Neutral Citation No. [2013] NIQB 138 | *Ref:* **GIL9078**

Judgment: approved by the Court for handing down | *Delivered:* **12/12/2013**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

BETWEEN:

JOHN WHITE

Plaintiff;

-and-

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Defendant.

_____

GILLEN J

Introduction

[1] The plaintiff's claim in this matter is for damages for personal injuries, loss and damage sustained by him by reason of the assault, battery, trespass to the person, and false imprisonment of the plaintiff by members of the PSNI at or about Castlemara Drive, Carrickfergus on 9 May 2009.

The plaintiff's evidence

[2] In the course of his evidence before me the plaintiff made the following points:

- He was a deliveryman for Chinese food.
- Before that he had served in the army for 18 years up until 2003, in the course of which he had received a commendation for bravery for his role in intercepting a bomb in 1993.
- On the evening of 9 May 2009 he had delivered Chinese food to an address at 127 Castlemara Drive. Because of traffic congestion he had parked his car on the opposite side at or about No. 28 Castlemara Drive.

- When he returned to his vehicle, a man who he knew to see in the area approached him from No. 28 and asked him for some change of a £20 note.
- The plaintiff exited from his vehicle, engaged in a brief chat about football and had given change to the man in question when police cars came on the scene behind him. One police officer emerged with what the plaintiff described as a ramrod and told him to get into No. 28 where the door was open with the imperative "Get in! Get in!"
- The plaintiff entered the house into the hallway and was told to go into the living room where there were a number of people there. He recognised a number of them from the locality.
- The plaintiff claimed that he tried to remonstrate with the police indicating that he was simply a delivery driver and that the engine of his vehicle was still running. A police officer said to him "You are unlucky" and told him that if he said anything more he would be "cuffed".
- He sat down in the room with the others. He then spoke to a woman police constable to inform her that his engine was still running and asked her to switch the engine off.
- After a period of time he was brought into the kitchen by four police officers, two of whom were in plain clothes. A young police officer said to him "You understand this is a full body search". He put blue gloves on. Again the plaintiff told him that he had been a delivery driver, but he was told to take off the top half of his clothes. Having done that he then was told to put them back on and now to take off the bottom half with which requests he complied.
- The plaintiff said that he was told to face the wall and to bend down. He then saw a light beam in front of him having been shone from behind him.
- The plaintiff said that he felt humiliated and degraded.
- Having put his clothes on the police officer said "That's you done. Go back to your mates".
- Thereafter the police took him to his vehicle. Two officers searched that vehicle. There was a hostile crowd around at this stage. He was then given two blue slips of paper and told to go on.
- The plaintiff asserted that he later on that same evening returned to the house went upstairs and spoke to the officer who had searched him. He claimed he informed this officer that he did not want to be associated with these people in the house and did not want his presence to be collated. The plaintiff contended that the police officer said to him "You're not even here. Go on".

[3] The following day he attended at the local police station in Dunmurry and explained his concerns about being associated with known terrorists to the police officer who was there. He said he later received a telephone call from a police officer from Dunmurry station who told him that "As far as we are concerned you weren't even there".

[4] In cross-examination of the plaintiff by Mr Robinson who appeared on behalf of the defendant, the following points emerged:

- The plaintiff did know the man who had approached him for change by the name of Gary Whiteside. He knew him to be "a hanger on with the UDA".
- He denied telling the police that he had been delivering the food to No. 28.
- He denied the assertion which was to be made by the police that he in fact had been in the hallway when the police arrived.
- He asserted that the police had arrived before he had completed handing the change over to the man in question.
- Dealing with the search in the kitchen, he accepted that it was still daylight and the lighting was good but still insisted that the police produced and used a torch.
- He denied that he was informed that the grounds for searching him were under Section 23 of the Misuse of Drugs Act because he had been found on premises where the police suspected drugs were.
- He resisted the suggestions that he had neither been required to bend down nor that a torch had been shone in the direction of his rear end.
- He denied the police assertion that his vehicle in fact had been outside No. 127.
- He denied that he then shouted at police officers about searching his vehicle.
- He accepted that in his letter of claim sent by his solicitor of 15 October 2010 the following paragraph appeared:

> "Later that evening when the officer, we believe the one who carried out the search, realised the position he telephoned Mr White at home to apologise to him."

The defendant's evidence

[5] I heard from four police officers namely Detective Constable McKee (whose role was confined to proving the unchallenged assertion that there was an intelligence basis for a warrant to search No. 28), Constable Comiskey, Constable O'Neill, Constable Fox and Constable Connolly. The following points emerged from their evidence:

[6] Constable Comiskey gave evidence and the following points emerged:

- He was the first member of the search team carrying the enforcer to force open the door if necessary which in the event proved unnecessary.
- The police had parked short of No. 28 and alighting from their vehicles ran towards the house.
- He said that he had seen neither Whiteside nor the plaintiff before entering the premises and when he did, the plaintiff was standing in the hallway. He claimed he ushered the plaintiff from the hallway into the living room along with the others.
- He recalled the plaintiff declaring that he was only there delivering food, although the police found no hot food there.

- He told the plaintiff that the police would have to make sure that he was not telling a story and that they had not seen any hot food in the house.
- In the kitchen, to where the plaintiff was brought, the lighting was good and the police proceeded to strip search him. The purpose was to ascertain if he had anything hidden in his clothing. There was no attempt to carry out an internal search of his body and indeed the witness only recalled having done this once in 12 years of service. He emphatically denied using a torch to examine the plaintiff.
- He recalled the plaintiff's car being parked on the opposite side of the road to No. 28 i.e. on the same side as No. 127.
- He recalled the plaintiff then being taken out to his vehicle in order for it to be searched.
- In cross-examination he said that if they had seen the plaintiff speaking to someone from the house such as Whiteside, the police would undoubtedly have questioned the plaintiff. In the event they did not see this.
- He was emphatic that the plaintiff was in the hallway when he first saw him because he could not get past him.
- He was under the impression that the plaintiff had been delivering food to that house although he could not remember him actually saying that.
- He emphatically denied that the plaintiff was asked to bend over during the search.

[7] Constable O'Neill gave evidence and the following points emerged:

- He moved towards the house on the right-hand side of Comiskey. His job was to be log keeper.
- The plaintiff was inside the door in the hallway.
- He made the point that even if the plaintiff had confirmed that he was a delivery driver, he still would have been searched. Why was he in No. 28 in circumstances where food was not being delivered to No. 28?
- This witness could not recall the plaintiff ever returning to the house after the search commenced and he made the point that he should not have been allowed into the house during the course of a search.
- He also made the case that if the plaintiff had been seen speaking to one of the occupants of the house who had then run off into the house that would have been enough for him to be searched, particularly if they had seen an exchange of money between them.
- They did not consider it necessary for the police to ascertain the bona fide of the plaintiff in terms of whether or not he was a deliveryman. More thought might have been given to his story if there had been food in the house.
- He recalled the plaintiff saying that he had been dropping off food to that house whilst in the kitchen.
- He could not see how the police benefited taking him off the street into the house as alleged by the plaintiff.

- Whilst there was a history of persons at times concealing drugs between their buttock cheeks, there was nothing to suggest that in this instance and accordingly he was not asked to bend over.

[8] Constable Fox, who was also a search team member, gave evidence and the following points emerged:

- He had accompanied Constables Comiskey and O'Neill into the house. He saw the plaintiff in the small hallway.
- He conducted the search of the plaintiff in the kitchen. He explained to him why they were there, how the search was being conducted and that he would be provided with a copy of a search record. He recalled the plaintiff protesting that he had been a delivery driver and was innocent.
- He did not mention that he had been to No. 127.
- It was a clothing search during which he was not told to bend over.
- He built up a rapport with him and accompanied him with other police officers to search his car.
- His car was parked on the opposite side from No. 28.
- The plaintiff did not return to the house and speak to him after they had released him. No one would have been allowed into the house during a search.
- He stoutly denied ever apologising to the plaintiff.
- In cross-examination he accepted that he did not make a note of what the plaintiff had said.
- He accepted that he put on gloves but this was not because of an intimate search.
- He did not carry out an independent check of whether the plaintiff was employed as a deliveryman etc.
- He did check the kitchen and living room to see if there was any evidence of food having been delivered.
- They were heavily outnumbered by the number of persons in the house. It was a stressful, dangerous time and it was unrealistic to expect them to carry out an independent check of the plaintiff's story in the time available.
- He knew Gary Whiteside having spoken to him on several occasions and he would have remembered if he had been on the street. If he had seen the plaintiff speaking to Gary Whiteside outside the house in the circumstances alleged by the plaintiff that alone would have been sufficient for the police to detain him on a suspicion of drug involvement. There was no motive to force him up the steps into the house.
- He found nothing unusual in the fact that the statement later made by Comiskey and himself several months later did not refer to the search of the plaintiff but rather of the search of the car.
- He did not think it odd that the wording of the statement made by himself and Comiskey was virtually identical insofar as the last three sentences were concerned. I pause to observe that I recalled Comiskey on this matter and he similarly was not surprised that the wording was similar because he said the

same routine may have been adopted in many cases where they made statements.

[9] Constable Colm Connolly gave evidence and the following points emerged:

- He had been the acting sergeant and was team leader. He did not recall seeing anyone outside the premises when they arrived. He first saw the plaintiff in the hallway of the house when he entered with the other police officers.
- He recalled the plaintiff stating that he was a deliveryman but he did not recall the plaintiff saying he had taken a delivery to the house opposite.

Misuse of Drugs Act 1971

[10] Under a warrant issued under Section 23(3) of the Misuse of Drugs Act 1971, police may search premises for drugs or documents but may also be authorised to search a person not under arrest who is found on the premises during the course of the search if the warrant specifically authorises the search of persons found on the premises. I am satisfied that was the case in this instance and the plaintiff was so informed.

The Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE)

[11] Searches involving exposure of intimate parts of the body under PACE must not be conducted as a routine extension of a less thorough search, simply because nothing is found in the course of the initial search. Searches involving exposure of intimate parts of the body may be carried out only at a nearby police station or other nearby location which is out of public view (but not a police vehicle).

Credibility

[12] This was a case essentially involving my assessment of the credibility of witnesses. In Thornton v NIHE (unreported GIL7711) I set out the criteria for assessing the credibility of a witness in the following terms at [13]:

> "In assessing credibility the court must pay attention to a number of factors which, inter alia, include the following;
>
> - The inherent probability or improbability of representations of fact ,
> - The presence of independent evidence tending to corroborate or undermine any given statement of fact,
> - The presence of contemporaneous records,

- The demeanour of witnesses e.g. does he equivocate in cross examination,
- The frailty of the population at large in accurately recollecting and describing events in the distant past,
- Does the witness take refuge in wild speculation or uncorroborated allegations of fabrication,
- Does the witness have a motive for misleading the court,
- Weigh up one witness against another."

Conclusion

[13] I have come to the conclusion that the plaintiff has not satisfied me on the balance of probabilities that his account of what happened is correct or accurate and accordingly I have decided to dismiss his case. I have come to this conclusion for the following reasons.

- First, it was common case that the search of the property was justified under the Misuse of Drugs Act 1971. I am also satisfied that police were entitled to search any person found on the premises.
- I find it inherently improbable that if the police had observed the plaintiff speaking to Whiteside and had observed him running into the house at No. 28, they would not have made a note of this and acted on it in relation to the plaintiff. The plaintiff's suggestion that there was an exchange of money between him and Whiteside makes it all the more likely that the police would have harboured suspicions of this. In my view that in itself would have been a good reason for searching the plaintiff. It may be that there was some such exchange with Whiteside and the plaintiff but I am satisfied that it did not happen on the street and that, if it did, it must have occurred prior to the plaintiff entering the house.
- Hence I considered it inherently improbable that the police would conspire to make up a story that he was in the hallway when they first saw him in order to justify a search of him. The truth of the matter is that if they had observed him speaking to Whiteside exchanging money that in itself would have been sufficient to search him. It was therefore quite unnecessary for them to manufacture such a case which if anything may have served to dilute the suspicions which they had of him once he protested his innocence. What possible motivation would they have for ignoring such an important piece of evidence?
- It is inherently improbable that the police would deny that the plaintiff informed them he had been to No. 127 to deliver food, since this would have made it all the more unusual for him to be either immediately outside or indeed, as I believe, in the hallway of No. 28. That in itself would have been

sufficient to fuel more suspicion and I can see no logic in the police denying such a circumstance.

- I consider it inherently unlikely that the police used a torch during the search. It was broad daylight, there were no blinds or curtains drawn in the kitchen and even the plaintiff accepted therefore that there was no lighting issue. Why then would the police use a torch?
- The letter of claim from the plaintiff's solicitor dated 15 October 2010 recorded as follows:

> "Your indication in your correspondence is that our client was present in the house. This is not so, he was outside the property and was asked to go into the premises by the PSNI."

- I find this description somewhat inconsistent with the plaintiff's case that he was forced to enter by Constable Comiskey, armed with an enforcer, shouting "Get in! Get in!".
- Further the suggestion in the letter of claim that the officer who carried out the search "realised the position and he telephoned Mr White at home to apologise to him" is not the case that the plaintiff made before me. When I drew his attention to this letter, he quickly retraced his steps and attempted to suggest that something in the nature of an apology had been made. I simply did not believe him when he gave this evidence. I consider that this was very likely an embellishment which he had given to his solicitor at that time.
- I consider it very unlikely that the police would have allowed him to come back into the house after his release and during their search. Such an entrance could well have impugned the integrity of a search by the police in the absence of anybody else and I would be very surprised if it had been allowed.

[14] I am satisfied that the police did provide a contemporaneous record of the plaintiff being in the hallway. It seems to me very unlikely that they would have decided to invent such a note at that time when they would have been unaware that any difficultly was going to arise out of the search of the plaintiff.

[15] I am satisfied that the plaintiff does have a motive for misleading the court on this matter and that he was being less than candid with me during the course of his evidence. As I have indicated above, I see very little reason for the police to be motivated to conspire against him when the facts as related by the plaintiff would have given them equal justification for searching him.

[16] I watched the plaintiff carefully during the course of his evidence and sadly I have formed the view that he was a man given to embellishment and exaggeration, issuing stout denials when it suited his case to do so. In short his evidence struck too many false notes.

[17] I pause to observe that in this matter I also found a part of the evidence of the police to be unsatisfactory. I simply do not accept that Constable Comiskey and Constable Fox could have produced statements which they both made on 15 April 2010 which were virtually identical in certain parts i.e. the last lines were virtually verbatim with each other and their joint failure to address the search of the plaintiff, without having discussed in detail what was to be said or having looked over each other's statements. To suggest that this was brought about by the regularity of giving statements or the contents of an e-mail to them was risible. Whether this assertion on their part was due to oversight with the passage of time or otherwise I do not know. However, despite the difficulty it caused me, I do not consider that this flaw in the defendant's evidence was sufficient to repair the array of deficits in the plaintiff's evidence to which I have adverted above.

[18] In all the circumstances therefore I reiterate that I am not satisfied that the plaintiff has been telling me the truth about this event and I therefore dismiss his case.