REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No P-101 of 2013
Claim No. CV2011-01656

BETWEEN

MATADAI ROOPNARINE

Appellant/Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent/Defendant

PANEL

G. Smith J.A.

C. Pemberton J.A.

G. Lucky J.A.

DATE OF DELIVERY: October 20, 2021

APPEARANCES:

Ms. Alana Rambaran instructed by Mr. Jared Jagroo for the Appellant.

Mr. Duncan Byam instructed by Ms. Avaria Niles for the Respondent**.**

JUDGMENT

Delivered by C. Pemberton J.A. and G. Lucky J.A.

1. On 5th February 2000, the Appellant, Matadai Roopnarine (MR), a truck driver, was charged with several offences surrounding a conspiracy to pervert the course of public justice, forging certain documents to procure bail of a third person, making false declarations and uttering false documents- all allegedly committed on September 23 1999.[1] On 13th February, 2000, he was admitted to bail in the sum of $500,000.00, which he secured after seven months on remand. MR made several appearances before the Magistrates' Court, before the DPP, on 14th April, 2008, discontinued the prosecution.

2. By amended claim filed on 17th November 2011, MR claimed damages, both exemplary and aggravated for malicious prosecution against the Attorney General (AG). The particulars relied upon to support the main element of his claim, that the prosecution was without reasonable and probable cause and was with malice, are listed at page 10 of the record of appeal and stated as follows:-

    a. *The servants and/or agents of the defendant concocted and/or fabricated evidence to the effect that the claimant had perverted the course of justice.*
    b. *The servants and/or agents of the defendant failed to conduct any proper investigations into the matter and ignored the presumption of innocence of the claimant.*
    c. *The servants and/or agents of the defendant attempted to introduce false and/or contradictory evidence at the trial.*
    d. *Police Corporal Mohammed regimental number 10073 failed to conduct sufficient enquiries and/or conduct proper*

[1] Statement of Agreed Facts, page 655-656 of the Record of Appeal

investigations and/or maliciously allowed the claimant to be maliciously prosecuted on insufficient evidence and/or concocted evidence.

e. *Police Corporal Mohammed regimental number 10073 continued the prosecution of the claimant despite the lack of credible and/or insufficient evidence.*

f. *The evidence pertaining to the implication of the claimant was given in the knowledge that it was false and that the claimant would be prosecuted for the offence referred to above.*

g. *The servants and/or agents of the defendant were reckless in the discharge of their duties as police officers as it related to the arrest and/or malicious prosecution of the claimant.*

3. The matter came up for hearing before the trial judge. MR led his evidence and he was cross-examined vigorously on its contents. At the end of MR's evidence, MR closed its case. Counsel for the AG closed its case without calling any witnesses and made a no case submission.

4. The trial judge dismissed MR's claim, in that, he did not find that the evidence led was sufficient to satisfy the legal and evidential burden of proof, that the prosecution was activated and pursued without reasonable and probable cause and with malice. Since MR's evidence did not achieve this activation, the trial judge questioned whether the evidential burden shifted to the AG. The answer to that question was no. It is instructive to quote what the trial judge said, and we shall do so where appropriate.

5. By Notice of Appeal filed on 30th April 2013, MR appealed the trial judge's decision on the following grounds:-

i. *The court erred in finding that MR did not satisfy the legal burden of illustrating a lack of reasonable and probable cause*

on the part of the Police officer who had charged and prosecuted MR.

ii. *The Court erred in finding that MR's version of events did not shift the evidential burden to the AG.*

iii. *The Court erred in finding that the AG had no case to answer and in upholding the AG's no case submission.*

iv. *The Court erred in ordering that there be Judgement for the AG as against MR and ordering MR to pay fifty percent (50%) of the prescribed costs based on the value of the Claim at fifty thousand dollars ($50,000.00) if not agreed.*

v. *The decision of the Trial Judge is contrary to law and against the weight of the evidence.*

6. The resolution of this appeal really lay in whether MR satisfied the burden of proof. To our minds, the trial judge has placed the nub of the case efficiently and succinctly. This was: what was necessary was an examination of the available evidence led solely by MR and a determination of whether this evidence looked at holistically, satisfied MR's legal and evidential burden of proof, which would then make it incumbent upon the AG to lead evidence to prove that there was reasonable and probable cause to prosecute him.

7. After considering the trial judge's decision, Counsel for MR's submissions and Counsel for the AG's submissions, we cannot say that the trial judge was plainly wrong in his management of the case, to wit, the identification of the key issues and his analysis of the facts and law. The trial judge stated that after he considered the evidence led and the authorities placed before him, MR *"has put forward facts in this matter that show that he had (an) explanation contrary to what is alleged against him and that he was innocent and knew nothing of what he was charged for and that in itself is not sufficient. (I)t is not about whether he is innocent or guilty but whether*

the prosecutor has reasonable or probable cause to bring this action against him and for that, that evidence has not been forthcoming".

8. It is clear that the trial judge looked at all of the evidence placed by MR for his consideration and characterized it in the way he did as an explanation for his association with others and his protestations of innocence. The trial judge was entitled to find that MR failed to lead evidence necessary to establish his case, that is, that the prosecutor did not have the honest belief in his guilt at the time of the prosecution. The trial judge was further entitled to find that MR did not lead sufficient evidence to sustain his case, that reasonable and probable cause did not exist at the time of his arrest and prosecution and that the prosecution was actuated by malice.

   The trial judge carried out the exercise commended in the 1998 JCPC decision of **Gibbs v Rea.**[2] Having stated his approach to the evidence, we can find no fault with his finding and conclusion.

9. Counsel for the AG made much weather on the presence or absence of the Notes of Evidence from the Magistrates' Court. The trial judge did not comment on that in his judgment. The presence or absence of the Notes of Evidence from the Magistrates' Court, therefore, was of no moment to the trial judge and did not inform the decision. We find no fault with that.

10. The trial judge was therefore correct in his analysis, application of the law and conclusion. Accordingly, MR failed to meet his burden and so the trial judge was right to find as he found.

[2] [1998] A.C. 786 per Gault J at p. 798 G commenting on the shifting burden of proof "*The other aspects on which some comment on the approach of Harre C.J. is appropriate is that of a shifting burden of proof. Their Lordships find such terminology unhelpful …**The preferable approach is to consider the matter in the round and determine whether the evidence as a whole satisfies the standard of proof…'.***

11. In the circumstances, the appeal is dismissed; the trial judge's judgment is affirmed and MR to pay the AG's costs to be assessed. The following are the reasons for the judgment.

FACTS

12. We have outlined the short facts above and we propose to add nothing further. We thank Counsel for all of their submissions, which have been useful and of great assistance. We crave their indulgence to refer to them as we find necessary.

ROLE OF THE APPELLATE COURT

13. The Court of Appeal will only reverse a trial judge's findings of fact where the judge was plainly wrong to do so. The trial judge's findings will be plainly wrong where he has made findings based on no evidence, where he misunderstood the evidence or where he made findings, which no reasonable tribunal would have made: **Beacon Company Limited v Maharaj Bookstores Ltd [2014] UKPC 21; Bahamasair Holdings v Messier Dowty Inc [2018] UKPC 25**.

ISSUES

14. To us, the issues to be decided involve an examination of the trial judge's judgment and MR's evidence. They are as follows:

    i. **Whether the trial judge was plainly wrong to find that MR's evidence failed to support his case that the prosecution did not have reasonable and probable cause to bring criminal proceedings against him;**

    ii. **Whether the trial judge was plainly wrong not to find on the evidence that the prosecution was actuated by malice.**

Issue i:

Whether the trial judge was plainly wrong to find that MR's evidence failed to support his case that the prosecution did not have reasonable and probable cause to bring criminal proceedings against him.

TRIAL JUDGE'S JUDGMENT

15. It may be useful to note the salient points of the trial judge's judgment:-

    a. That at the trial, *"the defence has not called any witnesses and closed its case and relies upon the law and the evidence of the Claimant".*
    b. That he relied on the case of **Glinski v Mc Iver** [1962] A.C. 726 and the learning espoused in that case.
    c. That *"having regard to the authorities cited to me, what the claimant has put forward goes really to his innocence or guilt in the criminal matter. Whether or not he committed the offence and I want to make the distinction as whether or not he committed the offence or not is really not the issue."*
    d. The issue was *"…whether what was before the prosecutor, could have led the prosecutor to 'reasonably have concluded' what would have been sufficient to satisfy the rule that there was reasonable and probable cause to proceed with the matter."*

16. The case at trial was one of mixed fact and law. It turned on the evidence led. The trial judge had to determine whether the case as pleaded was proved by MR. In coming to this determination, the trial judge had to assess the evidence before him. This involved a determination of fact. The only evidence led was that of MR since the AG elected not to call evidence.

17. The trial judge found as a matter of law that no *prima facie* case was made out against the AG. He upheld the no case submission advanced by the AG

and dismissed the action for malicious prosecution. The issue on this appeal is therefore one of law.

LAW

18. The law on malicious prosecution, is settled and clear and bears little repetition, save to say that the authors of **Clerk and Lindsell on Torts,** in the 20th ed. at para. 16-09 state as follows:-

> *"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 by the Defendant 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 those is on the claimant****."* (emphasis ours).

ANALYSIS AND CONCLUSION

MR'S Evidence at trial

19. MR's witness statement gave a narrative of who he is and the fact that he was unemployed at the time of the statement. MR also detailed the circumstances under which he arranged to procure bail for his acquaintance; his trip to Tobago; his acceptance of payment for his part in procuring bail; the circumstances of his assistance to police officers when told of the possible infraction of the law and his experience with the handwriting expert. He described his eventual arrest, charge and detention; his experience during detention and his eventual release when admitted to bail. His cross-examination was largely uneventful, even though there were some minor inconsistencies. For some reason, the focus of MR's evidence was not that the police did not have enough information

to set the law in motion against him. Instead, his evidence focused on complaints about his arrest and detention.

20. It is noteworthy that after hearing both Counsel, the trial judge, like Counsel for the AG, found that MR led no evidence of the matters which he complained about in his statement of claim, to wit, lack of reasonable and probable cause and malice on the part of the police officers**.** The following are the trial judge's observations about the evidence:-

    a. "*what the claimant has put forward goes really to his innocence or guilt in the criminal matter … that is not really the issue. The issue is whether what was before the prosecutor, could have led the reasonable prosecutor to 'reasonably have concluded' [that the evidence] would have been sufficient to satisfy the rule that there was reasonable and probable cause to proceed with this matter…".*[3]

    b. *"We are still at the stage of whether a prima facie case was established; (whether) it throws any burden on the Defendant?"*

    c. In answer to that question, *"I say no that has not been established and that the fact that the Claimant has put forward facts in this matter that show that he had (an) explanation contrary to what is alleged against him and that he was innocent and knew nothing of what he was charged for and that in itself is not sufficient. (I)t is not about whether he is innocent or guilty but whether the prosecutor has reasonable or probable cause to bring this action against him and for that, that evidence has not been forthcoming."*

[3] See page 2, line 24 of the Judgement and Reasons taken on 19th March, 2013

SUBMISSIONS ON APPEAL

MR's submissions

21. Counsel for MR, made mention of the need for lack of reasonable and probable cause as a necessary ingredient of his success. Counsel cursorily mentioned that, "*Despite the burden of proof being on the claimant, the existence of reasonable and probable cause is a question of fact that must be judged in light of what is known to the defendant at the time of the initiation of the prosecution".*[4] Counsel for MR goes on to elucidate the test as to whether there was reasonable and probable cause and the nature of evidence needed to establish the offences of conspiracy and forgery. Counsel then went on to expound on the law relating to no case submissions, drawing adverse inferences and malice.

The AG's Submissions

22. Counsel's submissions were succinct. Counsel relied on **Glinski v Mc Ivor (1962) 2 W.L.R. 832** in which the categories of cases of malicious prosecution was discussed by the House of Lords. Counsel placed this case in the first category of cases discussed in that seminal case and concluded that: "*Where there has in such a case been a preliminary enquiry or trial, it will fall into the first category. In this case the appellant was the subject of a preliminary enquiry, the notes from which were revealed in discovery…".* The burden to produce those notes lay on MR. Counsel urged this Court to dismiss this appeal for MR's failure to produce the notes. Reliance was placed on a judgment of this Court of Appeal, **Wills v Voison (1963) 6 W.L.R. 50**, a judgment of none other than Wooding C.J.

Further submissions – Gibbs v Rea

23. In the first hearing of this appeal, Smith JA brought to Counsel's attention the case of **Gibbs v Rea [1998] A.C. 786,** a decision of the JCPC and invited submissions. That case concerned the malicious procuration of a search

[4] See paragraph 13 of the submissions of the Appellant

warrant. The defendants in that case merely denied the plaintiff's allegations and apart from producing informations and warrants, elected not to give evidence. By a majority of three to two, the JCPC held in part 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; that there was a circumstantial case that there were no grounds on which the plaintiff could reasonably have been suspected of (the offence) or benefiting therefrom; that in the circumstances, the plaintiff's case called for an answer and the first defendant's silence supported the inferences that he did not have sufficient grounds on which to suspect that the plaintiff had carried on or had benefited from drug trafficking … and that that the Court of Appeal had been entitled to find that the first defendant had been actuated by malice…"*[5]

24. The matters taken into account by their Lordships were as follows:-

> *"Indeed it became apparent that there was no police file at all at that date. It was also established that the Grand Court had no note or other record of what took place before the judge who issued the warrants."* [6]

25. The court took into account as well certain inferences drawn by the trial court from *"the reluctance of an officer who heads the Drug Profit Confiscation Unit … to come to this court to be asked about his work".*[7] Their Lordships also examined the judgment of the appeal court which noted that: "*This is not a case such as* **Rhesa Shipping Co. S.A. v Edmunds [1985] 2 All E.R. 712**, "*where the evidence was physically unavailable so that there was no basis upon which the court could say whether or not the burden of*

[5] See paras 796, 798-799, 800
[6] [1998] A.C. 786, Page 793
[7] ibid, page 795

proof had been discharged. Here the evidence was available but it was withheld…"[8]

26. In order to decide whether there was evidence speaking to proof of lack of reasonable and probable cause in these circumstances, their Lordships stated that, ***"The preferable approach is to consider the matter in the round to determine whether the evidence as a whole satisfies the standard of proof"***.[9] Further their Lordships opined in this case, *"**When all of the factors mentioned are knitted together they form a circumstantial case of absence of any grounds upon which a person could reasonably suspect (the respondent) of trafficking in drugs or benefitting therefrom"**.*[10]

Analysis of Submissions

27. We shall deal with both sets of submissions together.

28. Counsel for MR opened their account in their primary submissions with the procedural aspects of the absence of the Notes of Evidence from the Magistrates' Court. There is no dispute that the Notes of Evidence was among the documents in the AG's possession. MR could have used any of the tools available under the CPR to procure those documents for his use at trial. His failure to do that cannot impugn the AG's decision not to call a witness to lead evidence on those documents. We say no more.

29. In MR's supplemental submissions, Counsel developed his discussion by reliance on dicta from Boodoosingh J (as he then was) in **Blake v The Attorney General**[11] and Mohammed JA in **The Attorney General v Harridath Maharaj**[12]. Both of these cases have markedly different factual

[8] ibid, page 766
[9] ibid, page 798
[10] [1998] AC 786, page 800
[11] CV2010- 03388
[12] Civ App No 118 of 2016

matrices from the case on appeal. In both of these cases, both the pleadings and evidence led, established a *prima facie* case for the defendant to answer. The trial judge in the instant case was of a different view. After a careful review of MR's pleaded case, his witness statement and his cross examination we cannot say that the trial judge was plainly wrong to find that there was no *prima facie* case for the AG to answer. As far as we see, if one does not get past the first base identified by Wooding CJ, then the following step of what is to happen when the submissions are objectively considered is otiose.

30. Mr Byam reiterated his position that was in alignment with Wooding CJ, that in a case of malicious prosecution, the non-production of the Notes of Evidence allowed a court to non-suit a plaintiff as not discharging the legal and evidential burden of proof. Counsel saw an alignment of **Wills v Voison** and **Gibbs v Rea,** in that both cases applied the "*best evidence"* rule. In the latter case, Counsel stated that, where less evidence was available, the merest evidence could be used to satisfy the plaintiff's burden of proof. Mr Byam further submitted that the **Gibbs** case did not depart from the time-honoured rule that "*once a claimant adduced the best evidence available to him, he would be regarded as having discharged the burden without having to put evidence on which the prosecutor acted before the Court, that is, he will have a prima facie case once he obeys the best evidence rule".*

Analysis and Conclusion

Absence of Notes of Evidence

31. The traditional "*best evidence"* rule has undergone significant review. The modern thinking is to confine the rule to determine the efficacy of documentary evidence in the case to be made out by a party. We say that when one looks closely at the **Gibbs** case, Mr Byam's submission may not be without merit, if the "best evidence" is not understood as it has been in the past. If we accept that "*best evidence"* means the most compelling

evidence available that proves a claim then we do agree that there is an alignment of the two authorities. In **Wills**, Wooding CJ found that the plaintiff did not adduce the most compelling evidence to prove his claim. In **Gibbs**, their Lordships found that Mr Rea gave compelling evidence, which called for an answer that was not forthcoming from the prosecution. In **Wills,** the claim failed and in **Gibbs** the claimant saw success on his claim.

32. In the context of compelling evidence, Mr Byam made heavy weather about the absence of the Notes of Evidence and the **Wills** conclusion that lack of the Notes of Evidence non-suits a plaintiff. We observe that at page 404 of the Record of Appeal, which contained the List of Documents as part of the disclosure process, the "*Notes of evidence in R, Mohammed Cpl#10073 v Ramnanan Ramroop (who was charged jointly with MR)* was clearly stated at #42. The AG satisfied his duty of disclosure. MR was free to inspect that document and employ methods provided for, to bring that evidence before the trial judge so that he could have prosecuted his case. He failed to do that. The question is, does anything turn on the absence of the Notes of Evidence in this case so much so as to non-suit the claimant?

33. It is clear that the trial judge did not lay much store on Wooding C.J.'s dicta in **Wills** the AG's linchpin in this case. When one reads the record, the trial judge was very clear that this case was distinguishable. The trial judge clearly articulated that distinction as *"(Chief Justice Wooding) is talking about) a situation where the defence would have raised – would have had evidence in and the court has to weigh this up and the court would go to all the historical documents in this matter which would have included – that is the best evidence, the best evidence that could have been raised by the claimant in a contested matter could be to go back to the statement that the officer took and received from the witness…. But in this case here...there is no evidence on the other side, this is one side, the claimant, the best evidence before this court now is a narration by this witness as to what*

transpired. That is the only evidence and that is from what the court has to make a determination in this matter". [13]

34. In other words, the **Wills** case did not influence the trial judge in his deliberation. We see no reason to find fault with this analysis of the case or the trial judge's refusal to follow it in this case on the basis that it was distinguishable and irrelevant.

35. At the end of the day, what was the case facing the trial judge? Was the trial judge plainly wrong to assess the evidence in the way that he did and further to distinguish this case from Wooding CJ in **Wills**?[14] Those are the questions facing this Court.

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[13] See page 36 – 37 Supplemental Record of Appeal.

[14] Wooding CJ in the seminal case of this Court of Appeal **Wills v Voision (1963) 6 W.I.R. 50** at page 61 Letters E-G followed the learning in **Lea v Charrington**. Wooding CJ opined:

> In a case such as this, where the person complaining of having been maliciously prosecuted had been committed to stand his trial, and more especially so when he had eminent counsel appearing on his behalf before the examining magistrate, **it is, in my judgment, essential for the depositions taken before the magistrate to be put before the court in order to enable it to determine therefrom whether or not they disclose such a case against the person prosecuted as would, if believed, have probably resulted in his conviction.** In that event, they would go to negative an absence of reasonable and probable cause for the prosecution. In the instant case, not only did the respondent Voisin not put the depositions in evidence, but his counsel objected when the appellant sought to tender them. **The case of *Lea v Charrington* ((1889), 5 T L R 218) is authority for saying that his failure to put the depositions in evidence was ground for non-suiting him**… (Emphasis mine).

Two later leading texts support Wooding CJ's dicta.

(1) The authors of **CLERK AND LINDSELL ON TORT** identified what needs to be addressed when the claimant alleges lack of reasonable and probable cause in malicious prosecution. In the 20th ed. at para. 16-09 the passage reads:

> *The question of reasonable and probable cause… involves the proof of a negative …the Claimant has, **in the first place** to give some **evidence** tending to establish an **absence of reasonable and probable cause operating in the mind of the Defendant.** To do this he must show **circumstances in which the prosecution was instituted.** It is not enough to prove that the real facts established no criminal liability against him, unless it also appears that those facts were within the personal knowledge of the defendants … **If they were not it must be shown what was the information on which the defendant acted, which is sometimes done by putting in the depositions which were before the Magistrate.** (Emphasis mine).*

No Case Submission

36. It is accepted by both parties that at the close of the case for MR, the AG indicated that a no case submission would be made. Immediately thereafter, the trial judge put the AG to its election whereupon, the indication was given that no witnesses would be called. The exchange between the trial judge and counsel for the AG is reflected on page 27 of the supplemental record of appeal which states as follows:-

> *"Mr Hemans: My lord the defendant does not propose to call any evidence and make a no case submission my lord.*
>
> *Court: So that's the case for the defence? Well you can't say you are not calling any evidence, make submissions and if it doesn't go your way call witnesses. That's not what you are suggesting, are you?*
>
> *Mr Hemans: I believe your lordship is putting it to my election, it would be the case for the defence my lord.*
>
> *Court: What would be the case?*
>
> *Mr Hemans: That's the case for the defence my lord. The defence doesn't propose to put in any evidence my lord."*

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(2) In **PHIPSON ON EVIDENCE** the authors of that text had this to say at para. 36-59 of the 14th ed.*In actions for malicious prosecution, it is said to be **essential for the plaintiff**, in addition to proving the acquittal, to put in as part of his case the depositions before the magistrate, to show the absence of reasonable and probable cause, since the burden of that issue is upon him …*
The authors placed reliance on **Lea v Charrington 5 T.L.R. 218** as did Wooding CJ.

37. The trial judge, after discussion with both parties as to the procedure to be followed, heard submissions in the order of Counsel for MR and then Counsel for the AG. Both Counsel then made submissions. They both alluded to the fact that the only evidence before the court was that of MR. The trial judge observed that the only evidence placed for consideration was what MR had said. It is useful to reproduce the exchange between the trial judge and MR's Counsel:-

> *"Court: the only evidence before me is what (MR) has said.*
>
> *"Counsel (MR): … the issue would really be whether the defendants have tested the credibility of (MR) and his evidence … sufficiently to show that they had…*
>
> *Court:* ***Even before that question is whether the evidence that he has given both evidence in chief and in cross-examination whether that sustains the case that you have put before the court. That's the first question, it is you who have to prove your case and once he has done what he has done you have discharged whatever burden that is needed to be discharged and throws any burden on the defendants, for the defendant to show now through the submission how, that has not been done."*** [15]

38. The case of **Benham Ltd v Kythria Investments Ltd and Another** [2003] All ER (D) 252 (Dec) explains the procedure to be adopted when a no case submission is made. In essence, the case distinguished two situations that may arise with respect to a no case submission. The first scenario is one in which the defence makes a no case submission and is not put to their election. In this instance, the test is whether the claimant's case has a real

[15] See pages 28 and 29 of the Notes of Evidence

prospect of success. Paragraph 27 of **Benham** states that "*this is a different and lower test than that of a balance of probabilities, the test to be applied once the court has heard all the evidence that is to be called"*. If the judge determines that the claimant's case has no such prospect, the judge will dismiss the claim and that would be the end of the matter. If, on the other hand, the judge determines that the claimant's case has a prospect of success, the judge must go on to hear the defendant's evidence and thereafter find the factual position on the whole of the evidence, on a balance of probabilities.

39. The second scenario is the instance in which the defendant, who makes a no case submission, is put to their election and elects not to give evidence. In this regard, the principal consideration is whether the claimant had established his claim on the balance of probabilities. Paragraph 30 of **Benham** states:-

> *"30… the only issue then is whether the claimant has established his claim on the balance of probabilities. But it must be recognised that he may have done so* ***by establishing no more than a weak prima facie case*** *which has then been strengthened to the necessary standard of proof by the adverse inferences to be drawn from the defendant's election. Such adverse inferences can in other words tip the balance of probability in the claimant's favour." (emphasis ours).*

40. Based on **Benham**, this case fell into the second scenario, and so, it was incumbent on the trial judge first to determine whether MR had established a *prima facie* case. This approach is consistent with the principle that 'he who alleges must prove'. The determination of whether the claimant has satisfied the burden in the scenario as indicated requires the trial judge to examine all the evidence tendered in the case including all the relevant inferences, which arise from the evidence. This was the

approach adopted in **Gibbs v Rea** in which the finding of the Judicial Committee of the Privy Council (JCPC) was based on direct and circumstantial evidence.

41. Paragraph 28 of **Benham** states:-

> *"…The judge entertaining a no case submission should in my opinion clearly recognise and bear in mind the real possibility that the defendant, were his submission to fail, might choose to call no evidence (or, indeed, call evidence which in the event proves helpful to the claimant, something in the experience of all of us) thereby entitling the court to draw adverse inferences which go to strengthen the claimant's case.* ***Of course, such adverse inferences can only be drawn when the claimant's own evidence itself establishes a case to answer****. A case to answer, however, as the third Wisniewski principle indicates, is established by "some evidence, however weak" ("only a scintilla of evidence ... to support the [relevant] inference" as May LJ put it in one of the earlier authorities, Hughes -v- Liverpool City Council)." (emphasis ours).*

42. The above excerpt shows that no adverse inference can be drawn from the silence of the defence unless the claimant's own evidence establishes a case to answer. So, we go back to these questions: Was the trial judge plainly wrong to characterize the evidence in the way he did? Was the trial judge plainly wrong to conclude that MR led no evidence upon which he could base his case? We therefore need to look at MR's evidence to determine whether the evidence that he placed before the trial judge and what he stated allowed him to *prima facie* establish that the prosecutor lacked reasonable and probable cause to prosecute him and that the prosecution was actuated by malice. We shall deal with malice in a separate section. The JCPC case of **Gibbs v Rea** will provide some assistance

in dealing with this issue. We reiterate that this case was not placed for the trial judge's consideration.

Silence of the defence

43. Another question that arose was whether the trial judge was plainly wrong not to draw adverse inferences from the AG's election to call no evidence. In the **Miller** case, Lord Justice Simon Browne addressed this issue. Let us say though that this will be applicable when the claimant has led *prima facie* evidence that is relevant to establishing the proof required in his case. Referring to Brooke LJ in the **Wisniewski v Central Manchester Health Authority [1987] PIQR P324** the Judge culled three principles that may be applicable in cases, when adverse inferences may be drawn, where the defendant elected to call no evidence. They are as follows:-

    (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
    (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced or that issue by the other party or to weaken the evidence, if adduced by the party who might reasonably have been expected to call the witness.
    (3) ***There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference; in other words, there must be a case to answer on that issue.*** (emphasis ours).

44. Again, we could not agree more with this statement of the law. Learning in **Halsbury's** fortifies this position and reads as follows:

    "In proving the absence of reasonable and probable cause in a claim for damages for malicious prosecution the claimant has to prove a negative, and, in general, need only give slight evidence of that.

However, absence of reasonable and probable cause cannot be inferred from the most express malice. The mere innocence of the claimant is not prima facie proof of its absence, and the fact that no indictment was preferred, or that the defendant did not give evidence at the trial although he was present in court, does not prove it." [16]

45. Counsel for MR submitted, that this was a case in which MR led sufficient evidence, which called for an answer by the AG. Counsel for MR in written submissions before this Court stated that MR adduced evidence at the trial both in his witness statement and *viva voce* to the effect that: -

    i. *At all times he co-operated with the officers and protested his innocence.*
    ii. *He told the officers his version of events but they ignored him and continued to accuse him of committing a crime.*
    iii. *He never had any knowledge of fraudulent bail being taken.*
    iv. *He did not attend the Magistrates' Court to secure bail for Gaston Pierre.*
    v. *He did not know of any Samdaye Barlo.*
    vi. *He was not aware that Samdaye Barlo owned property jointly with her brothers.*
    vii. *He did not sign any documents nor did he impersonate Samdaye's brother, Roopnarine Ramlochan.*

46. Counsel for MR further relied on the fact that the trial judge ought to have made an adverse inference in favour of MR with respect to the AG's decision not to call witnesses or tender the Notes of Evidence.

[16] Halsbury's Laws of England/Tort (Volume 97A (2021))/9. Wrongful Use of Process/(1) Malicious Prosecution/(v) Malicious Prosecution: Proof of Claim/327. Absence of reasonable and probable cause for prosecution; evidence; para. 327. *Absence of reasonable and probable cause for prosecution; evidence.*

47. In order to determine the merit of her submission, we carefully examined and dissected the case of **Gibbs v Rea.** After thorough analysis of **Gibbs v Rea** and the application of the law as espoused in that decision, for reasons that we shall explain, we consider that MR failed to discharge the onus that was placed upon him to prove that the charges were laid and prosecuted maliciously. Unlike **Gibbs v Rea**, we are of the view that there is no direct and/or circumstantial evidence that the police acted without honest belief that there were grounds for charging and prosecuting MR or that the police acted maliciously when they conducted the investigation and prosecution of this case.

48. The JCPC in **Gibbs v Rea** disagreed with the decision of the trial judge and affirmed the decision of the Court of Appeal of the Cayman Islands in its finding that there was sufficient evidence, which included inferences made from the evidence tendered by the plaintiff in that case, to show a lack of reasonable and probable cause.

49. In order to make the relevant distinction between **Gibbs v Rea** and the instant matter, we find it helpful to refer to the reasoning of the Court of Appeal, which was quoted by the Board at page 796, paragraphs D-G:-

> *"At the trial the [plaintiff] gave evidence that during the whole of his life and career as a banker he had never indulged in or benefited from drug trafficking or done anything which he considered could give rise to a reasonable suspicion of such an indulgence or benefit. Although at the trial the Chief Justice dismissed that evidence as 'self-serving,' it is difficult to see what more he could have said given the total absence of any indication from the [defendants] as to the basis of the suspicion they had entertained... We are invited by counsel for the [plaintiff] in this circumstance to infer upon a balance of*

probabilities that the true reason for the first [defendant's] silence is that he had no evidence which he could give at the trial of grounds which, on an objective test, could be perceived as reasonable, for applying to the judge for issuance of these warrants. For my own part, I can see no possibility of reaching any other conclusion. This is not a case such as Rhesa Shipping Co. S.A. v. Edmunds [1985] 2 All E.R. 712, where the evidence was physically unavailable so that there was no basis upon which the court could say whether or not the burden of proof had been discharged. Here the evidence was available but it was withheld. That is a fact to which a court cannot simply shut its eyes and take refuge in the technicalities of pleading. It is something which goes to the root of the matter. In my judgment at the end of the day the absence of reasonable and probable cause was sufficiently made out and the Chief Justice should have so found…."

50. In **Gibbs v Rea** the refusal by the respondent to make the requested documents available, coupled with the silence of the defence at the trial was used by the Court of Appeal to make the inference that there was an absence of reasonable and probable cause. Unlike the situation in **Gibbs v Rea,** which reeked of a hesitation on the part of the police to disclose material relevant to the procuring of the search warrants, in this case, there was full disclosure of all the relevant material in the possession of the police to MR. At no time did MR complain about a lack of discovery of any material that might have assisted his case. An adverse inference about the silence of the AG could only be made if there was an evidential basis provided and MR failed in this regard. MR's denial of any involvement in and knowledge about the transactions, which formed the basis of the

charges,[17] were insufficient by themselves to persuade the Court to make inferences adverse to the AG.

51. The respondent in **Gibbs v Rea** gave evidence about his good character, denied any wrongdoing and indicated his lack of knowledge of anything that would cause anyone to suspect him of either carrying on or benefitting from drug trafficking. The respondent was not cross-examined and his evidence remained unchallenged. The Board found that this evidence *"by itself it does not prove that the detective inspector did not have reasonable grounds to suspect him".*

52. The Board went on to state the following at page 800, paragraph A:-

> *"But there is to be taken with it the evidence that his lifestyle was not such as to suggest affluence out of proportion to his income; that nothing was found in the searches; that he was not even interviewed by the police with reference to possible offending; that at the time the warrants were applied for there was no police file whatever; that repeated efforts to identify relevant documentary material by discovery unearthed no documents; that inquiries revealed no note or minute in the records of the Grand Court, and that disclosure of all information has been resisted without explanation right up to the present time."*

53. It was the other evidence referred to above from which inferences were drawn. Those inferences together with the protestations of innocence and evidence of good character led the Privy Council to affirm the decision of the Court of Appeal that there was a lack of reasonable and probable cause.

[17] See para. 47 *infra*

54. In this case, the trial judge was of the view that MR led no evidence that he could assess to see if MR had made out his case in malicious prosecution. MR had not even covered the first base. Lord Justice Simon Brown's dicta would have been helpful to MR had he led evidence, however slight it may be, to satisfy the burden that the prosecutor lacked reasonable and probable cause instead of trying to establish his guilt or innocence. That was the point spoken to by the trial judge. MR led no such evidence.

55. We cannot fault the trial judge for his characterization of the evidence led. It was open to him to do so. That slip is MR's to bear and his alone. We therefore cannot conclude that the trial judge was plainly wrong on this account.

REASONABLE AND PROBABLE CAUSE

56. In the present case, MR testified that he told the police his version of events. Based on his witness statement and viva voce evidence, his account to the police would have included that:-

    i. MR was approached by a friend Kenneth Parmassar who indicated that he knew someone who had been arrested in Tobago and that he needed help to secure bail for that person. In cross examination MR stated that Kenneth told him the person's name for the bail was "*Pierre something*". When asked if Gason Pierre rang a bell, MR responded "*I think so, could remember Gason Pierre or something so*".

    ii. "*Many people come to me and ask me of bail*" and "*People come to me for bail yeah*".

    iii. MR assisted Kenneth by securing a bailor, Kazim Azim Ali, who was also his friend.

iv. MR took Kenneth and a valuator to Kazim's house to get Kazim's identification card and deed.

v. Kenneth informed MR that he had received the valuation report.

vi. MR accompanied Kazim, Kenneth, Kenneth's wife and Kenneth's elderly mother in law to Tobago.

vii. MR proceeded to the Scarborough branch of Kentucky Fried Chicken where he remained while the other persons proceeded to the Scarborough Magistrates' Court.

viii. Kenneth paid MR fifteen hundred dollars ($1500.) for organizing the bailor and MR gave Kazim ($800). In cross examination MR stated "*Well I working for something because I getting somebody to assist him with something so he go give meh something*".

57. We must remember that MR's charge comprised various conspiracy offences as stated in paragraph one herein. Conspiracy is an inchoate offence and the evidence to charge a person for inchoate offences is less than that required for the relevant substantive offences.

58. The admissions by MR, as stated in paragraph 56 (i) to (viii) herein, confirm that MR had knowledge and was involved in the bail arrangement. Although MR testified as to his 'innocent' presence in Tobago, there was enough evidence to suggest otherwise, such as MR's collection of money for organizing the bailor and MR giving Kazim the sum of $800 from the money that MR collected from Kenneth. The fact that Kazim's property was used (in part) to secure bail and that he was paid by MR for doing so, would have been sufficient to raise suspicion about the legality of the activity. Further, the payment of any sum of money to a person who provides surety (in this case property) in order to secure bail is an offence in law.

59. It is accepted that there was no evidence led to show that MR was one of the persons impersonating a joint owner of the property that was used to secure bail. There was sufficient evidence, however, at the time of the charging of MR, to suggest that he played a critical role in the illegal arrangement to secure bail and thus was part of a conspiracy. The fact that MR may not have actually been present when the bail document was presented to the Clerk of the Peace does not exonerate him from criminal liability. The essence of conspiracy for the charges as stated in paragraph one herein is that MR knowingly and willingly participated in an illegal transaction to secure bail. There was more than sufficient evidence based on MR's own admissions, to satisfy the test of reasonable and probable cause.

60. All the admissions by MR, place him in a category far different from the respondent in **Gibbs v Rea**. In fact, we find that these admissions taken collectively or in any combination show evidence as to the likelihood of there being grounds on which MR could reasonably have been suspected of committing the offences for which he was charged and prosecuted.

61. We can find no evidence, either direct or circumstantial or by inference, to satisfy any of the particulars as stated in paragraph two herein. The suggestion by counsel for MR that the judge ought to have made an adverse inference by the silence of the AG, is in this case, unfounded. The adverse inference to be drawn from silence only arises when there was a need to answer. If in a case such as this, the claimant has not met the threshold of a *prima facie* case, the focus must be on the failure to satisfy the legal burden placed on the claimant and not the distraction of the silence of the defence.

62. During the hearing, the Court asked MR's Counsel whether she was depending on MR's testimony and pleaded facts to win MR's case; or whether she depended on the cross-examination of the AG's case. Counsel

responded *"a bit of both"*. This however does not detract from MR's duty to prove its case. It is for the claimant to tender evidence which at the very least, taken at its highest, passes the muster of a *prima facie* case. The claimant must first establish a *prima facie* case, which means that it must tender evidence that calls for an answer from the defence and then, of course, it can live in the hope that discrepancies and holes in the case for the defence can bolster its case. The law cannot be, that a claimant is allowed to establish a *prima facie* case with evidence that it relies upon from the case for the defence. If that were the position, then the claimant would be the beneficiary of a reduced burden of proof which is unknown to the law and which would be unfair to the defence. In order to ensure fairness in malicious prosecution matters, the claimant, as was the case in **Gibbs v Rea**, must lead evidence, which despite its size, is sufficient to call upon the defence to answer the case.

63. The issue therefore becomes, was it open to the trial judge to find that there was insufficient evidence led by the claimant to satisfy a *prima facie* case?

64. We have looked at the evidence led by MR at all angles. Even with the assistance of the best legal tools, and with the inclusion of all the inferences that could be made, we find that the trial judge was entitled to decide that there was insufficient evidence to establish a *prima facie* case of reasonable and probable cause.

65. Unlike **Gibbs v Rea**, we too find that there was no circumstantial basis that could have been used to cross the threshold of 'slender' evidence. This is not a matter of a weak *prima facie* case, it was, as found by the trial judge, to be no *prima facie* case at all.

66. In answer therefore to, **whether the trial judge was plainly wrong to find that MR's evidence failed to support his case that the prosecution did**

not have reasonable and probable cause to bring criminal proceedings against him, we say no.

Issue ii

Whether the trial judge was plainly wrong not to find on the evidence that the prosecution was actuated by malice.

Malice

67. In **Gibbs v Rea**, the Board quoted the Court of Appeal of the Cayman Islands at page 796, paragraph G and page 797, paragraph A which states as follows:-

> *"I turn now to the issue of malice. This again is a matter to be proved by the [plaintiff] but there is ample authority that in a proper case it may be inferred from want of reasonable and probable cause although the converse is not true: see Brown v. Hawkes [1891] 2 Q.B. 718. Malice in this connection does not necessarily connote spite or ill-will. It is sufficient if a defendant is shown to have used the machinery of the courts for an improper purpose not in contemplation of the authorising statute, as for example to conduct a fishing expedition against a person against whom no reasonable ground of suspicion is entertained. . . .*
>
> *My conclusion looking at all the available evidence in this case in its context must be that it is proper to infer malice here on the part of the first [defendant] in the sense in which that term is understood as an ingredient of the tort of abuse of process."*

68. Since MR failed to establish a *prima facie* case of reasonable and probable cause, it stands to reason that, the allegation that the prosecution was actuated by malice must fail**.**

Duty of Candour

69. There was some mention made of the duty of candour that is thrust upon the State. That duty will arise only in circumstances in which the initial burden is discharged by the production of cogent and sufficient evidence. This doctrine cannot be relied upon to prove a case or to fill lacunae in an opponent's case. If the person, upon whom the burden falls, did not bring evidence to satisfy their case, their burden cannot be displaced to the other side by raising the duty of candor. It simply does not arise.[18]

70. In the premises, we dismiss the appeal filed on 30th April 2013 and shall hear the parties on costs.

…….

/s/ C. Pemberton

Justice of Appeal

…….

/s/ G. Lucky

Justice of Appeal

[18] See Bereaux JA in **Oswald Alleyne v The Attorney General & Ors Civ. App. 52 of 2003** and **Allan Mitchell & Ors v The Attorney General Civ. App. 96 of 2013** para. 24 per Pemberton JA.

Delivered by Smith J.A.

INTRODUCTION

71. After much deliberation, I find myself in a position where I am unable to agree with the majority decision in this matter.

72. This was a case where the Appellant brought an action against the Respondent seeking damages for malicious prosecution. The Appellant had been charged and prosecuted for several offences of conspiracy in relation to alleged bail fraud at the Scarborough Magistrates' Court. The Appellant had been acquitted of all the charges following a Notice of Discontinuance from the Director of Public Prosecutions.

73. At the trial of the Appellant's claim for malicious prosecution, only the Appellant led evidence and then his case was closed. The Respondent elected to call no evidence and made a no case submission.

74. The trial judge decided that the Appellant's evidence did not satisfy the proof of want of reasonable and probable cause in the Respondent to prosecute the Appellant, and he dismissed the Appellant's case.

75. The majority have upheld the trial judge's decision, however, I, with all due respect beg to differ.

THE EVIDENCE BEFORE THE TRIAL JUDGE

76. To get a proper appreciation of this matter I find it necessary to set out in some detail the evidence that was available to the trial judge when he made his determination on the Respondent's no case submission.

77. The Appellant had filed a witness statement in this matter and he relied on this as his evidence in chief.

78. A summary of the relevant parts of this witness statement revealed that in October 1999 the Appellant was approached by a man he had known for over 40 years as Kenneth Parmassar who indicated to the Appellant that he knew someone who had been arrested in Tobago and that he needed the Appellant's help to secure bail for that person.

79. The Appellant decided to assist his long time friend and the Appellant approached one of his friends, Kazim Ali, to use his land as security for the bail of Kenneth Parmassar's friend. Kazim Ali agreed to do this.

80. Some time later, the Appellant, Kazim Ali, Kenneth Parmassar, Mr. Parmassar's wife and mother in law travelled to Tobago. They proceeded to the Scarborough Branch of Ketucky Fried Chicken (KFC) where the Appellant remained while the other persons went to the Scarborough Magistrates' Court.

81. About 2 hours later, the other persons returned to KFC, and they all then proceeded to return to Trinidad.

82. Kenneth Parmassar gave the Appellant $1500.00 for organizing the bailor and the Appellant gave Kazim Ali $800.00 from his $1500.00.

83. In November 1999, three police officers, Rocky Mohammed, Maurice Piggott and Wayne Boyd visited the Appellant's home in relation to an investigation about bail fraud. The Appellant denied any knowledge of any bail fraud and was 'willing to assist' the police. The officers searched his home and thereafter the Appellant accompanied them to the Police Administration Building in Port of Spain where he again reiterated his willingness to co-operate with the police. The officers also recorded a statement from the Appellant.

84. A few days later, the same three police officers once again visited the Appellant at his home and he accompanied them to the Freeport Police Station. There, he was interviewed and informed that he was being investigated for taking the bail of one Gason Pierre and for impersonating Baliram Ramlochan and Roopnarine Ramlochan. He again protested his innocence and denied knowing Gason Pierre or taking bail for Gason Pierre. He also provided handwriting specimens to the police officers.

85. On the 5th February, 2000, the Appellant was arrested at his workplace and taken to the Port of Spain prison and later transferred to prison in Tobago. He stayed at the Tobago prison for 7 months until his bail was approved.

86. The Appellant detailed appalling conditions in respect of his detention in prison before he was able to secure his release on bail and he testified to the loss and damage suffered.

87. The charges that had been brought against the Appellant had been set out in his statement of case and in the Appellant's Agreed Statement of facts, they were:

    i. Conspiracy to pervert the course of public justice;
    ii. Conspiracy to forge a certain document namely a recognisance of bail;
    iii. 2 charges of Conspiracy to utter a certain forged document namely, a statutory declaration;
    iv. Conspiracy to utter a false document namely a recognisance of bail;
    v. Conspiracy to make a false declaration;
    vi. Conspiracy to forge a certain document namely an oath justifying bail.

    It is important to note that the charges against the Appellant revolved around the presentation of allegedly false or forged documents. The Appellant had not been prosecuted for any offence with respect to the

payment of money to Kazim Ali, nor in respect of any acts of assistance that he rendered to his friend, Kenneth Parmassar, to secure bail. Further, there was never any pleading nor allegation by the Respondent that these acts (i) the payment of money to Kazim Ali or (ii) the simple assistance the Appellant rendered to his friend, Kenneth Parmassar, to secure bail, were of themselves illegal acts.

88. The extract from the Magistrate's Case Book which had been put in evidence as an annexure to the Appellant's witness statement only revealed that the Appellant was alleged to have conspired with one Samdaye Barlo and other persons unknown to forge a recognisance of bail in respect of one Gason Pierre.[19]

No other details about any alleged conspirators or about the other alleged conspiracies had been put in evidence before the trial judge.

89. The Appellant later attended the Scarborough Magistrates' Court, Tobago on numerous occasions until the D.P.P. issued notices of discontinuance of the proceedings against him on 11th April 2008.

90. I agree with the majority that the cross examination of the Appellant by Counsel for the Respondent was largely uneventful. It did not shake the Appellant's testimony and he reiterated his innocence and lack of knowledge of any conspiracy. Interestingly, the Respondent's attorney put a case to the Appellant that he was impersonating Baliram Ramlochan and Roopnarine Ramlochan and that he had signed bail documents in these names. This was roundly denied by the Appellant.

Counsel for the Respondent also asked the Appellant if the name Samdaye Balloo (phonetic) rings a bell. Perhaps this was an attempt to make some connection with the name "Samdaye Barlo"

[19] See Annexure MR1 of the witness statement of the Appellant (pages 425 and 426 of the Record of Appeal)

which appeared in the extract of the Magistrate's Case Book as a co-conspirator of the Appellant. However the Appellant denied that this name rang a bell to him.

91. The trial judge made no finding as to the Appellant's credibility or lack thereof; this reinforces the finding of the majority, with which I agree, that the cross examination of the Appellant was uneventful, and as I have stated, his testimony remained unshaken.

92. Therefore, at the end of the Appellant's case, the evidence which the trial judge had before him indicated that:

    i. The Appellant had innocently assisted Kenneth Parmassar to secure bail for a friend of Mr. Parmassar.
    ii. There was no illegality shown or alleged in this transaction.
    iii. There was no evidence of any conspiracy with anyone or as alleged in the charges brought against the Appellant.
    iv. The Appellant always protested his innocence, attempted to co-operate with the Police, and denied involvement in any conspiracy or any knowledge of any conspiracy as alleged or at all.
    v. Yet the police prosecuted the Appellant for an unproved and unsubstantiated conspiracy.
    vi. The prosecution was eventually ended by the D.P.P. (for reasons unknown).
    vii. The Appellant had suffered loss and damage as a result of this unsubstantiated and unproved prosecution.

RELEVANT LAW

93. I agree with the statement of the majority on the essential elements of the tort of malicious prosecution as cited from **Clerk and Lindsell on Torts** 20th edition paragraph 16-09:

"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 by the Defendant 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 those is on the claimant."

94. I also agree with the majority that the dispute in the present matter revolves around the third requirement above, namely, proof of want of reasonable and probable cause.

95. An often cited definition of reasonable and probable cause is from Hackney J in **Hicks v Faulkner** namely "**An honest belief in the guilt of the accused founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary 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."**[20]

96. In an action for malicious prosecution the burden of proving this want of reasonable and probable cause of the prosecutor, rests on the claimant. However there are two idiosyncrasies in this matter of proof of want of reasonable and probable cause that need to be mentioned here:

    i. First, "**In proving the absence of reasonable and probable cause in a claim for malicious prosecution, the claimant has to prove a negative and in general, <u>need only give slight evidence of that</u>**" (my emphasis).[21]

[20] 1878 8QBD 161,171

[21] See **Halsbury's Laws of England** Vol 97(2015)/9 at paragraph 741

ii. Second, the claimant has to prove the negative in respect of the state of mind of the DEFENDANT or his witnesses. This generally has to be done by circumstantial evidence.[22]

97. **"The issue of whether the defendant had reasonable and probable cause to institute a prosecution…will normally depend on resolving a conflict of evidence between the claimant and the defendant"**.[23]

To resolve this conflict, in the usual course of a trial for malicious prosecution the claimant will lead the evidence of matters within his knowledge which tends to prove his case and the defendant will lead evidence of the circumstances and/or reasons behind the prosecution of the defendant. However, the situation sometimes arises, like here, where the claimant testifies to what he knows and the defendant elects to lead no evidence.

Since the burden of proof of want of reasonable and probable cause is always on the claimant, the issue in this situation is what is the evidence or standard of proof that would satisfy a court of the slight evidence, or circumstantial evidence needed to prove want of reasonable and probable cause in the prosecutor?

98. The Privy Council decision in **Gibbs v Rea**[24] addressed this very situation, in circumstances which, to my mind, are very similar to the present matter. Since it is seminal to the present matter, I will refer to it in some detail.

THE DECISION IN GIBBS V REA

99. **Gibbs v Rea** concerned an action for malicious procuring of a search warrant. However as the majority decision recognised, the principles are similar to those which apply to malicious prosecution. In the words of Gault

[22] See **Brian Gibbs and others v John Mitchell Rea** (P.C.) 1998 A.C. 786 at 799 E
[23] See **Clerk and Lindsell on Tort** 21st Edition at 16 – 33
[24] See footnote 22 above

J who gave the majority decision, "**It is akin to malicious prosecution …and the less common tort of maliciously procuring an arrest… The true foundation of each is intentional abuse of the process of the court…**"[25]

The facts were that Detective Inspector Gibbs applied for warrants to search the home and premises of the bank of which Mr. Rea was the managing director. In the information supporting the application, Gibbs stated that there were reasonable grounds for suspecting that Rea had carried on or benefitted from drug trafficking and that incriminating material would likely be found in the search. A judge issued the warrant and the search proceeded. Nothing incriminating was found. However, Rea was constructively dismissed by the bank. He then commenced an action for the wrongful and malicious procuring of the search warrant. At the hearing of this matter, the plaintiff gave evidence of his personal circumstances, which did not suggest affluence disproportionate to his means and also gave unchallenged evidence protesting his innocence. The defendant apart from producing the information and the warrants, called no evidence.

The Privy Council by a majority decided that there was a circumstantial case that there were no grounds on which the plaintiff could reasonably have been suspected of drug trafficking or benefitting therefrom and as such the plaintiff's claim called for an answer and the defendant's silence supported the inference that he did not have sufficient grounds on which to suspect that the plaintiff had carried on or had benefitted from drug trafficking.

The plaintiff had therefore proved the elements of the tort.

100. Similarly, in the present matter as I indicated in paragraph 92 above, at the conclusion of the claimant's case, the uncontroverted evidence before the trial judge was that the innocent and co-operative Appellant had been prosecuted for unproved and unsubstantiated conspiracies. He denied any

[25] at page 797 C and see also page 797E - H

knowledge of involvement in any conspiracy and the prosecution had been discontinued against him by the D.P.P.

This, like in the case of **Gibbs v Rea**, was slight and circumstantial evidence that the prosecution of the Appellant had been done without reasonable and probable cause. A fortiori, these facts called for an answer from the defendant and their silence by failing to call any evidence, further supported the inference of a want of reasonable and probable cause in the prosecution of the Appellant.

101. Again, because of its direct relevance to the present matter I quote some passages from the majority decision of Gault J in **Gibbs v Rea**.

102. In respect of the burden of proof, the majority decision stated:

> **"The burden on the plaintiff was to prove on the balance of probabilities that the detective inspector did not believe in good faith that there were grounds for suspicion that the plaintiff had carried on or benefited from drug trafficking. The state of a person's mind can be proved by evidence of what he or she has said or done. <u>It can be proved also by circumstantial evidence.</u>"**(my emphasis)[26]

103. Similarly, in the present matter the burden that lay on the Appellant to prove that the Respondent/Prosecutor did not believe in good faith that he had reasonable grounds for prosecuting the Appellant could have been and was met by the circumstantial evidence mentioned in paragraph 92 above which, in summary, on the evidence before the trial judge, showed that the innocent and co-operative Appellant had been prosecuted for unproved and unsubstantiated conspiracies which he flatly denied and which charges had been discontinued against him in the Magistrates' Court.

[26] at page 799 D-E

104. With respect to the standard of proof (the evidence) required, the majority in **Gibbs v Rea** noted:

> **"The preferable approach is to consider the matter in the round and determine whether the evidence as a whole satisfies the standard of proof.**
>
> **It was of course open to the defendants to elect to give no evidence and simply contend that the case against them was not proved. But that course carried the risk that should it transpire there was some evidence tending to establish the plaintiff's case, albeit slender evidence, their silence in circumstances in which they would be expected to answer might convert that evidence into proof."** (my emphasis)[27]

105. Similarly, in the present matter the only evidence before the trial judge as stated before showed that the innocent and co-operative Appellant had been prosecuted for unproved and unsubstantiated conspiracies which he flatly denied and which had been discontinued by the D.P.P. This was more than slender evidence of the want of reasonable and probable cause for his prosecution. These facts called out, even cried out, for an answer from the Prosecutor and in the absence of any evidence from the Prosecution (Respondent) their silence converted the evidence of the Appellant into proof of the want of reasonable and probable cause for his prosecution.

THE ARGUMENTS OF THE RESPONDENT AND THE RATIO OF THE MAJORITY

106. The Respondent's list of documents revealed that there were notes of evidence of the aborted prosecution of the Appellant on the conspiracy charges before the Magistrates' Court. This was not a matter revealed or explored in evidence before the trial judge. The Appellant did not put the notes of evidence from this aborted prosecution, which were part of the

[27] at pages 798G – 799A

Respondent's list of documents, into evidence in presenting his case on malicious prosecution before the trial judge.

107. The Respondent and the majority relied on this alleged shortcoming of the Appellant to contend that in the absence of these depositions/notes of evidence, the Appellant failed to prove a want of reasonable and probable cause for his prosecution.

Re the argument of the Respondents

108. The Respondent submitted that as a matter of law, the claimant in an action for malicious prosecution must put the depositions and/or these notes of evidence of the prosecution into evidence or else his claim should be dismissed.

This is not a correct statement of the law.

109. The Respondent's submission is founded upon the authority of two cases which are readily distinguished from the present case. These cases are **Lea v Charington**[28] (from the Queen's Bench Division) and **Wills v Voisin**,[29] a 1963 Court of Appeal decision from Trinidad and Tobago.

110. The first distinction is that in both of those cases, the plaintiff in the malicious prosecution action had been acquitted at the assizes after a magistrate had previously found a prima facie case for their continued prosecution in the assizes. In this situation, the prior finding of a judicial officer of a prima facie case for continued prosecution was an important part of the factual matrix behind the prosecution of a claimant. In the present matter, no magistrate had found a prima facie case for the continued prosecution of the Appellant. The D.P.P. discontinued the prosecution in the Magistrates' Court and the Magistrate acquitted the Appellant of all of the conspiracy charges. The importance of a prior

[28] (1889) 5 TLR 218
[29] (1963) 6 WIR 50

committal to stand trial at the assizes was not a relevant matter in the present case.

111. Second, the ratio in **Lea v Charrington**, as can be gleaned from the law reports,[30] is that the act of a justice (lay magistrate) in issuing a warrant of arrest is a judicial act and is an answer to an action for malicious prosecution. Statements in that case about the failure to put in depositions before the lay magistrate were obiter dicta.

In any event the correctness of this decision is open to doubt on both the ratio and the obiter dicta in the light of the contrary decision of a superior court (the Privy Council) in **Gibbs v Rea**.

112. Third, in **Wills v Voisin**, evidence in the malicious prosecution action was led by both the claimant and by the defendant/prosecution, unlike in the present case where the Defendant/Prosecution led no evidence. Further, in **Wills v Voisin,** the Court of Appeal came to the conclusion about the lack of proof of the absence of reasonable and probable cause after a detailed assessment of all the facts before it which included the evidence of the claimant and the defendant/prosecution.[31] One of these facts was the absence of the notes of evidence.

Even further in **Wills v Voisin**, the prosecutor tried to put in the depositions from the Magistrates' Court but was prevented from doing so upon the objection of the claimant in that case.[32]

That malicious prosecution trial followed the normal course of the plaintiff/claimant leading evidence of matters within his knowledge and the defendant leading as much evidence as it could as to the facts behind the prosecution. That case is not authority for the proposition that as a matter of law in an action for malicious prosecution, the omission of a claimant to put in depositions or notes from a prior

[30] See footnote 28 above and see also (1889) 23 QBD 45
[31] See pages 56-61 of the report
[32] See page 61 F

prosecution results in a dismissal of his claim. That case decided, as did **Gibbs v Rea**, that all the evidence before a court must be examined to see whether or not a claimant in a malicious prosecution case led sufficient evidence of want of reasonable and probable cause. A fortiori, the case does not address a situation where, like here, the prosecution chooses not to call evidence and in so doing, does not put in evidence one of its own documents, namely, the notes of evidence/depositions from the prosecution.

113. Fourth and in any event, the proposition that the omission or failure of a claimant to put in depositions or notes of evidence with respect to his prosecution automatically results in a dismissal of his claim is one which is much too broad. It does not cater for cases where, for instance, the notes of evidence would be irrelevant to a malicious prosecution suit especially so in cases like the present where the claimant alleges negligent or biased prosecution by a failure to do a proper investigation which would have revealed the innocence of the accused, or other grounds upon which it was not reasonable to prosecute an accused. The depositions/notes of evidence in such cases will necessarily be incomplete and unhelpful or irrelevant and the omission or failure to put them in evidence would not affect the question of reasonable and probable cause.

114. Fifth, the statement of the Respondent about the dismissal of a malicious prosecution claim for the failure to put in notes of evidence/depositions as part of the claimant's case runs counter to the clear findings and decision of the Privy Council in **Gibbs v Rea,** as well as the local Court of Appeal decision in the **Attorney General v Harridath Maharaj**[33] and the High Court decision in **Mark Blake v The Attorney General.**[34]

[33] Civil Appeal No.P118 of 2016 per Mohammed JA at paragraph 54
[34] CV.2010-03388 per Boodoosingh J at paragraphs 21 to 24

115. For these five reasons, I find that the Respondent's submission, that as a matter of law the omission or failure of a claimant in a malicious prosecution suit to put in depositions or notes of evidence in respect of his prosecution would result in a failure to prove the absence of reasonable and probable cause and/or a dismissal of the claim, is without merit.

116. The law, as properly identified in my discussion, in **Gibbs v Rea** (above) is that where, as here, a Prosecutor/Defendant in a malicious prosecution case elects to lead no evidence, he runs the risk that any or even slender or circumstantial evidence which tends to establish the claimant's case when added to the silence of the prosecution may (as here) be enough to prove the absence of reasonable and probable cause for the prosecution.

Re the opinion of the majority

117. The majority are of the opinion that, first, the facts of the present case are materially different from **Gibbs v Rea** since, on the facts of the present case, the Appellant failed to establish want of reasonable and probable cause in the prosecution and, second, there was no reason to come to the view that the silence of the Respondent called for an answer to the Claimant's case.

118. Respectfully, I beg to differ.

119. The majority base their finding on what I would summarise in two propositions namely:-

a) The evidence of the Appellant with respect to the conspiracy allegation is materially different to that in **Gibbs v Rea**.
b) The evidence of the prosecution in **Gibbs v Rea** reeked of a hesitation by the police unlike in the present matter.

120. With respect to (a) above, I am of the view that while the facts of each case will be different, the differences in the present matter are not so material from the **Gibbs v Rea** case as to cause a different outcome.

In **Gibbs v Rea** the claimant gave unchallenged evidence protesting his innocence and pointing to his "normal" standard of living in denial of any benefiting from drug related activity. In a similar way, as the majority accept, this Appellant, on the uncontroverted evidence before the trial judge, protested his innocence and denied any involvement in any conspiracy. On the uncontroverted evidence, he also gave full details of his involvement in the bail related matter which showed no illegality, and he even co-operated fully with the police.

If anything the material facts in this matter bear close resemblance to those in **Gibbs v Rea**.

Further, the majority refer to the conspiracy charge as having a bearing on the differentiation of **Gibbs v Rea**. They state that conspiracy offences are inchoate offences and "the evidence to charge a person for inchoate offences is less than that required for a substantive offence".

While that may be so, the only and uncontroverted evidence before the trial judge was that the Appellant was not involved in anyway nor did he have any knowledge of any conspiracy. There was no evidence of any reason to charge the Appellant with any inchoate offence. Any suggestion that there may have been some reason to charge the Appellant, on the evidence before the trial judge was mere speculation.

121. With respect to (b) above, the majority state that the situation in **Gibbs v Rea** "reeked of a hesitation on the part of the police to disclose material relevant to the procuring of the search warrant," to Mr. Rea (the accused). Specifically, they point to the fact that the police withheld their file and any record of what took place before the judge who issued the warrant; they also refer to the failure or the reluctance of the officer in charge of the unit to come to court to be asked about his work.

122. I will deal with these matters in reverse order. In **Gibbs v Rea**, the failure of the officer in charge of the Drugs Unit to come to court to be asked about his work bears a striking similarity to the present case.

> Even though the evidence revealed that the police complainant in the magisterial prosecution (Officer Mohammed) had since died, there were two other senior police officers, Acting Senior Superintendant Wayne Boyd and Deputy Commissioner of Police Maurice Piggott, who the Appellant stated were involved in the investigation and charging of the Appellant. They had also filed witness statements in this matter. However, they had not been presented to give evidence in this suit. No reason had been advanced for this. The Respondent/Prosecution, like in **Gibbs v Rea** chose to withhold these officers from being questioned about their work (investigations and charging of the Appellant).

123. With respect to the disclosure of the relevant material i.e. the notes of evidence/depositions and witness statements to this Appellant, unlike what occurred in **Gibbs v Rea**, I make the following three observations.

124. First, there is a suggestion that the trial judge may have been correct to view this omission to lead the "best evidence" as a material factor. However, it would be very odd if a claimant were under a duty to reveal or put in evidence a defendant's documents in advancing his (the claimant's) case. The notes of evidence/depositions were the documents of the Respondent/Prosecution and it was they who, without explanation, chose not to reveal them to the court. The Claimant cannot be held responsible for, nor should he suffer any prejudice on account of the Respondent/Defendant's omission. Perhaps it may have been different if these notes of evidence/depositions had been part of an agreed bundle or one of the documents in the Appellant's List of Documents; the Appellant may then have been under a duty to put them into evidence and his failure to do so could be regarded as an omission to give material evidence which

would put the case on a footing similar to **Wills v Voisin.** However, as I stated above, these depositions/notes of evidence were the Respondent's documents which they chose to withhold from the court and for which they must bear the consequences or the risks as a result of their failure (see **Gibbs v Rea**).

Similarly, the Appellant cannot be faulted for nor suffer prejudice for not alluding to the Defendant's witness statements, where the Defendant, without explanation, chose to withhold the witnesses and their evidence from the court.

If there was any withholding or hesitancy to be forthcoming with evidence, this lay squarely on the Defendant/Prosecution who, like in **Gibbs v Rea**, chose to adopt this position.

125. Second, as the majority recognises, the best evidence rule is not applicable to situations such as this. It is now confined to situations where an original of a document is the best evidence and, in its absence, copies and other reproductions of the document may be accepted.[35] Any reference by the trial judge to the best evidence in this case was misguided.

126. Third, to suggest that a party's case could be compromised or prejudiced by a failure of the opposite party to present their own evidence, especially in a case of malicious prosecution, would in effect be holding Prosecutors to an unacceptably lax standard in these cases. Prosecutors must be aware that they have a duty to the court and to the wider society to conduct their affairs with transparency and all due propriety especially when their actions impact upon the lives and liberties of citizens. The serious consequences of their shortcomings, like in this case, ought not to be visited upon the citizen claimants. This is even more egregious where, as here, the uncontroverted evidence before the trial judge revealed only that an innocent and co-operative citizen who disavowed any knowledge

[35] See Phipson on Evidence 17th Edition at 41-03 to 41-04

of or involvement in any conspiracy was still prosecuted for these unproved and unsubstantiated conspiracies. Any suggestion about what the depositions or witness statements may have revealed in respect of reasonable and probable cause for prosecution was bare speculation and had no foundation in the evidence at the trial. In fact, if one were to speculate, a reasonable assumption would be that the Respondent/Prosecutor chose not to put in the witness statements, depositions or notes of evidence for fear of being exposed to a cross examination which would have destroyed their defence.

127. Therefore, for the reasons that I have given above, I disagree with the submission of the Respondent and the finding of the majority. As I stated, I find that the Appellant had satisfied the burden of proving the want of reasonable and probable cause in respect of his prosecution.

For completeness, I need to refer to 2 matters they are:

(a) A further shortcoming of the trial judge; and

(b) The issue of malice (the 4th element of the tort of malicious prosecution).

(a) A further shortcoming of the trial judge

As I stated at paragraph 92 above, the uncontroverted evidence before the trial judge showed that the innocent and co-operative Appellant had been prosecuted for unproved and unsubstantiated conspiracies, which he flatly denied, and which had been discontinued by the D.P.P.; this called or cried out for an answer from the Prosecution/Defendant and in the absence of the same, their silence further converted the evidence of the Appellant into proof of the want of reasonable and probable cause for prosecution.

Therefore the finding of the trial judge that the Appellant failed to prove want of reasonable and probable cause cannot stand.

128. However, the trial judge in his short judgment of three pages sought to justify his finding by asserting that the Appellant tried to show that he was innocent and knew nothing of the charges alleged against him. To quote the trial judge "what the claimant has put forward goes really to his innocence or guilt in the criminal matter." The trial judge felt that this did not go to proving the want of reasonable and probable cause for the prosecution.

By analysing the matter in this way, the trial judge failed to realise that the Appellant's assertion of innocence and lack of knowledge of any conspiracy was, like in **Gibbs v Rea**, one of the facts or was a bit of circumstantial evidence that went to proof of the absence of reasonable cause for the prosecution. When taken in connection with all the other facts mentioned at paragraph 92 above, it was, like in **Gibbs v Rea**, sufficient proof of the negative proposition, namely the lack of reasonable and probable cause in the prosecution. Further, the trial judge failed to appreciate or throw into the scales that these facts called out for an answer from the Defendant/Prosecution and their silence could, and did in this case, convert the circumstantial and other evidence of the Appellant into proof of the want of reasonable and probable cause.

As a result of this further shortcoming in his analysis, the decision of the trial judge cannot stand.

(b) Malice

129. I agree with the majority citing from **Gibbs v Rea** that in a proper case malice may be inferred from want of reasonable and probable cause. This is also in keeping with local authority to the same effect (see **Alistaire Manzano v The Attorney General of Trinidad and Tobago Civil Appeal No. 115 of 2011** at paragraph 48).

On the evidence before the trial judge, this was a proper case to infer malice from the want of reasonable and probable cause for the prosecution. To repeat the facts, on the uncontroverted evidence, an

innocent and co-operative accused who always protested his innocence and disavowed any knowledge of any conspiracy was still prosecuted for unproved and unsubstantiated conspiracies; a fortiori, in these circumstances which called out for an answer, the silence of the prosecution strengthened the inference of malice to the point of proof.

CONCLUSION

130. Having established all the elements of the tort of malicious prosecution, I am of the view that the Appellant, on the evidence before the trial judge, ought to have succeeded in this action. I would therefore allow this appeal and refer the question of damages to a Master.

…….

/s/ G. Smith

Justice of Appeal