

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No.: CV2011-04900

BETWEEN

DENZIL FORDE

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr. Justice Vasheist Kokaram

Date of Delivery: 28th February 2013

Appearances:

Mr. Edwin Roopnarine instructed by Mr. Taurean Dasayne for the Claimant

Ms. Salisha Khan instructed by Ms. Kerri-ann Oliverie for the Defendant

ORAL JUDGMENT

1. The Claimant, Denzil Forde was attacked in his garden at Carnbee Tobago on May 25, 2007 by one Mr. Leechoy Lezama. A fight between the two ensued following which both Mr. Lezama and Mr. Forde were injured. The Claimant left Mr. Lezama in the garden and reported the incident at the Old Grange Police Station, Tobago. Police Constable Andy Melville #15744 (PC Melville) investigated the incident and attended the scene

with the Claimant. The Claimant was then taken to hospital and on his discharge he was eventually charged with the offence of wounding with intent to do grievous bodily harm. He was kept in a cell at the station over the weekend and taken before the Magistrate at the Scarborough Magistrate Court, Tobago on Monday 28th May 2007.

2. The proceedings before the Magistrate eventually ended with him being committed to stand trial on 26th February 2008. The outcome of those proceedings was that the Claimant was eventually found not guilty at the Criminal Assizes on 17th December 2010.
3. The Claimant has instituted this claim for damages for false imprisonment and/or malicious prosecution and/or negligent investigation arising out of charges laid against him for wounding with intent by the arresting officer PC Melville. The claim for damages for negligent investigation was abandoned at the trial leaving only the claims for false imprisonment and malicious prosecution.
4. The burden is on Claimant in a claim for malicious prosecution to prove that there was no reasonable and probable cause for the commencement of the prosecution and that the prosecution was set in motion maliciously. The Defendant on the other hand has the burden of justifying the arrest in the claim for false imprisonment.
5. The key element in both of these claims is the presence or absence of a reasonable and probable cause for the arrest and prosecution. In some cases the mere absence of reasonable and probable cause can amount to acting maliciously for the purposes of the tort of malicious prosecution.

6. The facts which the Claimant has relied on for the lack of reasonable and probable cause and for malice are set out in the Statement of Case of the Claimant. That the Defendant: failed to carry out any proper or objective investigation or negligently; failed or refused or omitted to take any written statements when the Claimant went to the police station; unlawfully or negligently imprisoned the Claimant despite the fact that the Claimant had given an oral report and was prepared to give a written statement in a full account of the incident; failed to inquire of the Claimant if there were any witnesses who could support his report; arrested and charged and prosecuted the Claimant when there existed no reasonable grounds for so doing and acting on the word of a known criminal Leechoy Lezama.

7. In its Defence, in particular paragraph 6, the Defendant contended that “upon the arrival at the station Police Constable Melville was met by Sergeant Daly who pointed out the Claimant to him. Sergeant Daly informed him that the Claimant reported that he and Mr. Lezama had a dispute in the Claimant’s garden and in order to defend himself against Mr. Lezama he began swinging his cutlass and Mr. Lezama was chopped in the process.” The cutlass was handed over to PC Melville who then marked it again in the Claimant’s presence, it already having been marked by the Sergeant.

8. PC Melville identified himself to the Claimant showed him his ID card and proceeded to ask if he had anything to say. The Claimant was asked if he would like to give a statement and the Claimant’s response was no but he would like to make a report as to what transpired and the report was recorded in the station diary.

9. I agree with the Claimant’s Counsel that the absence of any documentary evidence used by the Defendant in this case, is wholly unsatisfactory and for the very least the station

diary extracts should have been produced to this Court as evidence of the matters referred to in paragraph 7 of the Defence¹.

10. More importantly in paragraph 10 of the Defence, the Defendant sets out the reasons for laying the charge against Mr. Forde. They are: the instruction to charge the Claimant was based on the evidence the Defendant had adduced based on the investigations which were the degree and extent of injuries Mr. Lezama received, the Claimant's admission that he chopped Mr. Lezama and a statement from Mr. Lezama saying that the Claimant was the person who chopped him.

11. Both parties identified the joint issues for the determination by this Court as:

- (i) whether the police officer had any reasonable and probable cause to arrest the Claimant on the 25th May 2007,
- (ii) whether the Claimant has proven that the officer acted maliciously in initiating proceedings;
- (iii) whether the officer failed to carry out a proper investigation

False Imprisonment

12. On the issue of false imprisonment the touchstone of liability as it is with malicious prosecution is the lack of reasonable and probable cause for arrest. Whether there are any facts objectively established that can lead to a reasonable belief held by the arresting officer to arrest the Claimant? The essential ingredients of the tort of malicious prosecution are set out in Clerk & Lindsell on Torts (20th Ed.) at page 1070, para. 16:09:

¹ "Police Constable Melville identified himself to the Claimant and showed him his Police Identification card. He then proceeded to caution the Claimant and asked him if he had anything to say. Police Constable Melville also asked the Claimant if he heard what Sergeant Daly had to say. The Claimant was also asked if he would like to give a statement and the Claimant response was no but he will like to make a report about what transpired. The Claimant's report was recorded in the Station Diary. The difference in making a report versus making a statement is the manner in which it was documented. When someone indicates that they wish to make a report, it is recorded in the station diary and when someone indicates that they wish to make a statement it is recorded on a sheet of paper and is signed by the person making the statement.

“In an action for malicious prosecution the claimant must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge; secondly, that the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause; fourthly, that it was malicious. The onus of proving every one of these is on the claimant. Evidence of malice of whatever degree cannot be invoked to dispense with or diminish the need to establish separately each of the first three elements of the tort.”

The absence of reasonable and probable cause is a question to be determined by the judge. The burden of proving it lies on the Claimant. In Halsbury’s Laws of England 4th Ed. Vol. 45(2) reasonable and probable cause is stated as follows:

“Reasonable and probable cause for a prosecution has been said to be an honest belief in the guilt of the accused based on 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 an accuser, to the conclusion that the person charged was probably guilty of the crime imputed.”

Reasonable and Probable cause was defined in the case of **Hicks v Faulkner** (1878) 8 QBD as:

“an honest belief in the guilt of the accused based on 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.”

13. There is a subjective and objective element in determining what is reasonable and probable cause which was usefully explored by Justice of Appeal Kangaaloo in the judgment of **Kowlessar v The Attorney General of Trinidad and Tobago** Ca Civ. 167 of 2005. That case was useful in so far as it was a very similar case where there was an altercation at the appellant’s home involving the appellant and the incident was reported to the police and the two persons were arrested by the officers. It would appear from the judgment that the reason the arrest was made was that Constable Luke relied on his observation that the appellant had a blue black mark under his eye and was limping. After

the inquires and/or those statements were taken by the arresting officer, the charge of assault and battery was laid. Justice of Appeal Kangaloo in dealing with that matter looked at the powers of arrest of a police officer without a warrant, as was referred to in paragraph 6 of that judgment where he refers to the Criminal Law Act Chap 10:04 3(2), (3), (5) which provides that a police officer can arrest without a warrant any person whom they have reasonable cause to suspect is in the act of committing an arresting offence.

14. At paragraph 10 the Court of Appeal held that the officer did not have reasonable and probable cause to arrest those appellants:

*“...the hurdle which proves insurmountable for the Respondent in this case is the requirement that police officers must have reasonable cause to suspect that an arrest-able offence has been committed. This is an objective test: **Shannon Smith v Attorney General** H.C.A.S-1022 of 1996. However as **R. v. Latimer** [1997] 1 SCR 217 decided in the Supreme Court of Canada, there is also a subjective element to the formula in that the arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Therefore a police officer must have sufficient evidence to be satisfied objectively that he can arrest the citizen without a warrant. The concept of reasonable suspicion was examined in the case of **Calliste (Devin) v R** [1994] WIR 130 where the court held that reasonable suspicion can be contrasted with mere suspicion, the latter amounting only to a hunch or instinct which cannot be explained or justified to an objective observer whilst the former is founded on fact. It is to be noted that in this area of law there is tension between the fundamental rights of citizens and the duty of police officers to preserve the peace and act in the public good. However as noted in the Christie case (*Christie v Leachinsky* [1947] A.C. 573), the liberty of the subject and the convenience of the police or any other executive authority are not to be weighed in the scales against each other” per Lord Simonds at page 595) Thus the mandate of police officers to bring criminals to justice does not detract*

from the fact that a citizen is not to be deprived of his liberty except by due course and process of law”.

15. Justice of Appeal Kangaloo also went on to say that it can hardly be said that a police officer can have sufficient evidence upon which a reasonable suspicion can be said to arise simply based on the say so of a complainant. Such a subjective stance may lead to conclusions which can potentially jeopardize the fundamental rights of citizens and so Justice of Appeal Kangaloo is right to highlight that there is a duty of officers to ensure that their decision to arrest is based on objective and reasonable grounds. The problem in that case was that Police Constable Luke had proceeded to arrest the appellants simply on his observation of a blue black mark under the eye. The officer did not obtain medical reports of any further injuries from the complainant. Additionally, further inquiries could have been made with a view to obtaining statements from the witnesses. None of these inquiries was embarked upon and thus there was no other material and/or statements available at the time of the Claimant’s arrest.

16. The Privy Council recently in **Ramsingh v. The Attorney General of Trinidad and Tobago** [2012] UKPC 16 at para 8, set out relevant principles to determine the tort of false imprisonment which are

- (i) The detention of a person is prima facie tortious and an infringement of section 4(a) of the Constitution of Trinidad and Tobago.
- (ii) It is for the arrester to justify the arrest; that is the Defendant in this case.
- (iii) A police officer may arrest a person if with reasonable cause he suspects that the person concerned has committed an arrest-able offence;
- (iv) thus the officer must subjectively suspect that the person has committed such an offence; and
- (v) The officer’s belief must have been on reasonable grounds or as some of the cases put it, there must have been reasonable and probable cause to make the arrest
- (vi) Any continued detention after arrest must also be justified by the detainer”.

17. If I may say so these principles set out by the Privy Council simply reaffirms the judgment of Justice of Appeal Kangaloo in **Kowlessar**. The key ingredient to be determined in this case is whether the suspicion subjectively held by the officer that the Claimant committed an offence is based on reasonable grounds. This requirement is not far removed from the ingredient of proving lack of reasonable and probable grounds in the tort of malicious prosecution and to that extent I refer to the judgment of Chief Justice Sharma in **Kennedy v. Donald Morris and The Attorney General** Civ. App. 87 of 2004. In dealing with the limb of reasonable and probable cause, Chief Justice Sharma referred to the Halsbury Laws Vol. 45(2) at para 469 which states:

“Reasonable and probable cause for a prosecution has been said to be an honest belief in the guilt of the accused based on 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 an accuser, to the conclusion that the person charged was probably guilty of the crime imputed.”

18. The grounds for the prosecution’s belief therefore depends more on a reasonable belief in the existence of the fact to justify prosecution rather than the actual existence of the fact. As previously held in that judgment of Chief Justice Sharma, he referred to the case of **Baptiste v Seepersad and the Attorney General of Trinidad and Tobago** HC 367 of 2001 (Unreported). This is another case similar to the case before this court where an officer arrested the Plaintiff in that case who had acted on a report made at the police station. In that case, the question was asked by the Court would a reasonable man assuming to know the law and possessing the information of facts by the arresting officer, believe that there is reasonable and probable cause for the arrest. There must be reasonable and probable cause for the suspicion. In that case the single statement of the virtual complainant was recorded by the arresting officer but it was contradicted by the Plaintiff’s denial of the allegations and the statement was not supported by any results of searches on the Plaintiff’s home and maxi taxi. Therefore based on those inquiries the question arose, how could any reasonable person have any reasonable suspicion for the offence for which the Claimant was arrested? Moreover, the Claimant voluntarily went to

the police station. He was never given an opportunity to be heard regarding the alleged incident. Instead he was taken to the police station where he arrested with no reason being advanced for his arrest.

19. Additionally in **Baptiste**, because of the uncertainty in the arresting officer laying the charge, the Court found that the test for reasonable and probable cause was not met as it could be said that the actions of the officer was precipitated and he could not have formed a reasonable suspicion, nor did he have prima facie proof at the time of arrest.

Analysis of Evidence

20. Coming to the assessment of the evidence in this case the Claimant was not tested in cross examination and there really was no serious attempt to attack the Claimant's credibility and his story remains un-contradicted: That he was sitting in his garden when he was approached by Mr. Lezama. Whether Mr. Lezama is of a bad character or whether he is a known criminal really is of no moment as even if he was it does not make him immune from being a victim of crime. An altercation ensued and Mr. Lezama ran towards the Claimant swinging his cutlass and started chopping at the Claimant. The Claimant fell to the ground and upon noticing his own cutlass and out of fear that he might be killed, stretched for it to defend himself against Mr. Lezama. He wielded his cutlass in the air in an attempt to frighten off Mr. Lezama who thereafter shouted that he got chopped. He helped Mr. Lezama off the floor and left the scene. He then reported the incident to Sergeant Daly and then went back to the scene of the incident with the police who conducted inquiries and then took him to the hospital. The medical report attached to the witness statement show some corroboration of minor injuries sustained by the Claimant. After being seen at the hospital, the Claimant was taken back to the police station where he was placed in a cell and remained there from Friday afternoon to Monday afternoon.

21. Importantly it was the case of the Claimant that he was not aware that he was charged for any offence and it was when he was taken before the Magistrate he heard for the first time that he was charged. That is found in the Statement of Case at paragraph 5 and at paragraph 9 of the witness statement. However the evidence of PC Melville is also unchallenged in particular that paragraphs 11 and 12 of his Witness Statement states that after returning from the hospital there was a discussion with Sergeant Daly. PC Melville then charged the Claimant then handed him over to the sentry where he was processed and placed in a cell where he was informed of his rights and privileges. He was also told that because of the nature of the crime he could not get bail from an officer and he should make arrangements with his family so that they come and make bail for him. This was not subject to cross examination and was untested. I also took note of the questions asked in cross examination which were premised on the fact that he was charged on Friday 25, May 2007. I find as a fact that he was charged with the offence on Monday 28, May 2007. On the 25th of May 2007, the first day that he went into the police station. Indeed on the night of the 26th and the morning of the 28th, the unchallenged evidence of the officer is that he asked the Claimant if everything's ok and he said yes. A preliminary inquiry was held at the Magistrates Court and importantly there was no case submission made by the accused and he was committed to stand trial. The evidence of the Magistrates Court was not materially different from what was before the court and so for the most part there is really no dispute between the parties on the facts. The fact of an altercation having taken place, of the Claimant saying that he was attacked and he was trying to defend himself, of the fact that the Claimant did chop Mr. Lezama, of the fact that the Claimant did sustain minor injuries, of the fact that Mr. Lezama was more severely injured as he was found lying in a pool of blood and was still there when the police was conducting their inquiries and the fact that the Claimant voluntarily came to the police station to make the report and was interviewed and detained after the parties left the scene.

22. There were no further inquiries made by the police of any witnesses. According to PC Melville there were no witnesses to the incident. The only information relied on by the

police was that of the severity of the injuries of Mr. Lezama, the utterance of Mr. Lezama that 'Denzil chopped me' and the admission by the Claimant that he did chop Mr. Lezama. The arresting officer was told that he acted in self-defence or according to what Sergeant Daly said to PC Melville, he was defending himself, even though the officer was aware of that he still charged the Claimant. As far as he was aware the defence of self defence is a matter for the Court to determine and not for him. I accept PC Melville as an honest witness. He was hesitant but not evasive and although he may have been testy at times he came across to me as being careful. He was asked if he interviewed witnesses and he said if he was told by Denzil Forde that he acted in self defence he would still have charged him for it was a matter for the Court and that if he had acted on his own without consulting Sergeant Daly, he still would have charged the Claimant. That I find, reveals the honest belief in this officer to lay the charge against the Claimant, an ingredient that was missing in **Seepersad**. He held an honest belief that Mr. Forde should be charged and it is his view that he could not make that judgment call to determine the defence of self defence, that was reasonable in my view. There is no evidence of malice based on this testimony.

23. The question is, is that honest belief based on reasonable grounds and the facts remain that he relied on three very important facts that was pointed out in the Defence and the witness statement (a) serious injury of the chop to Mr. Lezama, (b) Mr. Lezama saying that he chopped him and (c) the Claimant saying that he chopped Mr. Lezama. It is not unreasonable therefore to arrest the Claimant for the charge and I imagine that it was therefore not unreasonable for the Claimant when he was the accused in the Magistrates Court not to have succeeded on a no case submission. Judging on this very same evidence, he was committed to stand trial. It is not on every occasion when an accused is vindicated at the criminal trial and acquitted, he will be entitled to relief under the tort of malicious prosecution. The touchstone has always been the reasonableness of the actions of the arresting officer. In my view the arresting officer held a reasonable belief on reasonable grounds that the Claimant did commit the offence and should be prosecuted. In my opinion there was perhaps no other choice but to lay the charge. The Claimant

himself importantly did not say in his witness statement that there were as a matter of fact witnesses to the incident and the evidence of the parties do not show that back at the same location did not reveal any such witness. Although I raised with the Claimant's Counsel that the lack of documentary evidence was unsatisfactory, it has not affected the outcome. It was in my view that the Defendant had probable cause to arrest and prosecute the Claimant and for these reasons my order is that the claim is dismissed.

24. Because the claim is one for damages, cost is to be awarded on the prescribed scale based on a stipulated sum of the value of the claim. I have reviewed the written submissions on quantum by both parties and in any event I would have stipulated a very modest sum of \$50,000.00 for this claim and so the costs to be awarded on the prescribed scale would be \$14,000.00.

25. The claim is dismissed with prescribed costs in the sum of \$14,000.00 to be paid by the Claimant to the Defendant.

Court: Any comments as to the question of costs?

Mr. Roopnarine: No please my Lord. Deeply obliged.

Vasheist Kokaram
Judge