

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO. SLUHCV2013/1030

BETWEEN:

PC 793 JAMES JUNIOR FREDERICK

Claimant

and

THE ATTORNEY GENERAL

Defendant

APPEARANCES:

Mr. Colin Foster for the Claimant
Ms. Kozel Creese for the Defendant

2016: May 23;
2017: September 22.

JUDGMENT

- [1] **BELLE J:** The Claimant pleaded and was required to prove that on Monday 25th June, 2012 he was arrested and imprisoned for having "on Monday 25th June 2012, between 9 p.m. and 11 p.m. at Riverside Road situated in the village of Canaries within the First Judicial District of this state, did without lawful excuse, forcefully carried away Mervin Charles without his consent contrary to section 120(1) of the Criminal Code of St Lucia."
- [2] The Claimant also claimed that on 29th June, 2012 he and Ali Thomas were brought in custody before Magistrate Louis where the Defendant's servant or agent, Corporal 582 Kimberly Francis, maliciously and without probable cause continued

to prosecute the said charge against the Claimant. The Claimant further claimed that the Defendant's servant Corporal 582 Kimberley Francis, caused the Court to remand him and Ali Thomas to prison and caused them to be further imprisoned on unsubstantiated grounds inter alia:

- (a) The complainant is a vulnerable witness
- (b) The quality of the complainant's statement was likely to be affected by interference by the Claimant or his associates;
- (c) That there was a real risk of the Claimant interfering with the witness or the investigation;
- (d) That the Claimant should be kept in custody for his own protection; and
- (e) That Corporal 582 Kimberley Francis was seeking the services of various professionals in the child development and guidance centre with a view to obtaining a witness statement from the Virtual Complainant.

[3] The Claimant further claimed that he had to make three applications to the High Court to obtain bail and after the application of the 8th March, 2013 he and Ali Thomas were released on bail in 11th and 12th day of March, 2013. The Claimant also pleaded that the situation only came to an end when on Friday 5th July, 2013 one year after the date of his arrest at a sufficiency hearing the Defendant's servants were still unable to produce any witness statement or any sufficient evidence against the Claimant or Ali Thomas and the prosecution terminated the proceedings against him and Ali Thomas.

[4] The Claimant claims that by reason of the facts as outlined above the Claimant was greatly injured in his credibility, character and reputation having received negative public and media scrutiny. Consequently, the Claimant claims he had suffered mental anguish and pain due to the deprivation of his liberty and freedom for over or about two hundred and sixty days. The Claimant has thereby suffered loss, inconvenience, disgrace, indignity, humiliation and incurred expenses in defending himself and he has thereby suffered loss and damages.

[5] The Claimant claimed:

- 1) Damages for false imprisonment
- 2) Damages for malicious prosecution
- 3) Damages for detinue
- 4) Exemplary damages

- 5) Special Damages
- 6) General damages
- 7) Such further and or other relief as the Court may seem just
- 8) Cost
- 9) Interest

- [6] The central issue of this case is whether the initial evidence provided to the police which instigated the Claimant's arrest was sufficient to sustain a prosecution for the offence(s) charges and whether the evidence was known to be false.
- [7] There are few disputes of fact in the case. Consequently, much of the evidence turns to be interpreted on nuances of the facts. However the disputes of fact boil down to 1. Whether the Defendant's servant Corporal 582 Kimberly Francis (Sergeant Francis at the time of trial) sought and obtained advice before preferring the charge against the Claimant. 2. Whether the alleged complainant against the Claimant on the charge of kidnapping was forcefully taken away by car by the defendant and his friend.
- [8] Sergeant Francis has insisted in evidence that she sought advice and was advised to prefer the charge of forcefully taking away Mervin Charles against his will.
- [9] It is my view that the reason for preferring the charge can be gleaned from the totality of the evidence collected. Not all of the evidence was of the same quality. The evidence of Police Corporal 43 Matthew Charles who intercepted the Claimant and found Mervin Charles in his car would have been of some importance. The only difficulty with this evidence is that Mervin Charles never described the offence of being forcefully taken away against his will but instead reported that he had been sexually assaulted.
- [10] In light of the fact that Mervin Charles was known to be mentally challenged this would not have been an unlikely scenario.
- [11] Corporal Matthew Charles also alleges that the team of police investigators saw a broken condom packet, grease and alcohol in the Claimant's motor car the night of

the arrest. And the claimant was not able to explain why he did not take Mervin Charles home.

- [12] In my view based on the facts before the court the investigating officer could form the suspicion and conclude that there was sufficient evidence available to charge the Claimant with the cited offence. All of the evidence appeared to point to the “force” being used in the sense of, “mental or moral power; or influence with a person or thing exerting this”: according to the Oxford English Dictionary.
- [13] Clearly the case against the Claimant was not perfect but there would reasonably appear to be evidence upon which the investigating officer could conclude that a successful prosecution could be pursued against the Claimant.
- [14] It is with this background in mind that the arguments of the parties can be analysed to arrive at a conclusion on the elements of the alleged tortious acts which must be proved if the Claimant is to successfully prosecute his claim against the defendant.
- [15] The Claimant’s counsel argued that there are four elements of the tort of malicious prosecution. There is no dispute on the interpretation of the authorities which all state that the Claimant must prove:
- a) That there has been a prosecution of the Claimant.
 - b) The prosecution was instituted by the Defendant.
 - c) The prosecution was determined in his favour.
 - d) That the defendant acted without reasonable and probable cause, and
 - e) That the defendant acted maliciously.
- [16] There is no disputing that the Claimant has proved the first three elements of the tort of malicious prosecution.
- [17] However a different picture arises on the issue whether the defendant acted without reasonable and probable cause in preferring the charge of kidnapping against the Claimant. This issue is strongly disputed and reference to the background provided above provides some insight into the difference of opinion on this matter.

- [18] I should mention that there were two obvious areas of weakness in the prosecution's case are 1. Whether Mervin Charles could give coherent evidence about the alleged crime committed and; 2. Whether the community exerted pressure against the police to prefer the charge of kidnapping. I agree with the conclusion that a charge of sexual assault would have been an alternative charge but the police had the right to decide which charge was most appropriate in the circumstances. This is a matter for the police which cannot be ignored on the basis that the police would have had difficulty procuring a statement from Mervin Charles. But other evidence could be used to establish a forceful taking away of Mervin Charles.
- [19] I take judicial notice of the fact that the police concluded that the case involved a vulnerable person. This implied that his evidence could be treated differently to that of the ordinary complainant or witness.
- [20] Counsel for the claimant argues that the failure to produce any witness statement or sufficient evidence against the Claimant after over one year from the date of his arrest is sufficient evidence to conclude that the Defendant's agent Sergeant Kimberly Francis maliciously and without probable cause continued to prosecute the charge of kidnapping against the Claimant after bringing him before Magistrate Louis and causing the Court to remand the Claimant and Ali Thomas to prison and to be further imprisoned on unsubstantiated grounds.
- [21] The Defendant submitted that Corporal Francis executed her duties lawfully and further in her testimony she indicated that she sought advice from the office of the Director of Public Prosecutions before charging the Claimant. She also submitted that there is no reason to doubt her.
- [22] Furthermore the Defendant argues that the evidence upon which Sergeant Francis relied was derived from police and civilian witnesses which indicated that Mervin Charles was taken away by the Claimant. She also obtained a doctor's report which showed that Mervin Charles had recent anal sexual penetration less than the (3) days before and the Mervin Charles made verbal pronouncements concerning the allegation of sexual assault and indicated to Corporal Francis that the Claimant took

him from his home to the dam. This evidence when added to the items found in the car already alluded to above could and would have caused considerable suspicion that an offence may have been committed. The question is, which offence?

[23] Counsel argued that the fact that Mervin Charles was unable to give a written statement is not indicative of the fact that there was no evidence to support a charge. Although it has not been argued as a matter of expert evidence but it must have been a factor weighing on the mind of the investigating officer that the alleged victim by way of reputation was mentally challenged and this allegation has not been refuted by the Claimant. Indeed the Claimant claims to have spoken to the alleged complainant on a number of occasions and describes his encounters in the following terms under cross examination.

[24] The Claimant indicated that he did not know Mervin Charles to be mentally challenged or differently abled. He stated that Mervin did not function as would a normal 17 or 18 year old would. He indicated that he said this because of Mervin Charles' appearance and the way he speaks. With regard to the way Mervin Charles walked, when asked, the Claimant said that Mervin Charles always had his mouth open, and he walked with a limp. When you spoke to Mervin Charles he said his speech seemed to be okay but when you say something to him you have to say it twice before he answered.

[25] Finally he said that Mervin Charles was not his friend but someone he knew from Canaries.

[26] The obvious question is why would you pick up someone who is not your friend who is clearly not normal, in the night to take them to the Dam with alcohol and sexual paraphernalia?

[27] Applying the case of **Barbour v AG**¹ of the Court of Appeal of Trinidad and Tobago all of the evidence taken together amounted to reasonable and probable cause for

¹ TT 1981 CA 36

prosecuting the Claimant. In that case Hyatali CJ reviewed relevant authorities including **Dallison v Caffery**².

[28] In **Dallison v Caffery** Diplock LJ set out the test to be applied to ascertain whether there was reasonable and probable cause for a prosecution in the following terms:

“A person, whether or not he is a police officer, acts reasonably in prosecuting a suspected felon if the credible evidence of which he knows raises a case fit to go to the jury that the suspect is guilty of the felony charged. This is what in law constitutes reasonable and probable cause for the prosecution.”

[29] The test whether there was reasonable and probable cause for the arrest or prosecution is an objective one, namely, whether a reasonable man assumed to know the law and possessed of information which in fact was possessed by the defendant, would believe that there was reasonable and probable cause. Where the test is satisfied, the onus lies on the person who has been arrested or prosecuted to establish that his arrestor or prosecutor did not in fact believe what ex hypothesis he would have believed had he been reasonable.”

[30] When questioned about her conclusion that there was sufficient evidence to prefer a charge of kidnapping against the Claimant the investigating officer Sergeant Kimberly Francis stated that she disagreed that there was not sufficient evidence to prefer charges. She also disagreed that the statements of witnesses did not disclose evidence of kidnapping or indecent assault. Again, I have no reason to doubt Sergeant Kimberly Francis in the circumstances.

[31] Counsel for the Defendant concluded that a reasonable and cautious man having the information that Sergeant Francis had would have arrived at the conclusion that a crime had been committed and the end result would have been charge(s) being brought against the Claimant.

² (1964) 2 All E.R. 610

- [32] I must say that I prefer the Defendant's argument which addresses the evidence that was available to the Sergeant at the time of arrest and beyond. Such evidence could not have been ignored even if there was doubt about some aspects of it.
- [33] Counsel argued that there is no indication that Sergeant Francis or any other police officer acted with malice and therefore the Defendant is not liable for committing the tort of malicious prosecution.
- [34] In light of my findings of fact, I cannot see how I could possibly conclude that as a matter of law the Claimant has satisfied all of the essential ingredients of the torts of malicious prosecution. It is true that for some time the police were aware that they would not have been able to adduce the evidence of the alleged complainant at trial. For this the delay they should have been made to pay costs but the peculiar position of the Claimant being a member of the community where the alleged offence was committed and the Claimant being a police officer provided some justification for the refusal of bail on the ground that he might have sought to interfere with witnesses.
- [35] In the premises, I dismiss the claim for damages for the torts of false arrest and malicious prosecution. Costs are awarded to the Defence in the circumstances pursuant to Part 65 of the CPR 2000.

JUSTICE FRANCIS H.V. BELLE
HIGH COURT JUDGE

BY THE COURT

REGISTRAR