JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL NO. 38 of 1992

BEFORE: THE HON. MR. JUSTICE CAREY, P. (Ag.)
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

REGINA Vs. PAUL FOSTER

Appellant unrepresented

Patrick Cole for the Crown

December 14, 1992 and April 2, 1993

MORGAN, J.A.:

The appellant, a security guard, was tried on an indictment containing two counts in the Resident Magistrate's Court, Black River, on the 21st February and 1st April, 1992, by His Honour Mr. N. Irving. Count I charged him with assault occasioning actual bodily harm on Stephanie McCallum and count II with maliciously damaging her property to wit, one blouse. Both counts arose out of the same incident. He was convicted on count I and fined $500 or thirty days, and on count II there was apparently no verdict as the records do not disclose any.

This appeal arose from an incident at the Treasure Beach Hotel where both parties worked, Stephanie McCallum as receptionist and the appellant as a security guard.

There was a rule of the hotel which prohibited its workers from entering the hotel property after working hours. This rule was not previously strictly enforced. Management complained however, that on several occasions they would find that rooms which were not rented were used for illicit purposes. Consequently, at a staff meeting called on September 16, 1991, the

proprietor brought to the attention of staff that this rule was now being enforced. The complainant was present, took the minutes of that meeting, and was well informed as to the rule, though until confronted with her handwriting she had denied knowledge. The appellant who manned the gate, was personally informed by the proprietor of the re-enforcement of the rule.

We will now set out the Resident Magistrate's findings of fact with respect to what subsequently occurred:

> "3. Sometime on the evening of 15/7/91 the complainant entered the hotel compound. She was not on duty at that time and her coming unto the hotel at the time was in contravention of hotel policy and hotel rules. The prohibition against employees returning unto the premises was to safeguard against unauthorised use of rooms by employees. This prohibition was modified by the concession to employees to return to watch TV and discretion for allowing this was vested in the security guard.
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> 4. When the complainant was on the hotel premises and at the entrance to the hotel there was an incident between the guard and the complainant when the guard instructed the complainant to leave. When the complainant did not respond in accord ance with the guard's instruction she was held, pulled and struck with the baton by the security guard."

The appellant gave sworn evidence and admitted that on the refusal of the complainant to leave, he held her, pulled and hit her, that he held her hand in order to remove her from the compound (she said she held on to a post), that he hit her with the baton when she punched him on his lip and kicked at his testicles, and that he pushed her through the gate.

This story indicated that there was much resistance. The Magistrate, having found that she was a trespasser, that she had no permission to enter the premises, that she was requested to depart and refused, had one sole issue to determine namely: was the force used to remove her excessive in all the circumstances? He, however, in our view, failed to evaluate the evidence and apply the correct law.

It is an old principle of law that where there is a trespasser it is lawful for the defendant to oppose force with force and the greater the resistance, it is expected the greater the force would be used. The principle was outlined by Mr. Justice Lawrence in Weaver v. Bush (1798) 8 T.R. 79. This is what he said:

> "The defendant ought not in the first instance to begin with striking the plaintiff: but the law allows him in defence of his person or possession to lay his hand on the plaintiff/ trespasser and then he may say, if any further mischief ensued, it was in consequence of the trespasser's own act: so that the battery follows from the resistance."

This principle, we fear, was not appreciated by the Resident Magistrate who stated thus:

> "The security guard cannot justify his conduct because he suspect the trespasser may have done more. There must be reliance upon remedy available against trespass in the civil courts or reliance upon the provisions and rights reserved (if any) in the contractual relationship between the employer and the employee. It should be added by way of a qualitative modification that in the absence of any rule of law to the contrary, in light of today's exegencies and circumstances there is an implied requirement of the need for security guards to understand the nature of their functions and the parameters within which they operate and this is parallel with the implied requirement on the part of those of us (the public) who interact with or are affected by the functions of private security to exhibit civilised and reasonable conduct in response to the request of a security guard."

This statement has no relevance to the facts and to the issues to be decided and can be regarded as a misconception of the relevant law.

In this case, the complainant clearly had no right to enter the premises and, as the Resident Magistrate found, she was trespassing. She was requested to depart and from her own mouth she refused. When the appellant attempted to remove her she resisted. He used no more force in the circumstances than was reasonable to evict her. Although she denied that she was aware of the implementation of the hotel rule, she later was

forced to admit the note of its implementation in the minutes of the meeting in her handwriting.

Crown counsel correctly conceded that he was unable to support the conviction, and we entirely agree.

For these reasons, notwithstanding the absence of the appellant, in the interest of justice, we allowed the appeal, quashed the conviction and set aside the sentence.