



[2015] JMSC Civ.86

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO HCV 02727 OF 2012

<i>BETWEEN</i>	<i>KEVIN SKYERS</i>	<i>CLAIMANT</i>
<i>A N D</i>	<i>THE ATTORNEY GENERAL FOR JAMAICA</i>	<i>1ST DEFENDANT</i>
<i>A N D</i>	<i>RICARDO ROBINSON</i>	<i>2ND DEFENDANT</i>
<i>A N D</i>	<i>SHAWN BROWN</i>	<i>3RD DEFENDANT</i>

Mrs. Angela Cousins-Robinson, Mrs. Simone Gentles and Mrs. Sonia Irons instructed by H.S. Dale and Company for the Claimant.

Ms. Carole Barnaby and Andre Moulton instructed by the Director of State Proceedings for the Defendants.

Heard : October 23, 24, November 27, 2014 and May 14, 2015.

**Trespass to the person and/or assault,
malicious prosecution and false imprisonment –
civilian shot by police**

P.A. Williams, J.

[1] On the 6th of October, 2006 Mr. Kevin Skyers, the claimant, was shot by Ricardo Robinson, the 2nd defendant who is a constable of police employed to the Jamaica Constabulary Force. He suffered injuries which led to him being hospitalized until the 3rd of December of the same year. Once discharged from the hospital, he was released into the custody of the police where he remained until he was brought before the Resident Magistrate for the parish of Portland. He was offered bail to return to court to

answer various charges alleged against him. On the 20th of June 2007 a no order was made in these matters.

[2] On the 16th of May 2012 the claimant commenced this action by filing a claim for damages for trespass to the person and/or assault, malicious prosecution and false imprisonment. He seeks compensation for his injuries and loss in the form of general and special damages along with exemplary and aggravated damages.

[3] The defendants took issue with the circumstances the claimant alleged the shooting occurred. They filed a defence on November 6, 2012 wherein they claim that the 2nd and 3rd defendant acted lawfully, with reasonable and probable cause, without malice and in accordance with the Constabulary Force Act.

[4] The law and issues in this case are not in dispute. It is the circumstances of the shooting and subsequent detention and prosecution that are in issue. Hence the credibility of the parties and the plausibility of their accounts of what transpired on that day is what will primarily resolve this matter.

The evidence re: the shooting

[5] The claimant was standing in the vicinity of the Bybrook taxi stand at Shoppers Pride Supermarket, Buff Bay in the parish of Portland in the afternoon of that fateful day when he observed a “private” car pass him which went to the area where goods are unloaded. The fact is undisputed and the 2nd and 3rd defendant agreed that they did go to that location at about that time in a private motor vehicle. They however maintain they were both dressed in marked police vests.

[6] The officers explained that they had gone to the area specifically in search of the claimant for whom they had warrants for his arrest for a number of offences. In support of this, three warrants on information and their accompanying information were tendered and admitted into evidence through the 2nd defendant. The first was signed by a Justice of the Peace on the 27th of January 2006. It commanded the apprehension of

John Skyers for unlawfully and maliciously wounding Odair Skyers on the 24th of January 2006. The second was signed by a Justice of the Peace on the 3rd of February 2006 and commanded the apprehension of John Skyers for assaulting Desmond Thompson on the 1st of February 2006 thereby occasioning actual bodily harm to the said Desmond Thompson. The third was signed by a Justice of the Peace on the 6th of October 2006 and commanded the apprehension of Kevin Skyers for unlawfully and maliciously damaging the property of Dwayne Palmer on the 4th of October 2006. The unchallenged evidence was that John Skyers and Kevin Skyers are one and the same.

[7] The 3rd defendant explained that having heard of the claimant's location he sought the assistance of the 2nd defendant in apprehending him. They chose to go to the location in a private motor vehicle and explained that this was because efforts to apprehend the claimant in the past had been unsuccessful as he had always managed to elude the police. Under cross-examination this assertion was explored but eventually was not challenged.

[8] It was therefore accepted that on one previous occasion when the police had gone to his home the claimant had thrown himself through a window and escaped. On another occasion he had been found in a chicken coop on the premises but due to insufficient police personal being on the scene, they were unable to hold on to him. The 2nd defendant also explained that the terrain where the claimant's premises is located is mountainous and is such that the claimant could see the police coming from seven (7) miles away before they could get to him.

[9] Thus the parties are agreed that on the 6th of October 2006 sometime in the afternoon the 2nd and 3rd defendants went to the Shoppers Pride Supermarket located along St. Georges Street in Buff Bay in the parish of Portland. There is agreement that the claimant was standing near to the supermarket. He said he was facing the market with his back to where he said vehicles were unloaded. The police officers said he was seen leaning on the wall of the supermarket.

[10] The claimant said he was speaking to someone named "Bertie" as the car passed. There was a piece of ply board leaning on the supermarket wall that belonged to him but it was not so close to him he said. The police officers also spoke of seeing the ply board but said it was actually being held by the claimant as he leaned against the wall. Only the 3rd defendant spoke of seeing the claimant apparently in conversation with someone.

[11] The claimant said having seen the car he noted it was being driven slowly. He said under cross-examination that he was able to see who was in the car as he was able to see them through the windscreen. He later said however that he did not see that it was a policeman until after he had got shot. He also said that he had seen the 2nd defendant in the car and knew that he was a policeman. When re-examined he sought to clarify by explaining that when he saw the men in the car he did not recognize them. He did see the 2nd defendant but "not so clear". Thus, he later maintained he had not known they were policemen when he saw them in the car.

[12] In any event, the 2nd defendant said that the car was tinted with a very dark tint. The top quarter of the windscreen was also tinted. The driver of the vehicle had indeed been the 2nd defendant but he in fact had not known the claimant before. It was the 3rd defendant who had pointed out the claimant as they drove into the area. The 2nd defendant agreed however that he was indeed driving slowly.

[13] The claimant said he was turning around to look in the direction the car had gone when he felt something hit him on his right hip and heard an explosion at the same time. He said he immediately fell to the ground. In his witness statement/evidence-in-chief he said he was on his left side when he saw the 2nd defendant come and stand over him with a gun. The claimant went on to explain how he was bawling and asked the constable what he had done to cause him to get shot. Under cross-examination he said he became unconscious and regained consciousness when he was taken to Annotto Bay Hospital. He was however able to describe things that allegedly happened after being shot and before getting to hospital. He spoke of being dragged on the

ground by the officers. He said it was a friend of his named "Lucky" who had helped put him into a car. He also spoke of how the officers had invited him to run whilst he lay on the ground. It was also at this time he said he had been told of ten (10) warrants for his arrest. When asked under re-examination what he understood the word unconscious to mean, he said it meant to lose focus and memories.

[14] Under cross-examination he went on to explain that he had not turned completely but had only turned his head when he got shot. He said he had seen where the car had gone but he couldn't say where the car had stopped. He had looked in the direction he had seen the car go. He was not asked and there is no explanation given as to why he had chosen to look in that direction at that time. So in effect his evidence is that he was shot without reason as he was merely standing "reasoning" with someone when it happened. He did not even see who it was that shot him.

[15] The version given by the 2nd and 3rd defendants is consistent with that of the claimant up to the point where the car they were in approached the area where the claimant was standing. Thereafter the 2nd defendant who was the driver said he brought the car to a stop within close proximity to the claimant. The 3rd defendant said he exited the car even before it came to a complete stop, walked quickly to the rear of the car towards the claimant. He explained that it was the intention to prevent the claimant from running out of the area unto the main road. As he explained it, the tactic being employed was for the purpose of limiting any opportunity for the claimant to escape from the complex as he was offered only one route which would be through the officers.

[16] As already noted, the parties disagree as to the actual positioning of the claimant. He said he was with his back to the area the car had gone and the 2nd and 3rd defendants said he was with his back to the supermarket, actually leaning on the wall. The 3rd defendant described how upon exiting the vehicle, he ran towards the claimant calling to him as he was approached. He in his witness statement/evidence-in-chief

said the claimant jumped off the side of the building and threw the sheet of ply board at him.

[17] The claimant admitted that the ply board was there and did in fact belong to him but denied that he was holding it on approach of the car or that he threw it at the 3rd defendant. The 3rd defendant insisted that it was the throwing of the ply board that caused him to push it out of his way, only then to be confronted with a knife coming towards his face. He jumped backwards to avoid being stabbed and stumbled and fell.

[18] The 2nd defendant said he was in the process of switching off the vehicle after the 3rd defendant had exited it, when he heard screams. This propelled him to exit the vehicle quickly and was in time to observe the 3rd defendant jumping backwards from the claimant who had a long knife in his hand. He observed also the ply board which had been leaning on the building now lying on the ground. Under cross-examination he said he had actually seen the claimant holding on the ply board with his left hand. He further explained that he had seen when the claimant removed the knife from his right pants pocket. He was not facing the claimant from in front but he was to the back of the claimant approaching from behind as the claimant stabbed at the 3rd defendant who was at that time on the ground.

[19] It is the 2nd defendant who spoke of hearing the claimant shouting “mi naw go a nuh station, mi prefer stab yuh up an kill yuh bwoy”. The 3rd defendant heard him saying, “mi nah guh a nuh blood claat station”. It was the 3rd defendant’s evidence that he on seeing the claimant over him pointing the knife in his direction felt he would be killed. He described how the claimant had been stabbing furiously at his head and chest. At the time the ply board was thrown, the claimant was said to have been no more than an arms length away from him. The 3rd defendant said under cross-examination that he kept giving the claimant instructions to drop the knife but he refused to comply with those instructions.

[20] The 2nd defendant said he had heard the 3rd defendant shouting “a wah yuh a do, drop di knife”. He upon seeing the claimant rushing towards the 3rd defendant who had been observed holding his right side, shouted to the claimant to stop. The 2nd defendant said he thought that the 3rd defendant had been stabbed by the claimant who was then intent on continuing the attack. The 2nd defendant felt that the claimant was going to kill the 3rd defendant and so he fired one shot in the claimant’s direction. The 3rd defendant said he saw when his colleague had been running from the direction of the motor car shouting something but he couldn’t hear what was being said.

[21] The claimant under cross-examination admitted that he did have a knife with him on that day. He said he had a little kitchen knife because he had been going to the market. He however, insisted that he did not use it to stab at the 3rd defendant. He admitted that he no longer had the knife and in fact did not have it when he got to the hospital. He said he did not know if the knife had fallen to the ground after he got shot.

[22] The claimant said he fell to the ground immediately upon getting shot. The 2nd and 3rd defendants said he ran off for a short distance before falling. They assisted him into a motor vehicle and escorted him to the Annotto Bay Hospital where he was admitted for treatment. They denied anyone else assisting them to place the claimant in the motor vehicle as he alleged. The claimant called one witness who supported only this aspect of his account.

[23] Sarah Campbell was the claimant’s witness who said she was coming out of that supermarket when she saw the claimant standing in front of the supermarket to the right. She heard an explosion and saw when the claimant fell to the ground and a policeman standing over him with a gun in his hand. Under cross-examination she said she was inside the supermarket when she heard the explosion and when she came outside she saw the claimant on the ground. She did not see the police shoot the claimant. She did not see what happened between the time of hearing the explosion and the claimant falling to the ground.

[24] She spoke of hearing the claimant asking “why you shoot me” – “what me do”. She said she saw one officer grab the claimant in his shirt while another held him by his foot and “Lucky” assisted in putting the claimant in the police vehicle. Under cross-examination she said it was Lucky who held both feet of the claimant in helping to lift him and place him in the vehicle.

[25] The cross-examination of the officers stoutly challenged their version of the events. The suggestions put to them significantly touched on their assertions that the claimant had a knife, threw the ply board, stabbed at the 3rd defendant and ran after being shot. There was no alternate suggestion put to the 2nd defendant as to how he came to shoot the claimant. The 3rd defendant was confronted with a version not in keeping with the evidence given by the claimant. It was suggested to him that the claimant had tried to escape and both officers pulled their firearms and the claimant was shot while running away. He denied these suggestions. In her submissions in closing on behalf of the claimant, Mrs. Cousins-Robinson said that these suggestions were not in fact a part of claimant’s case.

[26] One other significant aspect of the evidence given by the 2nd and 3rd defendants concerned whether or not the claimant had initially been alerted to their presence. Under cross-examination the 3rd defendant said he had identified himself to the claimant. This was not recorded in his witness statement. He also gave evidence that he had advised the claimant that he was there to arrest him. This too was not recorded in his witness statement.

[27] The 3rd defendant did not speak of actually seeing his colleague discharge a weapon and shoot the claimant. He at one point in his cross-examination said he first saw the 2nd defendant after having heard the loud explosion like a gunshot and then seeing the claimant run off. When confronted with his witness statement and the evidence therein that he had actually seen the 2nd defendant running from the parked car, he explained that initially when on the ground he had not seen his colleague but

whilst pulling away from the attack he was able to see the area behind the claimant and thus this would have afforded him an opportunity to see his colleague approaching.

The injury

[28] Two (2) medical reports were admitted into evidence detailing the injury suffered by the claimant. The first place he was taken for medical attention was the Annotto Bay Hospital. He was seen to have a gunshot wound to his right thigh. X-ray revealed a fracture of the right femur. He was transferred to the St. Ann's Bay Hospital Orthopedics department for further management. This report indicated that the claimant was seen on the 6th of October 2008 but it can safely be assumed that the year stated was an error, given all the evidence led in this case that the incident did take place in 2006.

[29] The second report is from Dr. Kimani White an orthopedic surgeon who the claimant said had looked after him while he was at Kingston Public Hospital and seen him at the Nuttall Hospital. Dr. White compiled the claimant's history from the records at the Kingston Public Hospital, those at the Nuttall Orthopedic Clinic, the report from the Annotto Bay Hospital and his own recall. It was noted that the claimant sustained a gunshot wound to his right thigh and allegedly continued running after being shot and subsequently fell. This contradicted the evidence given by the claimant.

[30] It was detailed in the report that on presentation at KPH the claimant had an entry wound to the right hip, 9 cm postero-inferior to the greater trochanter and he was on skin-traction. Plain radiographs confirmed a fracture of the right femur. On the 24th of November 2006 he underwent open reduction and internal fixation of his injury with a dynamic hip screw construct. He was discharged on the 3rd of December 2006 according to the doctor. The claimant said it was on the 6th of December that he was discharged into the custody of the police.

[31] The Doctor outlined that the claimant had defaulted from follow-up of this injury at the orthopedic outpatient department of KPH. At the time the report was prepared in

October of 2009 the doctor noted a 12 cm non-tender scar along the lateral thigh consistent with the previous surgery. There was a residual 2.5 cm limb length discrepancy. Bullet fragments were retained in the subcutaneous tissues of the medial thigh.

The proceedings in the Resident Magistrate's Court

[32] The 3rd defendant said he duly reported the assault upon him by the claimant and made relevant entries in the station diary. The matter was investigated by a Detective Corporal Hutchinson to whom he gave his statement and the knife he had recovered from the claimant.

[33] The claimant said that after his discharge from hospital he remained in custody for thirteen (13) days before he was placed before the court. He was charged for possession of an offensive weapon and assault.

[34] The 2nd defendant said he had advised the claimant of the report made against him by one Dwayne Palmer. Upon caution, the claimant was alleged to have said, "A lie di buoy a tell. Dem bad mine mi fi two acre of coffee". The claimant said in his witness statement that he had in fact attended court and had been advised of the allegations that he had chopped down Dwayne Palmer's coffee trees. He said he pleaded not guilty and was told that he was free to go.

[35] Under cross-examination the 2nd defendant said the claimant had been informed by him of the offences and the warrants outstanding against him. This officer however said he did not charge him for any offence at all.

[36] The claimant under cross-examination said he was not aware of any reports against him having been made to the police before he got shot. He admitted knowing the complainant in the wounding matter who was his brother. He denied knowing of any report being made by his brother or having been taken to court in any matter with his brother. In like manner, he knew the complainant in the assault matter who was his

neighbor but denied being to court on any matter involving that person. He now also denied being involved in any criminal case with Dwayne Palmer contradicting what he had said in his witness statement.

[37] The informations previously referred to on which warrants had been issued, clearly show that the claimant had been placed before the court on the 13th of December 2006 at which time a finger print order had been made and he was offered bail. Information with the offence of assault at common law against the 3rd defendant was also placed before the court at the time. A certified copy of this document was also admitted into evidence, with no objection.

[38] The endorsements on the informations indicate that the matters were mentioned before the court at least on three (3) occasions. The endorsements also show that the files were not completed. In relation to the matter involving the 3rd defendant, it was his evidence that the investigating officer failed to submit a requisite statement. This is supported by the endorsements.

[39] The 2nd defendant was stated as the investigator in one of the other matters. He too seemed to have failed to complete the file and there was no evidence presented to explain this failure.

[40] A certified copy of a page from the court sheet for the Resident Magistrate's court held on the 20th of June 2007 was admitted into evidence. It shows that on that date no order was made in four matters involving the claimant. The reason for this course being adopted is noted as being "file incomplete."

The Applicable Law
Re: Trespass to person/assault

[41] The definition given in one of the authorities relied on by the defendants is sufficient to provide the backdrop against which the evidence must be assessed. In

Fagan v Metropolitan Police Commission [1968] 3 All ER 442 at pages 445, James J stated:

“An assault is any act which intentionally or possibly recklessly – causes another person to apprehend immediate and unlawful personal violence. Although “assault” is an independent crime and is to be treated as such, for practical purposes today “assault” is generally synonymous with the term ‘battery’ and is a term used to mean the actual intended use of unlawful force to another person without his consent.”

[42] An assault or battery is justified if committed in reasonable defence of another. The question of what is reasonable is dependent on the circumstances of the case.

[43] Police officers also have the protection stated in section 33 of the Constabulary Force Act which states inter alia:

Every action to be brought against any constable for any act done by him in the execution of his office, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done either maliciously or without reasonable or probable cause, and if at trial of any such action the plaintiff shall fail to prove such allegation he shall be non-suited or a verdict shall be given for the defendant.”

Re: False imprisonment

[44] The case of **Peter Flemming v Det. Cpl. Myers and the Attorney General [1989] 26 JLR 525** is regarded by some as the *locus classicus* in this area from our Court of Appeal and is relied on by both sides in their submissions. At paragraph 527c Carey P (Ag.) as he then was, said:

“The action of false imprisonment arises where a person is detained against his will without legal justification. The legal justification may be pursuant to a valid warrant of arrest.”

[45] Further at paragraph 530 D-F he said:

“In my respectful view, an action for false imprisonment may lie where a person is held in custody for an unreasonable period after arrest and without either being taken before a Justice of the Peace or before a Resident Magistrate

Where the person arrested is released upon proof of his innocence or for lack of sufficient evidence before being taken to court no wrong is done to him. Where however he is kept longer than he should it is the protracted detention which constitute the wrong, the “injuria.” The abuse of authority makes the detention illegal ab initio. I see nothing either in principle or in authority to prevent an action for false imprisonment. Indeed it is a valuable check on abuses of authority by the police.”

[46] Another useful comment made in this case was by Forte J, as he then was, at paragraph 532B:

It is clear then in determining the reasonableness of the time that elapses, the circumstances of each case must be the guiding principle; and that any unreasonable delay in taking an imprisoned person before the court will result in liability for false imprisonment.”

Re: Malicious Prosecution

[47] In *Willis v Voisin* [1963] 6 WIR 50, a list of the ingredients to be proved in establishing a case of malicious prosecution was given by Wooding C.J at page 57.

They are:

- a. That the law must be set in motion against the plaintiff on a charge for a criminal offence
- b. That he was acquitted of the charge or that otherwise it was determined in his favour.
- c. That the prosecutor set the law in motion without reasonable and probable cause.
- d. That, in so setting the law in motion, the prosecutor was actuated by malice.

[48] It is of course to be remembered that the claim for malicious prosecution can be brought even when the matter was not determined on its merits. One classic explanation of this principle is succinctly stated in the text **Salmond and Houston on the Law of Torts** 21st edition at page 398 where is stated –“*what is required is not judicial determination of his innocence but merely absence of judicial determination of his guilt*”.

The discussion

[49] It is of course trite law that he who alleges must prove. There being no dispute that the claimant was in fact shot, it is for him to satisfy that on the balance of probabilities his version of the events leading to his being shot is credible. It is for him to prove the absence of any legal justification for the 2nd defendant shooting him. He must prove the absence of reasonable or probable cause or the presence of malice in his subsequent detention and prosecution.

[50] The credibility of the claimant therefore becomes crucial. In recognising this Mrs. Cousins-Robinson urged that upon cross-examination the claimant did not depart much or contradict the evidence that was given in his witness statement. She addressed the fact that the claimant did not come across very clear on the matter of whether he saw who was in the vehicle as it approached or whether he recognised whom he saw to be police officers. It was submitted that it must be recalled that he was in fact talking to someone as the car approached.

[51] An important question for Mrs. Cousins-Robinson was why the claimant would be motivated to just suddenly attack the 2nd or 3rd defendants if he did not hear his name being called and he did not know that they were policemen. Secondly, she queried even if he had known they were policemen; would he have tried to attack these men who had guns on them and who said they had their police vest on?

[52] In her submissions on behalf of the defendants, Ms. Barnaby opined that the claimant had in fact vacillated on whether he was able to identify anyone. The fact is however that the car was described by the 2nd defendant as being darkly tinted. It is

not in that circumstance unbelievable that the claimant may not have seen who was in the car. It is unchallenged that the 2nd and 3rd defendants had chosen this mode of transport to the scene to avoid being detected by the claimant given his ability to evade them in the past. It is significant that there was no challenge to the officers' evidence that there had been numerous previous efforts made to apprehend the claimant but he had always managed to evade capture.

[53] Indeed, Mrs. Cousins-Robinson accepted this and used it in her submissions to advance the argument that the plan by the officers was to capture the claimant by any means necessary including use of unlawful force against the claimant. She used the fact that they could have captured the claimant when he was in a chicken coop but "could not be bothered" for suggesting that they had other sinister ways of capturing and dealing with the claimant hence the incident on October 6, 2006. However, the converse of this argument would be that they could well have shot the claimant when he was in the chicken coop if it was their intention to capture him by any means necessary. There was no evidence as to civilians being present on the day he was in the chicken coop as against the very public place where the incident eventually took place so they could then easier have shot and captured him with no one to challenge their story.

[54] The fact that it is accepted that the claimant had on previous occasions taken measures such as jumping through a window to evade capture is what now causes the account of his desperate attempts to escape from the police officers by even resorting to stabbing at them to sound somewhat credible.

[55] The opinion of Ms. Barnaby was that the claimant ought not to be believed because he boldly lied to the court in particular as regards to his response to questions asked about the matters in which it remained undisputed warrants had been issued for his arrest. She pointed to his persistent denial of any knowledge of those matters. The unchallenged documentary evidence which was presented certainly caused the claimant's lack of knowledge to appear suspect. It is noted that in his witness statement

he did acknowledge some information as to one matter but at trial when confronted about it, he had no recollection of it.

[56] Mrs. Cousins-Robinson attempted to offer an explanation for this attitude of the claimant. She said he said he had never been to court before he was shot except for charges for marijuana. She urged that the claimant was a witness of truth as all the information provided as exhibits to the court indicated he was brought to court on those informations only after the incident had occurred.

[57] In fairness to the claimant, he was asked in cross-examination if before he got shot he was aware of reports being made to the police about him to which question he responded no. The questions thereafter did not refer to any time in particular but sought to enquire into whether he had any knowledge at all about accusations having been made by his brother and his neighbour. Certainly he can well claim that at the time he got shot he might not have been aware of the accusations but at the time of this trial in 2014 that should not have been the case. He had been before the Resident Magistrate's court on the charges he was being asked about between December 2006 and June 2007. Surely it is expected he would have been aware of the matters that had brought him there. Even if he had not been advised of the complainants in the matters, in his witness statement he did acknowledge awareness of at least one yet when cross-examined at this trial, he professed no knowledge about it.

[58] I am prepared to accept that the claimant is a simple and not well-educated individual. For that reason I am minded to accept the submissions from Mrs. Cousins-Robinson that his usage of the word unconscious to describe his state after he was shot, was not in an effort to mislead the court. He was sufficiently aware of what was happening to be claiming he was dragged by the police officers who he insist was assisted by someone named "Lucky." His witness could only support him in relation to that matter and the remainder of her evidence was of no real relevance to the issues at hand. It is regretted that the person with whom the claimant said he as "reasoning" and "Lucky" gave no evidence as to what they may have seen that day.

[59] There is one crucial matter for which an explanation from the claimant would have been useful. He accepted that he had a knife with him that day because he said he was going to the market. He also accepted that by the time he got to the hospital he no longer had it. He was sufficiently aware of what was going on after he got shot to the time he was taken to the hospital. All he could offer about the knife is that it could have fallen to the ground after he got shot. He does not suggest from where it could have fallen or how it came to just fall. This leaves only the explanation of the officers that a knife fell from his hand and was recovered and handed over as exhibit in the criminal prosecution against him. There was in fact no challenge to the evidence of the knife recovered being used for the purpose of a possible exhibit.

[60] It is part of Ms. Barnaby's submission that certain bits of evidence given by the 2nd defendant remained unchallenged on cross-examination as it was never put to that constable that he did not see (i) the 3rd defendant fall or (ii) the claimant stab at the 3rd defendant while he approached him, or (iii) the claimant stab at the 3rd defendant when he fell. Additionally, it was noted it was never put to the 2nd defendant that he shot the claimant while the claimant stood talking as pleaded and alleged. In regards to this issue, it must however be recognised that on the claimant's version of events, he did not profess to see who shot him. According to him he got shot and then saw the 2nd defendant standing over him with a gun.

[61] In her submissions Mrs. Cousins-Robinson referred to two cases which had facts she said were similar to this one in that the claimants therein had been shot in the back – **Maxwell Russell v Attorney General and Corporal McDonald Claim no. 2006 HCV 4024** delivered 18th January 2008 and **Michael Llewellyn v Gladstone Grant and Phillip Smith et al Claim no. 1995 L238** delivered 29th April 2010. In the former there was an acceptance of liability by the defendant. In the latter, the court had found for the claimant after the analysis of the factual situation therein.

The decision

[62] I have considered all the evidence along with all the issues raised by counsel in their submissions. I have noted the discrepancies between the evidence given by the

2nd and 3rd defendants. Mrs. Cousins-Robinson referred to the 2nd defendant's demeanour as condescending, haughty or supercilious and the 3rd defendant she found to be evasive and answered as if he was uncertain of the answers to give to the questions posed. She said they were best described as professional witnesses who could have worked together to ensure that their versions of events match each other. I find that the fact that there were discrepancies, such that their evidence did not match precisely prevents me from being propelled to the conclusion that their stories were concocted in unison. The discrepancies however were not so material to cause their evidence to be rejected in entirety.

[63] The claimant was not a very impressive witness. His version of events did not bear that element of credibility that leads me to the conclusion that on the balance of probabilities he has proven that he was shot without lawful justification or with no reasonable and probable cause. I accept that the 2nd defendant was forced to shoot the claimant in an effort to defend his colleague from the claimant's attack. The 2nd defendant had come upon the claimant from behind as the claimant was trying to evade capture once more. The actions of the 2nd defendant were justified in the circumstances.

[64] The defendants have successfully challenged the assertion that they assaulted the claimant. Having accepted that there was an assault committed by the claimant, his prosecution for the offence was justified. It is unfortunate that after six (6) months the matter could not have been readied for trial and the Resident Magistrate was compelled to make a no order in the matter because the file was incomplete. There is however no evidence that the defendants acted with any other motive than to bring the claimant to justice.

[65] The claimant was kept in custody for several days after receiving the required treatment needed for the injury he had received. He remained hospitalized and in custody for two (2) months until deemed fit for discharge. This time period therefore can be viewed as no more than was necessary for the State to undertake the responsibility of affording him care while lawfully in its custody. After discharge however

he was not placed before the court immediately. In his particulars of claim, he averred that he was kept in custody for a cumulative ten (10) days. In his witness statement he said from hospital he was taken to Denham town Police Station for two nights. He said thereafter he was taken to the Port Antonio Police Station where he remained for thirteen (13) days before he was taken to court. Though offered bail on his first appearance, he spent one more night in the lock-ups for reasons not stated. On his evidence it appeared that he was saying he spent 15 days in custody after being discharged from hospital on December 6, 2006.

[66] The documentary evidence does not support the claimant's assertion of the time spent in custody. The doctor said in the medical report that the claimant was discharged on December 3, 2006. The information exhibited indicates that he was first before the court on the 13th of December as regards to the matters for which warrants had been outstanding and on the 14th for the matter of assaulting the 3rd defendant. The accepted position therefore is that the claimant was kept in custody for a period of ten (10) days before he was taken to court.

[67] Ms. Barnaby submitted that having regard to the need to move the claimant from Kingston to Portland where the warrants for his arrest were issued and executed, the lapse of a period of nine (9) days in bringing him before the Resident Magistrate was not unduly lengthy or unreasonable. Unless it is being suggested that it took days to actually transport the claimant from Kingston to Portland, I cannot agree that there was any sufficient reason for the delay in taking him to court once he was discharged. There is no evidence offered to explain why he was not taken before a Justice of the Peace or a Resident Magistrate within the period he was held after being released from hospital.

[68] In the circumstances therefore I find that the claimant has failed in his claim for trespass to person and or assault and malicious prosecutions. There will be judgment entered for him in his claim for false imprisonment.

Assessment of damages

[69] Both sides relied on the case **Maxwell Russell v Attorney General and Corporal McDonald** (supra) in urging the approach to be taken in assessing damages for the false imprisonment. The approach taken by Mangatal J. in that matter is indeed useful. She was guided by the approach of Lord Woolf in the English Court of Appeal decision **Thompson v Commissioner of Police The Metropolis [1998] QBD 498** hence she awarded an amount for the first twenty-four hours at a particular rate and thereafter at a progressively reducing scale.

[70] I am mindful of the fact that in assessing damages for false imprisonment matters such as injury to feelings, mental suffering, and injury to reputation can be taken into account along with the loss of liberty. In the instant case I however find that there is no evidential basis on which I can entertain consideration of those matters. I find further that there is no aggravating circumstance and that there is no basis on which to award exemplary or aggravated damages.

[71] The suggested amount for an award under this heading by the claimant is \$975,221.94. For the defendants a more detailed analysis was done in arriving at an award of \$747,713.12. Using the award made in **Maxwell Russell v Attorney General and Corporal McDonald** (supra) it was submitted that the \$75,000.00 awarded for the first twenty-four hours which when updated at the time of trial with the CPI of 226.1 would be \$141,750.00. It was further submitted that no more than \$605,963.00.12 should be awarded for the second to ninth day. This, of course is based on the assumption that the claimant was in custody for nine days which is three days less than the 12 days in the **Maxwell Russell** case.

[72] Having found that the claimant was unlawfully detained for 10 days, I am minded to make an award of \$150,000.00 for the first day and thereafter at a progressively reducing scale from the second to the tenth day. In the circumstances I consider it appropriate to make an award of \$900,000.00 for false imprisonment.

Damages are therefore assessed as follows:

General damages

False imprisonment - \$900,000.00

Interest is awarded on this sum from the 4th June 2012, (the date the defendants acknowledge service of the claim form) to today's date at a rate of 3%.

Costs to the claimant to be taxed if not agreed.