

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO: CV2017-04369

BETWEEN

DONALD MOHAMMED

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Madame Justice Quinlan-Williams

Appearances: Mr. Alvin Shiva Pariagsingh instructed by Mr. Robert Abdool-Mitchell for the Claimant
Mr. Stefan Jaikaran instructed by Ms. Savitri Maharaj for the Defendant

Date of Delivery: 21st July 2020

JUDGMENT

1. The claimant was arrested and charged for shooting, along with other firearm related offences. The offences are alleged to have occurred on

Saturday 28th May 2011 in the village where the claimant lives. In fact, the victim of the shooting incident is a man who knows the claimant and is known to the claimant. The claimant says that he has an alibi for the day and time the offences are alleged to have occurred and therefore he was not and could not be the perpetrator. The claimant's case is that the offences occurred while he was at work and he could not have been at the location where the shooting occurred. Therefore, according to the claimant, any reasonable investigation would have shown that he could not have been a suspect and as such, should not have been charged.

2. The claimant's claim against the defendant is for damages for malicious prosecution, special damages for legal costs, interest and any other relief the court deems fit. Regarding the charge of malicious prosecution, the claimant says that Sergeant Glen Farley unlawfully and maliciously charged him.
3. There is no dispute that the criminal charges were determined in the claimant's favour. They were dismissed for want of prosecution on the 10th July 2015.
4. The claimant submitted that the charging officer, could not have had reasonable and probable cause about his guilt as he merely followed the instructions of a senior officer to lay the charges. Consequently, the court, in those circumstances can ascribe malice by the police complainant.
5. The defendant, on the other hand says that their agents and servants acted lawfully and without malice. The defendant further says that there was sufficient evidence and the charges were properly preferred against the

claimant. Therefore, the prosecution of the criminal charges was not malicious and no damages followed from the arrest and prosecution.

Issues

6. The issues before the court are:
 - a. Did the police officers including Sergeant Farley lack reasonable and probable cause to arrest and prosecute the claimant for the offences relating to the incident that occurred on the 28th May 2011; and
 - b. In charging the claimant, was the police including Sergeant Farley actuated by malice and ill will against the claimant.

Law of malicious prosecution

7. The claimant's claim is premised on the success of his plea regarding the behaviour of the defendant's servants in maliciously prosecuting him. The tort of malicious prosecution requires that the claimant¹:

“...must show first that he was prosecuted by the defendant, this 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”

Reasonable and probable cause

8. There is no dispute regarding the first two factors. The claimant was charged and appeared in a court of competent jurisdiction and the charges ended in his favour.

¹ Clerk and Lindsell on Tort. 20th Edition, paragraph 16:09

9. Whether there was reasonable and probable cause to bring the charges and whether the behaviour of the police was malicious are the two factors the court must decide. The claimant has the burden of proving the constituent parts of the tort of malicious prosecution. The burden applies separately from each factor. Evidence of malice, therefore does obviate the need to prove the other factors, including a lack of reasonable and probable cause.

10. The test to establish absence reasonable and probable cause was described by Lord Denning in *Glinski and McIver* [1962] A.C. 726 at 758 and 759:

“My Lords, in *Hicks v. Faulkner* Hawkins J. put forward a definition of "reasonable and probable cause" which later received the approval of this House. He defined it as an "honest belief in the guilt of the accused" and proceeded to detail its constituent elements. The definition was appropriate enough there. It was, I suspect, tailor-made to fit the measurements of that exceptional case. It may fit other outside measurements too. But experience has shown that it does not fit the ordinary run of cases. It is a mistake to treat it as a touchstone. It cannot serve as a substitute for the rule of law which says that, in order to succeed in an action for malicious prosecution, the plaintiff must prove to the satisfaction of the judge that, at the time when the charge was made, there was an absence of reasonable and probable cause for the prosecution. Let me give some of the reasons which show how careful the judge must be before he puts to the jury the question: "Did the defendant honestly believe that the accused was guilty?" In the first place, the word "guilty" is apt to be misleading. It suggests that, in order to have reasonable and probable cause, a man who brings a prosecution, be he a police officer or a private individual, must, at his peril, believe in the guilt of the accused. That he must be sure of it, as a jury must, before they convict. Whereas in truth he has only to be satisfied that there is a proper case to lay before the court, or in the words of Lord Mansfield, that there is a probable cause "to bring the [accused] to a fair and impartial trial": see *Johnstone v. Sutton*. After all, he cannot

judge whether the witnesses are telling the truth. He cannot know what defences the accused may set up. Guilt or innocence is for the tribunal and not for him. Test it this way: Suppose he seeks legal advice before laying the charge. His counsel can only advise him whether the evidence is sufficient to justify a prosecution. He cannot pronounce upon guilt or innocence. Nevertheless, the advice of counsel, if honestly sought and honestly acted upon, affords a good protection: see *Ravenga v. Mackintosh* by Bayley J. So also with a police officer. He is concerned to bring to trial every man who should be put on trial, but he is not concerned to convict him. He is no more concerned to convict a man than is counsel for the prosecution. He can leave that to the jury. It is for them to believe in his guilt, not for the police officer. Were it otherwise, it would mean that every acquittal would be a rebuff to the police officer. It would be a black mark against him, and a hindrance to promotion. So much so that he might be tempted to "improve" the evidence so as to secure a conviction. No, the truth is that a police officer is only concerned to see that there is a case proper to be laid before the court."

11. Lord Denning's statement of the principles of law related to "reasonable and probable cause" applied the dicta in *Hicks v Faulkner* [1898] (8) Q.B.D. 167 that the claimant has to show a negative proposition; the absence of reasonable and probable cause at the time the charge was laid. This negative proposition is not that the police officer has to be satisfied that the person charged is guilty of the crime. Rather, police officer should not be motivated by the outcome of the judicial process that the person is convicted, but only that the information available from his investigation is sufficient to make a proper case to be placed before the court.

12. In the case of *Trevor Williamson v The Attorney General of Trinidad and Tobago* [2014] UKPC 29 at paragraphs 11 and 14, Lord Kerr, applying *Glinski and Mclver* (supra) said:

"In order to make out a claim for malicious prosecution, it must be shown, among other things, that the prosecutor

lacked reasonable and probable cause for the prosecution and that he was actuated by malice. These particular elements constitute significant challenge by way of proof. It has to be shown that there was no reasonable or probable cause for the launch of the proceedings. This requires the proof of a negative proposition, normally among the most difficult of evidential requirements...

On the question of reasonable and probable cause, or the lack of it, a prosecutor must have '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': *Hicks v Faulkner* (1878) 8 QBD 167, 171 per Hawkins J, approved by the House of Lords in *Herniman v Smith* [1938] AC 305, 316 per Lord Atkin. The honest belief required of the prosecutor is a belief not that the accused is guilty as a matter of certainty, but that there is a proper case to lay before the court: *Glinski v McIver* [1962] AC 726, 758 per Lord Denning."

13. In *AG v Joel Roop* Civ App No. P183 of 2015, Mondonça JA summarised the subjective and objective elements necessary in relation to reasonable and probable cause as follows:

- i. Did the officer who laid the charge have the requisite belief;
- ii. Did the officer when exercising the power to lay the charge honestly believe in the existence of the objective circumstances which he relies on as the basis for that belief;
- iii. Was his belief in the existence of these circumstance based on reasonable grounds; and
- iv. Did these circumstances constitute reasonable grounds for the requisite belief.

14. The claimant is required to prove that the charge was laid without reasonable and probable cause. This does not require the police to be satisfied that the accused is guilty. The police must be satisfied that there is sufficient information for a criminal charge to be placed before the court.

Evidence and Analysis

15. In this case, the evidence presented by the claimant indicates that he was at work. The claimant's first inkling that something was wrong, according to him, was that his brother called him around 10:30pm and said that the word in the village was that he had shot Ali Mohammed. This information was not from the police, but from the village. Interestingly, the claimant acted on this information by going to his home to show his brother that his license shotgun was in his safe at his home.

16. The claimant says that he has only one firearm. However, the firearm described by Ali Mohammed was not a revolver. This by itself carries no weight since it does not follow that a person could not use another firearm to perpetrate a crime.

17. Meanwhile the police were investigating the report received from Ali Mohammed.

18. The first contemporaneous record of the events as reported is the station diary extract of the Gran Couva Police Station dated the 29th May 2011. The entry was made at 2:45pm and states that the claimant was told of the report under investigation and claimant gave his alibi.

19. Ali Mohammed gave three statements to the police, dated the 30th May, 15th June and 11th September 2011. In Ali Mohammed's first statement to

the police, he related the events in great detail. He also gave details about how and how long he knew the claimant; that the claimant lives across the road from Mohammed's mother in law; and the frequency with which he saw the claimant i.e. once or twice per week.

20. Ali Mohammed also said that he saw the claimant at a distance of about 10 feet when the shooting occurred. Ali Mohammed said that he called the claimant by his name, before and after the shooting. After the shooting, there was continued interaction with the claimant including conversation about why the claimant had shot Mohammed. Mohammed said that he was tied up and taken away and that during this time the claimant was present. According to Ali Mohammed, the incident with the claimant lasted half an hour. In other words, according to the statements given by Ali Mohammed, it was not a matter of a fleeting glance of the perpetrator, as the perpetrator was a man well known to Ali Mohammed by sight and name. In Ali Mohammed's first report to the police, he described the perpetrator by name. The names he called was the "home name" and the proper name of the claimant.

21. There was also a statement from Naziff Khan. He took Ali Mohammed to the police station and to seek medical attention after Ali Mohammed said he was able to free himself. Naziff Khan said that Ali Mohammed identified the shooter to him by the name "Don" as well as what occurred after the shooting. The account given to Naziff Khan was consistent with the account given to the police and recorded in greater detail in the statements given to the police by Ali Mohammed.

22. There is no dispute that Ali Mohammed was shot. The projectile was removed surgically from his hip and given to the police. The police

submitted it to the Forensic Science Centre for analysis and report. One assumes the fact that Ali Mohammed said he was shot, and that a projectile was removed during surgery, is what led to the preferring of the firearm charges against the claimant.

23. Corporal Ramlogan's statement, dated the 21st June 2011, noted that he received the first report from Ali Mohammed around 8:40pm on the night of 28th May 2011. In that report, Corporal Ramlogan said that Ali Mohammed identified the shooter by his name, Donald Mohamed and his alias "Dundee". That report initiated the investigation and the visit of the police to the claimant's home later on that day.

24. The fact that the claimant was not charged until the 27th January 2012 was explained by Sergeant Farley. Sergeant Farley said that Corporal Ramlogan proceeded on pre-retirement leave in January 2012 and he took over the case.

25. By that time, Corporal Ramlogan had already sought instructions based on the case file he had compiled. By the time instructions came from the senior officer, Corporal Ramlogan had proceeded on pre-retirement leave. Sergeant Farley was assigned the file and he was the officer who received the instructions to charge the claimant for the criminal offences of possession of a firearm, possession of ammunition, unlawfully carrying away a person and wounding. The charges were laid on the 26th January 2012 and four warrants of arrest obtained. The claimant was arrested on the 27th January 2012 and the warrants were executed.

26. Sergeant Farley was questioned whether he "went back" to interview the victim or anyone else, or whether he visited the scene. His answer was no.

Sergeant Farley was also asked whether he believed he had any choice in following the instructions and he responded that in his opinion he had none. He was questioned about the medical report and Sergeant Farley said he did not collect it. Consequently, he could not have been the person to tender it into evidence. Therefore, one would assume that Corporal Ramlogan would have been a witness rather than the police complainant.

27. The court did not find anything sinister in the evidence about the process adopted by the police officers. Firstly, the process to seek advice and receive “directions” from a senior officer suggest that the investigator does not only act on his opinion but that of an officer senior to him. This surely provides a layer for further analysis of the evidence gathered before a suspect is charged.

28. Secondly, the fact that Sergeant Farley was a formal complainant rather than the investigative complainant is also not alarming to the court. It is expected that there must be some procedure because attrition is a fact of life; whether by retirement, resignation, abandonment or death. How the transition from investigative complainant to formal complainant occurs will depend on the circumstances of each case. In a case where the investigation is not completed, the substitute complainant would have to complete the investigation and then seek advice. Another situation maybe that the accused is charged and then unfortunately dies. In that situation the substitute complainant will be a formal complainant. In the circumstances of this case, the investigation was completed and the advice of the senior officers sought. Sergeant Farley took the baton from there.

29. The circumstances of this case did not seem to require Sergeant Farley going back to the scene and re-interviewing the victim of the shooting. He

certainly could not go back to the hospital and retrieve the apparent projectile from the victim. Another substitute complainant may have decided to immerse themselves in Corporal Ramlogan's case file in a more active manner, but the fact that Sergeant Farley did not, cannot objectively amount to there not being reasonable and probable cause for the claimant being charged.

30. Based on the evidence the court is satisfied that the police, as an organization, rather than as individual officers, had sufficient information for criminal charges against the claimant to be made and brought before the court. Therefore the claimant has not negated the proposition that the police had reasonable and probable cause, at the time, to charge him.

31. This finding, by itself, is sufficient to dismiss the claimant's claim as he has to prove all elements of malicious prosecution. Without a lack of reasonable and probable cause, the claimant cannot sustain his claim for malicious prosecution.

Malice

32. On the question of malice, *Hicks v Faulkner* (supra), explained that there are circumstances where the want of reasonable and probable cause does not equate to malice. That was the case before them in *Hicks v Faulkner* (supra). In those circumstances, in *Hicks v Faulkner* (supra) at pages 174 and 175, Hawkins J said:

"In an action of this description the question of malice is an independent one of fact...the malice necessary to be established is not malice in law such as may be assumed from the intentional doing of a wrongful act (see *Bromage v Prosser* (1) per Bayler H) but malice in fact-maus animus-indicating that the party was actuated either by spite or ill-will towards an individual, or by indirect or improper

motives, though these may be wholly unconnected with any uncharitable feelings towards anybody”

33. Hawkins J, also said in the judgment, at page 175, that malice is a question of fact even where the fact finders:

“Think there was want of probable cause might nevertheless think that the defendant acted honestly and without ill-will, or any other motive or desire than to do what he bona fide believed to be right in the interest of justice -in which case they ought not, in opinion, to find the existence of malice”

34. In the case of *Brown v Hawkins* [1891] 2 QB 718 Cave J. said at page 722:

“Now malice, in its widest and vaguest sense, has been said to mean any wrong or indirect motive; and malice can be proved, either by shewing what the motive was and that it was wrong, or by shewing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor. In this case I do not think that any particular wrong or indirect motive was proved. It is said that the defendant was hasty and intemperate. It may, I think, be assumed that, believing, as the jury have found he did, that Brown had stolen his boots, the defendant was angry; but, so far from this being a wrong or indirect motive, it is one of the motives on which the law relies to secure the prosecution of offenders against the criminal law. He may also have been hasty, both in his conclusion that the plaintiff was guilty and in his proceedings; but hastiness in his conclusion as to the plaintiff's guilt, although it may account for his coming to a wrong conclusion, does not shew the presence of any indirect motive”

35. The judgment of Lord Kerr in *Trevor Williamson v The Attorney General of Trinidad and Tobago* (Supra) states at paragraphs 13, 16 and 17

“Malice can be inferred from a lack of reasonable and probable cause – *Brown v Hawkes* [1891] 2 QB 718, 723. But a finding of malice is always dependent on the facts of the

individual case. It is for the tribunal of fact to make the finding according to its assessment of the evidence...

This conclusion bears directly on the question whether the prosecution can be inferred to be malicious [that there was no proof of an absence of reasonable and probable cause]. Where there is absolutely no basis for suspicion, especially where that is accompanied by an apparent reluctance to proceed with the charge, one might draw such an inference. But that was not remotely the position here. Of course, the failure of Constable Caldeira to appear on the various occasions that Mr Williamson came before the Magistrates' Court is reprehensible but this is not nearly sufficient, in the Board's view, to allow the inference to be drawn that his intention was to manipulate the legal system or to pursue the prosecution for a wholly extraneous and improper motive.

Remembering that it is for the tribunal of fact to make a finding on the question of malice, it is to be noted that Constable Caldeira, in his witness statement of 31 January 2007, prepared for the High Court proceedings, had averred that he had reasonable and probable cause for laying charges against and prosecuting Mr Williamson and had acted throughout in good faith and without malice. He was not challenged on those averments. In those circumstances, the Board finds it unsurprising that both the High Court and the Court of Appeal were not prepared to draw the inference that he had acted with malice in proceeding with the prosecution against Mr Williamson. His appeal against the finding that he had not made out a case of malicious prosecution must be dismissed."

36. Malice is a question of fact, the proof of which is dependent on the particular circumstances of each case. Here the claimant alleges that the circumstances of themselves are enough to amount to malice. The circumstances relied on by the claimant relate to the nature of the police investigation vis a vie the alibi claimed by the claimant. However, the court is not satisfied that in the circumstances, the claimant has discharged their burden. The police received a report of shooting. They interviewed the claimant soon after the report was made. The claimant provided his

explanation and alibi. The explanation and alibi were interrogated and the alibi witness, Mr. Balnarine Ramlal, interviewed. The investigator noted in his report about the investigation that the alibi witness went contrary to the statement given by the claimant. The claimant and Mr. Ramlal went to the claimant's home 10:30pm, the night of the 28th May 2011. This journey occurred after the claimant's brother called and said that people in the village were saying that the claimant shot Ali Mohammed.

37. Therefore, the alibi was fully investigated. The fact that more could or should have been done does not provide proof of malice. For instance, the claimant suggested that his hands should have been swabbed for firearm residue. The fact that this was a possibility and it was not done does not amount to malice. The report received by the police included the identification of the perpetrator by name; both proper and home names.
38. The circumstances identified by the claimant also include that the claimant has one licenced firearm, that the claimant was not swabbed on the night of the 28th May 2011 and that the claimant provided an alibi. The claimant also identified the length of time he was detained and released without charge.
39. Regarding the firearm, Ali Mohammed alleges that he was shot with a small firearm drawn from the waist of the claimant. The description of the firearm used did not match the firearm lawfully held by the claimant. But that by itself is not proof of malice. The allegation made was that the claimant used a firearm which was not lawfully held by the claimant.
40. In *The Attorney General v Joel Roop* (supra), Mondonça JA agreed that in certain circumstances the "omissions to investigate significant and

material matters may point to a motive other than the proper invocation of the criminal law and provide evidence from which malice may be inferred.”²

Evidence and analysis

41. The circumstances between the transition from Corporal Ramlogan to Sergeant Farley, does not show any malice. Rather it appears to be a simple case of continuity of a police investigation at the particular stage of investigation. The circumstances of this case do not appear to show any lack of investigation of any critical factors at all or any critical factors which would cause the court to form the view that Sergeant Farley, at the time the case was assigned to him, was actuated by any improper motive.

42. Additionally, the manner of investigating the alibi does not show any malice. The alibi was not determinative. The alibi witness said there were no surveillance recordings nor was the claimant required to sign any register. Further, the alibi witness did not see the claimant between the hours of 4:00pm and 10:30pm. The fact that the police left that dispute of fact, in the circumstances of the allegation of Ali Mohammed and the alibi raised by the claimant for the court, is also not suggestive of any malice.

43. The claimant was arrested and detained without charge, from around 1:00am on the 29th May 2011 to around 6:00pm on the 1st June 2011. While the period of detention was longer than one would have expected, during this time the investigation continued. Ali Mohammed was hospitalized and underwent surgery. A projectile was recovered and handed over to the police. The police recorded statements from Ali

² Paragraph 80.

Mohammed on the 30th May 2011 and claimant on the 31st May 2011. The police also recorded a statement from Balnarine Ramlal on the 31st May 2011. After the claimant was released on the 1st June 2011 the investigation continued. The police recorded two further statements from Ali Mohammed and two statements from Naziff Khan. Finally, the initial investigator proceeded on pre-retirement leave and a new investigator continued the investigation, sought and obtained instructions to charge the claimant.

44. The fact that the case was dismissed for want of prosecution also cannot amount to malice. The dismissal occurred not on the merits of the case but for want of prosecution. Even if it had been dismissed after the merits of the charge were considered, such a dismissal would not, without more support that the charges were maliciously laid by the police.

Credibility of witnesses

45. The findings made by the court were also impacted by the credibility of some of the witnesses. The claimant's answers to questions in cross examination were so illogical that they impacted his credibility. Firstly, the evidence that he was working off shore at the time of the shooting was incredulous. The claimant said that he worked off shore from 6:00am to 1:30pm and then took up his job as a security officer. Secondly, the claimant said that Mr Ali Mohammed was rearing his animals on lands adjoining the farm where he worked from Monday to Thursday. These adjoining lands was where Mr Ali reported that he was shot by the claimant. When asked how long he would take from the farm to the adjoining lands, the claimant replied two hours.

46. There was also evidence from the alibi witness which the court believed was said to embellish the evidence about the alibi. The court did not believe that the witness had a prayer that evening. There was no evidence of this in any statements given by the witness nor the claimant to either the police or as evidence in this matter. That embellishment was given, the court believed, to provide a more fulsome alibi, that he saw the claimant between the hours of 4:00pm and 10:30pm. Without that new evidence, the witness could not account for the whereabouts of the claimant during the hours of 4:00pm and 10:30pm.
47. There were also material contradictions between the claimant and his witness. Firstly, the claimant said that the scrap yard was not completely fenced and that persons entered from the back when stealing scrap iron. The witness, on the other hand said that the scrap yard is completely fenced and the thieves entered by cutting the fence.
48. The claimant also said that he did not see the witness between 4:30pm and 10:30pm. And as noted above the witness gave a different account.
49. The contradictions and inconsistencies served to undermine the veracity of the witnesses especially as it related to the alibi evidence provided by them. In any event, the fact that the claimant provided any alibi would not change the court's findings that the police did not lack reasonable and probable cause when the claimant was charged nor were the laying of the charges motivated by malice.

Disposition

50. The claimant's claim against the defendant is dismissed. The claimant shall pay the defendant's costs as prescribed in the sum of \$14,000.00. Stay of execution is 42 days.

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Justice Avason Quinlan-Williams

JRC: Romela Ramberran