the premises, that he worked there. He says that he recounted to them what had occurred. Two other occupants of the premises also confirmed to the police party at that time that Mr. Nelson did indeed work there. Nonetheless, he was taken to the Marverly police station and thereafter to the Kingston Public Hospital, where he was treated and taken back to the police station despite the protests of the medical team.

At the police station he was subjected to "the silent treatment" when he enquired what it was that he had done. He says that he was ignored. He says that although no one accused him of anything while he was at Three Views Avenue, it was while he was at the police station that he heard Mr. Gayle on the telephone and he discovered that it was the next door neighbour, retired Superintendent Shirley, who had shot him. He testified that the police then deliberated as to what to charge him with, and then decided on the charge of assault at common law. He remained in custody until the 18th July and attended court on that date. Three months and three further court appearances later, no order was made against him and the prosecution was brought to an end, in his favour.

Mr. Nelson was strenuously cross-examined, but the effort only served to reinforce his familiarity with his craft, the premises, the occupants thereof and the derelict Lincoln Continental. Despite the initial impression given by his sleeping in an old motor-car at night, he proved to be an intelligent, articulate witness, bordering on the loquacious. His evidence that he was a graduate of a tertiary educational institution was credible.

The account of the defence:

The defence produced a statement from retired Superintendent Shirley, who has since died. According to Mr. Shirley he had heard a noise

outside his house at about 2:15 on the morning in question. He says that he armed himself with his firearm, and went out to investigate. It was then that he saw, across the fence, a man breaking into one of his next door neighbour's cars. The man was beside the car. He says that he accosted the man, who promptly "jammed at (him) with an object", and used some indecent language. Mr. Shirley says, "I jumped and was so frightened I fired one shot in his direction". He says that the man screamed, dropped the object which proved to be a piece of iron pipe, and ran to the side of the premises. Mr. Shirley then went inside his house and called the police, who arrived shortly after. He says he made a report to them and showed them the piece of iron pipe. The police then went to the rear of the premises and returned with the same man who had attacked him. The man was limping and the police took him away.

Mr. Gayle then gave evidence. He says that he received a report and went to Three Views Avenue, where he saw and spoke to Mr. Shirley, whom he knew to be a retired superintendent of police. He says, "Mr. Shirley pointed out a man sitting in front of him on the sidewalk and made a report to me. He also handed over to me a piece of iron pipe."

Mr. Gayle says that the report was made in the presence of the man, that is, Mr. Nelson, but Mr. Nelson did not respond to the report. Mr. Gayle

says he prompted Mr. Nelson to respond to Mr. Shirley's report but Mr. Nelson remained mute. He says that he sent Mr. Nelson off to the hospital and on Mr. Nelson's return to the police station, Mr. Nelson's silence continued, even when charged and cautioned by Mr. Gayle. In respect of the criminal case Mr. Gayle explained that the trial did not take place because of Mr. Shirley's illness.

In cross examination Mr. Gayle insisted that there was no other person on the premises when he saw Mr. Nelson. In answer to the court he said that when he saw the car, it was an old car; it could have been a Buick. One of the rear doors was open and there were chips of paint missing by the door lock. He said he saw blood close to the car and out on the sidewalk where Mr. Nelson was. He said that the car seemed to have been functional. It is clear that he did not pay any close attention to the car.

Findings of fact:

Mr. Nelson's account was credible. Although there were discrepancies between his witness statement and his oral testimony as to the reason why he returned to the premises from the bar and as to whether he had previously slept in that car, I accept unreservedly that he worked at those premises and was accustomed to using the car as a resting area. From his demeanour, I also accept that he and two other occupants of the

premises did explain his presence on the premises to Mr. Gayle when the police arrived. The person who testified in court would not have remained silent when confronted by the police that morning. I therefore reject Mr. Gayle's account to the contrary. The differences between his account and Mr. Shirley's also lead me to disbelieve him. In addition I also reject his attempt to give credibility to Mr. Shirley's report by implying that he saw signs of forced entry to the vehicle.

I also find that upon hearing Mr. Nelson's account, Mr. Gayle ought to have been put on enquiry as to the circumstances under which Mr. Nelson came to be shot. He should have examined the vehicle. He should have made enquiries concerning Mr. Nelson's claimed right to be on the premises. He however did not. I shall now apply the law to those findings of fact.

False Imprisonment

False Imprisonment arises where a person is detained, arrested, imprisoned or otherwise prevented, without lawful justification, from exercising his right to leave the place at which he is. Another way of defining false imprisonment is "the complete deprivation of liberty for any time, however short, without lawful cause". (para. 681 of *Clerk and Lindsell on Torts* -14th Ed.) In Jamaica, where a police officer purports to act in the execution of his duty, Section 33 of the Constabulary Force Act, requires the

claimant, in this case Mr. Nelson, to prove that the officer acted either maliciously or without reasonable or probable cause.

Mr. Nelson was detained for a period of two days. There is ample authority for the principle that the person detained by the police should be taken promptly before a judicial officer or a Justice of the Peace for the question of bail to be considered. This detention took place on a Wednesday morning. No explanation has been given for the two day delay in granting bail to Mr. Nelson. Such a delay would render unlawful even an initially lawful detention.

Based on my findings of fact, I find that Mr. Gayle's detention of Mr. Nelson was unreasonable and without probable cause. Mr. Gayle instead of accepting *carte blanche* what Mr. Shirley said, should have applied an enquiring mind, he should have questioned the veracity of Mr. Shirley's statement given the fact that Mr. Nelson said that he worked at the premises and he should have contemplated that with a chain link fence some five to eight feet high between the two men, whether Mr. Shirley, a retired police officer, was being truthful as to the circumstances in which he shot Mr. Nelson. And he should have examined the car. It has been established in the case of *Glinski v. McIver* [1962] 2 W.L.R. 832 that the police officer need not be convinced of the guilt of the accused. He need only be satisfied

that there is a proper case to go before the court. Mr. Gayle took Mr. Nelson into custody immediately upon arriving on the scene. I am of the view that he did not objectively assess whether there was a proper case to go before the court. I would rely on the following passage from *Hicks v Faulkner* (1878) 8 Q.B.D. 167 concerning what is reasonable and probable cause:

“...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 ordinary 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 ground as would lead a reasonably 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.”

Malicious Prosecution

In an action for malicious prosecution, in order to succeed, the claimant must prove on a balance of probabilities the following:

1. That the law was set in motion against him on a charge for a criminal offence;
2. That he was acquitted of the charge or that otherwise it was determined in his favour;
3. That when the prosecutor (in this case Inspector Lawrence) set the law in motion he was actuated by malice or acted without reasonable or probable cause;

4. That he suffered damage as a result.

There is no contest in this case that the law was set in motion by Mr. Gayle against Mr. Nelson and that the prosecution was determined in Mr. Nelson's favour. For the reasons set out above I find that Mr. Gayle's prosecution of Mr. Nelson was not prompted by a genuine attempt to bring an offender to justice. I find that he was motivated by an attempt to protect a retired member of his organization, who had gained a senior rank, from the embarrassment and possible peril of having a criminal charge laid against him for having shot Mr. Nelson.

What however, has Mr. Nelson said was the damage which he suffered? Indeed, other than saying that he the police ignored his requests to be informed of the charge against him and gave him "the silent treatment" and that he had to attend court, he has not proved any other damage. No mention of any effect on his health, well-being or reputation was made.

I now turn to the question of damages.

General Damages

Mr. Moodie who appeared for the defendants, properly pointed out that Mr. Nelson gave no evidence concerning any physical pain or suffering he endured as a result of the detention. Nor did Mr. Nelson show any financial loss flowing therefrom. It is true that Mr. Nelson ceased working

for Mr. Christie from the date of the incident, but the evidence is that that was because he was unable to walk as a result of the injury.

Mr. Moodie cited the following cases in support of his submissions concerning the quantum of damages to be awarded:

- a. *Cornel McKenzie v Attorney General* (unreported) C.L. 2002/M088 (delivered 26th June 2003)
- b. *Everton Foster v Attorney General and Anthony Malcolm* (unreported) C.L. 1997/F135 (delivered 18th July 2003)

Mr. Williams on behalf of Mr. Nelson relied on the case of *Earl Hobbins v The Attorney General and anor.* (unreported) C.L. 1998/H196 (delivered 29th January 2007).

False Imprisonment

For the false imprisonment, Mr. Moodie submitted, using the authority of *McKenzie* cited above, that the sum of \$17,000.00 per day is appropriate. Mr. Williams, citing the *Hobbins* case (*supra*) claimed a figure in excess of \$400,000.00.

Support for Mr. Moodie's submission can also be found in the case of *Allan Currie v The Attorney General for Jamaica* (unreported) C.L. 1989/C315 (delivered 10th August 2006), where Rattray J., after reviewing the authorities, awarded Mr. Currie the sum of \$500,000.00 in respect of

twenty-nine days of incarceration. The daily figure amounts to just over \$17,000.00 per day.

The awards for shorter periods of incarceration seem, however, to be relatively higher, than the longer periods cited in the *Allan Currie and McKenzie* cases. In the consolidated claims of *Keith Bent and others v The Attorney General* (unreported) C.L.1998/ B 330 (delivered 19th December 2006) the court awarded \$60,000.00 where there was incarceration for four hours. Mr. Bent was a labourer. In the case of *Inasu Ellis Ellis v The Attorney General and anor.* SCCA 37/01 (delivered 12th December 2004) (unreported), the Court of Appeal awarded the sum of \$100,000.00 for a detention for seven hours, during which period, Mr. Ellis, a Justice of the Peace and Government Officer, was interrogated. In *John Gaynor v Cable and Wireless Jamaica Limited and others* (unreported) C.L. 2000/G-124, (delivered 1st December, 2005), Mr. Gaynor, a cable technician was incarcerated for a period of four days. Jones J. awarded him the sum of \$120,000.00.

In considering Mr. Nelson's status and the absence of any evidence of trauma associated with the incarceration, I am of the view that an award of \$200,000.00 is appropriate in these circumstances.

Malicious Prosecution

Mr. Williams submitted that an award of in excess of \$600,000.00 be awarded under the head of malicious prosecution. He pointed to the fact of Mr. Nelson's injury and submitted that to arrest and charge a person who was injured was more heinous than for a person not having an injury. He submitted that for that reason Mr. Nelson should be awarded more than Mr. Hobbins was. I would use as a guide, the case of *Kerron Campbell v Kenroy Watson and The Attorney General of Jamaica* (unreported) C.L. 1998/C385 (delivered January, 6, 2005). In that case Mr. Campbell was maliciously prosecuted for possession of ganja. He was apparently a man of modest means. Sykes, J. (Ag.) (as he was then) awarded him \$90,000.00 under this head. Mr. Nelson is a qualified graduate of a tertiary institution. There is no evidence of any deleterious effect on him arising from the prosecution. Despite that I find that for the three months that he had to deal with the matter of the prosecution, during which he was still suffering from his injury, he should receive an award of \$400,000.00.

I was surprised that Mr. Moodie made the submission, in connection with the award of damages, that updating awards of damages for this type of tort was inappropriate because every case was different. I would have

thought that Rattray J. in the *Allan Currie* case had effectively disposed of that line of thinking. I respectfully adopt the reasoning and logic of Rattray J. where he says, at paragraph 42 of the judgment:

“Mr. Cochrane’s contention that the CPI is not to be applied to cases of false imprisonment is devoid of authority and logic. The purpose of applying the CPI is to arrive at a present day value of an award made some time past. Applying such a formula provides a degree of consistency in awards handed down where the circumstances of the respective cases are similar. This enables the court to reflect upon a range of figures in attempting to arrive at reasonable compensation after considering the particular circumstance of the cases before it. I therefore do not accept Counsel’s submission that awards in false imprisonment cases ought no to be updated using the CPI.”

Special Damages

There was no evidence of special damages.

Conclusion

Although he had received a report from Mr. Shirley, about seeing Mr. Bent breaking into a car and Mr. Shirley having to shoot Mr. Nelson in self defence, I find that having been told of Mr. Nelson’s connection with the car and the premises, Mr. Gayle would have been alerted as to the lack of credibility in Mr. Shirley’s account. He should therefore not have acted as hastily as he did in detaining Mr. Nelson and arresting and charging him.

I find therefore that his detention arrest and prosecution of Mr. Nelson was improperly motivated. For these reasons therefore, Mr. Nelson is entitled to damages for false imprisonment and malicious prosecution.

It is therefore ordered that Judgment be entered for the Claimant with damages assessed as follows:

General Damages:

False Imprisonment	\$200,000.00
Malicious Prosecution	<u>\$400,000.00</u>
Total	\$600,000.00

Interest is awarded thereon at 3% per annum from 24/6/98 to 30/6/99, at 6% per annum from 30/6/99 to 22/6/06 and at 3% per annum from 22/6/06 to 20/4/07.

Costs to the Claimant in the sum of \$100,000.00.