[2010] JMCA Civ 50

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 126/2007

BEFORE: **THE HON MR JUSTICE COOKE JA**
THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE MORRISON JA

BETWEEN	**THE ATTORNEY GENERAL**	**APPELLANT**
AND	**GLENVILLE MURPHY**	**RESPONDENT**

Miss Lisa White and Mrs Trudy-Ann Frith instructed by Director of State Proceedings for the appellant

Rudolph Smellie instructed by Daly, Thwaites & Company for the respondent

17 & 19 February 2009 & 20 December 2010

HARRIS JA

[1] On 19 February 2009 we dismissed an appeal with respect to liability, allowed the appeal in respect of quantum, set aside the award of $600,000.00 and substituted therefor an award of $180,000.00. We ordered that the respondent should have his costs in the court below and 50% of the costs of the appeal. We promised to put our reasons in writing. We sincerely regret the delay in doing so.

[2] Sometime between 8:30 and 9 o'clock on the morning of 5 April 1998, the respondent was taken from his house and arrested by the police on an allegation that he had sexual intercourse with his daughter. He was detained in custody and released at 10:00 am on 6 April 1998. The arrest had its genesis in a report made to the police by Mrs Venice Lawrence-Beckford, the half sister of the respondent's daughter. She was subsequently medically examined, at which time it was discovered that she was a virgin.

[3] The respondent, being aggrieved, commenced an action seeking damages against the appellant and others for false imprisonment. In an amended statement of claim, his particulars of special damages were stated to be as follows:

> "Loss of contract to plant 2 acres of coffee $250,000.00."

[4] Sykes J made the following order:

> "Mr Murphy has established his claim for false imprisonment. The award is $600,000.00 at 3% interest from August 10, 1998, to October 9, 2007. The claim for special damages fails. Costs to the claimant to be agreed or taxed."

[5] Four grounds of appeal were filed. Ground four will first be addressed as it relates to liability. The ground is stated as follows.

Ground 4

> "The Learned Judge erred in finding that the word 'reasonable' and the adverb 'reasonably' import a standard outside that of the specific police officer. Further, that the officer is not permitted to set his own standard and act on that."

[6] Miss White submitted that the test which the learned trial judge applied as to reasonable suspicion, is not well founded as he imported a standard outside of that which is required by law by equating prima facie proof with reasonable suspicion. In giving consideration to the matter, she argued, the learned trial judge followed the dissenting judgment in the case of **O'Hara v Chief Constable of the Royal Ulster Constabulary** [1997] AC 286 and by so doing, he imported into his decision the standard mandated by Article 5 (1)c) of the European Convention for the Protection of Human Rights and Freedoms, the provisions of which are wider than section 13 of the Constabulary Force Act.

[7] Section 13 of the Constabulary Force Act authorizes the police to apprehend any person who they reasonably suspect to have committed a crime. The relevant portion of that section for the purpose of the appeal is outlined thus:

> "The duties of the Police under this Act shall be to keep watch by day and by night, to preserve the peace, to detect crime, apprehend or summon before a Justice, persons found committing any offence or whom they may

> reasonably suspect of having committed any offence…"

[8] The fact that the police are empowered to arrest and detain in custody any person on suspicion of his having committed an offence does not mean that they are at liberty to do so without lawful justification. This suspicion must be reasonable. The police must show that the arrest was justified. An action for false imprisonment offers a safeguard against police excess and abuse of their powers. As a general rule, no injury is suffered by a claimant where he is arrested but subsequently shown to be innocent before taken to court. However, in circumstances where he is detained for an unreasonable period, then the detention constitutes the wrong, making the detention illegal ab initio. In **Flemming v Detective Corporal Myers and The Attorney General** (1989) 26 JLR 525 at page 530 Carey P (Ag) said:

> "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 constitutes the wrong, the "injuria". This 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."

[9] The burden is on the claimant to prove that the police had no lawful justification for his arrest. However, if it is shown that the arrest was

unjustifiable and the period of detention unjustifiably lengthy, the onus shifts to the defendant to show whether in all the circumstances, the period of detention was reasonable - see **Flemming v Det. Cpl. Myers and The Attorney General.**

[10] The learned trial judge observed that it is common ground that the police may carry out an arrest on reasonable suspicion. He then went on to outline section 13 of the Constabulary Force Act. Thereafter, at paragraphs 7 and 8 he continued by saying:

> "From the Constabulary Force Act and case law we get the idea that it is quite legitimate for the police to be in a state of conjecture or surmise that a particular person has committed an offence. However the adverb *reasonably* which qualifies or cuts down on the prima facie broad meaning of the verb *suspect* must have some role in the definition of the expression whom they *may reasonably suspect* as used in section 13. The police may suspect and arrest but the suspicion must be reasonably held. This imports an objective element into the expression. Thus we arrive at the position that the police officer himself must suspect but his suspicion must have a reasonable basis. As a matter purely of language, the word *reasonable* and the adverb *reasonably* imports a standard outside that of the specific police officer. The police officer is not permitted to set his own standard and act on that. If that were so, it would be difficult if not impossible to detect arbitrary arrest.
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> It has been suggested that because the objective and subjective elements are so intertwined that any attempt at separating them is highly undesirable. This was the view of Potter L.J. in **Jarrett v Chief Constable of West Midlands**

> **Police** [2003] EWCA Civ. 397 (delivered 14th February 2003) who had to consider *the* expression *reasonable grounds for suspecting* found in section 25 of the Police and Criminal Evidence Act, 1984."

[11] He went on to make reference to the **O'Hara** case [1997] AC 286 on which Potter LJ relied. He spoke to the fact that in **O'Hara** the House of Lords considered the meaning of the words "reasonable grounds for suspecting" within the context of section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984. He continued by saying:

> "His Lordship relied on the House of Lords decision of **O'Hara v Chief Constable of the Royal Ulster Constabulary** [1997] AC 286. In that case the house was considering the expression *reasonable grounds* for suspecting in section 12 (1) of the Prevention of Terrorism (Temporary Provisions) Act 1984 which reads in the material *part a constable may arrest without warrant a person whom he has reasonable grounds for suspecting*. The House distinguished two categories of statutes. First, there were those that said that the particular officer must have reasonable grounds for suspecting. Second, there were those that simply state that reasonable ground must exist for the suspicion. In the latter case, the person doing the actual arrest need not himself have the suspicion as long as objectively viewed such grounds exist. In this latter case, the actual arrestor is protected if he simply followed orders to arrest the person. In the former situation the actual arrester is not protected if he simply followed orders and he himself had no reasonable grounds for the suspicion. In **O'Hara** the statute was a first category one and the House held that the particular officer passed the test because he acted on the information given by his senior as a briefing. The remarkable thing is

> that no one knew what that information was. **O'Hara** went on to the European Court of Human Rights and while the claimant in that case was unsuccessful, largely because, it was said, of his failure at trial to explore fully the background to the arrest, the court took the opportunity to emphasise the following at paragraph 34:
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> 'The court emphasises that the 'reasonableness' of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention laid down in Article 5(1)(c) of the Convention. This requires the existence of some facts or information which would satisfy an objective observer that the person concerned may have committed the offence, though what may be regarded as reasonable will depend on all the circumstances of the case.'"

As can be observed, the learned trial judge in giving consideration to the applicable test for false imprisonment displayed a preference for an objective test. He was of the view that the dicta of Potter LJ gave insufficient weight to the objective test as he, the learned trial judge, found that it was the objective element which offers protection to a citizen from arbitrary arrest.

[12] The learned judge in treating with the **O'Hara** case was of the view that the European Court of Human Rights' emphasis on the importance of the objective test was correct. He examined a dissenting judgment of that court in which the judge was in agreement with the majority as to the statement of the law but disagreed on their application of the facts. The learned judge acknowledged that the English statutory provisions are

not completely in harmony with section 13 of the Constabulary Force Act and stated that the citation of the English cases was not to support an interpretation of the provisions of section 13 but strangely, he relied on Article 5(1)(c) of the European Convention to show that whenever the words "reasonable" or "reasonably" are used, they import an objective element into the statute. He concluded that the application of the objective test would satisfy such proof as required by section 13.

[13] We are constrained to disagree with the learned trial judge. The test as to the reasonableness of suspicion is expressly prescribed by Article 5(1)(c) and cannot be introduced into our statute. The word 'reasonably', as used in section 13 of the statute imposes a subjective as well as an objective element. It does not introduce an exclusive objective element. The test for the purpose of section 13 is partly subjective and partly objective. The learned trial judge found that an honest belief on the part of the police that a crime was committed by a party is insufficient. He concluded that the police may have honestly believed that the offence had been committed by the respondent but they, having acted on rumour, could not say that they had reasonable grounds for a suspicion that the offence was committed by the respondent.

[14] Surely, the question as to whether the arresting officer entertained a genuine belief that the respondent had sexually molested his daughter is

a highly critical consideration and ought to be the first step in determining whether the arrest was justified. The issue as to the existence of an honest belief on the part of the police of the respondent's guilt, indubitably, must ground the foundation of the subjective test. If it is found that the police had honestly believed that the respondent had molested his daughter, then no liability could be ascribed to them. However, if it established that they could not have had any genuine suspicion that he had done so, then the objective test comes into play. Consideration would then have to be given as to whether there were reasonable grounds for the police to have reasonably suspected that he had committed the offence.

[15] There was evidence from Marie Morgan, a district constable at the Glengoffe Police Station, who in cross examination, said that the respondent's daughter was present when her sister, Mrs Veniece Lawrence-Beckford made the report. This information Mrs Lawrence-Beckford said she received from her mother and from members of the community. On receipt of the report on 5 April 1998, the respondent was arrested. There is no evidence that the police, before making the arrest, interrogated the respondent's daughter in order to corroborate the report. Further, they ought to have taken her to be medically examined the very day of the report.

[16] It is clear from the evidence of Inspector Duetrees Foster-Gardner that it was on 6 April 1998 that an attempt was made to interview her. She was medically examined on that date. The respondent was not released until after the medical examination of his daughter proved that the allegations made against him were false. Clearly, the police could not have presumed to have had a genuine suspicion or an honest belief for arresting the respondent, nor could they be said to have had any reasonable ground for so doing.

We now turn to grounds one, two and three.

Ground 1

> "The Learned Judge erred in finding that there was injury to feelings and injury to reputation to Mr. Murphy to merit making an award in those respects, as the evidence did not support such an award."

Ground 2

> "The Learned Judge erred in making separate awards for injury to feelings, injury to reputation and loss of liberty as opposed to one award for general damages for false imprisonment to account for all three heads of damages."

Ground 3

> "The Learned Judge erred in making an excessive award in the circumstances."

[17] Miss White argued that there was no evidence from the respondent regarding his reputation or relating to injury to his feelings, yet the

learned judge made awards covering these heads of damages, Further, she contended, the learned trial judge wrongly applied **Thompson v Commissioner of Police of The Metropolis** [1998] QB 498 by making awards with respect to injury to feelings and injury to liberty. A sum of $100,000.00, she argued, would have been adequate compensation for the respondent. In support of her submissions she cited the cases of **Allen v JPS Co and Coke** Claim No 2006 HCV 566, delivered on 10 April 2008, **Russell v Attorney General and Another** Claim No 2006 HCV 4024 delivered on 18 January 2008 and **Nelson v Gayle and Another** Claim No CL 1998/N 120 delivered on 20 April 2007.

[18] The heart of the appellant's complaint is that the award made by the trial judge is excessive as there was insufficient evidence to support such an award. In dealing with the question of the award of damages, the learned trial judge said in paragraphs 22 and 23 of his judgment:

> "In assessing damages for false imprisonment there are a number of matters that are taken into account. These are loss of liberty; injury to feelings, that is to say, the indignity, disgrace and humiliation and mental suffering arising from the detention. There is the injury to reputation. In this case, Mr. Murphy has stated that he had to leave the community because of the allegation. It is well known in Jamaica that an accusation or suspicion of incest is deeply damaging to one's image and character. The cases to which I was referred by counsel do not adequately reflect that all the matters mentioned above should be taken into account. They tend to focus mainly on the loss of liberty. That may explain in part

why the awards for false imprisonment tend to be so low.

In recent times there has been a review of the approach to the assessment of damages for false imprisonment and malicious prosecution by the Court of Appeal of England and Wales. In the case of **Thompson v Commissioner of Police of Themetropolic** (sic) [1998] Q.B. 498, a jury awarded very substantial damages to (sic) claimant in a false imprisonment case. That case was one of a number of cases in (sic) juries were obviously outraged by the conduct of police officers in the United Kingdom and gave expression to this in the damages awarded. To give a flavour of how outraged the jurors were I shall give a few figures. In **Thompson** the jury awarded £20,000.00 for damages including aggravated damages and £200,000.00 as exemplary damages. The damages were reduced on appeal."

[19] The learned judge went on to say at paragraphs 25 and 26:

"The point there is that the Court of Appeal has seen it fit to bring greater rationality to this area of assessment. I am not saying that we must use the same figures but it is not impossible for there to be some judicial consensus on what is an appropriate base figure. His Lordship emphasised the importance of the shock of the first hour of arrest. I shall use this approach. The Master of the Rolls went to speak of what would be an appropriate sum for a twenty hour false imprisonment. I shall also take into account that in false imprisonment it is quite legitimate to take account (sic) the injury to feelings and injury to reputation. I shall itemize each aspect of the award. I apply all this to the facts as I have found them.

Mr. Murphy was particularly incensed by the fact that he was treated worse than an animal, that is

> to say, being locked up without food or refreshment for twenty four hours. In addition, Mr. Murphy testified that there was no bed in the cell and he had to sleep on the concrete. It would seem to me that this kind of treatment must be regarded as aggravating the loss of liberty. Taking all matters into consideration as well as previous cases the award is as follows:
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> (a) Loss of liberty - $100,000.00
> (b) Injury to feelings - $300,000.00
> (c) Injury to reputation - $200,000.00"

While the learned trial judge recognised that the figures used in **Thompson's** case might not be used as a base figure here in Jamaica for making an award, he cast some doubt on the appropriateness of the use of the Consumer Price Index as the benchmark for updating awards. He was of the view that there ought to be some judicial consensus as to a base figure. He was content to use an approach suggested by Lord Woolfe in **Thompson's** case in which he intimitated that a sum should be awarded for the first hour and thereafter an additional sum should be awarded on a progressively reducing scale for any further period of imprisonment.

[20] It has always been recognized that there may be some difficulty in deciding on a reasonable compensatory amount to be awarded to a claimant for damages suffered. However, the practice in the courts in using comparable awards as the basis in making an award and applying

the Consumer Price Index thereto, has not in any way worked prejudicially to a claimant. The object of applying the Consumer Price Index is to take care of inflation. We see no reason to depart from the usual practice and cannot say that we are in agreement with the learned trial judge that the suggested approach of Lord Woolf should be adopted.

[21] The fact that a successful claimant is entitled to reasonable compensation for damages for false imprisonment is not open for debate. Nor can it be disputed that injury to his liberty, his feelings and reputation are relevant. In making an award, each of these heads of damages must be considered but only a single award should be made. There is some merit in Miss White's contention that there was not sufficient evidence before the learned trial judge from the respondent supporting damage to his reputation. The question which arises therefore is whether the evidence before the learned judge was sufficient to show that the respondent had been held in contempt by right thinking members of society.

[22] The respondent's evidence was that the police accused him of impregnating his daughter and struck him on his shoulder and chin. He was forced to remove his shoes, was locked in a cell, had to sleep on the floor and he received no food during the period of detention. He remained outside of the district for seven years as he was physically

attacked by persons in the district due to the allegations made against him. These factors would clearly affect his feelings. However, the evidentiary material before the learned trial judge to support a finding of the respondent's loss of social status was inadequate. There was no evidence of his social standing in the community. Consequently, no damages for injury to his reputation would accrue to him. The learned judge was clearly wrong in making an award with respect to that head of damages. He also erred in making an award for the respondent's feelings as an independent head of damages. Despite this, the respondent was wrongly arrested and detained. He would have been entitled to be compensated. Such compensation would have attracted a global award under the head of false imprisonment but for a lesser amount than that which had been given by the learned trial judge. We are unable to accept the cases cited by Miss White as offering us assistance in arriving at an award. In all the circumstances, we are of the view that an appropriate award of $180,000.00 would have been a reasonable compensatory sum for the respondent's imprisonment.

[23] An appellate court is disinclined to interfere with an award made by a trial judge. The court will however intervene if it is of the view that the award is too low or excessive - see **Flint v Lovell** [1935] 1 KB 354 and **Davis v Powell Duffryn Associated Colleries Ltd** [1942] AC 601. In our judgment, the award of $600,000.00 was excessive and therefore could not stand.

Accordingly, we had set aside that award and substituted an award of $180,000.00, which in our opinion would have adequately compensated the respondent.