

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(Civil)**

SAINT LUCIA

CLAIM NO.: SLUHCV2017/0189

BETWEEN:

**1. RASHAAD JOSEPH
(appearing by his next friend RONALD JOSEPH)
2. DEXTER PHILLIPS
(appearing by his next friend DEBRA JN. BAPTISTE)**

Claimants

and

THE ATTORNEY GENERAL

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Gerard Williams of Counsel for the Claimants

Mrs. Antonia Charlemagne with Mrs. Rochelle John-Charles of Counsel for the Defendant

2019: January 16-17;
October 25.

JUDGMENT

[1] **CENAC-PHULGENCE J:** The claimants seek from the defendant general and aggravated damages for assault, battery, false imprisonment, unlawful arrest, and unlawful search allegedly committed by then Acting Assistant Commissioner of Police George Nicholas ("ACP Nicholas"), Woman Police Constable No. 152 Burtly Ferdinand ("WPC Ferdinand") and Police Constable No. 343 Kensley Joseph ("PC Joseph"). They also claim interest and costs. This claim was initially

filed by the next friends of Rashaad Joseph and Dexter Phillips but at the time of trial, both had attained the age of majority and continued with the trial on their own.

The Parties' Cases

The Claimants

- [2] The claimants' case is that on 22nd September 2016 at about midday, they were seated at a table with three male friends at the food court of the Blue Coral Mall, Bridge Street, Castries, when they were approached by a woman and two men dressed in plain clothes. The woman introduced herself as WPC Ferdinand, a police officer, displayed her ID card, and informed them that she would be conducting a routine search. She then directed them to place their hands on the table in front of them. The claimants allege that several of them repeatedly asked why they were being searched, to which WPC Ferdinand only repeated she was conducting a routine search. They also asked several times for the identification of the two men accompanying her, but this was not forthcoming.
- [3] It was at this time, the claimants allege that ACP Nicholas gave the first claimant ("Rashaad"), whose hands were not on the table, a hard blow with his open hand to the back of Rashaad's head, causing his cap to fly off and stunning him. They say ACP Nicholas then forcefully placed Rashaad's hands on the table. The claimants and their friends were ordered to stand up away from the table and their belongings, and the officers proceeded to search their person and all their belongings. They say they did not consent to the search; they were never told why they were being searched or what the officers were looking for; and nothing of interest to the officers was found on them. WPC Ferdinand thanked them for their cooperation and the officers walked away.
- [4] The claimants say that they walked over to the officers as they were leaving and continued to ask them for their names and identification cards but were given no response. WPC Ferdinand only told them to stop following them. The claimants say they complied, but Rashaad took out his cell phone to photograph the officers.

On seeing this, WPC Ferdinand announced that she was arresting Rashaad as well as the second claimant ("Dexter") who had also persisted in requesting identification. The claimants say they did not resist arrest. Yet, they were handcuffed together and made to walk some two blocks along Bridge Street to the Police Headquarters ("the station"), escorted by the officers. They say that both at the Mall and as they walked along Bridge Street, persons gathered and were staring at them.

- [5] The claimants say at the station, they were made to sit on some chairs. Each was allowed to call his parent to whom he was later released, without being charged. Rashaad says his father arrived about half an hour after his call and Dexter says his mother arrived approximately one hour after his call. Rashaad says he spent a total of some four hours in police custody, and that it was only at the station, in the presence of his father, that WPC Ferdinand mentioned any report of attempted robbery. Apart from being given the opportunity to make the call, no one confronted him at the station. Both Rashaad and Dexter say that from the moment they were approached by the officers at the food court, they felt that they were not at liberty to leave of their own free will; they never consented to searches of their person or property; and they were humiliated by the whole incident.

The Defendant

- [6] The defendant's case is that on that day, ACP Nicholas had received a report that a group of boys, seated on the balcony of the food court at the Blue Coral Mall were planning a robbery and appeared to be drawing an escape route. On his way to investigate the report, ACP Nicholas saw WPC Ferdinand and PC Joseph and enlisted their assistance. They proceeded to the food court where they saw the claimants and their friends, who fit the description received. They say that ACP Nicholas first cleared the floor of the few persons present, before joining WPC Ferdinand and PC Joseph who had approached the group.

- [7] The defendant's case differs from the claimants' in that the officers say the incident began at about 1:00 p.m. They state that on approaching the claimants and their friends, WPC Ferdinand introduced not only herself, but PC Joseph and ACP Nicholas as police officers as well. PC Joseph had given his own name and displayed his ID card to them also. The officers say that WPC Ferdinand informed the claimants and their friends that information was received that a group of boys fitting their description were preparing to commit a robbery and that she would like to conduct a search of them.
- [8] The officers say that ACP Nicholas instructed the boys to remain seated and place their hands on the table. However, they deny that ACP Nicholas struck Rashaad to the back of his head. ACP Nicholas explained that after he asked the claimants and their friends to place their hands on the table, Rashaad kept his hands under the table and appeared to have an object in his hand. Rashaad was sitting with his back to him. As a result, ACP Nicholas touched him on the shoulder to alert him to the fact that the instruction to put his hands on the table was directed at him. ACP Nicholas says that Rashaad then put his hands on the table and he was able to see that he had been holding a cell phone.
- [9] Each boy was then asked to stand in turn, and searched by either WPC Ferdinand or PC Joseph. After each was searched, he was asked to identify his belongings which were also searched, and which each was instructed to observe. They say that during the search, the boys were quarrelling about why they were being searched, and some were slamming the table. They deny that the search was conducted in the presence of patrons of the Mall, as ACP Nicholas had cleared the area for safety prior to approaching the boys. A drawing of what seemed like the layout of a building was found, but nothing illegal, so WPC Ferdinand thanked them for their cooperation, and they walked away.
- [10] The officers say however that the claimants followed them, continuing to quarrel, using expletives, questioning why they were searched, demanding the officers'

names and identification, which they had already been given, and threatening to make complaints and/or report them. The claimants ran past the officers and stood in front of them, recording them with their cell phones. Their attention was directed particularly at ACP Nicholas. ACP Nicholas cautioned them, but they persisted in their behavior despite instructions from all three officers to calm down and go about their business. At one point, when PC Joseph held onto Dexter and told him to calm down, Dexter told PC Joseph not to touch him.

[11] As a result, WPC Ferdinand informed them that it was an offence to behave in a disorderly manner in a public place and that she was arresting them for the offences of disorderly behavior and harassment of ACP Nicholas. She thereafter cautioned them. She held on to Dexter to escort him to the Major Crime Unit ("the Unit"), however he started wrestling from her, holding onto the railing of the stairs and kicking. She was assisted in restraining him by PC Joseph, while ACP Nicholas restrained Rashaad, who was trying to free himself also. When they got to the ground floor of the Mall, another police officer passing by provided handcuffs, which were placed on the claimants and they were taken to the Unit. They say that the commotion attracted the attention of onlookers who had gathered.

[12] At the Unit, each of the claimants were individually escorted to the corporal's office, again told the reason for his arrest, informed of his rights as a prisoner in custody, asked whether he understood his rights to which each responded yes, and asked whether he wanted to exercise his rights. To this, Dexter replied he was okay, and Rashaad indicated that he wanted to call his mother, which he was allowed to do. WPC Ferdinand further says the sister of the one of the claimants (Dexter), who is a police officer called the station to speak with him; she was permitted to do so. While in the office with Rashaad, WPC Ferdinand says that he began crying and asked her why they had searched him. She repeated the reason and he informed her that he had been playing music videos with friends outside Bank of Saint Lucia when Dexter said it would be easy to rob a bank,

which two ladies overheard and commented on. He apologized for his behaviour and said that he was upset because the officers had embarrassed him by searching him.

- [13] WPC Ferdinand says she released Rashaad into the care of his mother, after explaining to her the reason for his arrest and cautioning him again. She then explained the reason for Dexter's arrest to his parent, cautioned and released him also. Both were released at approximately 2:45 p.m. The officers say that they did not assault the claimants and WPC Ferdinand says she made the relevant entries of the search, arrest and the claimants' release in the station diary.

The Issues

- [14] The issues that arise for determination are as follows:
- i. Whether the search of the claimants was unlawful?
 - ii. Whether ACP Nicholas committed assault and/or battery of Rashaad during the search?
 - iii. Whether the arrest of the claimants was unlawful?
 - iv. Whether the search or the arrest and detention of the claimants amounted to false imprisonment?
 - v. Whether the claimants are entitled to general and/or aggravated damages, and if so, the quantum?

The Evidence

- [15] Each of the claimants gave evidence. On their behalf, their friend Gershon Gerson, who was present and searched along with them, and Rashaad's father Ronald Joseph, who allegedly attended the Unit and to whom Rashaad was released also gave evidence. The evidence for the claimants was generally fraught with inconsistencies.

- [16] As examples, I note two obvious differences between their respective evidence in chief. In Rashaad's evidence in chief, he mentions that after he and Dexter were

arrested and handcuffed, as they were being escorted down the stairs of the Mall, one of the male officers pushed Dexter from behind, causing him to trip, fall and his leg to become entangled in the railing of the stairs. Rashaad says this jerked his wrist, almost causing him to fall also. However, nothing concerning this was mentioned by Dexter in his evidence in chief, though he mentions it in cross examination. The other significant variation was that Ronald Joseph in his evidence in chief stated that when he attended the station and while in a private office with WPC Ferdinand and Rashaad, WPC Ferdinand asked Rashaad, "I didn't do you anything, did I?" He says Rashaad only shrugged his shoulders in response. He maintained this in cross examination; however, this was never mentioned by Rashaad at any time.

[17] Further, the evidence of the claimants did not hold up well under cross examination. Several inconsistencies came to light and the demeanor of the claimant's witnesses did not lend to their credibility. In cross examination, Rashaad, when asked what time he and his friends arrived at Blue Coral Mall stated it was about 1:00 p.m., which corroborates the evidence of the defendant's witnesses and contradicts his own evidence in chief. When this was pointed out to him, he prevaricated before saying he could not remember. He said the search took about 15 to 20 minutes, and that immediately after, they followed the police officers for about 3 minutes during which they persisted in questioning them. He said in relation to taking out his cell phone and recording the officers, that incident took another 3 minutes. He could not say what time he arrived at the station but stated that his father arrived at the station about half an hour after he did, and he left with his father about 15 minutes after his father arrived. He said he left after Dexter or at the same time. This timeline does not add up to the four hours he says he was in custody in his evidence in chief.

[18] It is worth mentioning just a few of the other discrepancies on Rashaad's evidence. Under cross examination he said he was not allowed to make a call, instead that his mother had heard of the incident and called the station. This is in

stark contrast to his witness statement where he said on arrival at the police headquarters, he was allowed to call his mother. When asked in cross examination whether WPC Ferdinand introduced the other officers, Rashaad prevaricated again. After some hesitation he said she did not. Subsequently however, he changed his answer and said that he did not hear anything about two persons; if anything, she identified the dark-skinned officer (referring to PC Joseph), but not ACP Nicholas.

[19] Also, in cross examination, Rashaad said he did not hear WPC Ferdinand give the instruction to place their hands on the table because the other officer was speaking at the same time. He subsequently said that it was not WPC Ferdinand who instructed them to put their hands on the table, but ACP Nicholas. Both these statements are contrary to the evidence given by him in his witness statement. In his witness statement, initially he said that WPC Ferdinand gave those instructions and in a later paragraph that ACP Nicholas did not ask him to place his hands on the table; if he did, he did not hear him say so. His evidence in this regard cannot be accepted as either accurate or truthful given the inconsistencies.

[20] Furthermore, Rashaad could not give a straight answer when asked about his and Dexter's location when they were arrested and handcuffed. Initially, he said he was arrested at the top of the stairs and handcuffed midway down the stairs. He thereafter changed his answer, saying that he does not believe he was handcuffed at the time he was arrested because WPC Ferdinand had to get the handcuffs from another officer. This is consistent with the defendant's case. Rashaad said Dexter became entangled in the railing at the top of the stairs and they were not then handcuffed. This casts doubt on his evidence in chief that Dexter was pushed down the stairs while they were handcuffed causing him to almost fall. When it was put to him that his witness statement, wherein he said they were handcuffed together at the top of the stairs and Dexter was pushed while they were walking down the stairs, causing him to trip and fall was incorrect, he replied it was truthful, just not accurate.

- [21] In cross examination, Rashaad admitted that while in the office at the police station, the officers did in fact speak to him and explained the reason for their arrest. This is at variance with his evidence in chief that no one confronted him at the police station, save for allowing him to call his mother.
- [22] Dexter said in cross examination that they arrived at the Mall at about 12:00 p.m. After about 20 to 30 minutes of being there, the officers approached. He says the search took 5 to 10 minutes. They followed the officers for approximately 1-2 minutes thereafter, but he could not recall what time they got to the station. He was asked if he called his mother immediately on arriving at the station to which he replied his sister found out about the incident and called his mother; he did not call his mother personally. He was asked if it was his sister who came to the station and he said yes. It was then put to him that his witness statement, in which he said he was allowed to call his mother and that his mother showed up at the station about an hour later, was incorrect. He replied that his statement was not incorrect. He was asked again if his mother showed up. He responded that Rashaad's father showed up, before he eventually stated, by way of explanation, that everyone takes his sister for his mother. This exchange severely calls into question his credibility. He too, insisted that he and his sister left the station at about 4:00 p.m. and at the same time as Rashaad.
- [23] Under cross examination, Gershon Gerson's evidence was that they arrived at the Mall at around 11:00 a.m. or 12:00 p.m. It was about 20 minutes after arrival that they were approached by the officers and the search took approximately 15 minutes. Immediately after the search, he stated that he headed for the Police Band Barracks, which was about 2 minutes away, to get help. At the time he left, Rashaad and Dexter were not restrained by the officers or under arrest. He spoke to someone at the Police Band Barracks and then he left. On leaving, he saw Rashaad and Dexter being escorted in handcuffs down Bridge Street. This was

about 25 minutes from the time he left the Mall immediately after the search. The timeline still does not add up.

[24] Under cross examination, Ronald Joseph said that he received the call informing that his son was at the police station just after 2:00 p.m. It was put to him that in this witness statement, he said it was about 3:00 p.m., to which he replied it was between 2:00 and 3:00 p.m. He said at the time, he was in Marigot. He left about 15 minutes after he got the call, and it took him about 20 to 30 minutes to arrive at the station. He said he first saw his son some 30 minutes to 1 hour after he arrived but did not inquire as to why it took so long. He said his conversation with WPC Ferdinand lasted some 30 to 45 minutes and he left the station with his son at about 4:00 p.m. He insisted that he was at the police station for about 2 hours. Again, this timeline does not add up.

[25] For the defendant, the three officers gave evidence. Their evidence substantially reflects the defendant's case as set out above. The defendant's witnesses' evidence was the same as between them in most material particulars and did not reveal any significant inconsistencies or discrepancies under cross examination. I note only that PC Joseph stated in his evidence in chief that after the search, when the claimants had pursued them, one of them (Dexter) attempted to grab onto ACP Nicholas. This is when he said he held onto him and told him to calm down. None of the defendant's other witnesses mention this attempt to grab ACP Nicholas. Also, PC Joseph's evidence in chief failed to mention either of the claimants using their cell phone to record them.

Findings of Fact

[26] There is really little or no dispute between the parties as to the law on assault, battery, false imprisonment, unlawful arrest, or unlawful search. What is in dispute are the factual issues in the case, and each side has urged the Court to accept their respective contentions of how the events unfolded and what transpired on 22nd September 2016. Having considered the evidence of the parties and seen

and heard their witnesses, I find the defendant's evidence to be more credible. I do not find that the claimants have been witnesses of truth, given the numerous and significant inconsistencies in their evidence as between them and as between their evidence in chief and under cross examination. I therefore make the following findings of fact:

1. The officers approached the claimants and their friends shortly after 1:00 p.m. on 22nd September 2016 on the balcony of the food court of the Blue Coral Mall.
2. WPC Ferdinand introduced herself as a police officer and produced her identification card. She also introduced PC Joseph and ACP Nicholas as police officers and gave their names. PC Joseph displayed his identification card also.
3. WPC Ferdinand indicated that the officers wished to conduct a search and gave the reason, being that information was received that a group of boys fitting their description were preparing to commit a robbery.
4. The claimants and their friends quite vociferously questioned why they were being searched, insisting that they were not bad boys.
5. The claimants and their friends were instructed to place their hands on the table in front of them, with which all complied except Rashaad.
6. ACP Nicholas touched Rashaad on his shoulder to indicate that he had not complied and that further instruction to comply was directed at him. I do not believe that ACP Nicholas gave Rashaad a hard blow to the back of his head as alleged.
7. Each of the claimants and their friends stood in turn and identified their belongings to be searched, as requested. The search was conducted and nothing illegal was found on any of them. The officers thanked them for their cooperation and walked away. The search lasted some 15-20 minutes.
8. The claimants were upset and agitated by what they perceived to have been an unjustified search, which as they say left them feeling humiliated and violated. Rashaad was also upset about being reprimanded by ACP Nicholas and the touch on his shoulder.

9. The claimants pursued the officers, still demanding to know why they were being searched and demanding the officers' identification in order to make a report against them. The demand for identification was particularly directed at ACP Nicholas, given that he never produced his ID card. The officers ignored their questions telling them to go about their business, as a result of which the confrontation escalated.
10. I believe, on a balance of probabilities, that the claimants in their state of agitation, did curse, quarrel and generally behave in a disorderly and disruptive manner. The claimants also attempted to record or photograph the officers since they were unable to obtain the identification they sought.
11. The officers warned the claimants that it was an offence to behave in the manner in which they were behaving, despite which the claimants persisted. The confrontation attracted a crowd.
12. In order to put an end to the altercation, WPC Ferdinand made the decision to arrest the claimants. I believe that she informed them of the offences for which they were being arrested, being disorderly behaviour and harassing ACP Nicholas.
13. I believe on a balance that the claimants resisted arrest by attempting to wrestle free from the grasp of WPC Ferdinand and ACP Nicholas respectively. This necessitated PC Joseph assisting WPC Ferdinand. The claimants were arrested at the top of the stairs and were escorted down the stairs, Rashaad by ACP Nicholas and Dexter by both WPC Ferdinand and PC Joseph. I do not believe that either claimant was pushed down the stairs. They were handcuffed together at the bottom of the stairs to in order to restrain them, when a passing officer provided handcuffs.
14. They were then made to walk along Bridge Street to the Major Crimes Unit. The claimants' pursuit of the officers, the ensuing confrontation, their subsequent arrest and the walk to the Major Crimes Unit lasted some 25 to 30 minutes.
15. At the Unit, they were again given the reason for their arrest and informed of their rights as persons in custody. They confirmed that they understood their

rights and were permitted to call their parents, which they did. Dexter was also permitted a call from his sister. The claimants were released to their respective parent/guardian at approximately 2:45 p.m., about one hour after their arrival at the station.

16. WPC Ferdinand took the decision not to charge the claimants because they apologized for their behavior and considering their age, she exercised her discretion to give them a break.
17. The entire incident, from the time the police officers approached the boys at the food court of the Mall to the time of their release, lasted no more than two hours.

Discussion

i. Whether the search of the claimants was unlawful?

Law and Analysis

- [27] Counsel for the claimants, Mr. Gerard Williams (“Mr. Williams”) has not in his submissions, shown the Court how the search of the claimants was unlawful, though he declares that it was. However, in the statement of claim, it is the claimants’ case that they did not consent to the search of their person or belongings.
- [28] Counsel for the defendant, Mrs. Antonia Charlemagne (“Mrs. Charlemagne”) submitted that the search was lawful. Her basis for saying so is that section 5 of the **Criminal Code**¹ (“the Code”) provides for the application of the common law where the Code is silent. She submitted that the Code is silent as to the power of the police to stop and search persons and the procedure to be followed. She stated that the common law in relation to the police’s power to search is as pronounced by the courts of England prior to the *Police and Evidence Act 1984*. She submitted, without citing any authority, that the common law is that the police have the power to stop and search a person where an officer has reasonable grounds to believe that the person has been involved in a crime or to think that the

¹ Cap 3.01 of the Revised Laws of Saint Lucia.

said person is in possession of a prohibited item. In respect of reasonable grounds, she submitted, citing **Dallison v Caffery**² that “the test for whether there is reasonable or probable cause was an objective one, namely whether a reasonable man, assumed to know the law and possessed of the information which was in fact possessed by the defendant, would believe that there was reasonable and probable cause.”³ Although this case concerned reasonable cause to arrest, she submitted that the test is the same in relation to a search.

[29] Mrs. Charlemagne further submitted that the officers had reasonable cause, based on the report received, that a group of boys at the food court of the Blue Coral Mall, matching the claimants’ and their friends’ description were preparing to commit a robbery. Preparing to commit a robbery is an offence contrary to sections 73 and 80 of the Code, namely conspiracy to commit a crime and preparation for the commission of a crime, respectively.

[30] Mrs. Charlemagne further relied on section 23(1)(a)-(c) of the **Police Act**⁴, which places a duty on police officers to preserve the public peace, prevent and detect crimes and other infractions of the law, and apprehend persons who have committed or who are suspected of having committed or being about to commit any crime or offence. She also argued that the officers, suspecting that the boys may have been armed, duly exercised the power to search available to them under section 38 of the **Firearms Act**.⁵

[31] From the outset, I do not accept that the **Firearms Act** can now be used to justify the search, as I do not believe on a balance of probabilities that the officers conducted the search pursuant to that Act. The **Firearms Act** requires the officers to have suspected that the boys concealed a firearm or ammunition on his person. The report received does not objectively and reasonably lend itself to such

² [1964] 2 All ER 610.

³ At page 619.

⁴ Cap 14.01 of the Revised Laws of Saint Lucia.

⁵ Cap 14.12 of the Revised Laws of Saint Lucia.

suspicion. There was no mention that the boys were or might have been armed and the officers have raised no other allegation of fact on which the Court could come to the conclusion that it was reasonable to so believe. In any event, section 38 of the **Firearms Act** grants the police the power to require the person suspected of concealing a firearm or ammunition to produce it, and only upon a failure to comply, to search him or her. There is no evidence of the officers having asked the boys whether they were in possession of a firearm, and if, so to produce it.

[32] While section 23(1)(a)-(c) of the **Police Act** does place a duty on police officers to preserve public peace, prevent and detect crime and apprehend persons who are suspected of committing or being about to commit an offence, their duty is to take such lawful measures to do so, which must therefore be pursuant to either statute or the common law.

[33] No other statute pursuant to which the officers acted when they conducted the search has been drawn to the Court's attention. This leaves the common law. I have searched but have been unable to find any English authority which explicitly states that there is a common law police power to stop and search persons on having reasonable grounds to suspect that an offence is being or is about to be committed. However, I have come across several English, Caribbean and Canadian cases which suggest that this power does exist at common law. In the absence of any authority that contradicts the existence of a common law police power to search on reasonable grounds to believe that an offence is being or is about to be committed, I accept that there is such a power, albeit a very restricted one. I shall refer to some of these cases.

[34] In the case of **Ghani v Jones**⁶, police officers, in the course of investigating a suspected murder, went to the plaintiffs' house. The plaintiffs invited them to enter the house. The police officers questioned the plaintiffs, searched the house and

⁶ [1969] 3 All ER 1700.

asked for their passports, which they were handed. The police took these away, as well as some letters. The question the court had to consider was whether the police officers were entitled to retain the passports in circumstances where they had seized property without a warrant and without making an arrest and had retained it without the consent of the party from whom it was taken. In this case, it appears to have been accepted that the plaintiffs had given consent for the search, which was therefore not in issue. Nonetheless, Lord Denning made the following oft-cited statement:

“The common law does not permit police officers, or anyone else, to ransack anyone's house, or to search for papers or articles therein, or to search his person, simply to see if he may have committed some crime or other. If police officers should so do, they would be guilty of a trespass.”⁷
(my emphasis)

[35] In the Bahamian case of **Smith (Frederick) v Commissioner of Police and another**⁸, Smith, driving along a highway, spotted a roadblock erected by the police where vehicles were stopped and searched for dangerous drugs and illegal firearms. The roadblocks were barriers erected across the road under powers conferred on the police by the Police Act 1965, section 46. The police maintained that they also had power so to act under the Road Traffic Act, section 56. Smith was stopped by the police and refused consent for his car to be searched. The police nevertheless insisted and carried out a search. Smith sought a declaration, in accordance with article 21(1) of the Constitution, which protected against search of person or property without consent, that the police had no power or authority to search his car without his consent, in the absence of reasonable cause to suspect that he had committed an offence.

[36] The Court found that the erection of barriers across the road under section 46 of the Police Act was prima facie a breach of the right to freedom of movement under article 25 of the Constitution, but that such breach was justifiable as being in the interest of 'public order' (article 25(2)(a)(i)), and was 'reasonably required' given

⁷ At page 1703.

⁸ (1984) 50 WIR 1.

the background of drug dealing and the success of police raids. However, the Court held that the right to erect barriers and stop vehicles did not incorporate a right to search the vehicles nor the persons of their drivers and passengers; and that **the search of Smith's car without his consent when there was no reasonable ground on which he could have been suspected of possessing dangerous drugs or firearms constituted the tort of trespass.**

[37] Georges C.J. who delivered the judgment said:

“My attention has not been drawn to any law which permits the search of an individual's property (which would clearly include his car) without his consent, **unless there was reason for suspecting that individual to be in breach of a law.** An example has already been cited: section 41(2) of the Firearms Act.

At common law, the power to search is very narrowly prescribed. As Lord Denning MR stated in *Ghani v Jones* [1969] 3 All ER 1700 at page 1703:

“The common law does not permit police officers, or anyone else, to ransack anyone's house or to search for articles or papers therein or to search his person simply to see if he may have committed some crime or other. If police officers should do so, they would be guilty of a trespass...”⁹ (my emphasis)

[38] In *Hermans, Gary v The Attorney General of Jamaica*¹⁰, the claimant sought damages for assault, false imprisonment and malicious prosecution he alleged was committed by police officers arising from a stop and search of his vehicle. The defendant asserted that the claimant committed three offences namely uttering indecent language, abusive language and assaulting a police constable. The defence denied that the claimant was assaulted and averred that the arrest and imprisonment of the claimant was lawful.

[39] Batts J assessed the evidence of the parties and held:

“It is therefore manifest on these findings of fact that the defendant is liable to the claimant for assault, false imprisonment and malicious prosecution. **There was no reasonable or probable cause to stop**

⁹ At page 13.

¹⁰ [2013] JMSC Civil 75.

arrest or charge the Claimant as he had committed no breach of the peace, felony or misdemeanor... nor was there any breach of the peace threatened or in progress...

Let me say further that even on the account given by the Defendant's witnesses no lawful reason is given for stopping the Claimant's vehicle. **Nor is there any lawful reason advanced for the desire to search his vehicle or for the alleged request for his documents.**

It is still the law of this nation that persons under the Queen's peace are entitled to freedom from search of their person or property **unless such a search is legally justified**. I hold that it is not a lawful reason to stop and search a car, "based on the fact that cars with similar features are often stolen and used in the commission of crime."¹¹ (my emphasis)

[40] In another Jamaican case **Evon Gordon v Det Cpl Brown et al**¹², the claimant alleged that on 1st June 2007, the police arrived at his business place, swarmed everywhere and searched everything. His telephone was taken from him. They were at his premises for 2 hours. A large crowd gathered and watched. The police demanded documentation relative to vehicles on the premises, which the claimant obtained and gave to them. The claimant and a member of his staff were arrested, handcuffed, and taken away in a marked police vehicle. He was released on 11th June 2007.

[41] In relation to the search, Batts J found on the evidence that one of the defendants had obtained a search warrant pursuant to the Unlawful Possession of Property Act, however that the first time the claimant saw the search warrant was on 6th May 2013. That officer had further not informed any of the other police officers of the existence of the search warrant. On the day in question, approximately 15 police officers proceeded to search the claimant's premises and ask him questions. The police did not ask permission before proceeding to search. The claimant made no objection and cooperated fully with the police, providing documentation and information. However, the claimant did not consent to the

¹¹ At paragraphs 55-57.

¹² 2014 JMSC Civil 223.

search but rather resigned himself to it given the sudden and overwhelming police presence.¹³

[42] Batts J determined that the legal question was whether the defendants, with the information in their possession, had a lawful basis to attend and search the claimant's premises. He held that **there was further no statute so far as he was aware that authorises a search or entry without permission onto a citizen's private property where there is no existing breach of the peace or no reasonable grounds to believe that a breach of the peace is occurring.** He noted that the Constitution provides – "s. 19(1) Except with his own consent, no person shall be subject to the search of his person or his property or the entry by others on his premises."¹⁴

[43] He held that the claimant was not asked to give permission before the search commenced. As did Lord Denning MR in **Ghani v. Jones**, he found that it was a little farfetched to say that the claimant consented to the search or to the entry. The entry and search of the claimant's premises was therefore unlawful. It did not matter not whether the police had an honest belief supported by reasonable grounds that stolen cars were located at particular premises. The law requires that they present a search warrant before entry to and search of the citizen's premises. He held that an honest belief was reasonably held but that the police did not rely on a search warrant when entering the Claimant's premises. Their entry and search were therefore unlawful and in breach of the claimant's constitutional rights.¹⁵

[44] I note that the distinguishing feature in **Evon Gordon v Det Cpl Brown et al** is that there was no suspicion on reasonable grounds that an offence or breach of the peace was being or about to be committed to justify a warrantless search. The only suspicion, albeit on reasonable grounds, was that stolen property was being

¹³ At paragraphs 34-37.

¹⁴ At paragraph 40.

¹⁵ At paragraph 41.

kept on the premises, for which a search warrant could simply have been obtained and did not necessitate a search of the claimant's premises, even on reasonable grounds, without consent.

[45] The Canadian case **R v Caslake**¹⁶ concerned the common law power to search incident to an arrest. Nonetheless, the Court made some pronouncements of general importance and confirmed that there is in fact a common law power to search on reasonable grounds. In that case, a RCMP officer, several hours after arresting the accused for possession of narcotics (marijuana), conducted an inventory search of the accused's impounded car pursuant to police policy and found cash and two individual packages of cocaine. He did not have permission or a search warrant. The accused unsuccessfully appealed his conviction of possession of marijuana for the purposes of trafficking and of possession of cocaine. At issue here was whether the search of the car was consistent with s. 8 of the *Canadian Charter of Rights and Freedoms* which guarantees the right to be secure against unreasonable search or seizure, and if not consistent, whether the evidence obtained from the search should have been admitted.

[46] The Court held that:-

"A search, to be reasonable under s. 8 of the *Charter*, must be authorized by law, the law itself must be reasonable, and the search must be carried out in a reasonable manner. Because a warrantless search has been held to be *prima facie* unreasonable, once the accused has demonstrated that the search was warrantless, the Crown has the burden of showing that the search was, on the balance of probabilities, reasonable.

Searches and seizures must be authorized by law and can fail to meet this requirement if any one of three conditions is not met. First, the state authority conducting the search must be able to point to a specific statute or common law rule that authorizes the search. Second, the search must be carried out in accordance with the procedural and substantive requirements the law provides. Third, a search must not exceed its scope as to area and as to the items for which the law has granted the authority to search.

¹⁶ [1998] 1 S.C.R. 51

If the law on which the Crown is relying for authorization is the common law doctrine of search incident to arrest, then the limits of this doctrine must be respected. The most important of these limits is that the search must be truly incidental to the arrest: the police must be able to explain, within the purposes recognized in the jurisprudence (protecting the police, protecting the evidence, discovering evidence) or by reference to some other valid purpose, why they conducted a search. They do not need reasonable and probable grounds. However, they must have subjectively had some reason related to the arrest for conducting the search at the time the search was carried out, and that reason must be objectively reasonable. Delay and distance do not automatically preclude a search from being incidental to arrest, but they may cause the court to draw a negative inference. That inference may be rebutted by a proper explanation.”¹⁷

[47] Importantly the court was of the opinion that **it is not necessary to establish reasonable and probable grounds independently to conduct a search incidental to an arrest. It is an exception to the ordinary requirements for a reasonable search in that it requires neither a warrant nor independent reasonable and probable grounds which is the normal threshold that must be surpassed before a search can be conducted.** Rather, the right to search arises from the fact of the arrest. This is justifiable because the arrest itself requires reasonable and probable grounds (under s. 494 of the *Code*) or an arrest warrant (under s. 495).¹⁸

[48] On the basis of these authorities, I therefore accept that a police officer has the power to stop and search where he or she has reasonable grounds to believe that the person is committing or is about to commit an offence or breach of the peace, albeit a very restricted power. I am of the view that the test for reasonable grounds is the same test as applies to cases of arrest without warrant, articulated in **Dallison v Caffery**. That test is whether a reasonable man, assumed to know the law and possessed of the information which was in fact possessed by the defendant, would believe that there was reasonable and probable cause to search. If the police have the power to arrest without warrant on reasonable suspicion that

¹⁷ At paragraphs 11-13 and 20.

¹⁸ At paragraph 13.

an offence has been, is being or is about to be committed, then it seems only logical that the police would also have the power to search on the same basis. This appears to me to be a necessary corollary of the powers of the police to carry out their duties to preserve the peace, detect crime and apprehend persons suspected of having committed, committing or being about to commit a crime.

[49] Of course, the manner in which any search is conducted must be reasonable and admit of the least interference with the fundamental rights of dignity, freedom and privacy of the person for achieving the purpose for which the power is exercised. The Court is ever mindful of the constitutional right of the citizens of the State of Saint Lucia to be protected from the search of his or her person or property without consent or authority of law which makes provision that is reasonably required for among other things, public safety, public order and for the purpose of protecting the rights and freedoms of other persons.

[50] I therefore find that the search was lawful, the power to do so existing at common law and the officers having reasonable grounds to believe that the offence of robbery was about to be committed based on the report received. In the event I am wrong, I do not agree that the boys did not consent to the search. While I accept that they questioned why they were being searched and insisted on their innocence, I do not agree that this amounts to refusing consent. Ultimately, they stood and allowed themselves to be searched and provided their belongings to the officers to be searched as well. Having so concluded, there is no need to consider Mr. Williams' submission that the search, if unlawful amounts to an assault.

ii. **Whether ACP Nicholas committed assault and/or battery of Rashaad during the search?**

Law

[51] Assault is an intentional or reckless act that causes someone to be put in fear of immediate physical harm. Battery is the intentional or reckless application of force to someone without his consent, and includes anything that amounts to a blow. It may be inflicted by hand.

[52] In order to establish battery it must be proven on a balance of probabilities that (a) there was intent to commit the act; (b) there was non-consensual contact with the person and (c) the battery caused actual harm meaning physical, mental, or emotional harm. The requisite intent is merely to touch or make contact without consent. The act must be voluntary but there need not be an intention to do wrong and the wrongdoer need not intend to cause the particular harm that occurs.¹⁹ The requirement of intention with respect to both torts is a reasonable inference to be drawn from all the circumstances.²⁰

Analysis

[53] The evidence of ACP Nicholas was that he touched Rashaad to indicate to him that he had not complied with the instruction and that the further instruction to put his hands on the table was directed at him. The evidence of the claimants' witnesses was that Rashaad was the only person who did not comply with the officers' instructions. Rashaad himself admits that he was focused on WPC Ferdinand, and at the time, was questioning why they were being searched. He says that if such instruction was given to him by ACP Nicholas, he did not hear it, though he admits hearing those instructions from WPC Ferdinand. It was also the evidence of ACP Nicholas, Dexter and Gershon, that ACP Nicholas was standing behind Rashaad, whose back was facing ACP Nicholas and that the alleged blow was inflicted from behind. It is reasonable to infer, based on the position of the parties, that ACP Nicholas would have needed to somehow call Rashaad's attention to the fact the instructions were directed to him. A touch on the shoulder is not an unreasonable means of doing so. Given that ACP Nicholas is a tall and strapping officer, it is possible that the contact may have felt like more than an ordinary touch, however, I do not believe that ACP Nicholas gave Rashaad a blow to his head.

¹⁹ Wilson v Pringle [1986] 2 All ER 440; Tort: The Law of Tort (Common Law Series)/Chapter 9 Intentional Interference with the Person/A Introduction/Intention [9.4]; B Battery at paragraphs [9.5] and [9.8].

²⁰ Clerk and Lindsell on Tort at paragraph 17-03.

Assault

- [54] In the circumstances I do not find that there was any assault, an assault being an act that puts another in reasonable apprehension or fear of immediate physical harm. As the touch was from behind, which Rashaad would not have seen and did not see coming, that act could not have put him in fear of harm.

Battery

- [55] The question is whether the touch amounts to battery, given that there only need be intention to touch without consent, which is not disputed here, and there need not be intention to do wrong or cause harm. I find that the touch given Rashaad by ACP Nicholas does not amount to battery. I have reached this conclusion upon two bases.
- [56] The first basis is that the search being lawful, I am of the view that ACP Nicholas can avail himself of section 571 of the **Criminal Code**, which provides that: "A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large."
- [57] Section 571 requires the degree of force used to be reasonable in the circumstances for preventing crime. As I have found that there is a common law power to conduct a search on reasonable grounds to suspect that an offence is about to be committed, and that the officers did have reasonable grounds to so believe based on the information received, the search was therefore a lawful measure for the prevention of crime. I also find that no more force was used than necessary in the circumstances, being a touch by ACP Nicholas to draw Rashaad's attention to instructions lawfully and reasonably given, to which Rashaad was clearly not paying attention. I further accept ACP Nicholas' evidence that this request itself was made as a security measure. I accept his evidence, which has not been challenged, that he noticed an object in Rashaad's

hand and that once the instructions were complied with, he realized was a cell phone.

[58] The second basis concerns the nature and degree of touch that is properly actionable under the tort of battery. That the definition of battery, which prima facie includes any non-consensual touch is extremely wide and consequently problematic, has made the demarcation of its limits the subject of much judicial debate. Judges have sought to distinguish 'touch' that is actionable from that which is not by proposing thresholds varying from 'touching in anger' held actionable in **Cole v Turner**²¹; 'hostility of contact' held to be actionable by the Court of Appeal in **Wilson v Pringle**²²; to the exception that arose in **Collins v Wilcock**²³ that embraces all physical contact generally acceptable in the ordinary conduct of daily life.

[59] In the House of Lords decision of **F v West Berkshire Health Authority and another (Mental Health Act Commission intervening)**²⁴, Goff LJ starting with the fundamental principle that every person's body is inviolate and everybody is protected not only against physical injury but against any form of physical molestation, said the following:

"As I pointed out in *Collins v Wilcock* [1984] 3 All ER 374 at 378, [1984] 1 WLR 1172 at 1177, a broader exception has been created to allow for the exigencies of everyday life: jostling in a street or some other crowded place, social contact at parties and such like. This exception has been said to be founded on implied consent, since those who go about in public places, or go to parties, may be taken to have impliedly consented to bodily contact of this kind. Today this rationalisation can be regarded as artificial; and, in particular, it is difficult to impute consent to those who, by reason of their youth or mental disorder, are unable to give their consent. For this reason, I consider it more appropriate to regard such cases as falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of everyday life.

²¹ (1704) 6 Mod 149, 87 ER 928.

²² [1986] 2 All ER 440.

²³ [1984] 1 WLR 1172.

²⁴ [1989] 2 All ER 545.

In the old days it used to be said that, for a touching of another's person to amount to a battery, it had to be a touching 'in anger' (see *Cole v Turner* (1704) Holt KB 108, 90 ER 958 per Holt CJ); and it has recently been said that the touching must be 'hostile' to have that effect (see *Wilson v Pringle* [1986] 2 All ER 440 at 447, [1987] QB 237 at 253). I respectfully doubt whether that is correct. A prank that gets out of hand, an over-friendly slap on the back, surgical treatment by a surgeon who mistakenly thinks that the patient has consented to it, all these things may transcend the bounds of lawfulness, without being characterised as hostile. Indeed, the suggested qualification is difficult to reconcile with the principle that any touching of another's body is, in the absence of lawful excuse, capable of amounting to a battery and a trespass."²⁵

- [60] This principle as set out by Lord Goff has been accepted as the preferable approach. I find that a mere touch to draw Rashaad's attention to the fact he was being spoken to is physical contact generally acceptable in the ordinary conduct of daily life and police duties and therefore ought not to be actionable.

iii. Whether the arrest of the claimants was unlawful?

Law

- [61] Section 570(2) of the **Criminal Code** provides that "a police officer may arrest without warrant anyone who is, or whom he or she, with reasonable cause, suspects to be, in the act of committing or about to commit, an offence." In a claim of unlawful arrest, the onus is on the defendant to satisfy the Court that the arrest is lawful, that is, that the officers acted with reasonable cause or upon reasonable suspicion.

Analysis

- [62] The Court accepted as a finding of fact that immediately prior to their arrest, the claimants were agitated, quarreled, used obscene language, and generally behaved in a disorderly manner in the presence of and directed at the officers. WPC Ferdinand informed the claimants she was arresting them for the offences of disorderly behavior and harassment of ACP Nicholas. As counsel for the defendant points out, these are offences under sections 529 and 356 of the **Criminal Code**, respectively. It therefore goes without saying that their arrest for

²⁵ At pages 563-564.

disorderly behaviour and harassment of ACP Nicholas was lawful pursuant to section 570(2) of the **Criminal Code**.

[63] Counsel for the claimants, Mr. Williams submitted that the offence of harassment was not committed, because section 356 of the **Criminal Code** requires there to be a complaint made and no such complaint was made. The wording of the provision does not require a complaint to be made and no authority has been provided to support any implied requirement. Section 356(1)(a) merely requires use of threatening, abusive or insulting words or behaviour or disorderly behavior within the hearing or sight of a person likely to be harassed, alarmed or distressed by such words or behaviour, where the person intends his words or behavior to be threatening, abusive or insulting or intends his behaviour to be or is aware that his behaviour may be disorderly. I believe that the claimants intended their words and behavior to be threatening and abusive. After all, they were seeking to obtain the identification of the officers who made it clear they were unwilling to provide that information as it had already been provided. The boys were agitated, having felt wronged by what they perceived to be an unjustified search and were intent on making a report/complaint about the officers. I also find that they were aware that their behavior, which involved pursuing, quarrelling and cursing at the officers in the Mall, may have been disorderly.

[64] I specifically note for the avoidance of doubt that it was solely the subsequent pursuit of and confrontation with the officers by the claimants which led to their arrest. Their arrest was entirely independent of the information received by the officers that a group of boys were preparing to commit robbery. In relation to this information, the claimants had been earlier searched and nothing illegal found on their person or in their belongings. The officers were by the time of the boys' arrest satisfied that there were no reasonable grounds to suspect they were about to commit the offence of robbery. This was no longer of any import.

[65] Further, I accepted that the claimants were informed of the reason for their arrest and were cautioned. At the station, they were again informed of the reason for their arrest and of their rights and given the opportunity to exercise such of their rights as they indicated they wished to utilize in conformity with section 584 of the **Criminal Code**. Therefore, I can find no act or omission, in either substance or procedure which would render their arrest unlawful. Counsel for the claimants submitted that where an arrest is unlawful, it amounts to assault. As I have found that the arrest to have been lawful, there is no need to consider this submission.

iv. Whether the search or the arrest and detention of the claimants amounted to false imprisonment?
Law

[66] False imprisonment has been defined thus:

“the unlawful imposition of constraint on another’s freedom of movement from a particular place. The tort is established on proof of: (1) the fact of imprisonment; and (2) the absence of lawful authority to justify that imprisonment. For these purposes, imprisonment is complete deprivation of liberty for any time, however short, without lawful cause.”²⁶

Analysis

The Search

[67] Dexter’s evidence is that from the moment that the officers approached him at the food court of the Mall and informed of the search, he felt that his liberty was no longer his choice. He says he felt this way because of the manner in which the officers surrounded them. Rashaad says that from the moment he was allegedly given the blow to his head by ACP Nicholas, he felt he was not at liberty to leave. I accept that the claimants and their friends at the time of the search were not free to leave at their will; therefore the fact of imprisonment has been established.

²⁶Albert Augustin v WPC 152 Bertie Ferdinand and The Honourable Attorney General of Saint Lucia SLUHCV2008/0647 at paragraph [31], quoting from Clerk & Lindsell paragraphs 15-23 Imprisonment; Alexander Jules and Lisa Callender v The Attorney General SLUHCV2016/0595 at paragraph [10].

However, for the reasons given above, I find that the officers were conducting a lawful search of the claimants and their friends, having reasonable grounds for so doing based on information received of a group of boys fitting their description and location preparing to commit a robbery. Therefore the claim for false imprisonment in respect of this period has not been made out.

The Arrest and Detention

[68] It is not disputed that the claimants, from the point of their arrest to the point of their release, were imprisoned as a matter of fact. However, the question is whether the officers acted without lawful authority. That question has been answered above. The officers were acting with lawful authority, the claimants having committed the offences of disorderly conduct and harassment in contravention of articles 529 and 356 of the **Criminal Code**, respectively in the presence of the officers. The proper procedures were followed, in that the claimants were told of the reason for their arrest, informed of their rights, allowed to exercise such of their rights as they requested, and released to their parents within a reasonable time; certainly, within an hour of their arrest. There is therefore no legal basis for the claim of false imprisonment in respect of this period.

v. Whether the claimants are entitled to general and aggravated damages, and if so, the quantum?

[69] As the claimants have not made out their case for assault, battery, false imprisonment, unlawful search or unlawful arrest, the issue of damages does not arise. However, on this issue arose the question whether the claimant's claim for aggravated damages could be considered, having not been included in the claim form, and although included in the statement of claim. I find it necessary to address this issue.

[70] CPR 8.6(3) provides that a claimant who seeks aggravated damages must say so in the claim form. Therefore, the claimants are not in strict compliance with the

rules. I note that CPR 8.6(1)(b) provides that the claimant must in the claim form specify any remedy he seeks but is qualified by CPR 8.6(2) which provides that notwithstanding rule 8.6(1)(b), the Court may grant any other remedy to which the claimant may be entitled. However, I do not find that this would avail the claimant, given that it is immediately followed by CPR 8.6(3) which is in no way similarly qualified.

[71] The case cited by the defendant in support of its submission that the Court cannot properly consider the claim for aggravated damages concerned a situation where the claim for exemplary damages was not included in either the claim form or statement of claim and only arose in closing submissions. This is materially different from the situation before this Court in which the claim for aggravated damages was included in the statement of claim and therefore put the defendants on notice. Though not in strict compliance with the rules, it formed part of the pleadings and had liability been established the Court would have been minded to consider such an award.

[72] In similar vein, I note that unlawful search and unlawful arrest were not causes of action included in the claim form, but which were mentioned and arose from the allegations in the statement of claim. They were therefore pleaded and would in any event have to have been considered on the claim for assault and false imprisonment. Nonetheless, the Court implores counsel, for the sake of tidiness of pleadings, and the avoidance of doubt, confusion, time wasted in addressing such procedural and preliminary matters, and the very grave risk that causes of action and relief which a party seeks will not be considered by the Court, that counsel pay greater attention in setting out the parties' cases in the pleadings in conformity with the Rules.

Conclusion

[73] Based on the foregoing, I make the following orders:

1. The defendant is not liable to the claimants for the torts of assault, battery, false imprisonment, unlawful search or unlawful arrest.
2. The claimants' claim is therefore dismissed.
3. The claimants are not entitled to general damages or aggravated damages.
4. The claimants are ordered to pay the defendant prescribed costs in accordance with CPR 65.5 in the sum of \$7,500.00.

**Kimberly Cenac-Phulgence
High Court Judge**

By the Court

Registrar