

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

CASE NO: 380 OF 2002

BETWEEN

DONAVAN ISIDORE

Claimant

and

(1) ATTORNEY GENERAL
(2) FRANCIS DARIAH

Defendants

Appearances:

Mr. Michael St Catherine for Claimant
Mr. David Cox for the Defendants

2003: May 29
June 4

JUDGMENT

Introduction

[1] **Shanks J:** On 5 November 2001 at 4.15 am Mr Isidore was shot in the back by Police Corporal Dariah as he tried to escape from the Central Police Station where he was in lawful custody on a charge of robbery. He suffered serious injuries which have left him paralysed. This trial dealt only with the question whether the police are liable to him for the shooting; quantum will be dealt with on another occasion if the Claimant succeeds on liability.

[2] I heard evidence from the Claimant and two of the officers involved, namely Corporal Dariah and Constable Smith; I was provided with photographs taken at about 6.00am by PC Simeon; and I visited the Central Police Station with the attorneys for the respective parties. I was also provided with a copy of the Police Standing Orders.

Facts

[3] I am afraid that I could not generally rely on the evidence of the Claimant where it conflicted with that of the two officers. The Claimant changed his mind on a number of points as he went along and his evidence about his escape from the cell was not consistent with the photographs. PC Smith appeared to me an honest and reliable witness. Corporal Dariah appeared competent and experienced and was also honest and reliable on most points though he had the air of one rather too well rehearsed and appeared to me a little insouciant about the whole incident. Based on this evidence I make the following findings of fact.

[4] Just before the incident the Claimant was in one of the cells at the Central Police Station with about nine other prisoners. The two policemen who gave evidence were sitting with two colleagues near the TV, although it was not on and they were just chatting. A colleague of theirs had gone to get some water and left the door which leads out to the street on the latch but not padlocked as it would normally be.

[5] Corporal Dariah had in his waist band a .38 revolver. Normally firearms are kept locked in the armoury which is on the other side of the police station but the revolver in question had

been used that night by another officer in the course of his duties providing an armed cash escort to Kentucky Fried Chicken and had been handed back to the Corporal who had decided to keep it with him for no particular reason. He told me in evidence that "if we feel like arming ourselves we keep a gun with us". I do not think this approach is consistent with the general rule that the police should be unarmed unless there is a good reason to be armed or with the letter and spirit of the regulations contained in the relevant Standing Order which are set out below.

[6] It seems that the Claimant and/or others managed to remove a horizontal bar about 18 inches long and an inch in diameter at the base of the cell and bend back two vertical bars, thus making a hole about one foot square. At the time, they were, of course, out of view of the officers, who believed that everyone was asleep. The Claimant and one other prisoner managed to crawl out of the hole and escape from the cell.

[7] Once out of the cell the Claimant grabbed a large bucket containing urine and other debris which is kept just outside the cell and went into the area where the officers were sitting and where the gate to the outside world was and threw the bucket and its contents over the Corporal and PC Smith. The contents landed on the officers and went all over the floor and created a smelly and slippery mess. The officers' evidence was that the Claimant was carrying the 18 inch metal bar which had been removed from the cell at this stage. He denied it and though I was not convinced by his evidence in general I am not entirely sure the officers can have been right about this since it would have been difficult for the Claimant to throw the bucket while holding the rod and it is just as likely that the other prisoner was carrying it, but I do not think much turns on this issue.

[8] When the bucket was thrown at the officers they stood up and attempted to move towards the Claimant but they were at least initially hampered by the wet floor in the area where they were sitting. The Claimant rushed to the door and started to unlatch and open it (it opens inwards). The police shouted out to him to stop but did not feel able to make a rush at him to attempt to restrain him physically on account of the slippery floor. When he did not stop the Corporal took out the revolver and shot him in the back at a distance of about 10 feet. No warning was issued before the shot was fired.

[9] The Corporal told me that he was aiming for the Claimant's leg but hit him in the back accidentally because it was not easy to take up a firm stance on account of the state of the floor. I am not sure that I can accept this evidence although I do not think the Corporal was setting out to deceive me about the matter. I just think it far more likely that the officer simply made a split-second decision to shoot in the direction of the escaping prisoner without consciously aiming for any particular part of his body.

[10] The Claimant fell half in, half out of the door to the outside world which he was now in the course of opening. The other prisoner managed to push past him and run out into the street. The whole incident happened extremely quickly and probably did not last more than a minute.

Police Standing Order No 46

[11] In the course of the trial I requested that the Attorney General supply me with a copy of any written rules concerning the keeping and use of firearms by the police in St Lucia.

After the trial I was supplied with a full set of the Police Standing Orders. Although these were not disclosed by the Defendants before trial and neither party sought to rely on them at trial it seems to me that Standing Order No 46 in particular is highly material to the issues which arise in this case.

[12] Standing Order No 46 contains the following provisions:

“(2)...(i) Firearms are to be issued only where there is reason to suppose that a Police Officer may have to face a person who is armed or otherwise so dangerous that he could not safely be retained without the use of the firearms...

(ii) Firearms are to be used by authorized and trained Police Officers only as a last resort...

(3) Permission to use a firearm must be obtained from an Officer not below the rank of Assistant Superintendent except when the circumstances render it impracticable...

(6)...(i) Firearms should be issued only to officers who are currently authorized and trained...

(ii) Records of issue...should be maintained...

(7)...Unless it is considered impracticable, an oral warning is to be given before a firearm is used...

(10)...(iv)...examples of circumstances in which it would be proper for a senior Officer to give an instruction to shoot would be co-ordinated fire by Police Riflemen in a terrorist/hostage situation, or by baton gunners in extreme public order situations...

(12)...(i) Firearms are to be used only as a last resort. The objective of an armed Police is to incapacitate and arrest an armed suspect with the least possible danger...

(iii)...if the circumstances would not justify the killing there must be no attempt to stop a suspect merely to wound him...

(15)...(iii) All firearms not in immediate use will be kept at the Police Armoury and no Firearms shall be removed without the appropriate authority. Gazetted Officers, Inspectors and subordinate Officers are responsible for the safe storage of firearms...at their...Stations...All firearms...when not in use are to be kept under lock and key...

(v)...An officer to whom a Firearm has been issued will, on his return to the Station, report to the senior person in charge who will make the necessary entry in the register...”

The defences

- [13] The statement of claim appears to raise a case based on negligence. I do not think negligence has anything to do with this claim. The fact that he was shot by Corporal Dariah *prima facie* entitles Mr Isidore to bring a claim against the Corporal under Article 985 of the Civil Code for damage caused by his deliberate act (an assault and battery under the law of England), not for damage caused by neglect or want of skill (negligence under the law of England). Mr Cox, in his able submissions on behalf of the Attorney General, raised two answers to this claim: first, that the Corporal was using legitimate force to prevent a prisoner escaping; and second, that the claim is not maintainable because Mr Isidore was injured as a consequence of his involvement in a criminal exploit (namely escaping lawful custody) and it is therefore barred by the maxim *ex turpi causa non oritur actio*. He expressly disavowed any reliance on self-defence. The pleaded Defence also relied on the defence of contributory negligence.

Legitimate force

- [14] Both sides were agreed that the proper tests are contained in sections 27(1) and 55 of the Criminal Code:

“27 (1) Any person may ...if the other person...endeavours to escape from custody, use any force that is necessary for his ...recapture, and may kill him, if he cannot by any means otherwise be...retaken

55...force cannot be justified...(a) which is in excess of the limits prescribed in the section...relating to that matter (b) which in any case extends beyond the amount and kind of force which is reasonably necessary for the purpose for which force is permitted to be used; Provided however that force shall not be deemed to be in excess of the limits prescribed ...on the ground only that the degree of force used was in fact unnecessary if it is proved that the person using the force acted in the honest belief based upon reasonable grounds that the use of such force was necessary”

[15] It seems clear that the onus is on the Defendant to establish that they can take the benefit of these provisions (note the proviso to section 55 in particular). I also take note of the well-made point that in assessing whether reasonable force has been used the court “does not use jeweller’s scales” and note that the court must take account of all the circumstances, including the circumstances of the detention and the escape and the level of violence which the potential escaper appears to be prepared to use.

Ex turpi causa

[16] On this part of the case, Mr Cox relied on a fairly recent decision of the English Court of Appeal, namely *Harry Cross v William Dickinson Kirkby* (18.2.2000, Beldam , Otton and Judge LJJ) which (to my admitted surprise) appears to suggest that in circumstances like these a Claimant would be barred under English law by the maxim *ex turpi causa*. It seems to me that two questions arise: first, whether in fact the Claimant would be barred under English law; and second, whether the law of St Lucia applies the same rule as English law.

[17] The *Harry Cross* case concerned a Claimant who was a “hunt saboteur” who went onto the Defendant’s land armed with a baseball bat and attacked the Defendant. The Defendant managed to wrestle the baseball bat from him and hit him on the side of the head with a single hard blow which caused a serious fracture of the skull. The judge rejected the defence of self-defence and the contention that the claim was barred by the maxim *ex turpi causa*. The Court of Appeal reversed his findings on both points. On the latter point the Court of Appeal referred to the well established rule stated by Lord Mansfield in *Holman v*

Johnson (1775) 1 Cowp R 341 and stated that wherever the facts which give rise to the Claimant's claim and injury are "inextricably linked" with his criminal conduct the court ought not to countenance the claim (see in particular paras 103 and 104).

[18] My own view is that Millett LJ was right in stating in an earlier case (*Revill v Newberry* [1996] QB 567) that there was no place for the doctrine of *ex turpi causa* in this context and that "if the doctrine applied, any claim by an assailant or trespasser [or, I would add, escaping prisoner] would be barred no matter how excessive or unreasonable the force used against him", and I strongly suspect that in a case against the police rather than a private individual an English court would find a way to say that the claim was not barred by the maxim. However, I cannot see any legitimate basis for distinguishing *Harry Cross* at the moment and, although there were two grounds for the Court of Appeal's decision, there is no doubt that the finding on *ex turpi causa* was intended to be part of the Court's reasoning. I therefore conclude that on the current state of English law Mr Isidore's claim would be barred by the maxim. I must therefore consider whether St Lucian law applies the same rule.

[19] I was not referred to any express provision of the Code or any other St Lucian statute which bars a claim under Article 985 on the basis of the maxim. Although the maxim reflects a principle which one might expect to find in many systems of law I do not think I can simply deduce that this is an oversight and that it is to be presumed to be part of the law of St Lucia, not least because I note that in the context of the law of contract there is a provision of the Code expressly stating the law in a related area (see Article 11: "An agreement contravening the laws of public order or morality is void.").

[20] In the absence of any express provision, the Defendants must therefore rely on Article 917A of the Code which provides as follows:

“(1)...the law of England for the time being relating to ...torts shall *mutatis mutandis* extend to [St Lucia], and the provisions of articles 918 to 989 and 991 to 1132 of this Code shall as far as practicable be construed accordingly...

(3)Where a conflict exists between the law of England and the express provisions of this Code or of any other statute, the provisions of the Code or of such statute shall prevail.”

[21] It seems reasonably clear that the phrase “for the time being” is to be given “ambulatory effect” so that the relevant English law is that applying at the time the matter comes before the St Lucian court and, even if the law has been developed by recent English authorities, it is the current English law which is to be applied (see the authorities cited at p199 or the enlightening article by the present Prime Minister entitled *The Courts and the Interpretation of a Civil Code in a Mixed Legal System: Saint Lucia Revisited* in the *Caribbean Law Review* Vol 5 No 1 June 1995 144).

[22] It is therefore open to Mr Cox to rely on the *Harry Cross* case provided it is not in conflict with the express provisions of the Code or any other statute. Under the express provisions of the Code, Article 985 makes the Corporal “responsible for damage” caused by his deliberate act in shooting the Claimant and Article 1002 (along with the definition of “debtor” in Article 917) makes him liable, “though in good faith”, to pay damages in respect thereof unless he shows that the damage “proceeds from a cause which cannot be imputed to him”. It seems to me that to allow the Claimant's claim to be defeated by the application of English law as set out in the *Harry Cross* case where there is no analogous St Lucian provision would be to overrule these express provisions of the Code in a way

which is not permitted by Article 917A(3). I confess that I am not troubled by this conclusion: I believe the sections of the Criminal Code I have set out above and those dealing with self-defence, as well as Article 989D (contributory negligence) and Article 1003 (irresistible force without fault) of the Civil Code and the need to prove a duty of care and causation in the context of a claim based on “neglect” (see *Northrock Ltd v Jardine* (1992) 44 WIR 160 at 167G) together provide a sufficient legal framework to give a just answer in any case one could imagine in this area.

[23] I therefore conclude that the outcome of this case on liability depends entirely on whether the Corporal used legitimate or excessive force as tested by reference to the elaborate provisions in the Criminal Code which I have quoted. I turn therefore to consider whether the amount of force used by the Corporal was reasonably necessary to prevent Mr Isidore's escape and, if not, whether there was nevertheless an honest and reasonable belief on the part of the Corporal that it was reasonably necessary. I will then consider the question of contributory negligence.

Necessary force

[24] In my view the level of force used was more than was reasonably necessary to prevent the escape since there were other steps that might have been taken which were likely to have achieved the same end. I can see that having had the bucket of debris and urine thrown over them and with the slippery floor and one of the prisoners having a metal rod in his possession, it was probably not feasible to physically restrain the Claimant. However, I think a warning by the Corporal that he was armed and that if Mr Isidore did not stop he would shoot him may well have prevented the escape. Since it was the case that the

Corporal would not normally have been armed this would probably have come as a surprise to the Claimant and brought him to a halt. Further, as was implicitly accepted by the Corporal, he could have shot the Claimant in the leg, rather than the back, and stopped the escape that way, though I note that to attempt this would itself have involved a breach of the Standing Order.

Honest and reasonable belief

[25] That, however is not the end of the matter: even if the amount of force used was more than was reasonably necessary the Corporal still has a defence if he honestly and reasonably believed that shooting at the Claimant was reasonably necessary to prevent the escape. Although it is clearly a rather artificial exercise to attempt to analyse the mental state of someone who is deciding to shoot a revolver in split-second circumstances, I think it is clear that his decision to shoot was genuinely designed to prevent the escape (rather than being revenge for throwing the urine over him or for some other motive) and that he honestly believed that this was a necessary step.

[26] The question is whether that belief was based on reasonable grounds. This depends on all the circumstances. The situation was clearly a dangerous and chaotic one; there were at least two prisoners who were prepared to use some violence to escape; the police did not know at that stage how many other prisoners may have got out of the cell and what further danger was in store for them. On the other hand, the Corporal had no reason to believe that the escapers had firearms; they did not represent an immediate threat to his own safety at the time he shot since they were clearly in the process of running away; it was somewhat fortuitous that he had a firearm and he must have at least suspected that

this would come as a surprise to the Claimant; he obviously knew that shooting a man at a range of 10 feet might well have catastrophic results; as a reasonable police officer he must be taken as being aware of the provisions of Standing Order No 46 which are set out above.

[27] I have found this an extremely difficult decision but in the end I have reached the clear conclusion that the Corporal has not shown that he had reasonable grounds to decide that it was necessary simply to shoot without at least first issuing a warning that he was armed and would shoot if the prisoner did not surrender. I base this on my own assessment of the situation as well as on the guidance provided by the sections of the Standing Order which are set out above, particularly the requirements that an oral warning is normally given and that firearms are used only as a last resort. I therefore reject the defence based on the proviso to section 55 of the Criminal Code.

Contributory negligence

[28] Article 989D of the Civil Code sets out the law on this topic. Although it may be unusual to find that there has been contributory negligence in a case of a deliberate act giving rise to the liability, having regard to the definition of "fault" in Article 989D(1) and the terms of Article 989D(2), I can see no reason why I should not reduce the Claimant's damages in this case to reflect justice and equity having regard to his share in the responsibility for the damage. It is well established in English law that "responsibility" in this context involves a consideration of both causation and culpability. Whilst the Claimant's culpability was far greater than the Corporal's, it was the Corporal who actually inflicted the injuries in

circumstances where I have found he ought to have issued a warning. In the circumstances I propose to reduce the Claimant's damages by 50%.

Outcome

[29] There shall be judgment for 50% of such damages as are assessed as flowing from the Claimant's injuries resulting from his shooting.

Post script

[30] I wish to make a few observations by way of post-script:

- (1) I stress that in finding against the Corporal I am not in any way attacking his *bona fides* in acting as he did on that difficult night and I do not intend to undermine the police on whom all St Lucians must rely for their security and peace;
- (2) There may be lessons still to be learnt, however, arising out of this case, particularly in relation to compliance with Standing Order No 46, control over the issuing of guns, training in their use and station security;
- (3) Although the Claimant will be entitled to damages for pain suffering and loss of amenity the court will obviously be astute to see that he does not recover any kind of windfall in relation to a claim for loss of future earnings in light of the fact that, at least *prima facie*, he appears to have been involved in serious criminal activity.

Murray Shanks
High Court Judge (Ag.)