In The Supreme Court of Bermuda

CIVIL JURISDICTION

2007: No. 331

BETWEEN:

RICKY RAMNARINE

Plaintiff

and

THE COMMISSIONER OF POLICE

Defendant

RULING

Date of Hearing: 19 March 2008

Date of Ruling: 28 March 2008

Mr Mark Pettingill, Wakefield Quin, for the Plaintiff

Mr Huw Shepheard, Attorney-General's Chambers, for the Defendant

Introduction

1. This ruling arises from an application made on behalf of the defendant ("the Commissioner") that the statement of claim be struck out and service of the writ be set aside or alternatively that the action be dismissed and judgment entered for the Commissioner under Order 18 rule 19 of the Rules of the Supreme Court 1985. The grounds of the application are that
    (i) it (presumably a reference to the statement of claim) discloses no or no reasonable cause of action against the Commissioner, who is not

vicariously liable for the conduct of the constables comprising the Bermuda Police Service, each constable being the holder of an independent office; or

(ii) it is scandalous, frivolous or vexatious in that, pursuant to section 461 of the Criminal Code 1907 it was open to the Commissioner to keep the plaintiff ("the Plaintiff") in custody for up to twenty-four hours without preferring any charge against him; or

(iii) it is otherwise an abuse of the process of the Court

Background

2. These proceedings were taken by the Plaintiff (in November 2007) because he had been arrested and detained on 7 July 2006 on suspicion of sexual assault, following a complaint made by a female passenger from a cruise ship docked in St. George's. The main complaint said to give rise to the Plaintiff's cause of action is that his detention continued throughout the day, many hours after the complainant had withdrawn her complaint.

3. The police investigation into the alleged assault commenced at about 6.30 am on 7 July. The Plaintiff, who is a serving police officer, was arrested by API Evans at 8.12 am on 7 July, shortly after he had attended for duty at the St. George's Police Station. From the time of the initial complaint, the complainant was being questioned and examined, and at some time shortly after 10.30 that morning, the complainant advised police officers that she did not wish to return to Bermuda and did not wish to give a statement of complaint. Her cruise ship was scheduled to depart at 12.00 noon.

4. However, the Plaintiff remained in custody throughout the day, and was eventually released, according to the statement of claim, after 6.00 pm in the evening.

5. The statement of claim makes two complaints against the Commissioner in his personal capacity. First, it is said in paragraph 5 that despite the withdrawal of

the complaint by the complainant, the Commissioner ordered that the Plaintiff continue to be held in custody. Secondly, in paragraph 6 it is said that the Plaintiff was unlawfully and falsely imprisoned for over six hours without further questioning or action being taken by the police or the Commissioner, the latter knowing full well that the complaint had been withdrawn. It is on the basis of his alleged unlawful detention that the Plaintiff seeks damages.

The Evidence

6. The only evidence before the court was an affidavit sworn by Mr Shepheard only the day before the hearing, in which he included a chronology of the police investigation, together with statements of the investigating police officers, and a short statement from the complainant confirming that she did not wish to pursue the matter and requesting no further police action. That statement was of course obtained on 7 July 2006. Also exhibited was a report which had been prepared by DCI Mouchette on 14 July 2006, and which was addressed to the Commissioner, together with a supplemental report dated 3 November 2006. I pause to note that the affidavit evidence for the Commissioner should not have been filed at the last minute; the summons itself had been filed 3 months earlier.

7. For the Plaintiff, written submissions were produced which included the statement that it had been revealed to the Plaintiff's attorney by an unidentified senior police officer, whom it was said would be called to give evidence, that it was the Commissioner personally who had ordered the continued detention of the Plaintiff. The documents exhibited by Mr Shepheard did not disclose any knowledge of or act by the Commissioner on 7 July 2006, so there is a conflict between the parties as to the role of the Commissioner which, for the Commissioner, takes the form of the contemporaneous police statements, and for the Plaintiff takes the form of an assertion by counsel.

8. There is one other aspect of matters which is covered in the report of DCI Mouchette, but not in any of the statements, and this relates to the Plaintiff's release. In this regard, I will quote from DCI Mouchette's report, as follows:

"At 1630 hours, by way of another conference call, Acting Assistant Commissioner White was informed of the subject's refusal to consent to a voluntary interview and medical examination. This resulted in a lengthy discussion with a subsequent suggestion to seek legal advice from the DPP's Office.

At approximately 1730 hours, I spoke to Principal Crown Counsel Mr Carrington Mahoney on his cell. I informed him of the full circumstances of this incident and he advised that we should release the subject as there was no longer an active complaint.

On the advice of Mr Mahoney I recommended to Acting Assistant Commissioner White that we release the subject from Police custody without bail and this was accepted.

At 1810 hours, Acting Inspector Evans and I attended the waiting room within the cell area and spoke with the subject. I informed him of the full circumstances of his arrest and the reason for his detainment. He appeared to understand. I then authorized his release from Police custody."

The Argument

9. At the outset, Mr Pettingill accepted (contrary to the terms of his written submissions) that the Commissioner had no vicarious liability in respect of the acts or omissions of more junior officers. Mr Pettingill's case was that the Commissioner was liable because of the direction he had given to other officers. Mr Shepheard therefore concentrated upon the second limb of the grounds contained in the summons, namely that it was permissible pursuant to section 461 of the Criminal Code to keep the Plaintiff in custody for the period in question without preferring any charge against him. In this regard, Mr Shepheard submitted that it was irrelevant that the complaint had been withdrawn some time prior to the Plaintiff's release. He said that it was a matter for the DPP to decide, once he had all the available evidence, whether a charge should be preferred. He said that if the alleged victim of the alleged offence had decided that she did not wish to persist in the complaint, that was but one factor among many that the DPP had to take into account, and there could be independent evidence which

justified a charge. He also suggested that the complainant had agreed to reconsider her decision in about a week's time, but it does not seem to me that that can have any relevance when the Plaintiff was in fact released, on the basis of Mr Mahoney's advice, well before the complainant had had an opportunity to reconsider matters. For that matter, the contention that the complainant's complaint was but one of the factors to be taken into account by the DPP does not seem to be maintainable in view of the facts in this case; the reality is that once the complainant indicated that she no longer wished to pursue the matter, the advice from the DPP's office (in the form of Mr Mahoney) was that the Plaintiff should be released. In any event, Mr Shepheard maintained that until a decision had been taken not to pursue a charge against the Plaintiff, it was perfectly permissible for directions to be given that he should be kept in custody. He did accept that once a decision had been made that a charge was not to be preferred, it was incumbent upon the police to release the Plaintiff.

10. Mr Pettingill referred to the conflicts in the factual background, both in relation to the Commissioner and the advice from the DPP's office. In relation to the role of the Commissioner, he submitted that that was a matter which had to be resolved at trial. In relation to the advice from Mr Mahoney, Mr Pettingill said that he had known nothing of this until receipt of Mr Shepheard's affidavit very shortly before the hearing. Consequently he needed to take instructions to determine if there was indeed a conflict, and his position was that he did not accept that there was not a conflict in relation to Mr Mahoney's advice.

11. Generally, Mr Pettingill submitted that the police were entitled to arrest when they had "the beginnings of evidence", but said that such beginnings came to a halt when the complaint was withdrawn. He maintained that on the basis of the comment attributed to Mr Mahoney, that the Plaintiff should be released because there was no longer an active complaint, the position at the time of the Plaintiff's release was the same as it had been at 10.40 am, when the complaint was withdrawn. He submitted that even if the operative time was when Mr Mahoney's advice had been given at 5.30 pm, the continued delay of forty

minutes or so in releasing the Plaintiff was still actionable. In response to that comment, Mr Shepheard submitted that once advice had been given, that need not secure the Plaintiff's immediate release. He said that there were processes which needed to be gone through before persons were released from police custody, and those inevitably took time.

The Relevant Law

12. It is well established that it is only in plain and obvious cases that recourse should be had to the summary process afforded by Order 18. Mr Pettingill referred me to a relatively recent statement of the law dealing particularly with the position in relation to disputed questions of fact, in the judgment of Auld LJ in *Electra Private Equity Partners & Ors -v- KPMG Peat Marwick & Ors* [1999] EWCA Civ 1247. Auld LJ put the position in the following terms:

> "It is trite law that the power to strike out a claim under RSC Order 18 r. 19 or in the inherent jurisdiction of the Court should only be exercised in "plain and obvious" cases. That is particularly so where there are issues as to material primary facts and the inferences to be drawn from them, and when there has been no discovery or oral evidence. In such cases, as Mr Aldous submitted, to succeed in an application to strike out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known. Certainly, a judge, on a strike-out application where the central issue is one of determination of a legal outcome by reference to as yet undetermined facts, should not attempt to try the case on the affidavits."

I accept that to be an accurate statement of the test to be applied.

Vicarious Liability

13. I agree with Mr Pettingill that this case differs from that of *Simmons -v- Commissioner of Police,* on which I gave a ruling as recently as 14 March 2008. In that case, the plaintiff sought to make the Commissioner liable solely for the acts of other police officers; in this case, the action is pursued on the basis of acts

said to have been the acts of the Commissioner, in terms of himself giving directions to other officers. It may be that the matter is not as clearly pleaded as might be the case, insofar as it is not clear when or to whom the Commissioner gave the direction relied upon by Mr Pettingill. But in my view that aspect of matters can be dealt with by a request for particulars, and I take the view that there are sufficient factual matters in issue for me to refuse the application to strike out on this ground.

Section 461 of the Criminal Code

14. I have referred to the argument in relation to this aspect of matters, but again it does seem to me that the argument has to be looked at in the context of the relevant facts. The factual background on which Mr Shepheard relied included a judgment being made by Acting Assistant Commissioner White to seek legal advice from the DPP's office late in the afternoon of the relevant day, and it appears to have been approximately one hour later when DCI Mouchette had in fact spoken to Mr Mahoney of the DPP's office, as indicated above. Mr Mahoney's advice was said to be that the Plaintiff should be released "as there was no longer an active complaint". But as Mr Pettingill said, that was the position at 10.40 am, and Mr Pettingill's submission was that the relevant police officers should not have needed advice from Mr Mahoney to know that without an active complaint, the Plaintiff should have been released.

15. Again, it seems to me, there are factual issues which need to be resolved at trial in relation to the Plaintiff's continued detention after the complainant had withdrawn her complaint; I do not think it is simply a question of looking at the terms of section 461, and saying that the police were justified in continuing to detain the Plaintiff until such time as the DPP's office had reviewed the available evidence and determined whether a charge should be preferred. Mr Shepheard sought to suggest that the withdrawal of the complaint was just one part of the overall evidential picture considered by the DPP's office. As I have already indicated, that argument does not seem to be supported by the description of Mr Mahoney's involvement. Although DCI Mouchette did refer to having informed

Mr Mahoney "of the full circumstances of this incident", the advice given by Mr Mahoney seems to have been based on no more than the withdrawal of the complaint.

16. I am therefore of the opinion that there are issues of fact which need to be resolved at trial, and I do not think that it is realistic to look at the provisions of section 461 of the Criminal Code without reference to the underlying facts.

Summary

17. It does therefore follow that neither the writ nor the statement of claim should be struck out. I am not clear why the summons should have sought to set aside service of the writ; appearance has been entered, and it was not suggested that service was in any way irregular. I therefore dismiss the summons filed on behalf of the Commissioner.

Costs

18. As to costs, my view is that costs should follow the event, and I would therefore order that the Plaintiff should have his costs of this summons, to be taxed in default of agreement.

Dated the 28th of March 2008.

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Hon. Geoffrey R. Bell
Puisne Judge