THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2010-03388

MARK BLAKE **CLAIMANT**

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO **DEFENDANT**

Before the Honourable Mr Justice R. Boodoosingh

Appearances:

Mr Kevin Ratiram for the Claimant

Mr Neal Byam instructed by Ms Kerri-Ann Oliverie for the Defendant

Dated: 30 January 2013

JUDGMENT

1. The claim against the defendant is for damages for malicious prosecution including aggravated and/or exemplary damages.

2. The claimant alone gave evidence. The State did not put in any evidence and did not cross-examine the claimant. Each party filed written submissions which included submissions on the evidential objections raised by the State to certain paragraphs of the claimant's witness statement. The State was given an extension of time to file its submissions and a further extension to file submissions on quantum.

3. From the evidence, the uncontradicted facts are that on 16 February 1999 the claimant and his brother Sheldon Blake were arrested in connection with a kidnapping and robbery which took place on the same day. They were taken to the Marabella Police Station, and 3 days later, on 19 February 1999, they were placed on separate identification parades.

4. Sheldon Blake's parade took place first followed a few minutes later by the claimant's. Apart from the claimant and his brother, the same eight men were used on each parade. The alleged victim and only witness, Mr Melvin Mohammed, positively identified the claimant's brother, Sheldon, in the first parade. He then also identified the claimant in the second parade as the men who allegedly kidnapped, robbed and stabbed him.

5. The claimant and his brother were later charged by Corporal Glen Alpheus with robbery, kidnapping and wounding with intent. The claimant was arrested on a warrant on 11

June 2001. On 18 June 2001, bail with a surety was fixed for him in the sum of $60,000. It appears that no one took his bail and he remained in custody. At the end of the preliminary enquiry on 28 June 2002, the claimant was committed to stand trial. On his committal, bail with a surety was fixed for him in the sum of $45,000. He was later indicted on 10 May 2006 on one count of kidnapping and one count of attempted murder.

6. When the matter came up for trial on 14 January 2008, the State offered no evidence against the claimant. The claimant says the prosecutor informed the court that because the same men were used on both identification parades, the claimant's parade was defective, and that the State had no other evidence against the claimant. The claimant was then discharged on both counts.

7. By his Claim Form and Statement of Case filed on 12 August 2010, the claimant contends he was charged solely on the basis of this defective identification parade. Among the particulars of malice and lack of reasonable and probable cause pleaded by the claimant are:

    i) The complainant knew/ought to have known that the men used on his brother's identification parade ought not to have been used on the claimant's parade;
    ii) Accordingly, the complainant knew/ought to have known that the claimant's identification parade was defective;

iii) The complainant proceeded to charge the claimant despite the fact that he knew/ought to have known the claimant's identification parade was defective;

8. By paragraph 11 of its Amended Defence, the State denies the charges were or could have been laid maliciously and/or without reasonable and probable cause based on the facts as alleged by the claimant. They also rely on the fact that the claimant was committed to stand trial and indicted on the same evidence that was the basis of the charge.

9. It is well settled that to establish a case of malicious prosecution, the claimant must prove that the law was set in motion against him by the defendant/prosecutor on a criminal charge; he was acquitted of the charge or it was otherwise determined in his favour; the defendant instituted the proceedings *without reasonable and probable cause*; and that, in so doing, the defendant was *actuated by malice*. The onus of proving each of these elements is on the claimant. See **Wills v Voisin (1963) 6 WIR 50; Clerk & Lindsell on Torts, 20th Edition, para 16-09.**

Reasonable and Probable Cause and Malice

10. As in most cases, the issue here is whether the defendant had reasonable and probable cause to charge the claimant and whether he did so maliciously. The long accepted

definition of reasonable and probable cause is that given by Hawkins J. in **Hicks v Faulkner (1878) 8 QBD 167** at page 171:

"…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."

11. The test contains both an objective and subjective element. It is not enough that a reasonable and cautious man would in all the circumstances have believed in the guilt of the accused; the prosecutor must himself have an honest belief in his guilt. Further, it is for the claimant to prove the *absence* of reasonable and probable cause and not for the defendant to prove its presence. To succeed, the claimant must lead some evidence that tends to show the absence of reasonable and probable cause operating on the mind of the defendant.

12. Malice is proved by evidence that the defendant was actuated either by spite or ill-will against the claimant, or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some indirect or improper motive to the defendant – see **Halsbury's Laws of England Volume 97 (2010) 5th edn. para 639**. It is well established that malice can also be inferred from an absence of reasonable and

probable cause. In this regard, lack of reasonable cause is generally regarded as absence of a proper motive, and can itself be evidence of malice– see **Brown v Hawkes** [1891] 2 QB 718; **Ricardo Watson v Attorney General, CV 2006-01668**, Stollmeyer J. at page 10.

13. The crux of the claimant's case is that he was maliciously prosecuted **solely** on the basis of an identification parade which the complainant knew/ ought to have known was flawed/defective. No issue of actual spite or ill-will is alleged. The question therefore is whether this can be sufficient to constitute lack of reasonable and probable cause from which malice can be inferred.

Claimant's Submissions

14. Counsel for the claimant submits that once there are separate identification parades, different persons should be used on each parade. This is to avoid a suspect 'standing out' and to ensure fairness. He referred the court to the Judges' Rules on Identification Parades used locally as well the English *Police and Criminal Evidence Act 1984* Code D (Code of Practice for Identification of Persons by Police Officers). On the conduct of the identification parade, Rule 9 of the UK Code expressly states that **"…where there are separate parades they shall be made up of different people."**

15. While no identical rule exists locally, Mr Ratiram submitted that the procedure adopted would have led to the claimant unfairly standing out on the second parade. Being the only "new" face, the witness's attention would have obviously been drawn to the

claimant, thereby unfairly increasing the likelihood of the witness pointing him out. This he says did in fact happen. Moreover, six of the men from the first parade remained unchanged in position for the claimant's parade. Mr Ratiram further submits that the State prosecutor's indication at trial that because the same men were used on both parades the claimant's parade was flawed, is *prima facie* proof that the claimant's identification was in fact flawed.

16. On the issue of malice, Mr Ratiram says that once a complainant lays a charge and knows, or ought to know, that he has no evidence to substantiate it, malice is presumed or inferred. He says a complainant who simply fails to make reasonable investigations or enquiries into a report before charging – that is mere negligence on his part – can give rise to an inference of malice. He therefore submitted that here:

    i) The claimant's parade was flawed;

    ii) The complainant was deemed to have known this when he charged the claimant;

    iii) The complainant had no other evidence incriminating the claimant;

    iv) The complainant therefore charged the claimant without reasonable and probable cause;

    v) The fact that the claimant did this, points to an absence of proper motive which is evidence of malice.

Defendant's Submissions

17. The State, on the other hand, submits that the claimant has failed to discharge his evidential burden by not adducing sufficient evidence to establish absence of reasonable and probable cause or malice.

18. Counsel's main contention is that the claimant ought to have adduced into evidence the depositions from the preliminary enquiry which led to his committal and indictment. He submitted that the court would be right to dismiss the case on this ground alone. Counsel cited the dicta of Wooding CJ in **Wills v Voisin** in which the learned Chief Justice cited the English decision of *Lea v Charrington 5 TLR 218* as authority for the proposition that failure to put the depositions in evidence was a ground for non-suiting a claimant in a malicious prosecution claim.

19. The **Wills** case was one where the trial took place in the Magistrates' Court. In the present case, the trial was to have taken place in the High Court. The decision not to prosecute was taken on the basis of the depositions. The failure to put in the depositions here, by the claimant, was of no moment. This is especially so in light of the fact that the State Counsel was the one who stopped the case on the basis that there was no other evidence other than that of the flawed identification parade. The State, from the claimant's evidence, had thus conceded there was no evidence. It was open to

the defendant, if it wished, to file a witness statement seeking to contradict this assertion if they knew it to be untrue.

20. The defendant says that the claimant is instead attempting to adduce secondary hearsay evidence through his witness statement, mainly by paragraphs 10 and 12. This includes the evidence of the identification parade forms and the State prosecutor's statements on her reasons for offering no evidence at the trial. Even if the State prosecutor's statements were admissible, Counsel for the State says this proves nothing. It only means there was no other evidence against the claimant *on that day*, not that there was no other evidence when the charge was laid.

21. I found this submission to be surprising. The State is one indivisible whole. The State ought to have been in possession of all of the records on this matter. If there was other evidence against the claimant on which the charge was brought, the State could have advanced it. They ought to have the police docket. If there was more in the depositions, the State could have put in the depositions, or asked the court to look at it, it being a document filed in court. If the State Counsel at the trial had not said what the claimant says she said, they could have brought a witness statement from her to contradict this, or seek to put in a record of the proceedings. Many of these things could have been accomplished easily by a phone call to the Office of the Director of Public Prosecutions, or from perusal of the police records or the court file. Instead, the defendant did not cross-examine the claimant or advance any evidence at all, but

sought to make submissions on what may have been. In the CPR age of more open disclosure of each other's cases, and where attorneys on both sides have obligations to the court to assist it with the available evidence and the law, more is expected.

Absence of Reasonable Cause

22. The defendant also says the claimant has put no material evidence from which the court can find absence of reasonable and probable cause. The defendant says it is not for them to produce any such evidence. Further, counsel says the claimant has not produced any authority to show that a flawed identification can ever amount to absence of reasonable and probable cause.

23. On this issue, it is to be noted that while the burden of proof is on the claimant, the existence of reasonable and probable cause is a question of fact that must be judged in light of the facts known to the defendant at the time of initiating the prosecution. The want of probable cause has been said to be a negative, and the plaintiff can only be called upon to give some or slight evidence of such want: ***Taylor v. Willans*** (1831) **2 B. & Ad. 845, 857** Lord Tenterden C.J. Usually, the question whether the defendant honestly believed that the case was a proper one to prosecute will depend on resolving a conflict of evidence between the claimant and the defendant: ***Clerk & Lindsell on Torts*** **(19th edn, 2005), para 16–20**.

24. But in the case of ***Gibbs v Rea*** **[1998] 3 WLR 7**, the Privy Council by a majority held that where defendants elected to give no evidence and to contend that the plaintiff's case was not proved, **their silence in circumstances in which they would be expected to answer might convert evidence tending to establish the plaintiff's claim into proof**. **Gibbs** involved an action for the malicious procurement of a search warrant but the dicta applies equally to the tort of malicious prosecution. Their Lordships found that the plaintiff's case that there was no evidence of reasonable and probable cause to apply for a search warrant called for an answer and the defendants' silence supported the inference that he did not have such cause. At pages 800-801 of the judgment their Lordships stated:

> *"In the absence of any suggestion of possession by the police of information from any other source, the evidence of the absence of any grounds for suspicion having been provided by the plaintiff himself must be accorded weight. …*
>
> *Having regard to the consideration that when the plaintiff has to prove a negative in relation to matters which were within the knowledge of the defendant, slight evidence will suffice to require an answer from the defendant, Mr. Rea's case called for an answer…. The silence of the defence was maintained when some answer was called for. The absence of any answer supports the inference that there was no satisfactory answer and the detective inspector had no sufficient grounds, even though all that were required were grounds reasonably raising suspicion…*
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> *The further inference of improper purpose similarly called for answer, yet none was given. The further finding of malice therefore also was open to the Court of Appeal."*

25. Here, the claimant specifically pleaded that the identification parade was flawed, that the defendant ought to have known this, and that there was no other evidence against him. This in my view called for an answer by the defendant. The defendant could have advanced, for example, that the complainant had no knowledge of how the identification parade was conducted but he had reason to believe it was conducted properly and fairly, that he had other information or evidence, or that there were other circumstances which went to rebut these assertions. In the absence of evidence, the court is left to conclude that it would be reasonable for the complainant to have known about the flawed identification parade from early on. Again, the complainant would be deemed to know what was in his file. The identification parade forms would have alerted him to the fact that the same persons were used on both parades. In the absence of a denial, it can be inferred that he knew this was a flawed parade, that he had no other evidence, and that he nonetheless brought charges against the claimant.

26. The defendant further says that even if the court was to assume the identification was flawed, there would have still been a case fit to be tried. This is because of the circumstances where there was no doubt the crime was committed; it appears there were grounds for suspecting the claimant committed it (he was arrested 3 days before the identification parade); and that he was identified by the victim. In these circumstances, My Byam submits that the court would be right to find there was no absence of reasonable and probable cause. On this submission, I again reiterate that the court had no evidence from the defendant. The mere arrest 3 days before the

identification parade was held says nothing; the court cannot know if a crime was in fact committed; and the identification by the victim was in itself of no value, having occurred in the circumstances set out above. There can be no basis, other than speculation, on which the court could conclude that there was a case fit to be tried.

27. Further, the State submits, even if absence of reasonable and probable cause was established on the facts, the claimant has not proved malice. They point again to the fact that the victim was the one who identified the claimant; that all of the evidence was adduced before the magistrate and would have gone before the DPP who then indicted the claimant; and that the claimant has not suggested any improper/ sinister motive for the conduct of Corporal Alpheus. Counsel submits that if Corporal Alpheus' actions did not amount to reasonable and probable cause, the most likely inference is that he made a mistake of law which will not be held to be malicious. I do not agree with this submission. The fact of the claimant's indictment cannot aid the defendant here, as, on the uncontradicted evidence, the State Counsel at trial conceded there was no other evidence. If a charge is brought without any admissible or proper evidence, it leads to an inference of malice which calls for a response.

28. No cases with similar facts as the present case were cited to the court by either side. However, in the case of **Terrence Calix v Attorney General HCA S-1332/ 2001**, the issue of the fairness and conduct of identification parades did arise. The issue was whether the persons used on the identification parade sufficiently 'approximated' the

appearance of the plaintiff. The court found the members of the parade were not ideal but sufficiently proximate in appearance. The parade had resulted in a positive identification by not one, but two witnesses. Further, the State called evidence of the officer who conducted the parade and other evidence in the complainant's possession which had led to the laying of the charge. On the evidence as a whole, the court concluded that the decision to prosecute was based on a number of factors which did not deprive the prosecution of reasonable and probable cause.

29. However the same is not the case here. Unlike in **Calix**, this court has nothing before it but for the claimant's assertions which, in my view, in the absence of any evidence supporting other explanations, must be accorded weight. At paragraph 16 of **Calix** Aboud J. stated in relation to identification parades that *"the test to establish criminal liability is different from the test to establish malicious prosecution. The former is concerned with proof of unfairness in its conduct and the latter with* ***whether it was conducted without an honest belief in its fairness as a means of identification****."* The plank upon which the claimant rested his case is that the identification parade was conducted unfairly, the complainant knew/ought to have known this, and yet he was charged on the basis of the flawed parade with no other evidence against him. The motives of parties can only be ascertained by inference drawn from facts. In the absence of any answer from the defendant in circumstances which certainly called for one, this court is entitled to accept the claimant's evidence, even if slight, of want of reasonable and probable cause.

30. The manner in which the identification parade was conducted in this case requires some further comment. As noted above, the crux of the claimant's case was that his identification parade was unfair/ flawed since the same persons used in the first parade were also used on his. I am of the view that the practice of using the same persons on separate identification parades, where the same witness is involved in both, is unfair. In fact, while our Judges' Rules do not contain the express prohibition as in England, Rule 13(b) of the Judges Rules states: *"At the parade the identification officer shall ensure that a witness cannot – see any member of the parade before actually attending the parade."* The rationale of this provision is surely that it would be disadvantageous for a witness to see or interact with any member of the parade before it takes place. To my mind the rationale extends equally to a witness seeing the same persons used on two separate parades, as there is the increased likelihood of the witness' attention being drawn to the only new person on the second parade. This ultimately will render that witness' identification evidence to be of little or no value. It also cannot be fair to the accused on the second parade to whom attention will be drawn.

31. On the evidence before me therefore, I am led on a balance of probabilities to the view that the flawed identification parade, together with the absence of any other known evidence against the claimant, was sufficient in this case to constitute a lack of reasonable and probable cause and from which, also, an improper motive can be inferred.

Damages

32. As a result of the charges laid against him, the claimant was arrested and appeared before the court on 11 June 2001. He remained in custody up to 23 December 2004 – approximately 3 and a half years.

33. Several cases were cited by the claimant on quantum. In all of the cases the period of detention was much shorter than in this case. In **Anthony Sorzano and Steve Mitchell v The Attorney General** Civ App. No. 101 of 2002, each appellant was incarcerated for 385 days. They were each awarded $180,000. In **Stanisclaus v Attorney General** HCA No 1785 of 2000 the applicant was wrongly imprisoned for 690 days and was awarded $225,000. In the cases cited, awards have ranged from $100,000 to $ 280,000 plus exemplary damages in some instances.

34. Mr. Ratiram submitted that the long period of detention in this case puts us in 'unchartered territory' and warrants a substantial award of damages (including aggravated damages) in the range of $1.3 to 1.5 million. He submits the fact that the claimant was charged with three serious offences which remained pending for about 7 years when the decision to discontinue could have been taken at a much earlier stage of the proceedings are aggravating factors in this case. He also submitted that while actual malice was not alleged, exemplary damages should be awarded in the sum of $25,000.00. The State was invited to reply to these submissions and given further time

to reply to the claimant's submissions on quantum before judgment was delivered but none was received.

35. I have considered the length of detention but I am not persuaded on the facts and circumstances before me to award such a high sum as contended for. In **Takitota v The Attorney General of Bahamas**, PC Appeal No 71 of 2007, it was noted that "it is usual and proper to reduce the level of damages by tapering them when dealing with an extended period of unlawful imprisonment": per Lord Carswell at paragraph 9.

36. It is also to be noted the claimant gave no evidence of the conditions in which he was kept while incarcerated or particulars of damage suffered. This is a critical factor in the court's assessment of the level of pain and suffering endured. In **Sorzano** and other cases, detailed descriptions of the conditions such as overcrowded cells, poor food, hygiene and sanitation were given. The court is mindful, however, that the claimant would have surely endured some level of suffering having been incarcerated for such a long period of time. In addition, malicious prosecution by its nature entitles a claimant to be compensated for injury to reputation and feelings caused by the charge being brought against him.

37. I have also noted (from the High Court Criminal case file) that bail was fixed for the claimant 6 days after he was arrested. His bail was not taken, but he had the facility of bail being fixed. The argument advanced is that but for the charge he would not have

been in custody so that this entire period has to be taken into account. I am of the view that the appropriate approach is to take into account that he remained in custody for this period but it is also relevant that bail was fixed. This fact distinguishes a case from one where because of the nature of the case bail cannot be fixed.

38. Given the cases cited, this case calls for a higher award. However, it must be tapered to some extent. The approach is not a mathematical calculation based on the number of days concerned. The award must reflect the lengthy period of incarceration based on a finding of malicious prosecution in circumstances where no evidence was advanced by the State for the court to consider why the officer laid the charge. In my view an appropriate award for general damages is the sum of $450,000.00. I also accept the factors submitted by counsel for the claimant as adding an element of aggravation in this case. This sum therefore includes an element of aggravation. In light of the circumstances, particularly the fact that actual malice was not alleged, I make no award of exemplary damages.

39. Interest is at the rate of 6% from date of filing of the claim to date of judgment.

40. No evidence was led by the defendant at trial. No cross examination was done of the claimant. The actual trial took less than half hour. However, detailed preparation was required for trial and written submissions had to be filed. In consequence, costs are awarded for three-quarters of the prescribed scale based on an award of damages of

$450,000. I am grateful to my Judicial Research Assistant, Mr Ramcharitar, for his assistance in this matter.

Ronnie Boodoosingh

Judge