IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

C.V. 2010-2754

BETWEEN

ALISTAIRE MANZANO

CLAIMANT

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

DEFENDANT

BEFORE THE HONOURABLE JUSTICE RICKY RAHIM

Appearances:

Ms. C. Mohan instructed by Mr. H. Ramnath for the Claimant.

Mr. M. Bhimsingh instructed by Ms. R. Granado for the Defendant.

JUDGMENT

This was originally a claim for false imprisonment and malicious prosecution. The claim for false imprisonment having been dismissed at a Pre-Trial review, the only claim left for the court's decision is that in relation to malicious prosecution.

To succeed in an action for malicious prosecution a claimant is required to prove:

1. the prosecution by the defendant of a criminal charge against the claimant before a tribunal into whose proceedings the criminal courts are competent to inquire;
2. that the proceedings complained of terminated in the claimant's favour;
3. that the defendant instituted or carried on the proceedings maliciously;
4. there was an absence of reasonable and probable cause for the proceedings and;
5. that the claimant has suffered damage.

In respect of the first two elements there is no contention. The claimant was arrested on 20 April 2006 and charged on 21 April 2006 with a criminal offence, namely larceny of a welding plant valued at $60,000.00, the property of Paramount Transport Company Limited. The claimant secured bail on 22 April 2006 and thereafter attended the Couva Magistrate's Court on five occasions - 24 April 2006, 4 August 2006, 18 October 2006, 18 January 2007 and 24 April 2007 whereupon the charge was dismissed there being no appearance of the prosecution witnesses. It is also noted on the endorsement at the back of the information that on 24 April 2007, the prosecution was not in possession of a file despite the appearance of the complainant in court on that day.

The two central issues for determination in this case are therefore:

i. whether the claimant has established an absence of a reasonable and probable cause on the part of the arresting officer to initiate proceedings against him and;

ii. whether the claimant has proven malice on the part of the arresting officer in initiating those proceedings against him.

Reasonable and Probable Cause

In the matter of **Cecil Kennedy v AG of Trinidad and Tobago** Cv App 87 of 2004, Sharma CJ in delivering the judgment of the Court of Appeal set out at paragraphs 17 to 22 the law as it is widely accepted in this jurisdiction:

> *The absence of reasonable and probable cause is a question to be determined by the judge. The burden of proving it lies on the plaintiff. Halsbury's Laws Vol. 45(2) states:*
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> > "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."

The principle has been followed in cases such as Abbott v Refuge Assurance Co. Ltd. and Riches v. DPP.

Further, as noted in Fink et. al. v Sharwangunk Conservancy Inc., probable cause consists of "such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe the plaintiff guilty."

The grounds for the prosecutor's belief therefore depend more on a reasonable belief in the existence of the facts to justify prosecution rather than the actual existence of such facts. The following passage from Halsbury's Laws is instructive in this regard:

> "The presence of reasonable and probable cause for a prosecution does not depend upon the actual existence, but upon a reasonable belief held in good faith in the existence of such facts as would justify a prosecution. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action; his duty is not to ascertain whether there is a defence, but whether there is reasonable and probable cause for a prosecution. The belief in the existence of such facts as would justify a prosecution, or the belief in the accused's guilt, may arise out of the recollection of the prosecutor, if he has always found his memory trustworthy, or out of information furnished to him by others and accepted by him as true."

This point was reinforced in the early case of Chatfield v Comerford (1866) 4 F.&F. 1008 where it was held that a prosecutor is entitled to act upon reasonable hearsay evidence.

Additionally, any omission on the part of the prosecutor to sift information which appears to be suspicious, may be evidence of the want of reasonable and probable cause: Lister v. Perryman (1870) LR 4 HL 521

The objective test to be applied was followed in Baptiste v. Seepersad & AG of Trinidad and Tobago, HC 367 of2001 where the question asked by the court was would a reasonable man assumed to know the law and possessed of the information in fact, by the arresting officer, believe that there was reasonable and probable cause for the arrest? There must be proper and reasonable grounds of suspicion. In that case the person accused voluntarily went to the police station but was never interviewed or allowed to give his side of the story. He was merely told of the allegations against him. The judge found that the defendants did not meet the test of reasonable and probable cause. The claim for wrongful arrest therefore succeeded.

Furthermore, in that case, the single statement of the virtual complainant, recorded by the arresting officer at the time, was contradicted by the plaintiff's denial of the allegations and was not supported by the results of searches on the plaintiff's home and maxi taxi. Those searches failed to reveal any firearm, ammunition or indentation caused by a firearm being discharged, as evidence against the Plaintiff. Additionally, the arresting officer's uncertainty in laying the charges indicated that he did not have the necessary honest belief that there was reasonable and probable cause to prosecute. That lack of reasonable and probable cause was regarded in itself as evidence of malice.

In the present case, the only witness who testified on behalf of the defendant was the police complainant, Constable Deslie Adams. In summary, the information which Constable Adams appeared to have had in his possession is to be found at paragraphs 3, 4, 5, and 6 of his witness statement. Constable Adams testified that on 19 April 2006, while on duty at the Couva CID, he received a telephone call about an incident of larceny from one Brandon Small, the security officer on duty at the Paramount Transport compound situated at the Point Lisas Industrial Estate. That information was to the effect that the claimant, along with other men, came to the Paramount Transport compound in a white truck registration number TBU 6652 or 6552 and stole a Lincoln Welding Plant valued at $60,000.00.

Later that same day, Constable Adams went to the Paramount Transport compound where he met and spoke with Mr Small. Mr Small informed him that the claimant did not have authority to remove the welding plant. Constable Adams then proceeded to Marabella where he met with and took a statement from "the supervisor". He says he was informed that the claimant was employed with the company and was not authorised to remove the welding plant. It can be inferred from this evidence that that information was given to him by the supervisor. Constable Adams then went to the claimant's home at Caratal Road, Gasparillo. He was accompanied by the supervisor and other employees of the company but was unable to meet with the claimant as there was no one at home.

It is upon this evidence that this Court is being asked to accept that the claimant, acting in good faith, held a reasonable belief in the existence of facts that would justify prosecution in this case.

It is to be noted that the statement allegedly recorded from the supervisor has not been put before this court. Neither has there been any explanation given for its absence. Further, without explanation, Constable Adams has referred to the supervisor on no less than three occasions without stating his or her name. Certainly, if a statement was recorded from the supervisor such a statement ought to be before the court so that the court may have a clearer picture of the information which would have been in the possession of the complainant. At the very least, the name of the supervisor should have been disclosed. The court therefore places no reliance on the evidence of Constable Adams in this respect.

The statement of the supervisor may no doubt have assisted the court in its assessment of whether the reasonable man, assumed to know the law and possessed of the information in fact known to the complainant, would believe that there was reasonable and probable cause for the charge. However, a statement is only one aspect of the information available to a complainant prior to the laying of a charge. Invariably, investigators in any given investigation may possess information in one or more forms but may not have had the opportunity to reduce that information into writing prior to laying a charge. The absence of a written statement does not necessarily mean that there was no reasonable and probable cause or that the complainant did not hold an honest belief that there was reasonable and probable cause to lay such a charge.

The information which Constable Adams possessed prior to the laying of the charge was as follows:

1. An employee of Paramount Transport Company Ltd named Manzano went to the company's compound at about 1:30 am on 19 April 2006 together with other men where

they took away a welding plant, placed it on the tray of a truck with the aid of a forklift and left. This was all done in the presence of security officer Brandon Small, 33 years old, of 5 Bel Air Drive La Romain who thereafter telephoned the police. Constable Adams himself spoke with and received this information from Mr Small. This is supported by the station diary extracts of the Couva Police Station for 19 April 2006.

2. The make and value of the welding plant was ascertained, namely a Lincoln 400 welding plant valued at $60,000.00

3. The registration number of the truck was either TBU 6652 or TBU 6552 and its colour was white.

4. The employee named Manzano was known to Mr Small. It is to be noted here that no identification parade was held. Constable Adams testified that he did not hold one because he thought it was unnecessary. This is quite reasonable having regard to the fact that Mr Small had known Manzano before 19 April 2006 in any event.

5. Manzano had no authority to remove such a welding plant. This information, according to paragraph 4 of Constable Adams' witness statement, came from the security officer, Mr Small. In this regard, paragraph 22 of the claimant's witness statement in which he sets out the procedure for obtaining equipment from the employer's yard, is instructive. The procedure includes a request being made to the head office, an indication by head office as to where the equipment should be collected, speaking to the security upon arrival at the compound, the recording by the security guard on duty of the date, time and name of the person driving the truck, the number of the truck and the number of the trailer, along with a record of the specific number of the equipment taken. It follows that

Mr Small, being responsible for security that night, would more likely than not have been aware of this procedure. His information that the claimant had no authority to remove the item must therefore be taken in this context. Indeed, should this be the proper procedure to remove equipment from the compound, it follows that anyone who at 1:30 a.m. removes equipment without following the procedure may not have been authorised to remove such equipment in the first place.

6. An address of the person named Manzano who allegedly stole the equipment. This is confirmed by the station diary extract.

The information in the possession of Constable Adams therefore, would have led him to an honest belief held in good faith, relying on what he was told by the security officer, that the claimant was probably guilty of the crime of larceny of the welding plant. As set out by the Court of Appeal above, the belief in the existence of such facts as would justify a prosecution, or the belief in the accused's guilt, may arise out of the recollection of the prosecutor, or out of information furnished to him by others and accepted by him as true. Clearly, the prosecutor accepted that which was said to him by Mr Small as true, as he was entitled to do having regard to the details given by Small including but not limited to the registration number of the truck.

The absence of direct testimony of Mr Small in this case is not fatal to the defendant. As was stated in **Chatfield** (supra), a prosecutor is even entitled to act upon reasonable hearsay evidence.

Additionally, there is nothing to suggest that that the claimant considered the information which he received to be suspicious thereby requiring him to sift through such information. See **Lister** (supra).

Moreover, this was not a case of mere suspicion as it is well accepted that a prosecution cannot be commenced on mere suspicion. See **Meering v Grahame White Aviation Co.** (1919) 122 LT 44. This was a case where an individual whose duty it was to protect the equipment was alleging that a person, whom he knew as a fellow employee, came to the compound and took the equipment away at 1:30 a.m. without authority, literally like a thief in the night.

Further, a defendant is not required to be satisfied that there is enough evidence to secure a conviction before instituting proceedings. See **Meering** (supra).

But the matter does not end there. The court must be satisfied, despite the honest belief held by the prosecutor, that the circumstances so believed and relied on by the accuser was such as to amount to reasonable grounds for belief in the guilt of the claimant.

This court is of the opinion, having applied detailed scrutiny to all of the evidence, that the circumstances known and believed by the complainant to be true at the material time were such that a reasonable man assumed to know the law would believe that the claimant was probably guilty of the offence of larceny.

The fact that the information is mostly based on the "say so" of one witness is an insufficient basis by itself for ruling otherwise.

In **Bernard Baptiste v AG of Trinidad and Tobago** H.C.A. Cv. 3617 OF 2001, despite the plaintiff's denial of the commission of the offence, the information relied on by the police to prosecute emanated in large measure from the victim herself, Elizabeth Fontanelle. Stollmeyer J, as he then was stated:

> *"The police are therefore only required to be satisfied that the evidence available at the time is enough to commence a prosecution in respect of which there is reasonable and probable cause. In those circumstances, it might be said that the say so of Elizabeth Fontanelle was enough and that the Plaintiff's denial remained to be tested under cross-examination. As, indeed, would be the evidence of Elizabeth Fontanelle."*

It is therefore the finding of this court that the claimant has failed to prove that there was an absence of reasonable and probable cause for the institution of the criminal proceedings against him.

In so finding, the court notes that the police may have conducted further enquires in an effort to obtain more evidence in this case such as conducting a search on motor vehicles TBU 6652/ 6552 or a search of the claimant's home. The failure so to do however, in the court's view, does not diminish the content or quality of the information in the possession of the complainant at the time he laid the charge.

Malice

In the matter of **Cecil Kennedy** (supra), the judges of the Court of Appeal were clear as to whether, the court having found that there has been no proof of the lack of reasonable and probable cause, the question of malice does not arise. The instructive dictum is to be found at page 10 as follows:

> *For malice to be proved, there must be what is known as 'malice in fact'. Halsbury's Laws states:*
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> > "A Claimant in 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. If the defendant had any purpose other than that of bringing a person to justice, that is malice."
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> *However, there are numerous authorities which indicate that where a lack of reasonable and probable cause is NOT proved, the question of malice does not arise: Randolph Burroughs v. AG, HCA 4702/86 and 2418/87. In Abbott v. Refuge Assurance Co. Ltd, [1961] 3 All ER 1047, it was agreed that once there was a prosecution to make possible a civil action, then the proposed plaintiff could not be actuated by malice, to render himself liable to an action in damages for malicious prosecution. According to Ormerod L.J. in that case:*
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> > "It may well be that the definition of malice in an action of this kind is wide enough to cover an 'improper or indirect motive', but I cannot accept that an

indirect motive includes doing something which the law has said must be done before civil proceedings may be instituted."

In the case of Burroughs, it was expressly stated by Ibrahim J. 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. Similar sentiments were expressed in Riques & Or. v. Warrick, AG HC111/80."

In this case, the court having ruled that the claimant has not proven the lack of reasonable and probable cause, the issue of malice does not arise. In any event, even if the court is wrong in its finding that Constable Adams had reasonable and probable cause, the court is not satisfied that the claimant has proved that Constable Adams was actuated by spite, ill-will or any improper motive in instituting the proceedings against him.

Disposition

1. The Claim is dismissed.

2. The Claimant is to pay the prescribed costs of the Defendant in the sum of $14,000.00.

Dated this 1st day of June 2011

Ricky Rahim

Judge