J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 32 of 1969

BEFORE: The Hon. Mr. Justice Luckhoo, J.A. (Presiding)
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Edun, J.A.

RAYON LAIRD - Plaintiff/Appellant

v.

THE ATTORNEY GENERAL - 1st Defendant)
) Respondents
and)
CONSTABLE JUSTIN BENNETT - 2nd Defendant)

(Mrs.) Margaret Forte for Appellant.

Patrick Robinson for Respondents.

Heard: 19th to 23rd November, 1973
5th April, 1974

FOX, J.A.:

This is an appeal from a judgment of Lopez J. sitting with a jury in which, ruling that the plaintiff had not made out a case against the defendants in his claim against them for assault, false imprisonment and malicious prosecution, he took the case away from the jury and entered judgment for the defendants with costs.

The Facts

On 18th May, 1966, Lloyd McNeish, an acting corporal of police in Kingston, swore to an information before the acting deputy clerk of the Traffic Court Kingston, on representations of which he was "credibly informed and verily believed." The information charged one Lascelles Nugent of 34 Beatrice Crescent, Kingston 11 with driving a motor car registered C 2595 on North Street, Kingston

without consideration for other users of the road contrary to section 26 (1) of the Road Traffic Law, Chapter 346. The information was sworn to by corporal McNeish, but the investigating officer was constable L. Soares of the Traffic police depot situated at the Elletson Road police station. On the back of the summons which was in due course issued on the information by the acting clerk of the Traffic Court, the name of constable L. Soares appears. At the trial, it was accepted that constable Soares was the prosecuting officer.

The original date in the summons on which the accused was required to attend the Traffic Court was 20th June, 1966. The summons was taken out by Constable E. Spence on 13th June, 1966 but the accused could not be found for service. The endorsement at the back of the summons by corporal Spence reads:

> "Taken out by me this 13.6.66. Deft. not found from information received he has removed from this address and his present address is not known."

The summons was reissued. The date for the appearance of the accused at the Traffic Court was changed to 8th August, 1966. The reissued summons was given to the 2nd defendant on 12th July, 1966. At the time of the trial, he was an instructor at the police driving school, Elletson Road. In July, 1966, he was a process server at the Traffic police depot, Elletson Road. His duties then included the service of summons and subpoenaes and the execution of warrants. The 2nd defendant made enquiries for the accused without success at 34 Beatrice Crescent, the address stated in the summons. He made further enquiries, and as a result of information which he received, including information from one Joscelyn Thomas of 34 Wavell Avenue, the 2nd defendant went to 45 Wellington Road where he located the plaintiff and served the summons upon him on 15th July, 1966.

Joscelyn Thomas owns taxi cabs. In giving evidence for the defence, he said that prior to the date on which the 2nd defendant made enquiries of him, the plaintiff was employed to him in 1966 as a driver of one of his cabs. He knew the plaintiff by the names of Nugent, and Laird, and he also called the plaintiff "Gertrude". In his evidence, the plaintiff denied that Thomas knew him by the name of Nugent, or that he was called "Gertrude". Nevertheless, the plaintiff admitted that he knew Thomas, and had been the driver of one of his taxi cabs from January to June 1966.

There was considerable conflict between the plaintiff and the 2nd defendant as to precisely what transpired when the summons was served upon the plaintiff. The jury were not allowed to resolve this conflict. Consequently, in deciding the issues raised up in this appeal, this court must have particular regard to the plaintiff's version of that and subsequent events. The plaintiff said that on a Friday morning he was in bed at his home at 45 Wellington Road when he heard a knock at his door. He opened a window and saw the 2nd defendant whom he knew as a policeman but not by name. The 2nd defendant identified himself as a policeman, and asked the plaintiff if he was a driver. The plaintiff replied in the affirmative. The 2nd defendant said he would like to look at the plaintiff's driver's licence. The plaintiff produced a licence in the name of "Rayon Laird". In reply to questions by the 2nd defendant, the plaintiff spelt and pronounced his name, told the 2nd defendant that he had no other name, was not called by any name other than in the licence, and was not called "Nugent". The 2nd defendant told plaintiff that he had a summons for Lascelles Nugent for whom he had been looking for some time, and that his investigations had led him to the plaintiff. The 2nd defendant handed the summons to the plaintiff. The plaintiff refused to take the summons and asked the 2nd defendant to read it to him. The 2nd defendant complied with his request. The plaintiff said that he had never been stopped by the police along North Street and, in effect, that he knew nothing about the vehicle the licence number of which, as stated in the summons, was C 2595. The plaintiff then

showed the 2nd defendant, his passport with his name, and three summonses with his correct name and address which had previously been served upon him to attend the Traffic Court. The 2nd defendant left the summons with the plaintiff telling the plaintiff then that he could go to court and explain to the judge how he had two names, and if he did not go to court he would be arrested on a warrant. The endorsement which the 2nd defendant signed on the summons reads:

> "Served personally by me this 15/7/66 upon the within named defendant who denied this name. I did not know him before the date of service."

The plaintiff said further that after the summons was served upon him he met the 2nd defendant who was stopped at a red light at the corner of Maxfield Avenue and Spanish Town Road. The plaintiff said that he went up and asked the 2nd defendant if he remembered him. The written evidence of the plaintiff reads:-

> "He said my face did not look strange but he cant recall if we had any business. When I told him that he should because I am the one to whose house he came and knocked and gave me a summons in the name of Lascelles Nugent. He told me he realised then who I was. I said "You find your man". He said "yes". Tnen he said it was an error, then the green came on after the amber light and he rode off."

In his evidence, the 2nd defendant denied this encounter. He also denied that when he served the summons upon the plaintiff, the plaintiff produced his passport, and his driver's licence and showed him three other summonses served upon him in the name of Laird.

The plaintiff disobeyed the summons issued in the name of Lascelles Nugent which the 2nd defendant had served upon him on 15th July 1966. He did not attend the Traffic Court. As a consequence, the judge of that court issues a warrant of arrest for disobedience of the summons. The person to be apprehended was described as Lascelles Nugent of 34 Beatrice Crescent. A first unsuccessful attempt to execute the warrant was made by Constable Walker

whose endorsement at the back of the warrant reads:

"Taken out by me 3.9.66. Defendant not found.

He lives at address but was out on my visit."

The warrant was then given to the 2nd defendant for execution. This he did early in the morning of the 26th November, 1966 by arresting the plaintiff at his home at 45 Wellington Road and by delivering him into the custody of the police at the Hunts Bay Police Station. The plaintiff's account of what happened on this occasion is to this effect: -

> He heard a knock at his door at about 6.30 a.m. on 26th November, 1966. He opened a window and saw the 2nd defendant and the policeman who had served the three summonses upon him. At the request of the 2nd defendant, he produced his driver's licence: The 2nd defendant said "Tell me something, who is really Nugent." The plaintiff said "Again? didn't you tell me at the traffic light that you found the man?" The 2nd defendant then said: "Well this thing has me puzzled so if (you) will take a drive with (me) for (me) to find out if (you) was ever called Nugent."

The plaintiff then went in a radio car with the 2nd defendant and two other policemen who were present to 34 Beatrice Crescent where the car stopped. The police looked at the number of the premises. The 2nd defendant said "dont bother waste any more time -- go so with the man." The police car then drove to the home of Joscelyn Thomas at 34 Wavell Avenue. He was not there but his wife was. The 2nd defendant asked her if she knew the plaintiff. The judge's note of her reply is somewhat obscure, but it would appear that she said that she did know the plaintiff, but not his name, because she had had very little to do with him. The plaintiff was then taken to the Hunts Bay police station where in handing him over to the officer in charge of the station the 2nd defendant said:

"Take this man, he is under arrest, he is on a bench warrant, his name is Rayon Laird, otherwsie called Lascelles Nugent."

The plaintiff protested saying that his name was Rayon Laird, and that the 2nd defendant was the first person to have called him by the name of Lascelles Nugent.

The endorsement which was made on the warrant by the 2nd defendant reads:

"Executed by me this 26.11.66 at 45 Wellington Road. Accused now gives his name as Raymond Laird o/c Lascelles Nugent."

The plaintiff was taken to the Traffic Court on the 28th November, 1966. On that day he was released on bail. The plaintiff returned to the Traffic Court on 5th and 19th December, 1966. On this latter date the prosecuting constable, presumably constable Soares, told the judge that the plaintiff was not the Lascelles Nugent he had prosecuted. The plaintiff was accordingly discharged.

It is convenient to consider the complaint on appeal under the headings of the three causes of action which constitute the plaintiff's claim.

Malicious prosecution

In this action the coomon law required the plaintiff to prove;

1. that the 2nd defendant prosecuted him,
2. that the prosecution ended in his favour,
3. that the prosecution lacked reasonable and probable cause and
4. that the 2nd defendant acted maliciously.

The first requirement obliged the plaintiff to show that the law was set in motion against him on a criminal charge by the 2nd defendant. The information for careless driving was sworn to by corporal McNeish, on representation made, presumably by constable Soares. The 2nd defendant had nothing to do with the making of that charge. Neither did he in any way cause the issue on the information of the summons which was eventually served upon the plaintiff. It was therefore

impossible to contend that the 2nd defendant was instrumental in setting the law in motion against the plaintiff on the criminal charge of careless driving. On appeal the plaintiff did not so contend. In paragraph 6 of the statement of claim it was alleged that: "the 2nd defendant falsely and maliciously and without reasonable and probable cause maliciously prosecuted the plaintiff by preferring a false charge against the plaintiff before the Judge of the Traffic Court and procured the said judge to grant a warrant for the arrest of the plaintiff on the said charge and arrested the plaintiff on the 26th day of November, 1966."

In opening the case to the jury, counsel for the plaintiff said that the 2nd defendant must have given false information in the an affidavit which moved the judge of the Traffic Court to issue a warrant for the arrest of the plaintiff. Unsupported as it is by evidence, direct or inferential, this assertion is without substance. Equally without merit is the suggestion made by counsel for the plaintiff in his closing submissions that the legal proceedings were instituted by the 2nd defendant when the summons was left with the plaintiff. This proposition is supported neither by authority nor by principle nor by any consideration of policy. On appeal it was emphasised that the false charge of which complaint was being made was not the charge of careless driving in the information, but was the false report which the 2nd defendant made when he endorsed the summons after service of the copy on the plaintiff. It was said that the endorsement did not make a full disclosure of all the pertinent facts, in that it omitted to state that the summons had been served upon the plaintiff at an address other than the one stated in the sworn information, and that the plaintiff had given his name as Rayon Laird. The report to the judge which this endorsement constituted was so incomplete, argued counsel for the plaintiff, as to be misleading and false. This Report was the first step in setting the law in motion against the plaintiff on the criminal charge of careless driving. Counsel submitted that the evidence of all the

proceedings following this report, including the issue of the warrant and the arrest and imprisonment of the plaintiff comprised material which should have been left to the jury for a determination of the issues which arose in the action for malicious prosecution. In taking the case away from the jury, the judge ruled that there was no evidence of the 1st, 3rd, and 4th requirement and that the plaintiff had failed, in law, to substantiate the action for malicious prosecution. The question which this court must answer is whether this ruling was correct.

In support of the submissions on appeal that by endorsing the summons, the 2nd defendant had set the law in motion against the plaintiff on a criminal charge, counsel relied upon the decision of the judicial committee in Mohamed Amin v. Bannerjee (1947) A.C. 322. In that case the defendant filed a petition of complaint charging the plaintiff with cheating under s. 120 of the Indian Penal Code. An Indian magistrate took cognizance of the complaint. He held an enquiry in open court (at which the plaintiff was present and represented by counsel) and announced that no criminal case of any kind had been made out. In holding that these facts were sufficient to found an action for damages for malicious prosecution the judicial committee said that the test whether criminal proceedings had been commenced was the stage at which damage to the plaintiff had resulted. Counsel submitted that, applying this test, it was not necessary for the plaintiff to show that the 2nd defendant had conducted the prosecution of the plaintiff for careless driving. Neither would the action against him fail because he had nothing to do with the initial issue of the summons. The 2nd defendant had made false allegations which had been considered by the judge of the traffic court, who, acting within his jurisdiction had issued a warrant for the arrest of the plaintiff. The consideration of the false allegations by the judge had resulted in damage to the plaintiff. These false allegations were therefore the commencement of the prosecution against the plaintiff as distinct from the commencement of the prosecution against the proper person

to be charged. This latter prosecution was commenced when the information was sworn to by Corporal McNeish, and the summons on that information was issued.

These submissions are misconceived on three grounds. Firstly the 2nd defendant made no allegation against the plaintiff. He charged him with no crime. The decision in The Quartz Hill Consolidated Gold Mining Company v. Eyre (1882) 11 Q.B.D. 674 which counsel cited to show that the term criminal charge includes "all indictments involving either scandal to reputation or the possible loss of liberty to the person", is of no relevance because the effect of the endorsement on the summons in the instant case is altogether different from the presentation of the petition to wind up the plaintiff company on the ground of fraud in its information which made the defendant in the Quartz Hill case liable in an action for malicious prosecution. At its highest, the endorsement does no more than to put the 2nd defendant exactly into the position of a man who merely tells a story to a judicial officer leaving it to him to decide what course should be taken. In this situation, as all the cases show, it is impossible to contend that the 2nd defendant had maliciously procured the judge to issue his warrant for the arrest of the plaintiff. Secondly, the endorsement records the pith and substance of the essential matters relating to the service of the summons and I cannot agree that it was false and could have misled the judge in the manner described by counsel. In this respect it is relevant to notice that the address at which the summons was served was written on its face by the 2nd defendant. The judge was therefore advised of the existence of two addresses for the plaintiff, and he should have been alerted to any significance this circumstance deserved when he was considering the exercise of his discretionary power to issue a warrant for disobedience of the summons.

Thirdly, there is no evidence that the endorsement caused the judge to issue the warrant. In the warrant it is stated that it had been proved to the judge "upon oath that the said summons was duly served." There is no evidence that such proof was made by

the 2nd defendant, and that fact cannot be presumed. The true position is that neither directly nor by implication did the 2nd defendant apply to the judge of the traffic court for the issue of the warrant. This is the critical fact which distinguishes this case from Roy v. Prior (1970) 3 W.L.R. 202 when a solicitor who had instructed counsel to apply for the issue of a bench warrant and himself gave evidence in support of the application, was held by the House of Lords to be open to an action for an abuse of the process of the Court.

Assault and False Imprisonment

The complaint on appeal in relation to these two causes of action may be dealt with together. An assaut is an act of a defendant which causes to a plaintiff reasonable apprehension of the infliction of a battery upon him by the defendant. Battery is the intentional application of force to the body of another person. In assault, an unlawful touching is threatened and apprehended. In battery the unlawful touching actually occurs. False imprisonment is a wrongful infliction of bodily restraint which is not expressly or impliedly authorised by the law. In an action of assault a plaintiff is required to prove only that he was assaulted. The defendant must then justify the assault. In an action of false imprisonment, the plaintiff is required to prove only that he was imprisoned. The defendant must then justify the imprisonment. In both assault and false imprisonment, it is open to a defendant to justify his action in several ways. The most frequently encountered is proof that the defendant had "reasonable and probable cause" for the assault or the imprisonment. In Jamaica, this common law position is qualified by section 39 of the Constabulary Force Law, Cap. 72 which provides:

> "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 the 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."

Assault and false imprisonment are actions of trepass. They give remedies for a direct and immediate wrong. Such a wrong would occur if a false charge were made to a constable and he thereupon made an arrest. The party making the false charge would be liable in actions for assault and false imprisonment on the ground that having directed the arrest it was his own act and not the act of the law which caused injury to the plaintiff. He had made a charge upon which it became the duty of the constable to act. He would therefore be answerable in trespass. Hopkins v. Crowe 4 A & E 774. On the other hand, where a party is assaulted and imprisoned, as the result of exercise of the discretionary power of a judge or a magistrate, the remedy of the person so assaulted and imprisoned is not in an action of trespass, but in an action of case. He must sue as for a malicious prosecution. Austin v. Dowling (1870) L.R. 5 C.P. 534. (See Wilkes J. at p. 540).

In the instant case, the plaintiff was admittedly arrested on a warrant issued by the judge of the Traffic Court. The opinion and judgment of the judge are interposed between the endorsement which the 2nd defendant made on the summons, and the warrant which the judge issued. In such circumstances, even if the endorsement on the summons is regarded as a "charge" brought against the plaintiff by the 2nd defendant, the arrest and imprisonment did not result from that "charge" but from the judicial act of a court of justice in issuing a warrant. The 2nd defendant therefore, cannot be made liable in the actions of assault or false imprisonment on the basis of the endorsement which he made on the summons. The only way in which the plaintiff can succeed in these actions is by showing that, despite the circumstance that the 2nd defendant acted under the purported authority of the

warrant, his physical apprehension and imprisonment were unlawful and without justification. In this connection, the plaintiff is presented at once with the formidable provisions of s.40 of the Constabulary Force Law, Cap. 72, which reads:-

> "When any action shall be brought against any Constable for any act done in obedience to the warrant of any Justice, the party against whom such action shall be brought shall not be responsible for any irregularity in the issuing of such warrant or for any want of jurisdiction of the Justice issuing the same, but may plead the general issue and give such warrant in evidence at the trial; and on proving that the signature thereto is the handwriting of the person whose name shall appear subscribed thereto and that such person was reputed to be and acted as a Justice for the parish and that the act or acts complained of was or were done in obedience to such warrant, there shall be a verdict for the defendant in such action who shall recover his costs of suit."

Counsel for the appellant submitted that even though the 2nd defendant purported to act under the authority of the warrant, that by itself did not entitle him to the protection of the provisions of section 40, because the plaintiff was not the person to whom the warrant was directed and, not having appeared in answer to the summons, the subsequent proceedings, including the issue of the warrant, were null and void. This submission is not without support. In Hoye v. Bush (1840) 1 Man. & G.775. it was held that, a constable is not justified if he arrests A. in virtue of a warrant directed against B. In that case Richard Hoye was suspected of stealing a mare. A warrant was issued for his apprehension under the name of John Hoye, which was his father's name. The son had never been known as John. Richard was arrested by the defendant under the warrant. In the action of

false imprisonment which Richard subsequently brought, it was held that Richard could not be arrested under a warrant against John and it was immaterial that Richard was in truth the party intended. Neither was the defendant allowed the protection of the Constables Protection Act 1750, (24 G. 2. C. 44), s. 6 of which provided that

> "no action shall be brought against any constable ..... for anything done in obedience to any warrant under the hand and seal of any justice of the peace etc."

In disposing of this point, Tindal C.J. said (p.786):

> "The question under the statute is whether the defendant is sued for an act done in obedience to the warrant. Instead of acting in obedience to the warrant and taking John Hoye, the defendant took Richard Hoye. The act for which the defendant is sued, is therefore not an act done in obedience to any warrant."

The facts in Hoye v. Bush are indistinguishable from the facts in the instant case. Counsel for the defendant sought to cope with its difficulties by laying stress upon relevant provisions of the Justices of the Peace Jurisdiction Law, Cap. 188. Section 2 provides, inter alia, for the issue of a summons upon an information, and for the service of such summons by a constable "upon the person to whom it is so directed." Section 3 provides, inter alia, "if the person so served with a summons as aforesaid shall not be and appear before the Justice or Justices at the time and place mentioned in such summons, and it shall be made to appear to such Justice of Justices, by oath or affirmation, that such summons was so served ------ it shall be lawful for such Justice or Justices, if he or they shall think fit ----- to issue his or their warrant (according to Form (2) in the schedule hereto) to apprehend the party so summoned" erc. Section 3 also gives the justices further discretionary power to issue a warrant in the first instance (Form 3 in the schedule) or to hear and

adjudicate upon the information exparte. The warrant which was issued in this case (Exhibit 3) is according to form 18 in the schedule to the law. It is the form of warrant which may be issued by Justices when exercising the power given by section 29 of the Law to hold preliminary examinations into indictable offences. Justices may issue summonses, and where such summons has been disobeyed, a warrant according to Form 18 may be issued for the apprehension of the person charged. Form 18 is in all essential respects the same as form 2. This particular defect in the warrant (Exhibit 3) was noticed neither at the trial nor on appeal. In any event, it is of no moment because by virtue of the provisions of s.40 of the Constabulary Force Law, the defendants "shall not be responsible for any irregularity in the issuing of such warrant or for any want of jurisdiction in the justice issuing the same ....." The great point made by counsel for the defendants was that, in the words of section 3 of the law, the plaintiff was "the person so served with a summons as aforesaid" and who did not "appear before the Justice or Justices at the time and place mentioned in such summons." He, therefore, and no other person, - so argued counsel for the defendants - was the person for whom the warrant had been issued, and the only person upon whom it could have been executed. Counsel submitted that in these circumstances the original mistake in the identity of the person to whom the summons was directed (s 2), could not affect the validity of that execution. In my view these submissions are well founded and should be upheld.

Without conceeding its validity Counsel for the appellant argument by emphasizing the failure of the plaintiff s, and by contending on the authority of P. N.S. 195; (1864) 3 H & C. 1 nceedings, including the wrence, John Kelly r served d

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In Jamaica, the true test for acertaining whether a constable is acting in the execution of his office as a constable is whether he was honestly intending to discharge his duties as such constable or falsely pretending so to act. (R.M. Civil Appeal 96/71. Reid v. Sylvester - April 14, 1972). A like test is rel when the matter to be determined is whether the co acting in obedience to a warrant. If a co intending to act in obedience to the would exclude both malignity deprived of the prote

the writ server that he was Michael Kelly, and not the person named in the summons. The plaintiff did not appear in the action and took no notice of it. The action proceeded. Judgment was obtained and a capias was issued against I.W. Kelly. Acting under the authority of the capias to take I.W. Kelly, the sheriff of London arrested and imprisoned the plaintiff, but at the end of six days, upon proof that he was not the person named in the summons, he was discharged from custody on a judge's order. In an action for false imprisonment against the sheriff it was contended that as the plaintiff had been served, he was the defendant in the action of debt, and therefore the execution had rightly issued against him, but it was held that the whole proceedings was a nullity inasmuch as there had never been any intention on the part of John Kelly in the action of debt to sue the plaintiff, Michael Kelly. At the new trial which was ordered, Keating J. told the jury that there was no obligation upon the plaintiff to set the sheriff's officer t right, so long as he did nothing to mislead him. The officer must take care and serve the proper person, nor could the onus be thrown upon the plaintiff of setting aside the writ of summons in consequence of the officer's mistake. The jury found a verdict for the plaintiff with £20 damages (note (a) 10 L.T.R. p. 197).

Kelly v. Lawrence affirmed and followed the decision in Walley v. McConnell, 13 Q.B. 903, and 19 L.J., N.S., 162, Q.B. which was also an action of trespass for false imprisonment. McConnell sued one Ireland for a debt in the county court. The writ server ignored the protestations of Walley that he was not Ireland, and persisted in leaving the summons with Walley. Following exparte proof of the service of this summons, and the issue and service of a second summons upon Walley in mistake for Ireland, a capias was issued for the arrest of Ireland. Walley was arrested and imprisoned on the capias. Throughout these proceedings Walley uniformly stated that he was not Ireland and informed those who served and arrested him of their mistake. It was held that the plea of justification under process of the county court was no anwer to the action of false

imprisonment. In the course of his judgment Erle J. said: (p. 165)

> "The allegation that the defendant issued a summons against the plaintiff is not true. It was against another man by his proper name, and intended by the defendant to be against him, and served upon the plaintiff only by reason of a mistaken supposition that he was the debtor. Whatever force there may be in the argument used as to the proper course to be pursued by one who is wrongfully served with process in an action, not being the intended defendant, the allegation in question is material, - indeed, it is the foundation of the plea; and the foundation failing the superstructure fails also --- Walley never became the defendant and never held himself out as Ireland".

The authorities upon which counsel for the appellant relied to support his submission that the effect of the failure of plaintiff to appear to the summons was to render the proceedings including the issue of the warrant a nullity, are concerned with process issued by a court in civil proceedings. It is also relevant to observe that these authorities occurred in the context of a way of life existing in England over one hundred years ago, and were the result of current considerations which in the estimation of the judges of that period should be recognized and upheld in the courts. Without embarking upon a philosophic discussion of the inevitability, the permanence, and the nature of change, it is sufficient for the purposes of this judgment to acknowledge the consistency which the laws of any country should exhibit to the incidents of life in that country at any particular time. Law should never be allowed to become a stagnant pond. Its true analogy is that of a stream whose flow and pace at any particular point are determined by the state of its banks and the condition of its bed at that point.

The main responsibility for the achievement of consistency between the law and life lies with the legislature which discharges this duty by enacting substantive law. But there are areas in the interpretation of enacted law where the responsibility for consistency falls to be discharged by the courts. On such occasions, judges must have the wisdom to perceive, the learning to describe, and the courage to articulate those principles which are necessary to keep the law in pace with the needs of the times. In my judgment, such an occasion has arisen in this appeal. In Jamaica at the present time, there is an overwhelming need to strengthen the sense of responsibility and discipline and to assert the supremacy of law and order in all sections of the community. When this need comes into conflict with and threatens to infringe the civil rights of individual members of the community, the resolution of that conflict, and the determination of the question of precedence involve a balancing of the need for security of the community against the need for security of individual liberty, and a recognition of the interdependence between these two needs. The controlling considerations in this balancing process and in this recognition are the nature of the individual right alleged to have been hurt, the circumstances under which the hurt occurred, the extent to which the particular legal remedy sought to be enforced for this hurt is likely to disrupt, restrict, and render impotent the processes whereby law and order are sought to be enforced in the community, and the effect which refusal of that remedy may have in undermining the basic freedoms of the community as a whole.

With these considerations in mind, I take the view that when a person is served by a constable with a summons charging him with a criminal offence it is the prima facie duty of that person to attend or to arrange for his representation at the named court at the time and place stated in the summons. If there is a complaint with respect to the service of the summons, the proper course if for the person served to obey the summons in the first instance and then

apply to the court to have that service set aside. The fact that the constable may have been mistaken in the identity of the person whom he has served should not be allowed to obviate the peril to that person of a warrant being issued for his arrest if he disobeys the summons. Neither should that mistake be able to destroy the protection given by the provisions of section 40 of the Constabulary Force Law to the constable who esecutes that warrant. In the context of the problem being considered, I can see no essential difference between the position of a person mistakenly served with a summons with that of a person mistakenly charged with an offence. The latter could not disobey a summons served upon him and expect to be compensated in damages for assault and false imprisonment when, after his arrest on a warrant issued for disobedience of the summons, it should transpire at the trial that the witnesses for the prosecution were hopelessly mistaken as to his identity, or for some other reason such as a cast iron alibi, a verdict of not guilty was categorically imperative. I can see no valid reason why the person mistakenly served with a summons should be placed in a more favourable position, and in basically similar circumstances, be able to recover damages against the arresting constable. In both situations the direct cause of the arrest was not so much the mistake of persons having anything to do with the criminal proceedings, but the deliberate disobedience of court process issued in those proceedings. Viewed in this light, both the person mistakenly served with a summons, and the person mistakenly charged in a summons, were the authors of any hurt which may have been done to them as a consequence of disobedience of the summons. This is the critical factor which reduces to negligible proportions any infringement which may have occurred to their civil rights and liberties.

By virtue of the test recognized in this Court for ascertaining whether a constable is acting in obedience to a warrant, and on the ground of a public policy which is rooted in the conditions of life in Jamaica at the present time, I distinguish the English authorities upon which counsel for the appellant relied for the

contention that the 2nd defendant was not acting in obedience to the warrant and was accordingly deprived of the protection of s.40 of the Constabulary Force Law. I hold that the principle described in Kelly v. Lawrence and Walley v. McConnell however relevant they may be in civil proceedings, does not apply to proceedings in which a person is charged with a criminal offence and when the factual situation is as described by the evidence in this case. In my view, therefore, the 2nd defendant was entitled to rely upon the provisions of s.40 and to the verdict in his favour which those provisions direct.

As I have indicated above, the only way in which this reliance could be defeated is by showing that the 2nd defendant's actions in serving the summons and in executing the warrant were not done in the execution of his office as a constable. He was "falsely pretending" to discharge his duties as a constable, and was not "honestly intending" so to act. On the evidence, no view is possible other than that the 2nd defendant acted throughout honestly in the execution of his office as a constable. Consequently, even if I should be wrong in the distinction which I make whereby the principle in the English authorities is inappliable to the facts of this case, that is not an end of the matter. If I am wrong, the 2nd defendant would not be entitled to the protection of s. 40. He would therefore have failed to discharge the burden which the common law places upon him to justify the assault and imprisonment. But that failure would not necessarily render him liable in damages to the plaintiff. As a constable acting in the execution of his office, he would be entitled to rely upon the further protection given to him by s.39 of the law. By virtue of the provisions of that section a burden was placed upon the plaintiff to allege and prove that the 2nd defendant acted maliciously or without reasonable and probable cause. The section shifts to the plaintiff the burden which the common law places upon the defendant. This allegation was made in the statement of claim in relation to both actions of assault and false imprisonment. The question which now arises for an answer is whether the evidence adduced at the trial was capable of supporting a finding that the 2nd defendant acted

maliciously or without reasonable or probable cause.

MALICE

This is a question of fact for the jury. Malice has been defined in many ways: "the presence of some improper motive - that is to say, an intent to use the legal process in question for some other than its legally appointed and appropriate purpose" (Salmon on Torts 15th Ed. p. 557): "Malice exists unless the predominant wish of the accused is to vindicate the law." (Winfield on Tort, 8th Ed. p. 583). If a plaintiff is able to show that he was prosecuted because of spite, illwill or a desire for revenge in his prosecutor, incompatible with a desire to do what the prosecutor honestly believed these are wrong and sinister motives which are obviously to be right in the interests of justice. In such a case the plaintiff would have proved an identifiable, - an 'express' malice. But unworthy motives are frequently hidden. They may remain impervious to the light of any evidence which the plaintiff is able to adduce. This is not necessarily decisive of the issue in favour of the defendant. If the facts of the case are such that they are capable of giving rise to the conclusion that there was no honest belief in the charge which had been made, and to an inference from that conclusion of some wrong or indirect motive in the prosecutor, albeit unidentifiable, the jury should be so directed. It would then be for them to conclude and to infer those matters of which the evidence is, in law, capable. But the capability of the evidence must first be assessed, and this is a question of law for the judge.

Reasonable and Probable Cause

Reasonable and probable cause is a matter for the judge. He must determine on the evidence whether there is reasonable and probable cause for the proceedings, - an assault, an arrest, or a prosecution. The phrase, as defined by Hawkins J. in Hicks v. Faulkner 8 Q.B.D. 167, 171; and approved by the House of Lords in Herniman v. Smith (1938) A.C. 305, 316, signifies "an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinary prudent

and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

In Glinski v. McIver (1962) A.C. 726, Lord Denning observed (at p. 758) that this definition "does not fit the ordinary run of cases ..... It cannot serve as a substitute for the rule of law which says that, in order to succeed in an action for malicious prosecution, the plaintiff must prove to the satisfaction of the judge that, at the time when the charge was made there a was an absence of reasonable and probable cause for the prosecution." A helpful definition was given by Lord Devlin in Glinski v. McIver (at 766 and 767 ubi supra) - where he said that the phrase "means that there must be cause (that is, sufficient grounds; I shall hereafter in my speech not always repeat the adjectives "reasonable" and "probable") for thinking that the plaintiff was probably guilty of the crime imputed: Hicks v. Faulkner. This does not mean that the prosecutor has to believe in the probability of conviction: Dawson v. Vandasseau. The prosecutor has not got to test the full strength of the defence; he is concerned only with the question of whether there is a case fit to be tried. As Dixon J. (as he then was) put it, the prosecutor must believe that "the probability "of the accused's guilt is such that upon general grounds of "justice a charge against him is warranted": Commonwealth Life Assurance Society Ltd. v. Brain."

Although reasonable and probable cause is a matter for the judge, if there is conflicting evidence on incidental questions of fact which are necessary for the judge's determination, this conflict may have to be decided by the jury by way of questions asked of them by the judge so that they, by their answers, may resolve that conflict. **But** a judge is entitled to make his own findings of fact, and where the evidence is overwhelming, or distinct and positive, a judge may very properly dispense with the assistance of the jury in arriving at conclusions on such facts in issue as depend upon evidence of that quality. Neither is it necessary to ask a question of the jury on every fact in issue. "If that were the law", observed

Lord Denning M.R. in Dalliston v. Caffery (1964) a 2All E.R. 610 and 617, "the questions to the jury might have no end. It is for the judge, and not the jury, to decide the question of reasonable cause. He need only ask questions on the salient issues of fact on which ne needs the help of the jury."

Conclusion

In the light of this bare outline of general principles relating to two matters which frequently occasion no little embarrassment in the conduct of trials of actions of this kind, it is at once apparent that the question whether the evidence adduced at this trial is capable of showing that the 2nd defendant acted maliciously, or had no reasonable or probable cause for arresting the plaintiff, depends essentially upon the effect of that evidence in revealing his state of mind when he served the summons and executed the warrant. Does the evidence go any further than to show that the 2nd defendant was honestly mistaken throughout? Is the evidence capable of any other conclusion? In examining the printed testimony for an answer to these questions, it must be carefully remembered that the evidential burden is initially upon the plaintiff to show that the 2nd defendant was not honestly mistaken. The plainitff is required to prove a negative. This is a notoriously difficult task, but it is one which the law requires him successfully to undertake before the 2nd defendant can be made liable in damages for actions done in the execution of his office.

In my opinion there are four negative features in the evidence which decisively show that the plaintiff has failed in the discharge of this burden. Firstly, there is no evidence of "express malice". Secondly, there is no evidence of the 2nd defendant not havir made reasonable enquiries to ascertain the identity of the correct person to be served with the summons. In this respect it is appropriate to observe that evidence of the information which the 2nd received as a result of enquiries which he made, was admissible on the

ground of its relevance to the state of his mind. For this reason, objections which counsel for the plaintiff made to the reception of the kind of evidence (e.g. the objection to the conversation between Thomas and the 2nd defendant at p. 42 of the record) were misconceived. Thirdly, when he served the summons, there is no evidence of the absence of an honest belief in the 2nd defendant that the plaintiff was the person intended. The plaintiff's evidence, denied by the 2nd defendant, of the encounter at the traffic light some time after the summons was served, does not really question the honesty of his belief prior to that encounter when the summons was served. In any event, the evidence is so improbable, and its significance so slender t and unconvincing, that the judge could very properly have dispensed with the assistance of the jury as to its incidental effect when he ruled on the question of reasonable cause. Fourthly, there is no evidence from which it could be inferred that in arresting the plaintiff the 2nd defendant intended to do anything more than to carry out the duties assigned to him to serve and to execute criminal process. To the contrary, the probabilities in the totality of the evidence point unerringly to the conclusion that all the actions of the 2nd defendant flowed from an honest though, as it subsequently turned out to be, a mistaken belief that the plaintiff was the proper person to be served with the summons, and a settled belief throughout, correct in my view, that the plaintiff was the proper person to be arrested on the warrant.

The learned trial judge considered that there was no evidence from which either malice or an absence of reasonable or probable cause could be found. I agree with him. The facts of this case are in the essential respects similar to the facts in Solomon v. Adams 1 Stephens 935. For substantially the same reasons stated by Beard J. in that case I consider that the verdict entered for the defendants in this appeal should be upheld. I would dismiss the appeal.

Luckhoo, J.A.:

The facts of the case have been fully set out in the judgment of Fox, J.A. and it is unnecessary for me to repeat them. It is only necessary for me to refer in turn to the three causes of action which constitute the plaintiff's claim. I do not propse to add anything to what Fox, J.A. has said in connection with the first cause of action, that of malicious prosecution, for I am in agreement both with his conclusion that the plaintiff's claim in this regard is misconceived and with the reasoning by which he reaches that conclusion.

In respect of the other causes of action - assault and false imprisonment - I regret that I am unable to share the view of Fox, J.A. that the learned trial judge was not in error in withdrawing from the consideration of the jury all questions of fact relating to the averment of lack of reasonable and probable cause. As Fox, J.A. observed there was considerable conflict between the plaintiff and the defendant as to precisely what transpired when the summons was served upon the plaintiff and I would add that there was also considerable conflict between those parties as to what transpired subsequent thereto including what transpired when the defendant sought to execute the warrant of apprehension on November 26, 1966. While it is well settled that the question whether in arresting or detaining a person a constable is acting honestly and reasonably is one to be decided by the trial judge yet where there is conflicting evidence on that issue it becomes a matter for the jury's finding of fact whereupon the judge would rule whether the defendant's conduct was reasonable or unreasonable, honest or dishonest. As the recital of the facts of the case by Fox, J.A. demonstrates the conflict of evidence on this issue was considerable and there were thus questions of fact which the learned trial judge should have submitted to the jury.

So much for the issue relating to the defendants' plea under s.39 of the Constabulary Force Law, Cap. 72 but what of their plea relative to s.40 of the Constabulary Force Law, Cap. 72? I am in agreement with the submission of counsel for the appellant (plaintiff) that even though the second defendant purported to act

under the authority of the warrant that did not entitle him to the protection of the provisions of s.40 of Cap. 72 because the plaintiff was not the person to whom the warrant was directed. Indeed the warrant like the summons was directed to Lascelles Nugent a person other than the plaintiff. Section 2 of the Justices of the Peace Jurisdiction Law, Cap. 188, which provides for the issue of a summons upon an information, contemplates the service of the summons "upon the person to whom it is so directed" - in this case Lascelles Nugent - and it would thus be Lascelles Nugent upon whom the service of the summons is to be effected. Section 3 of Cap. 188 provides for the issue by a justice or justices a warrant of apprehension upon a person "so served with a summons as aforesaid" if that person shall not be or appear in answer to the summons. I have no doubt that the issue of such a warrant is contemplated only in respect of a person to whom a summons is directed and who is duly served with the summons and is not contemplated in respect of a person to whom a summons is not directed but who is erroneously served with the summons. The case of Hoye v. Bush (1840) 1 Man. & G. 775 referred to in the judgment of Fox, J.A. is in my view clearly in point. The case of Kelly v. Lawrence (1864) 10 L.T. Rep (N.S.) 195 and Walley v. McConnell (1849) 13 Q.B. 903, also discussed by Fox, J.A. in his judgment are also in point. Those were civil cases but I can see no reason why the decisions in those cases are not equally applicable to arrests or detentions arising out of criminal cases. It would follow that the plaintiff's arrest was not for anything done in obedience to the warrant and so the second defendant cannot pray in and the provisions of s.40 of Cap.72.

In the result I would hold that the plaintiff's claim in so far as it relates to malicious prosecution was rightly dismissed, but that the learned trial judge was in error when he failed to submit for the jury's consideration those questions of fact which related to the determination by him of the issue of reasonable and probable cause which arose in respect of the plaintiff's claims in false imprisonment and in assault. I would accordingly allow the plaintiff's appeal

in part and order that there be a new trial in respect of the claim in assault and false imprisonment.

EDUN, J.A.:

On the issues of assault and false imprisonment I am of the view that there was sufficient evidence led on behalf of the plaintiff/appellant that the respondent knew that the appellant was not Lascelles Nugent, yet he arrested him. And in those circumstances, the learned trial judge was wrong in withdrawing such issues from the jury. I would, therefore, allow the plaintiff's appeal in that part. I agree with the orders proposed.

LUCKHOO, J.A.:

In the result the appellant's appeal in so far as it relates to his claim in malicious prosecution is dismissed and in so far as it relates to his claim in false imprisonment and assault is allowed. It is hereby ordered that there shall be a retrial in respect of the appellant's claim in false imprisonment and assault.

The appellant shall get his costs of this appeal in respect of his claim in false imprisonment and assault to be agreed or taxed.

The respondent shall get his costs here and in the court below in respect of the appellant's claim in malicious prosecution to be agreed or taxed.

The costs of the first trial in the court below in respect of the appellant's claim in false imprisonment and assault shall abide the result of the retrial ordered.