IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO# 511/93

12-01-95

ANTHONY YOUNG PLAINTIFF

v

RUDOLPH GORDON DEFENDANT

Mr. Pierre Lamontagne Q.C., with Mr. Graham Hampson for the plaintiff.
Mr. William Helfecht for the defendant.

JUDGMENT

Schofield J.

On the 5th July 1995 I dismissed this action with costs and I now give my reasons for doing so.

This is an action for false imprisonment against the defendant who is an officer with the Royal Cayman Islands Police Force. The plaintiff is a Prison Officer serving at Northward Prison, Grand Cayman, and was arrested by the plaintiff on suspicion of theft on the 5th December 1992. His detention thereafter, before bail was granted by the plaintiff, lasted for no longer than about five or ten minutes, but if the arrest was unlawful, as alleged by the plaintiff, the length of time he was held thereafter is immaterial

to the question of liability. Even a temporary detention which is unjustified in law amounts to false imprisonment.

The events leading up to the plaintiff's arrest are these. On the day before his arrest, the 4th December 1992, the plaintiff went to Foster's Food Fair in the Industrial Area of George Town on his way to duty at Northward Prison. He had with him roughly $231 which included two $100 bills. Because he owed a colleague, Glendon Binns, $40 the plaintiff, who was merely purchasing bananas for $2.17, paid with a $100 bill to get the change.

Immediately ahead of the plaintiff at the checking-out counter was Judith Mclaughlin. The plaintiff knew her and they acknowledged each other. After Mrs. McLaughlin (to whom I will refer as "the complainant") had checked out her goods the plaintiff says he put his $100 bill on the counter and the cashier put the bananas in a bag and placed the bag on top of his money. The cashier then moved the bag and took up the $100 bill and gave the plaintiff his change.

Later that day, at about 5 p.m., the complainant and the cashier visited the plaintiff at the prison. The complainant accused the plaintiff of stealing her $100 note, alleging that the plaintiff paid for his bananas with her, the complainant's, money. After being asked by the plaintiff whether she had not seen him take the money from his pocket the cashier said she is Spanish, does not speak English well, and she was not sure who the money belonged to. The complainant became noisy and he ordered them to leave, but the

complainant continued to complain that he had stolen her money to his fellow-officers as she was leaving the prison.

The complainant reported the matter to the police soon afterwards and the defendant, who was on duty in a patrol car, received the report by radio. He went to visit the plaintiff at the prison shortly after 7 p.m. on the same evening. He told the plaintiff of the complainant's report and the plaintiff denied stealing the $100. According to the plaintiff at that stage he took the receipt for the bananas out of his pocket and gave it to the defendant. He also, he says, took out the change from the $100, with some smaller change, and showed it to the defendant. He had put the $40 for Mr. Binns in a different pocket and intended to give it to him when Mr. Binns reported on duty at 11 p.m. The defendant says that he was shown money by the plaintiff, not at the prison but later at the police station. I shall return to this aspect of the case because it is not without significance.

The defendant wanted to take the receipt away as an exhibit but the plaintiff was reluctant to let him do so. After exchanges which involved the intervention of one of the plaintiff's senior officers it was agreed that the plaintiff would follow the defendant to Bodden Town Police Station to get a copy of the receipt. Before we leave the prison it is necessary to note a further divergence of evidence between plaintiff and defendant. The plaintiff alleges that the defendant told him that he knows he stole the $100 and he should give it back because the complainant at that stage did not

want to press charges, she merely wanted her money back. The defendant testified that he told the plaintiff that if he had taken the money then he should give it back to prevent further investigation because the complainant only wanted her money back at that stage.

According to the defendant it was while they were at Bodden Town Police Station on the evening of the incident that he asked the plaintiff to show him all the money in his possession. He recorded that the plaintiff showed him a total of $136 in denominations of one $100 note, one 25 note, one $5 note and one $1 note.

Just before midnight the plaintiff recorded the complainant's statement. She told him that as she checked out her goods at Foster's Food Fair she accidentally took out a $100 bill and put it on the counter. It was not until later, when she went into her purse, that she realized what had happened. The complainant went back to Foster's Food Fair but had difficulty understanding the cashier. She checked with one Mr. Miller at the store. A video camera records events in the store and when the relevant tape was run back she said she saw where the plaintiff had spent the $100. The cashier told her that she had picked the $100 note up off the counter and the plaintiff had said it was his.

The next day, the 5th December 1992, the plaintiff visited the store and coincidentally so did the defendant. They both viewed the tape and drew different conclusions from it. The plaintiff felt it

vindicated him; the defendant felt it supported the complainant's story. I have not seen the tape; counsel inform me that they have viewed it and it is not of good quality and is inconclusive. They exhibited, by agreement, a report of the tape subsequently prepared by Inspector Lumsden of the Royal Cayman Islands Police. It is accepted that this report accurately reflects what is seen on the tape. The tape does not show that the complainant dropped or left anything on the counter and it does not clearly show that the cashier picked up any money from the counter. Nor does it give a clear view of the plaintiff so that it can be seen whether he took any money from his pocket.

As they left the store the defendant spoke to the plaintiff. Again there is a divergence of evidence on what exactly was said. The plaintiff said that the defendant told him: "I need you to come to the station to give a statement, but if you don't want to come I will come for you ". The inference is that the defendant was threatening to arrest the plaintiff if he would not voluntarily attend the police station to give a statement. The defendant says he merely invited the plaintiff to go to the police station, and there was no threat implied or uttered.

That same evening the plaintiff was interviewed at Bodden Town Police Station by the defendant in the presence of Police Constable Hyre. The interview commenced at 6:12 p.m. and concluded at 7:30 p.m. A record of the interview was exhibited to Court. When the interview was concluded the plaintiff went through it and did not

agree with some passages. They were altered to his satisfaction and according to the plaintiff the defendant invited him to sign it and said "If you don't want to sign it you can spend the night with us". The defendant denied making that threat. As it is the plaintiff signed all but three answers, which the defendant maintains he refused to sign. The plaintiff also signed the statement at the end as being a true transcript of the interview. It is not disputed that the exhibit is such a true transcript.

In the interview the defendant asked the plaintiff how much money he had in his possession the evening before ie. the evening of the alleged theft. The plaintiff said : "Round about $228". When asked the plaintiff said he did not remember how much he showed the defendant but said he vaguely remembered the defendant making a note of the denominations of the notes he showed him.

The interview record goes on:

> Q. Can you remember the denominations you showed to me last night Friday 4/12/92.
> A. I can remember having 1 x 100.00 bill and the rest amounts to the balance that total $228.00. Those were in denominations of 4 x 25.00 1 x 10.00 2 x $5.00 and 2 x 1.00.
> Q. So you are saying then that last night Friday December 4th 1992 at about 7:30 p.m. when you showed me the denominations of the money you had in your personal possession you showed me 1 x 100.00 4 x $25.00 1 x 10.00 2 x 5.00 and 2 x 1.00 bill.
> A. I do not remember showing you all the denominations. I clearly remember showing you a

> $100.00 bill and the change from the $100.00 bill I submitted at Fosters.
> Q. When you showed me the money where did you take them from.
> A. My two side pockets and from the money I had in my pouch.
> Q. Mr. Young I am putting it to you that your are lying about the money you had in your possession on Friday December 4th 1992 at about 7:30 p.m. and about the amount of money and denominations you showed to me this is because when the total amount of money you showed to me was CI$136.00 in the denomination of 1 x 100.00 1 x 25.00 1 x 1.00 and 1 x 5.00 which you took from your top shirt pocket.
> A. I am not lying because I only showed you what I had in my top pocket.

The interview concluded at 7:30 p.m. We do not know what happened between then and 8 p.m., but at 8 p.m. the plaintiff was cautioned and arrested by the defendant on suspicion of committing the offence of theft. It took five or ten minutes to complete the bail formalities, according to whose watch one goes by, but the plaintiff was bailed to attend Bodden Town Police Station on the 24th December 1992. The plaintiff told the Court of his attendances at Bodden Town and George Town Central Police Stations in answer to his bail and its various renewals. It seems on occasions he was unnecessarily delayed and on one occasion, the 7th January 1993, he had the extraordinary experience of having to go in convoy with his attorney and a woman police constable to Central Police Station after answering to his bail at Bodden Town Police Station because an officer was not present at Bodden Town to renew his bail. At the end

of the day (on 1st February 1993) the plaintiff was told that a decision had been made by the Legal Department that he be not prosecuted.

The plaintiff recited to Court what a devastating effect the arrest had had, not only on his 1992 Christmas celebrations, but on his life generally . His wife supported that evidence.

That is a summary of the evidence in this trial. Let us now look at the law. The power of a police officer to arrest a citizen is given by sections 24(4) and 33(a) of the Police Law (1995 Revision). Section 24(4) reads:

> "24.(4) A police officer may arrest without warrant any person who commits or attempts to commit an arrestable offence in his view or whom he reasonably suspects to have committed an arrestable offence".

Section 33 (a) reads:

> "33. Any officer may, without an order from a Justice of the Peace and without a warrant, arrest any person-
> (a) whom he suspects on reasonable grounds to have committed or to be about to commit an arrestable offence;"

If the arrest of the plaintiff was lawful in that the defendant was exercising his powers under these provisions lawfully and properly, then he did not commit the tort of false imprisonment; on the other hand, if he was exercising his powers unlawfully and improperly

outside these provisions, then he was liable to the plaintiff in damages. I held that the plaintiff exercised his powers lawfully and properly.

Our statutory provisions set out above are so similar to the English provisions giving power of arrest, which are based on common law powers which have been imported to other parts of the Commonwealth, that we may look to English and Commonwealth authorities for guidance. In Shaaban Bin Hussein and others v Chong Fook Kam and another [1970] A.C. 942 a decision of the Privy Council on appeal from the Federal Court of Malaysia, and involving an allegation of false imprisonment and a review of the local Criminal Procedure Code as it related to powers of arrest, it was stated at p. 950 H:-

> "It is quite clear that the law of Malaysia has to be taken from the Code and not from cases on the common law, but where, as here, the Code is embodying common law principles, decisions of the Courts of England and of other Commonwealth countries in which the common law has been expounded, can be helpful in the understanding and application of the Code".

I should say at once that it is beyond doubt that the offence of theft, of which the defendant says he suspected the plaintiff, is an arrestable offence. The questions I had to answer in this trial are succinctly set out in the following passage from Clayton and Tomlinson, Civil Actions Against the Police, (Second Edition, 1992)

at p. 171:

> "Once it is clear that a suspect was, indeed, arrested for an arrestable offence there are three questions to be considered.
> "1. did the arresting officer suspect that the person who was arrested was guilty of the offence? The answer to this question depends entirely on the findings of facts as to the officer's state of mind;
> 2.assuming that the officer had the necessary suspicion, was there reasonable cause for that suspicion? This is a purely objective requirement to be determined by the judge if necessary on facts found by the jury;
> 3. if the answer to the previous questions is in the affirmative then the officer has a discretion which entitles him to make an arrest and in relation to that discretion the question arises as to whether the discretion has been exercised in accordance with the principles laid down by Lord Greene M.R. in Association Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 K.B.223.
> .....The burden of showing that the arresting officer had the necessary suspicion and that there were reasonable grounds for it is on the defendant. The burden of showing that the discretion to arrest has been exercised improperly is on the plaintiff."

I do not think it can be seriously contended that the defendant did not suspect that the plaintiff committed the offence alleged. There

was no allegation of bad faith put to him in Court and although the plaintiff's evidence contained various allegations that the defendant was heavy-handed in his approach to him, I do not find that the defendant acted other than honestly and in good faith. Certainly he knew the complainant. But this is not an unusual situation in these Islands: the defendant knew the plaintiff as well. The defendant acted upon the word of the complainant and he told the Court that he believed her. The complainant had the confidence in her complaint to confront the defendant at his own place of work and to repeat the complaint to his colleagues and, later, to the police. She was convincing enough in her complaint to carry the cashier along with her to the prison. It is not surprising then that the defendant believed her.

On the first day of the trial the defendant listed various factors which led to his suspicion. He added to that list when cross-examined the next day that he had spoken to the cashier before he interviewed the plaintiff. There is nothing sinister in that omission on the first day: the defendant listed those factors which came to mind when he was first asked the question and an additional factor came to mind subsequently.

The defendant satisfied me that he suspected that the plaintiff stole the $100 note.

The second question I had to answer was whether, viewed objectively, there was reasonable cause for that suspicion. Suspicion must not

be equated with prima facie proof. It is something less. As was stated in Hussein v. Chong Fook Kam (supra) at p. 948:.

> "Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove." Suspicion arises at or near the starting-point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police."

Their Lordships went on:

> "The test of reasonable suspicion prescribed by the (Malaysian) Code is one that has existed in the common law for many years. The law is thus stated in Bullen and Leake, 3rd ed. (1868) p. 795, the " golden" edition of (1868):
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> "A constable is justified in arresting a person without a warrant, upon a reasonable suspicion of a felony having been committed and of the person being guilty of it."
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> Their Lordships have not found any English authority in which reasonable suspicion has been equated with prima facie proof. In Dumbell v Roberts [1944] 1 All E.R.326, Scott L.J. said, at p. 329:
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> " The protection of the public is safeguarded by the

> requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called upon before acting to have anything like a prima facie case for conviction;..."
>
> There is another distinction between reasonable suspicion and prima facie proof. Prima facie proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all."

Mr. Lamontagne, for the plaintiff, argued that the Courts of the West Indies have applied a somewhat stricter test of what is reasonable in this context than have the English Courts. He cited the decision of the Court of Appeal of Trinidad and Tobago in Cedeno v O'Brien (1964) 7 W.I. R. 192 which has been followed by the Court of Appeal of Jamaica in R v Melvin Spragg (1975) 23 W.R. 371, and by our own Grand Court in Darvin D. McLean v Regina (Cr. Appeal No 15 of 1979, unreported) and John Mitchell Rea v Detective Inspector Brian Gibbs and others(c.c. 164 of 1992). The following passage from Cedeno's case was cited with approval of our Court of Appeal in G v S 1992-93 CILR 203:

> "It was contended that that procedure is in essence inquisitorial. So it is. And from that it was next contended that by its provision of an inquisitorial procedure the legislature must be presumed to have intended to grant the right to invoke it upon the merest suspicion or, alternatively, upon the bona

> fide suspicion of any immigration officer or constable. But the subsection does not so provide. By its terms he should have reason to suspect, which is very different from saying that he should suspect-without more. It is notorious, I am sure, that some people's suspicions are easily aroused. Any hint or conjecture, however tenous, will move the credulous to suspect although it be utterly devoid of reason to found a suspicion. Any attempt to alter the character of the statutory stipulation must therefore be firmly rejected.

George J.A. went on in G. v S. to say, at pp. 217-8:

> "The suppression of the drug trade in these Islands is a matter of priority and the powers granted under s. 16L (of the Misuse of Drugs Law) permit a necessary intrusion into the privacy of homes and offices of persons who may well be innocent of any wrongdoing. They also permit prying into confidential relations which would normally be shielded from scrutiny. There must be awareness of the importance of achieving a balance and this can best be achieved by ensuring that the suspicions on which the exercise of these powers are based are plainly shown to be reasonable."

By using the word "plainly" I do not think that his Lordship was meaning to add any additional test to what, objectively, a Court

would consider to be a reasonable ground for suspicion. He was merely stressing that for an officer to invoke the provisions of section 16L of the Misuse of Drugs Law he had to be able to satisfy the Court not only that he had a suspicion, but that the suspicion was reasonable. That was the thrust of the decision in Cedeno v. O'Brien. In that case the Court was considering the provisions of an Ordinance which gave an immigration officer or constable certain powers if he had "reason to suspect" that a person was a prohibited immigrant. The Court held that a "reason to suspect" required more than a mere suspicion or a bona fide suspicion; the Court equated the words "reason to suspect" with the words "reasonable cause to suspect" and held that the actions of an immigration officer or constable must be able to pass an objective test of what amounts to reasonable suspicion. As was stated by Sir John Summerfield C.J. in Darvin D. McLean v Regina (supra):

> "There is nothing in the Privy Council case of (Shaaban Bin Hussein and others v Chong Fook Kam and Another) cited by learned counsel for the respondent which in any way conflicts with the principles enunciated (in Cedeno v O'Brien)."

Similarly, there is nothing in Cedeno v O'Brien which conflicts with the principles enunciated in Hussein v Chong Fook Kam. What the authorities show is that suspicion is less than prima facie proof, but that an officer must show more than mere suspicion to justify exercising his power of arrest. It must be shown by the arresting

officer that the suspicion, when objectively viewed , was reasonable.

In support of the complainant's complaint the defendant had the fact that the plaintiff was in the queue directly behind the complainant at Foster's Food Fair and that he tendered a $100 bill for his goods. Furthermore the plaintiff admitted in his interview that he did not hand the money to the cashier but that she picked the money up from the counter, albeit he said, he had just taken it from his pocket. The video recording of the incident does not reveal that the defendant took the money out of his pocket and is as supportive of the complainant's allegation as it is of the plaintiff's denial.

The defendant paid for bananas costing $2.17 with a $100 note when he had smaller change in his possession. His explanation for that is that he needed change to pay a colleague $40 that he owed him. True it is that when the defendant checked with that colleague it was confirmed that the plaintiff did owe him $40. But the plaintiff did not pay him that night as he said he intended to. Furthermore, and more importantly, the defendant asked to see the money in the plaintiff's possession on the evening of the incident. The plaintiff had not spent anything since buying the bananas. There is a dispute over whether the money was shown to the defendant at the prison or at the police station, but I do not think anything much rests on that. I preferred the defendant's evidence in that regard because he made note of the event. I was also satisfied, and this seemed to be

accepted by the plaintiff on interview, that he only showed the defendant $136. He did say he only showed the defendant part of the money in his possession but it is hard to accept that evidence in the light of the fact that the reason why he tendered a $100 note to pay for a small purchase was such an important factor. We also have the evidence of the defendant that he asked to see all the money in the plaintiff's possession. During the interview, and after spending a good deal of time asking questions about the amount of money he had been shown by the plaintiff, the defendant directly confronted the plaintiff and accused him of lying about the amount of money he had shown him the evening before. Even if the plaintiff is telling the truth that he only showed the defendant part of the money in his possession, because of the issues involved it is most certainly a suspicious circumstance that he did not show the defendant an amount which could demonstrate that he had $40 to give to a colleague so as to support his explanation of why he paid $100 for a $2.17 item of shopping.

Taking all information which was known to the defendant at the time of the arrest and viewing that information objectively I concluded that the defendant did have reasonable cause for his suspicion.

I held that the defendant had the power to arrest the plaintiff. The third question I had to answer was whether the discretion to arrest had been exercised according to the principles laid down in Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1KB 223. Thus the discretion to make an arrest had to be

exercised in good faith and the defendant must not take into account any matters which ought not to be considered or disregard any matter which ought to be taken into account. The onus of proving this third condition for the lawfulness of the arrest fell on the plaintiff. He fell far short of satisfying me that the defendant had fallen foul of the principles laid down in the Wednesbury case.

In all circumstances I found that the plaintiff had not satisfied me he had a proper claim and I dismissed the case against the defendant.

Dated this 12th day of July, 1995.

D. Schofield

Judge