

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2011-04688

BETWEEN

RADHIKA CHARAN KHAN  
a/c RADICA CHARAN KHAN

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

**BEFORE THE HONOURABLE MADAME JUSTICE DEAN-ARMORER**

Mr. Rattiram, Attorney-at-law for the Claimant

Ms. Jones instructed by Brent James, Attorneys-at-law for the Defendant

**JUDGMENT**

***Introduction***

1. By these proceedings, the claimant seeks damages for malicious prosecution. The defendant has relied on the Defence that the prosecutor acted with reasonable and probable cause. In the course of this Judgement, the Court considered whether the ordinarily prudent and cautious prosecutor would have conducted further enquiries before laying a charge.

### ***Procedural History***

2. By her Claim Form and Statement of Case filed on the 1<sup>st</sup> December, 2011, the claimant alleged that one, Woman Police Corporal Ann Marie Mc Dowell maliciously and without reasonable and probable cause, charged the claimant for robbery, using personal violence contrary to ***Section 24 (1) (B) of the Larceny Act Chapter 11:12 as Amended by Act No. 17 of 1989.***
3. The charge emanated from a report made on the 12<sup>th</sup> May, 2003, by Lorna Byragee on behalf of her mother, Rajo Batchansingh.
4. A defence was filed on the 16<sup>th</sup> February, 2012. The defendant/Attorney General denied the allegations as claimed by the claimant and contended that WPC Mc Dowell had reasonable and probable cause for laying the charge against the claimant.
5. Hearing of the trial commenced on the 12<sup>th</sup> May, 2014. On that day, the Court heard the evidence of the claimant, Radhika Charan Khan who testified on her own behalf. The claimant was cross-examined by learned counsel, Ms. Jones.
6. Two (2) witness statements were filed on behalf of the Attorney General. The first was signed by WPC Mc Dowell. This witness statement was struck by reason of the witness' failure to attend court for the purpose of being cross-examined. Police Corporal Toolah Julien also signed a witness statement on behalf of the Attorney General. This witness appeared at the trial and was available to be cross-examined. Learn counsel, Mr. Ratiram opted however, to forego cross-examination.

***Facts***

7. In May, 2003, the claimant, Radhika Charan Khan, lived with her husband and children at 17C Chestor Street, Debe Trace, Debe and worked as a seamstress. She lived some three hundred feet (300 ft.) from Rajo Batchansingh, whom she referred to as “*Aunty*”. Prior to the events which gave rise to these proceedings, the claimant and Mrs. Batchansingh enjoyed a good neighbourly relationship.
8. On the 12<sup>th</sup> May, 2003 at about twelve o’clock, the claimant was at home cleaning fish when a police vehicle arrived at her home. The occupants of the vehicle were WPC Ann Marie Mc Dowell along with other male officers.
9. WPC Mc Dowell approached the claimant and informed her that she wished to have a conversation with her. Under cross-examination, the claimant told the Court that WPC Mc Dowell informed her that a report had been made against her. The substance of the report was that the claimant had stolen twenty-two thousand dollars (\$22,000.00) from Mrs. Batchansingh. The claimant responded by denying the accusation and told WPC Mc Dowell that she had received no more than two hundred dollars (\$200.00) from Mrs. Batchansingh, as payment for taking her to the doctor.
10. WPC Mc Dowell also told the claimant that Mrs. Batchansingh had reported that the claimant had pushed her down and had taken her money. To this, by the claimant’s evidence under cross-examination, the claimant suggested that the money had been stolen by Bati, Ms. Batchansingh’s daughter.
11. The claimant was asked to sit in the back of the police transport and was ordered to stay quiet. She was then taken to the home of Rajo Batchasingh. It was there that the claimant

was given the opportunity to confront her accuser as to the allegation that she had stolen twenty-two thousand dollars (\$22,000.00).

12. Upon arrival at the home of Mrs. Batchansingh, Mrs. Batchansingh was invited to repeat her accusation. She stated that the claimant pushed her down, took her money and caused her to hit her head. The claimant again protested her innocence saying, "*Aunty, I never do that, I would never hurt you...*"
13. The witness statement of the claimant was silent as to a response from Mrs. Batchansingh. Under cross-examination, however, the claimant told the Court that in answer to her protestation of innocence, Mrs. Batchansingh insisted that it was the claimant who had stolen the money, and, in turn the claimant repeated that she would never do a thing like that. This transpired in the presence of WPC Mc Dowell and Bati, the daughter of Mrs. Batchansingh.
14. Thereafter, the claimant was ordered back into the police transport and was taken to the San Fernando Police Station. At around 7.00 p.m. that night, the claimant was charged pursuant to ***Section 24 (1) (B) of the Larceny Act*** with the offence of robbery, using personal violence.
15. The following day, the 13<sup>th</sup> May, 2003, the claimant was taken to the San Fernando Magistrates' Court and was given bail at or around 3.00 p.m.
16. On the 28<sup>th</sup> June, 2006, the matter was brought before Her Worship Magistrate Sonia Aleong and the claimant was found guilty. The matter was appealed by the claimant and on the 5<sup>th</sup> December, 2007, the Court of Appeal quashed the claimant's conviction and ordered that there be no retrial.

17. The claimant claimed that she has been embarrassed as a result of being charged and complained of being the subject of “*name calling*” by members in her community as a consequence.<sup>1</sup>

### ***Submissions and Law***

18. Written submissions were filed on behalf of the defendant on the 3<sup>rd</sup> June, 2014, and by the claimant on the 6<sup>th</sup> October, 2014.
19. The principles in malicious prosecution are well established. These principles were identified by Wooding C.J. in *Wills v. Voisin*<sup>2</sup> in this way:

*“Accordingly, in an action for the vindication of the right to be protected against unwarranted prosecution, which is the action for...malicious prosecution, a plaintiff must show*

- (a) that the law was set in motion against him on a charge for a criminal offence;*
- (b) that he was acquitted of the charge or that otherwise it was determined in his favour;*
- (c) that the prosecutor set the law in motion without reasonable and probable cause; and*
- (d) that in so setting the law in motion the prosecutor was actuated by malice.”<sup>3</sup>*

20. Further, Mc Shine J.A. in the same case stated as follows:

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<sup>1</sup> See para 21 of the witness statement of Radhika Charan Khan filed on the 30<sup>th</sup> November, 2013

<sup>2</sup> [1963] 6 WIR 50 at 57

<sup>3</sup> Per Wooding CJ in *Wills v. Voisin* at page 57

*“... no action lies for the institution of legal proceedings, however malicious, unless they have been instituted without reasonable and probable cause.”*<sup>4</sup>

21. Accordingly, it is for the claimant to establish inter alia (1) that the defendant acted without reasonable and probable cause; (2) that the defendant acted maliciously. see *Tempest v. Snowden*<sup>5</sup>

22. In *Hicks v Faulkner*<sup>6</sup>, a case approved by the House of Lords in *Herniman v. Smith*<sup>7</sup>, Hawkins J. defined the term “reasonable and probable cause” as:

*“an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.”*

23. Hawkins J. further noted:

*“The question of reasonable and probable cause depends in all cases not upon the actual existence, but upon the reasonable bona fide belief in the existence of such a state of things as would amount to a justification of the course pursued in making the accusation complained of. No matter whether the belief arises out of the recollection and memory of the accuser, or out of information furnished to him by another. It is not essential in any case that facts should be established proper and fit and admissible as evidence to be submitted to the jury upon an issue as to the actual guilt of the accused. The distinction between*

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<sup>4</sup> Per Mc Shine JA in *Will v. Voisin* [1963] 6 WIR 50 at page 67

<sup>5</sup> Per Emershed MR (as he then was) at page 133

<sup>6</sup> (1881) 8 QBD 167 at 171

<sup>7</sup> [1938 AC 305 at 316

*facts necessary to establish actual guilt and those required to establish a reasonable bona fide belief in guilt should never be lost sight of in considering such cases as I am now discussing. Many facts admissible to prove the latter would be wholly inadmissible to prove the former.*”<sup>8</sup>

### **Malice**

24. The learned authors of *Halbury’s Laws of England* states, malice may be inferred from want of reasonable and probable cause but lack of reasonable and probable cause may not be inferred from malice<sup>9</sup>. Similar sentiments were expressed by Mendonça J. (as he then was) in the case of *Harold Barcoo v the Attorney General of Trinidad and Tobago*<sup>10</sup> where the learned Judge had this to say:

*“malice may be inferred from want of reasonable and probable cause in cases where there was no honest belief in the guilt of the accused.”*

25. In *Cecil Kennedy v. Donna Morris*<sup>11</sup>, the Court of Appeal, having relied on the decision of Justice Ibrahim in *Randolph Burroughs v. AG*<sup>12</sup>, stated

*“there are numerous authorities which indicate that where a lack of reasonable and probable caused is not proved, the question of malice does not arise.”*

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<sup>8</sup> Per Hawkins J. in *Hicks v. Faulkner* (1881) 8 QBD 167 at 173

<sup>9</sup> *Halbury’s Laws of England* Volume 97, (2010), 5<sup>th</sup> Edn. At para 639

<sup>10</sup> H.C.A. No. 1388 of 1989 at page 23

<sup>11</sup> *Cecil Kennedy v. Donna Morris* Civ. App. No. 87 of 2004

<sup>12</sup> HC 4702/1986;HC 2418/1987 delivered on the 5<sup>th</sup> of April, 1990 per Ibrahim J.

26. In *Randolph Burroughs v. AG*, it was held that since the Plaintiff had failed to discharge the onus of proving that the prosecution was undertaken without reasonable and probable cause, it had become unnecessary to consider the question of malice.
27. The claimant must also prove on a balance of probabilities that the defendant was actuated by malice when the proceedings were instituted. The authors of *Halbury's Law of England* put it in this way:

*“A claimant in a claim for damages for malicious prosecution or other abuse of legal proceedings has to prove malice in fact indicating that the defendant was actuated either by spite or ill-will against the claimant, or by indirect or improper motives”*<sup>13</sup>

28. In *Wills v. Voisin*<sup>14</sup>, Mc Shine J.A. expressed it in this way:

*“In brief, malice and reasonable and probable cause must unite in order to produce liability... malice, i.e, an improper motive the onus of proof of which also rests on the plaintiff – respondent...”*<sup>15</sup>

### ***Damages***

29. The claimant in these proceedings claimed damages for malicious prosecution together with aggravated and/or exemplary damages. In their written submissions, learned counsel for the claimant listed the following aggravated factors:

a. *The matter lasted about four and a half years*

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<sup>13</sup> See Halbury's Laws of England Volume 97, (2010), 5<sup>th</sup> Edn. at para 639

<sup>14</sup> [1963] 6 WIR 50

<sup>15</sup> Ibid per Mc Shine JA at pg 67



- b. *As per paragraph 20 of the claimant's statement, she felt ashamed having to go to Court ,... all the time*
  - c. *As per paragraph 21, the prosecution would have created in the minds of the claimant's fellow villagers, the perception that she was a thief, and worse yet, stole from, and used violence against, an elderly fellow villager.*
  - d. *There is no evidence that the claimant ever had brushes with the law*
  - e. *The claimant was charged around 7:00 p.m., and released on bail from the station around midnight, about five (5) hours in total*<sup>16</sup>
30. Counsel for the claimant relied on ***Kendell Yearwood v. The Attorney General of Trinidad and Tobago*** CV2012-01995, where the claimant was charged with robbery of cash and items totalling one thousand and one hundred dollars (\$1,100.00). The claimant was beaten and then charged. The claimant was kept in custody for twelve and a half (12½) hours. The Court held that the claimant was entitled to general damages including an uplift for aggravated damages in the sum of seventy-five thousand dollars (\$75,000.00)<sup>17</sup>.
31. In ***Chandararat Soogrim v. The Attorney General of Trinidad and Tobago*** CV 2007-3755, the claimant claimed against the defendant damages for wrongful arrest and false imprisonment. The Court accepted the claimant's evidence that he was taken from his home around 2:00 a.m. and was held for some seven (7) hours without being charged. The Court awarded general damages in the sum of thirty thousand dollars (\$30,000.00).
32. In ***Wayne Clement v. The Attorney General of Trinidad and Tobago***, the claimant sustained injury in the course of an unlawful arrest. The claimant sued for wrongful arrest

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<sup>16</sup> See Closing Submissions on the claimant's behalf filed on October 6<sup>th</sup>, 2014 at page 9

<sup>17</sup> *Kendell Yearwood v The Attorney General of Trinidad and Tobago* at page 8

and imprisonment. The claimant was also detained for seventeen (17) hours. The judge awarded general damages in the sum of fifty thousand dollars (\$50,000.00).<sup>18</sup>

33. In *Thadeus Clement v. The Attorney General Trinidad and Tobago* Civil Appeal No.95 of 2010, Jamadar J.A., a case cited by counsel for the defendant. The claimant was a taxi driver plying the San Fernando to Siparia route for over twenty (20) years. On the 23<sup>rd</sup> October, 2004, the claimant was changing the tyres on his motor vehicle in the vicinity of the Siparia Market, when he was approached by four (4) uniformed police officers who accused him of robbing someone. Despite protesting his innocence, the claimant was handcuffed and thrown into a police vehicle and was taken to the Siparia Police Station and then to the San Fernando Police Station. At the Siparia Police Station, the claimant described being handcuffed for three (3) hours without being informed of his right to retain a legal advisor. At the San Fernando Police Station, the claimant was forced to sign a document under threat of violence. The claimant was then charged with robbery contrary to *Section 24 (1) (a) of the Larceny Act*. Subsequent to this charge, the claimant was kept in a cell at the San Fernando Station until the 25<sup>th</sup> October, 2004. The claimant described the cell as being filthy and unsanitary and found the entire experience extremely embarrassing. The claimant was discharged two and one half (2½) years later following his release from detention on the 29<sup>th</sup> October, 2004. The claimant was awarded the sum of one hundred and sixty thousand dollars (\$160,000.00) in general damages.<sup>19</sup>
34. According to Jamadar J.A., apart from pecuniary loss, the relevant heads of damages for the tort of malicious prosecution are:

*a) injury to reputation; to character, standing and fame.*

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<sup>18</sup> See *Wayne Clement v. The Attorney General of Trinidad and Tobago* at page 7 para 12

<sup>19</sup> See Judgment of Jamadar J.A. in *Civil Appeal No. 95 of 2010* at page 20 of 23

*b) injury to feelings; for indignity, disgrace and humiliation caused and suffered.*

*c) deprivation of liberty; by reason of arrest, detention and/or imprisonment.*<sup>20</sup>

35. As it pertains to exemplary damages Jamadar J.A. cited with approval the case of ***Bernard Quashie v. The Attorney General of Trinidad and Tobago***<sup>21</sup>. At paragraph 31, Jamadar J.A. noted:

*“Exemplary damages, unlike aggravated damages which are compensatory in nature, are intended to be punitive, to punish or deter a tortfeasor. Such an award is appropriate where the police behave in an oppressive, arbitrary or unconstitutional manner, and where the Court having regard to the award for compensation (inclusive of aggravated damages) is of the view that it is not sufficient to mark the Court’s disapproval of the actions of the agents of the state (the police)”*<sup>22</sup>

### ***Reasoning and Decision***

36. In this action, the claimant sought an Order of the Court for damages for malicious prosecution. It was common ground that the claimant had been charged under ***Section 24 (1) (b) of the Larceny Act***<sup>23</sup> for having robbed Mrs. Batchansingh, the virtual complainant with personal violence.

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<sup>20</sup> Per Jamadar J.A. in Civil Appeal No. 95 of 2010 at para 12, page 6

<sup>21</sup> Civil Appeal No. 159 of 1992 at pages 9 and 10

<sup>22</sup> Per Jamadar J.A. in Civil Appeal No. 95 of 2010 at para 31, page 15

<sup>23</sup> Chapter 11:12 of the Larceny Act

37. It was also common ground that the claimant was convicted by Her Worship Magistrate Sonia Aleong on the 28<sup>th</sup> June, 2006. The conviction was however quashed by the Court of Appeal on the 5<sup>th</sup> December, 2007 and no re-trial was ordered.
38. The claimant now contends that WPC Mc Dowell in charging and prosecuting her, acted both maliciously and without reasonable and probable cause.
39. The law in respect of the tort of malicious prosecution is well settled. The claimant is required to prove on a balance of probabilities that the law was set in motion against her and that the proceedings were resolved in her favour. There is no dispute that the claimant has succeeded in establishing these two (2) elements.
40. The claimant is also required to prove the presence of malice, that is to say that the charge was prosecuted because of an indirect motive, a motive extraneous to the intention to bring the alleged perpetrator of a crime to justice.
41. In these proceedings, the claimant has provided particulars of malice at paragraph 9 of her statement of case. She has alleged there that the police complainant was biased in favour of the virtual complainant. However, an examination of the evidence fails to support this allegation. There is nothing in my view, in the evidence of the claimant to suggest that WPC Mc Dowell was engaged in anything beyond conducting an investigation as she was required, as a police officer to do. In fact, under cross-examination, the claimant admitted that WPC Mc Dowell proceeded to lay the charge her after having heard both sides.
42. Accordingly, it is my view that the claimant has failed to prove the presence of direct malice. If any malice is to be found in these proceedings, it must be inferred from the absence of reasonable and probable cause.

43. It is my view therefore, that the critical question in these proceedings is whether the claimant has succeeded in proving on a balance of probabilities that WPC Mc Dowell lacked reasonable and probable cause to prosecute her.
44. In so doing the claimant faces the monumental task of everyone who institutes an action for malicious prosecution of being required to prove a negative. The claimant is required to satisfy the two (2) tests which comprise the absence of reasonable and probable cause: the subjective test of absence of an honest belief on the part of the prosecutor and the objective test of whether, in the view of the ordinarily prudent and cautious man placed in the position of the accuser, the claimant was not guilty of the crime imputed. It is clear that the claimant who succeeds in proving one of these would have established the absence of reasonable and probable cause.
45. In considering this question, the Court had at its disposal only the evidence of the claimant. For unknown reasons, WPC Mc Dowell refused to appear in Court to be cross-examined in respect of the witness statement which she reluctantly and belatedly signed.
46. The evidence which emerged was that the prosecuting officer, having received a report of robbery with personal violence took the claimant to confront her accuser. The officer heard both sides, conducted some unknown investigations and decided to charge.
47. It is my view that an ordinarily prudent and cautious man placed in the position of WPC Mc Dowell, would have regarded the respective reactions of the accused and the accuser as inadequate for laying a charge. The ordinarily prudent and cautious person would have been concerned to verify the very serious allegation that an elderly lady had been pushed down and had suffered a blow to her head. Such ordinarily prudent and cautious person would have enquired whether the victim suffered injuries or sought and received medical

attention. This would have led to an enquiry of any attending physician. According to the uncontroverted evidence in this case, WPC Mc Dowell did not embark on these enquiries at all.

48. In my view, the ordinarily prudent and cautious man, seized of the claimant's response that the money had been taken by Bati, would have at least questioned Bati and taken a statement from her. This would not have been difficult since Bati was present when the claimant was taken to confront Mrs. Batchansingh, as her accuser.
49. WPC Mc Dowell failed to make these investigations. The officer failed to enquire as to the whereabouts of the claimant at the time of the alleged incident, or as to the location where the incident allegedly occurred.
50. It follows that it is my view that according to the evidence before this Court, WPC Mc Dowell has fallen for short of the test of the ordinarily prudent and cautious investigator as depicted in *Herniman v. Smith* and has failed the objective aspect of the test of the presence of reasonable and probable cause.
51. I turn to consider whether the claimant has proved the absence of an honest belief on the part of WPC Mc Dowell in a set of circumstances that led to the laying of the charge.
52. In this regard, it is impossible for the claimant to provide evidence as to the inner machinations of the mind of another. That could be provided only by WPC Mc Dowell. From her refusal to attend Court and her earlier reluctance to provide the witness statement, the Court will draw an inference as to the absence of such honest belief and also the presence of malice.

### *Quantum of Damages*

53. In these proceedings, the claimant seeks damages for malicious prosecution only.

Damages in actions for malicious prosecution are awarded under three (3) heads:

- Damage to fame,
- Endangerment of life, limb and liberty,
- And damages to property

54. In the instant case, having regard to earlier authorities, it is my view that an award of fifty thousand dollars (\$50,000.00) is appropriate.

### *Orders*

55. There will be Judgment for the claimant.

56. The defendant to pay to the claimant Damages as follows:

- (i) General Damages in the sum of fifty thousand dollars (\$50,000.00).
- (ii) Special Damages in the sum of thirty thousand dollars (\$30,000.00).

57. The defendant to pay to the claimant the Prescribed Costs in the sum of sixteen thousand dollars (\$16,000.00)

Dated this 10<sup>th</sup> day of July, 2015.

M. Dean-Armorer<sup>24</sup>  
Judge

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<sup>24</sup> Ms. Joezel Williams, Judicial Research Assistant