



[2013] JMSC Civ. 92

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2006 HCV 01051

BETWEEN	NORMAN WATSON	CLAIMANT
AND	THE ATTORNEY GENERAL OF JAMAICA	DEFENDANT

Ms Kanika Tomlinson and Mrs Nadine Freckleton instructed by Daly Thwaites & Co. for the Claimant.

Ms Cheryl-Lee Bolton instructed by Director of State Proceedings for the defendant.

Heard 18th, 19th and 20th March 2013 and 10th July 2013

POLICE FATAL SHOOTING – REASONABLE SELF DEFENCE – ABSENCE OF REASONABLE AND PROBABLE CAUSE

Straw, J.

[1] Ricardo Watson was shot on Johns Street by police officers on the 24th July 2000. It is alleged that he was shot a second time while he was being transported in the police jeep to the hospital where he was pronounced dead on arrival. His father, Norman Watson claims damages on behalf of his estate against the Attorney General, the defendant, who is vicariously responsible for the actions of the police officers as servants of the Crown. Mr. Watson alleges that the shooting of his son was malicious and/or without reasonable and probable cause. The police officers have admitted that Ricardo received two gunshot injuries from police fire on the street but they are alleging that they were acting in reasonable self defence.

[2] There are two major issues for determination. Firstly, whether the police officers had reasonable and probable cause to shoot Ricardo. Secondly, if there was no reasonable and probable cause, what is an appropriate award of damages under the Fatal Accidents Act for the benefit of his dependants and The Law Reform [Miscellaneous Provisions] Act for the benefit of his estate.

WAS THERE REASONABLE AND PROBABLE CAUSE FOR THE SHOOTING?

[3] There are several factual issues that must be carefully assessed in order to reach a determination. Ricardo's death was tragic. He was a young man who should have had the opportunity to live a fruitful and productive life. His family members have suffered loss and trauma but the court cannot render a decision based on sympathy. The claimant has the burden to prove that there was no reasonable or probable cause on a balance of probabilities.

[4] There is a great divide between the witnesses on both sides in relation to the circumstances surrounding Ricardo's death. However, both parties agreed on expert evidence contained in the post mortem report and the ballistic and forensic certificates.

SUMMARY OF CLAIMANT'S CASE

[5] The claimant relied on three witnesses in relation to the issue of liability. Mr Vincent Lee, the stepfather of the deceased, Barbara Douglas and Raquel Taylor, the mother and sister of the deceased respectively. Mr Vincent Lee's evidence is critical as he is the only eye witness to the actual shooting. His evidence is that on the day in question at about 10:45 a.m., he drove to Johns Street to pick up Barbara Douglas. He stopped the car about twenty feet from #24a. Ricardo was inside his gate at #20 standing on the other side of the road.

[6] He then came out of his car and called Ricardo. They met each other half way and he asked Ricardo to call his mother. Ricardo stepped three feet away and then he saw a police jeep turn onto the said street. The jeep stopped and a police man in the back seat shouted to Ricardo, "come yah bwoy." Ricardo stopped by #24a. He saw

three police officers in the jeep, one in red seam and two [including a female] in blue denim. The male officer in the denim came out of the jeep with a firearm in his hand. The other two also came out and they all made a semi circle around Ricardo.

[7] He further stated that Ricardo was pushed against the wall with the firearm pointed at his chest. The police officer was arm's length away from him. At this time, Mr Watson was six feet away but the backs of the police officers were turned to him (Lee) and he could not see into the circle. The female officer shouted "shoot the bwoy." The other male officer said "don't kill the youth." He then heard an explosion and saw Ricardo lying on the ground. He could taste the gunpowder. The police officers then lifted Ricardo up, threw him in the back of the police jeep and drove off.

[8] Mr Lee stated that he drove behind the jeep. When it reached the intersection of Water Street and Johns Street, he heard another gunshot coming from the jeep. He picked up Barbara [who was by then standing on Johns Street] and drove to Kingston Public Hospital. About ten minutes later, the police jeep arrived. Ricardo was pronounced dead by a doctor fifteen minutes later. Mr Lee stated that Ricardo had no firearm and the police officers took no weapon from his hand.

THE EVIDENCE OF BARBARA DOUGLAS AND RACQUEL TAYLOR

[9] None of these witnesses were on the scene at the time of the shooting. However, they support the evidence of Mr Lee to the extent that they only heard one explosion and rushed out on the street. Racquel stated that she heard an explosion and ran outside while she was at her home at #20 Johns Street. She looked down the road in the direction of #24 and saw a man lying in the trunk of a police car. The man in the trunk said, "Officer a whey me do." At that point she realized it was her brother. He was screaming and crying for help. She went up to the jeep and asked the female officer what he had done several times. Her only response was to say, "Kill him and done." The police officer who was sitting at the back of the jeep said "a kill a going kill him." They drove off. She tried to follow the jeep but was unable to keep up.

[10] She told the court that she could not say if a firearm was removed from her brother when he fell to the ground. She also stated that she did not see her stepfather, Vincent Lee, during the incident, but she was not paying him any attention. She cannot say if Lee was following the jeep and she did not see her mother on Johns street after the jeep went away.

[11] Ms Douglas heard a single explosion while she was at #11 Johns Street. She then heard her daughter screaming. She ran to the gate and looked out and about four houses down, she saw a police man holding one of Ricardo's arm and another holding one of his legs. They threw him into the back of a jeep which was facing her but before she could get to where they were, the jeep drove past her. After the jeep passed, she heard a shot coming from the direction where the jeep had gone. She started to run towards the bottom of Johns street when she saw Vincent. She got into his vehicle and they drove to Allman Town Police Station. However the jeep was not seen so they went to the Kingston Public Hospital. About ten minutes later the jeep arrived. She looked into the jeep and saw Ricardo on the floor. He kicked two times. A doctor came out five minutes later and pronounced him dead.

[12] It is the evidence of Ms Douglas that she did not see Racquel when she came outside. She did not see her running behind the jeep. After the jeep passed, she was so concerned with running down the street towards the lower end of Johns street, that she saw no one. Allman Town police station is situated at the lower end. She ran down instead of up because she wished to see if the jeep would come around by the other end of the police station. She did not see when Ricardo got shot, she did not see when he fell to the ground and she cannot say if a firearm was recovered from him.

SUBMISSIONS OF CLAIMANT'S ATTORNEY

[13] Based on this evidence, the claimant's attorney, Ms Tomlinson, has asked me to make the following findings and inferences:

Ricardo was standing alone when Mr Lee came and before the police jeep arrived.

He was surrounded by the police officers. He had no firearm and none was taken from or near his body.

He was shot once by a male officer and his body placed into the jeep. At that point he was still alive.

The jeep was driven away and shortly after, a second shot was heard coming from the direction of the said jeep. The inference to be drawn is that he received the second gunshot injury while he was in the jeep.

Since Mr Lee was able to arrive at the hospital before the police jeep, the police officers delayed in taking him to the hospital. The inference to be drawn is that the delay was to allow them to accomplish some nefarious activity in relation to Ricardo.

INCONSISTENCIES AND DISCREPANCIES IN THE EVIDENCE OF THE CLAIMANTS' WITNESSES

[14] It is the opinion of the court that there are some troubling issues related to the above evidence. Mr Lee puts himself within six feet of Ricardo when he was shot, yet he does not speak of Raquel coming on the scene and speaking to the officers. In fact, he said he heard no one say anything to the police. He did however say that he saw Racquel running behind the jeep and that she appeared hysterical, she was not speaking ,only crying, yet he did not pick her up as he was driving. He followed the jeep within a minute of it moving away. He explained that he did not mention her in the statement as Ricardo was the most important one.

[15] Racquel testified that she did not see Vincent at all. While her state of mind could be the explanation for her not being aware of her mother and Mr Lee driving behind the jeep, she ought to have at least seen Mr Lee at the time Ricardo was placed in the trunk. It is also inconceivable that Ms Douglas would not have seen her daughter running behind the jeep as she ran towards it and then it passed her.

[16] Secondly, I find that Mr Lee is not a reliable or credible witness in relation to several material issues. Under cross–examination, he said he could see who shot Ricardo and identified him as the male officer in the blue denim. He denied attending the Coroner's Court on the 22nd October 2003 and giving contrary evidence. He said he

did not attend any such court. He was shown a deposition with his alleged signature and denied it was his. The Coroner, Mr Patrick Murphy was called as a witness by the defendant and testified of Mr Lee's presence and the giving of his testimony and that he affixed his signature to the deposition which was duly witnessed on the 22nd October, 2003.

INCONSISTENCIES OF MR LEE

[17] In particular, several inconsistencies were revealed between Mr Lee's evidence during the trial and at the inquest. He told the Coroner's Court that he was sitting in his car approximately ten – fifteen feet away, no more than twenty, when Ricardo was shot and that the police officers were not in his line of sight. However, he told this court that he had come out of his vehicle, he was six feet away from the police officers and Ricardo and could see clearly. He also stated that one of the police officers fired a shot but he cannot say which one, which is contrary to what he said in evidence at the trial.

DISCREPANCY BETWEEN MR LEE AND MS TAYLOR

[18] There was also a discrepancy of some significance between Racquel and Mr Lee's evidence. She lived at #20 with Ricardo and her father, Norman. She stated it was about 10:45 a.m. that she heard the explosion while she was at home. About 10:30 a.m., Ricardo was at home sleeping. A male person called him. She spoke to him and he went away and came back five minutes later and called Ricardo. Ricardo eventually went outside. He was not in the yard but outside. She was sweeping the yard and she was outside in the yard. However, Mr Lee puts him standing inside the gate of the yard.

[19] She denied that at the coroner's inquest, she puts Ricardo at home sleeping between 10:30 and 10:45 a.m. and that it was at 10:45 a.m. that he was called. She however admits that her evidence on that previous occasion was to the effect that it was at 10:45 a.m. that she was outside and someone called her brother. The relevance of this is that the police witnesses have stated that they saw Ricardo on the street with two other men.

EVIDENCE OF THE DEFENDANT

[20] The defendant is relying on the evidence of woman sergeant Jaqueline Ricketts and Inspector Courtney Lilly [two of the three police witnesses who were part of the police party responsible for the death of young Ricardo]. Both Ricketts and Lilly essentially gave similar evidence as to the circumstances surrounding his death.

[21] Both were part of a mobile patrol including one corporal Baldwin Johnson [who has apparently left the constabulary force and is not available to give evidence]. At about 10:30 a.m. they were travelling in a marked service vehicle along Johns Street, when three suspicious men were observed on the said street. Two were stooping and one {the deceased} standing. The unit stopped and they all got out and proceeded towards the men. Two ran and the deceased pulled a handgun from his waist and fired in their direction. The witness, Ricketts, stated that she took cover, then heard other explosions. She indicated it was more than three, but cannot say whether four or five. She was armed with a M16 rifle but did not discharge her firearm. She further stated that the rifle was in her hand, slung across her chest with the mouth to the side. Inspector Lilly stated that he also took cover. He cannot say if any of the other two police officers fired. He got down on the road when Ricardo started firing. Ricardo fired two shots and he fired one shot. At this time he would have been three to five feet from Ricardo. He also stated that he cannot say where his colleagues were exactly when he took cover. It is also his testimony that the guns of the police officers were drawn as they approached the men. It is to be noted that he said that he did not really hear another return shot apart from his.

[22] Both witnesses said they saw Ricardo fall to the ground and that the firearm dropped from his hand. They rushed towards him and observed he was injured. Corporal Johnson took up the firearm. Ricardo was placed in the police unit and rushed to the Kingston Public Hospital where he was pronounced dead. Both indicated that they had no conversation with Ricardo or anyone else.

[23] All three police officers then went to Kingston Central Police station where the firearm was examined. It bore the serial #BBZO523 and contained two live rounds and two spent shells which were handed over to the Crime Officer at the said station. All their hands were swabbed.

[24] Woman Sergeant Ricketts stated that she did not recall any female asking what her brother had done and in fact, she saw no other persons around when Ricardo was placed in the vehicle. Inspector Lilly indicated that no female approached any of them on the day in question.

[25] Woman Sergeant Ricketts also told the court that she could not explain why the ballistic certificate indicated that her weapon had been recently fired and could have been fired on the 24th. She obtained the weapon that morning for the purposes of patrol and it had not been under her control before that time. She returned the same amount of ammunition that had been issued to her at the commencement of the patrol.

[26] It was suggested to her that one of them shot Ricardo on the way to the hospital and that a gun was placed in his right hand. She denied that such collusion took place and further stated that it took them five to seven minutes to arrive at the hospital.

EVIDENCE OF DSP PATRICK BENNETT

[27] Deputy Superintendent Patrick Bennett was stationed at the Bureau of Special Investigations at the relevant time and was assigned on the 24th July 2000 at about 11 am to investigate this fatal shooting. He has supported the evidence of Ricketts and Lilly to the limited extent that he confirmed that he received from Constable Roache of the Kingston Central station, the Smith and Wesson revolver #BBZ0523, two .38 cartridges and two .38 cartridge casings that was allegedly taken from the deceased. Constable Roache was the initial investigator. DSP Bennett stated that he also received weapons from Johnson, Lilly and Ricketts. These were a 9mm Browning pistol #245NV57887 [Lilly], a 9 mm Browning pistol #2455555NW76696 [Johnson] and an M16 #9602827 [Ricketts].

[28] He stated that he took all four weapons and ammunitions to the ballistic expert for testing on the same day and received a certificate. In the furtherance of his investigations, he received from Detective Wayne Butler on the 25th of July, a receipt from the forensic laboratory with respect to swabbing from both Johnson and Lilly and a receipt with respect to swabbing done on the deceased. He visited the scene and obtained several statements from eye witnesses. On the 17th August 2000, he attended the post mortem examination of Ricardo Watson which was conducted by Dr. E. Sessaiah.

[29] He also stated that he visited the Criminal Records Office where a trace was conducted on the firearm #BBZ0523 and that it was revealed that the firearm was stolen from a security guard on the 3rd November 1998. He later obtained ballistic and forensic certificates in relation to the four firearms and the swabbing done in this matter.

[30] Based on the evidence presented, the defendant's attorney, Ms Cheryl-Lee Bolton, has asked the court to find that the police officers were acting in self defence and fired two shots which resulted in Ricardo's death. Ms Tomlinson, on the other hand, has submitted that the evidence of the police officers is lacking in clarity and content. She has referred the court to the fact that Ricketts stated that her hands were swabbed but there is no reference on the forensic certificate in relation to any such sample. Secondly she has stated there are discrepancies in the evidence as to the amount of explosions heard. She also pointed out that Inspector Lilly stated that he was not aware that the deceased was shot twice although he assisted in putting him in the jeep. Finally, she also stated that the evidence from the police witnesses indicate that Ricardo was still alive when he was placed in the jeep.

THE SCIENTIFIC EVIDENCE

The Post Mortem Report

[31] The post mortem report reveals that there were two gunshot wounds, one on the right side and the other on the left side of his chest without gunpowder markings. The cause of death is listed as multiple gunshot wounds. The absence of gunpowder

markings is an indication that the firearm or firearms that discharged these bullets were not in close range to Ricardo's body, that is, the gun or guns would have been at least eighteen inches away. This is important, because Mr Lee places the police officers at arm's length away [in relation to the first shot] from Ricardo with the gun pointed at his chest. It is more likely therefore that at least one injury would have been close range.

[32] The post mortem report also lacks sufficient information in relation to certain details. It is not indicated whether any bullets were recovered from the body of the deceased. However, Deputy Superintendent Bennett testified that no bullets were recovered by the doctor. If any had been recovered, there could be tests to indicate what weapon or weapons were used to inflict the wounds. This evidence could assist in confirming the person or persons who shot Ricardo. There is also no indication as to how long Ricardo would have survived before expiring from his wounds. The fact that he may have been still alive while in the jeep is not cogent evidence, without more, that he only had one gunshot injury at that time.

The Ballistic Certificate

[33] The ballistic expert, Deputy Superintendent Sydney Porteous, received the four firearms and ammunitions described previously on the 24th July 2000. It was his opinion that all four weapons showed indications that they were fired and this could have been on the 24th July 2000. This evidence of course does not confirm that those weapons were fired that day. However, Inspector Lilly has confirmed that he fired one shot. Woman Corporal Ricketts has said she did not. Other shots were heard and the inference that the court is being asked to draw is that Corporal Johnson also fired. In fact, Mr Lee has said that he did. The firearm allegedly recovered from Ricardo could also have been fired that day. The police witnesses have said that it was. Mr Lee has said he had no such weapon.

[34] In relation to the ammunition allegedly recovered with the said Smith and Wesson, the expert has stated that the two unexpended cartridges were for use in the said Smith and Wesson and similar firearms. He further stated that an examination of

the two expended cartridge cases revealed that they were fired and their bullets discharged from the said firearm.

[35] Ms Tomlinson has submitted that the court should draw the inference that the gun was planted by the police to implicate Ricardo. There are two difficulties however to be surmounted with such a scenario. The firearm was turned over to Central Police station when the three police officers reported there after leaving the hospital on the 24th. By 11 a.m., Deputy Superintendent Bennett had been assigned to investigate the shooting and went to Central Police Station, where the said firearm and rounds as described were handed over to him. There is no indication of exactly what time this actually took place but, suffice it to say, he took it to the forensic laboratory on the same day. It would appear therefore that the said firearm and ammunition would have been in the custody of Central Police Station between 10:30 a.m. and 11 a.m.

[36] Secondly, Deputy Superintendent Bennett's evidence is that the said gun had been reported stolen from 1998 and if it had been recovered and in police custody previous to the 24th of July 2000, this would have been revealed during the trace of the firearm. He stated also that this information would also have been disclosed at the ballistics laboratory. While it may not be theoretically impossible for the police officers to have done what Ms Tomlinson has suggested, it does require a wide stretch of the imagination to draw this inference, given the circumstances as outlined. This is even more so when one considers that they would have had to discharge two rounds from the Smith and Wesson before handing it over, based on the findings of the ballistic expert.

[37] It is clear that the evidence presented by the defendant does leave some issues unresolved. There is no documentary evidence to state how many rounds, if any were discharged by each police officer. However, Deputy Superintendent Bennett stated that his investigations of the records revealed that there was consistency with what the police officers reported to him. Secondly, Inspector Lilly states that he would have been about five feet from Ricardo when he was fired upon. The evidence is that the police officers were not wearing bullet proof vests, yet none of them were injured. However,

the cumulative effect of the evidence is to suggest that it is more probable than not that the firearm was recovered in the circumstances outlined by the police officers. At the end of the day, there is some cogency to the evidence that Ricardo had a firearm in his possession.

The Forensic Certificate

[38] This evidence reveals that swabs were taken from the hands of Corporal Johnson, Inspector Lilly and the deceased, Ricardo Watson. Johnson had gunshot residue on his right palm, left palm and right back hand. Lilly had the residue on his left palm. The level of gunshot residue is not indicated. Ricardo had elevated levels of the residue on his right hand back and trace level on the left hand back. No issue has been taken with the integrity of any of the above samples. The court is therefore entitled to treat the forensic evidence as a factor to be taken into consideration in the determination of this matter. **Chris Brooks v R**, SCCA.103/2008 [per Morrison JA 47,48]

[39] Ms Tomlinson has advanced the theory that since Mr Lee testified that the police officers formed a semi circle around the deceased, pushed him against a wall and shot him within close range, the court could draw the inference that the residue was transferred from the hand or clothing of one of the officers. In the alternative, she submitted that the possibility exists that the police officers placed a gun in the right hand of the deceased and discharged a round while they delayed in taking him to the hospital. The court was referred to an article "THE CURRENT STATUS OF GSR EXAMINATIONS" by Michael Trimpe [via a website address] which made reference to the fact that gsr particles can be removed easily from surfaces and transferred to another surface or from one person to another.

[40] Ms Bolton referred the court to the evidence of the forensic expert, Mrs Marcia Dunbar, in **Chris Brooks** (para. 59), who testified that elevated levels of gsr would arise from firing a firearm or being in the direct path of gunshot residue as it is emitted from a firing firearm within a distance of nine inches. This is in comparison to trace level which

can result from secondary transfer. Counsel also pointed out that the author in the above mentioned article spoke to gunshot residue generally and did not specifically examine the different levels and possible methods of deposit.

The Effect of Elevated Level of GSR

[41] There is an unchallenged finding of elevated level of the residue on Ricardo's right hand. Bearing in mind the evidence in **Chris Brooks**, there are two possible scenarios to explain this finding. Ricardo fired a firearm within a couple hours of his hand being swabbed or he was in the path of gunshot residue as it was emitted from a firing firearm within a distance of nine inches. If the police officers manipulated his hand to discharge a firearm, then one would expect this to be connected with another shot being discharged. There is no evidence to support a third explosion. If the manipulation took place within the police vehicle as the 'second explosion' then one would expect to see gunpowder deposits around the area of one of the injuries. This is associated with a gun discharged at close range. In essence, the court is being asked to enter into the realms of speculation as the post mortem report is to the contrary.

[42] While the evidence of the elevated residue is not positive proof that Ricardo fired at the police at the time alleged, it certainly strengthens the case presented by the defence that he had a firearm in his possession. The defendant has also said that 'we have the solution to the mystery, that is, he fired at the police.'

THE LEGAL STANDARD

[43] Based on section 33 of The Constabulary Force Act, the burden of proving the absence of reasonable and probable cause rests with the claimant.

Every action to be brought against any constable for any act done by him in the execution of his office, shall be an action in the case 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 the trial of any such action the plaintiff shall fail to prove such allegation he shall be nonsuited or a verdict shall be given for the defendant.

Has the Claimant Discharged this Burden?

[44] The police witnesses have testified that they discharged their firearms after the deceased pulled a firearm and fired at them. The duties of the police [as authorized by virtue of section 13 of the above act] include the duties to keep watch by day and night, to preserve the peace and to detect crime.

[45] In **Sigismund Palmer v The Queen** 1971 A C, 815, pg 831 G-H, Lord Morris of Borth-V-Gest examined the issue of self defence:

“If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger, he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains, then the employment of force may be by way of revenge or punishment.

If there is an attack and it is reasonable necessary to mount a defence, it is not expected that the person being attacked will be able to weigh to a nicety the exact measure of necessary action.”
(pg 822A-B)

[46] If I were to accept the evidence of Mr Lee, then it is clear that the police officers discharged their firearm without reasonable and probable cause. However, as I indicated previously, I am unable to accept Mr Lee as a reliable and credible witness. While he is supported by Barbara and Raquel to some extent, their credibility is also questionable. So the court would be looking for some independent evidence to elevate the claimant’s case to the standard of the balance of probability.

[47] At the end of the day, bearing in mind all the above circumstances, the cumulative effect of the scientific evidence and the absence of any other evidence to support the theories of the claimant, this court is of the opinion that he has failed to prove that the police officers shot Ricardo maliciously or without reasonable and probable cause. The claimant has not succeeded in challenging the evidence that the officers met force with force and were acting in reasonable self defence to the degree necessary to prove his case. In light of this, I will not proceed to any assessment of damages to be awarded.

FINAL DISPOSITION

Judgment is granted to the defendant with costs to be agreed or taxed.

Leave to appeal granted.