

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

CV2012-02696

BETWEEN

**SHIVA            JAMES**  
Claimant

AND

**KAMALADEEN KHAN**  
Defendant

**BEFORE THE HONOURABLE MADAM JUSTICE JUDITH JONES**

**Appearances:**

**Mr. P. Maharaj for the Claimant.**

**Mr. L. Leu instructed by Mrs. T. Khan-Leu for the Defendant**

**REASONS**

This was a case of claims and counterclaims of assault. Essentially by an action commenced on 14<sup>th</sup> July 2012 the Claimant alleged that the Defendant assaulted and beat him on 1<sup>st</sup> March 2011 and as a result of this he suffered severe injury. The Defendant by his defence and counterclaim filed on the 21<sup>st</sup> December 2012 denies that he assaulted the Claimant; pleads that he was assaulted by the Claimant on the 1<sup>st</sup> of March 2011 and 8<sup>th</sup> June 2012 and counterclaims for damages as a result of both the assaults. The Claimant in response denies that he assaulted the Defendant on the 8<sup>th</sup> June and says that it was the Defendant who assaulted him.

The medical reports relied on by both parties were all tendered into evidence by consent. From the contents of the medical reports I was satisfied that the Claimant suffered serious injury from the events of the 1<sup>st</sup> of March, not so the Defendant. When examined his medical report of the 9<sup>th</sup> of March there are a few things shown. The first is that it is clear from the medical report that the Defendant did not immediately attend the South West Regional Health authority as he indicated. Secondly, according to the medical report it was not until the day after the incident that he went to the Couva District Facility.

I did not accept Mr. Leu's submissions with respect to the interpretation to be placed on the medical report. I am satisfied that the first two paragraphs deal basically with what was told to the doctor either by the Defendant or perhaps from information from the Couva District Facility. Unfortunately, we are not given the benefit of this information from the Couva District Facility.

I was satisfied that the findings of the doctor was as contained in paragraphs 3,4,5 of the medical report. Even if I accepted the Defendant's version of the assault therefore, there was no medical evidence linking a blow to his scrotum with kidney stones. On the evidence presented to me therefore I was satisfied that the injury disclosed on the medical report dated the 27<sup>th</sup> November 2012, had nothing to do with the assault. With respect to the medical report of the Defendant of the 8<sup>th</sup> of June it merely refers to certain abrasions that were seen on the Defendant. This is consistent with both versions of the later incident.

At the end of the day it's a question of whose evidence I believe. With respect to the incident of the 1<sup>st</sup> of March both sides brought witnesses. At the end of the day I accepted the evidence of

the Claimant and his witnesses. I was satisfied that given their evidence as to the circumstances of the assault and the positioning of the witnesses at the time of the attack and the nature of the attack it was reasonable to expect that only that witness Balroop could give a complete account of what occurred. In those circumstances the lacunas in the evidence, what little they are, suggested creditability rather than a lack of credibility.

At the end of the day the evidence led on behalf of the Claimant and his witnesses was consistent with the medical report. Their evidence was given in a straightforward manner. With respect to the inconsistencies while there were some they were minor and they were reasonable given the position of the witnesses and what they were doing at the time of the assault. None of them were shaken in cross-examination. As well the version of the incident given by them is inherently believable.

Not so the evidence of the Defendant. With respect to the Defendant's evidence I noted that his evidence in chief was almost word for word a repeat of his pleading. While it does not necessarily suggest a lack of credibility it certainly does not instil any confidence in it in that I am not satisfied that the witness statement was in his own words, completely. It was clear and I found that his evidence was designed to accommodate the findings contained in the medical report rather than the other way around.

Further the Defendant's version of the incident was inherently unbelievable. First was the position of the car. Given the width of the road it meant that the car would have had to have been parked in the middle of the road so that he would not have been able to pass. That is hardly

likely. Secondly, if his evidence is true there was ample opportunity for him to avoid or prevent the incident, he could have reversed, he could have turned up his window, he could have locked the car door. He does none of these things. Thirdly, how could the Claimant have been able to, using one hand, open the door and pull the Defendant out of the van while holding a big stone in the other hand. I am satisfied as well that given the Claimant's undisputed injuries and the Defendant's lack of injury his version of the struggle in the drain is unbelievable. And if his evidence is true how was he able to escape by merely pushing the Claimant's hand away, it just did not make sense.

There is as well a major contradiction to my mind with respect to the pelting of the stone and of course his evidence with respect to the visit to the hospital. In chief he gave the impression that he had done it all on one day. In cross-examination he eventually says that he went on the 2<sup>nd</sup> of March but in fact the evidence of the medical report says that he did not go until the 9<sup>th</sup> March. And finally his totally unbelievable reason as to why he was charged. At the end of the day the Defendant's evidence was just not credible.

Unfortunately I had to say the same for his witness, Shamatie Mahabir. I was satisfied from her manner in chief and under cross-examination that her evidence was rehearsed. It was noticeable that she initially forgot parts of the evidence with respect to the Claimant's driver calling out Shiva's name and was only reminded of it when prompted by attorney for the Defendant. It did not instil any confidence in her credibility. A major inconsistency with her evidence and that of the Defendant was to her presence at the time. According to the Defendant she was just passing by. According to her she was standing there for at least half an hour. I also noted that at no time

were the witnesses for the Claimant cross-examined as to the presence of Mahabir at the scene at the time. Finally, if she is to be believed she was present for the whole incident, yet she doesn't give evidence of seeing Shiva run over to the gate, pick up the stones and pelt one of them and this is despite her evidence of seeing him exit the car. I did not accept her evidence. I was satisfied that incident of the 1<sup>st</sup> of March 2011 occurred as a result of the Defendant assaulting the Claimant.

With respect to the incident in June neither party brought witnesses. It was therefore the Claimant's word against the Defendant's word. Essentially once again it was a matter of who was the more credible of the two. At the end of the day the burden of proof was on the Defendant to satisfy me that he was assaulted by the Claimant. Apart from the burden of proof one of the reasons for not accepting the Defendant's evidence, is that according to him he was hit multiple times over the head with a chair. It is not in dispute that the chair was damaged yet it is not supported by his medical evidence. According to the medical evidence he just got an abrasion on the forehead and soft tissue injury to his wrist and the abrasion to the web of his hand.

At the end of the day with respect to June incident I found the Claimant to be the more credible witness. The Defendant did not discharge the burden of proof that was on him to satisfy me that it was the Claimant who assaulted him. In those circumstances the counterclaim was dismissed.

With respect to damages I awarded the Claimant general damages for his pain and suffering and his loss of amenities but made no award with respect to loss of earning capacity. With respect to

his general damages I awarded the sum of \$150,000, this sum included an element of aggravated damages.

With respect to the special damages claimed it is not in dispute that the Claimant operated a motor vehicle repair business and indeed from the evidence with respect to that it is clear that the business was relatively busy. His evidence is that he makes \$3,500 a week and produces receipts for a four week period immediately prior to the incident. These receipts total \$11,800. I accepted the submissions of the Claimant that I must take into consideration the nature of the business and his evidence that it is not usual for him to be required to provide receipts for the work done. That said, even the receipts provided do not establish an income of \$3500 a month. I was satisfied that the sum of \$2500 for a week for 12 weeks is reasonable in the circumstances and I awarded him the sum of \$30,000 representing his loss of earnings.

In the circumstances there was judgment for the Claimant on the claim in the sum of \$150,000 which sum included aggravated damages and special damages in the sum of \$30,000. The counterclaim was dismissed.

Dated this 26<sup>th</sup> day of July 2013.

**Judith Jones**  
**Judge**