

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P162 of 2015

Between

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Appellant

And

KEVIN STUART A/C KEVIN STEWART

Respondent

**PANEL: N. BERAUX, J.A
P. MOOSAI, J.A
J. JONES, J.A.**

**APPEARANCES: R. Martineau SC, Z. Haynes-Soo Hon, C. Finley and J.
Forrester for the appellant
K. Ratiram and C. Kalloo for the respondent**

DATE DELIVERED: 25 July 2017

I agree with the judgment of Bereaux J.A. and I have nothing to add.

P. Moosai
Justice of Appeal

I too agree.

J. Jones
Justice of Appeal

JUDGMENT

Delivered by Bereaux, J.A.

Introduction

[1] There are three issues in this appeal:

- (i) whether Police Constable Nicholas Phillips (PC Phillips or Phillips) had reasonable and probable cause to arrest the respondent,
- (ii) whether PC Phillips had reasonable and probable cause to charge him and
- (iii) if he had no reasonable and probable cause to charge the respondent, whether the charge was preferred maliciously.

[2] The arrest was effected under section 12(1) of the Anti-Gang Act, No. 10 of 2011 (the Act or the Anti-Gang Act). The long title of the Act states that it is intended to provide “*for the maintenance of public safety and order through discouraging membership of criminal gangs and the suppression of criminal gang activity...*” Consistent with that intention a police officer who reasonably suspects that a person has committed an offence under the Act may arrest without warrant such a person and detain him or her for no more than seventy-two hours. See sections 12 and 13 of the Act. The legislation came into force on 15th August 2011 and the respondent’s arrest was effected at midnight on 27th August 2011 during a police exercise. Prior to the coming into effect of the Act, police officers were briefed on its provisions and information on various gangs was gathered through surveillance. But proving offences in respect of gang membership and gang-related activity is by no means clear cut.

Background

[3] The respondent was asleep at his home, at midnight on 27th August, 2011, when he was awakened by a party of police officers banging on his front door, shouting “*Police*”. I shall refer to him as the respondent or Stuart. He opened the

door and policemen with guns pointed at him entered his home. PC Phillips told him that he was being arrested “*for enquiries*”. According to the respondent PC Phillips did not identify himself during the course of the arrest neither did PC Phillips tell him that he had information that he (Stuart) was involved in gang-related and narcotic activity. Stuart was taken to the Marabella Police Station and put in a cell. The cell contained a toilet which was clogged and emitted a stench. He was forced to sleep on the ground.

[4] He was detained without charge (pursuant to section 13 of the Act) at the Marabella Police Station until 29th August 2011 when PC Phillips charged him with being a member of a gang, at Union Park East, Marabella, on 27th August 2011, contrary to section 5(1)(a) of the Act. On the same day, he appeared before a magistrate at the San Fernando Magistrates’ Court and was denied bail. He was later taken to the Maximum Security Prison then transferred to the Remand Yard Prison, Arouca. On 28th September, 2011, the Director of Public Prosecutions discontinued the proceedings against him. On 29th September 2011, the presiding magistrate at the First Court, San Fernando Magistrates’ Court discharged him and he was released at around 3:00 p.m. on that day. He had spent one month and a day in prison.

[5] The respondent initiated these proceedings seeking damages for wrongful arrest, false imprisonment and malicious prosecution. He contends that he was not arrested “*for any good/lawful reason*” and that the charge was laid by PC Phillips maliciously and without reasonable and probable cause. He claims aggravated and exemplary damages. He alleges that PC Phillips’ conduct was arbitrary and oppressive and that PC Phillips knew or ought to have known that he would automatically be denied bail as a result of the charge. The sole particular of malice and lack of reasonable and probable cause is that:

“At the time [PC Phillips] laid the said charge, he had no evidence before him that the [respondent] was a gang member on the 27th day of August 2011, at Union Park East, Marabella, but still

charged him”.

It is important to note that the respondent does not allege, as a particular of malice, any improper motive on the part of PC Phillips in laying the charge.

[6] The defence of the Attorney General is that there was reasonable and probable cause to arrest and charge the respondent and that the charge was laid by PC Phillips in the bona fide execution of his duties as a police officer.

Judge’s findings and reasoning

[7] The judge found that there was no reasonable and probable cause for PC Phillips to arrest or to prosecute Stuart for the offence of being a gang member involved in the trafficking of narcotics. She held that the prosecution was malicious in that PC Phillips, together with ASP Mohammed and ACP Fredericks, was actuated by indirect or improper motives. She did not specify what these motives were. She awarded the respondent eighteen hundred dollars (\$1,800.00) special damages at 3% interest from 27th August 2011 to 30th June 2015, general damages, including aggravated damages, in the sum of three hundred thousand dollars (\$300,000.00) and exemplary damages in the sum of fifty thousand dollars (\$50,000.00).

[8] The judge found that there was no reasonable and probable cause to prosecute Stuart because:

- (i) ASP Mohammed and ACP Fredericks failed to satisfy themselves that PC Phillips had reasonable and probable cause to charge Stuart. PC Phillips had only three years’ service when he was first assigned to conduct enquires about Stuart’s activities. Despite his inexperience, ASP Mohammed did not see it fit to obtain a written report from PC Phillips as to the outcome of his investigations so as to review what such a very junior officer had done. This written report was necessary to determine whether there was

reasonable and probable cause to arrest and charge Stuart.

- (ii) ASP Mohammed acknowledged during cross-examination that the proper approach would have been for him to have obtained a written statement from PC Phillips before issuing instructions to charge Stuart. His failure and that of ACP Fredericks (his immediate superior) to obtain a statement or file from PC Phillips before advising him to charge was a gross dereliction of duty.
- (iii) PC Phillips' evidence was riddled with contradictions and inconsistencies which undermined any basis for the existence of reasonable and probable cause to charge Stuart and undermined any basis he may have had for an honest belief in Stuart's guilt.
- (iv) PC Phillips throughout his evidence attempted to "*buttress, strengthen and fabricate new evidence against*" the respondent. This was a strong basis for concluding that he fabricated the case against Stuart and that he had no reasonable and probable cause to charge him.
- (v) In any event PC Phillips, acting on information without more, did not satisfy the requirements of sections 12 and 13 of the Anti-Gang Act which both provide that a police officer may only arrest on reasonable suspicion that a person has committed an offence under the Act.

[9] The judge found the prosecution to have been maliciously instituted because:

- (a) When ASP Mohammed finally carried out his duty and reviewed the file submitted by PC Phillips, he immediately realized that there was not sufficient evidence to charge Stuart. Coupled with his clear dereliction of duty in failing to receive a written report from PC Phillips, this amounted to evidence of an indirect or improper motive in charging the claimant.
- (b) Based on the many lies and inconsistencies in PC Phillips' evidence the prosecution of the respondent was malicious in that there was an indirect or improper motive for proceeding with the charge against him.

[10] The broad question in this appeal therefore is whether the trial judge was correct in the conclusions to which she came.

Summary of Decision

[11] (i) The judge drew inferences from the evidence of ASP Mohammed and PC Phillips which were not justified and failed properly to analyse the evidence in its entirety. The consequence is that it falls to this court to consider the matter afresh. Having done so, we find that, as to false imprisonment, there was no reasonable and probable cause to arrest Stuart and his arrest on 27th August 2011 was unlawful.

(ii) As to malicious prosecution there was also no reasonable and probable cause to prosecute him. However, there was no basis for the imputation of malice or improper motive to PC Phillips in laying the charge. The finding that the prosecution was malicious was wrong.

The appeal is allowed in part. The award of damages is varied as follows: in respect of the false imprisonment claim we award the sum of fifty thousand dollars (\$50,000.00) (including aggravated damages) for the thirty-three hours' imprisonment suffered by the respondent before he was charged and taken before the magistrate. That award shall bear interest at the rate of 2.5% from the 11th January 2012 to 25th July 2017. The award of damages for malicious prosecution is disallowed. The award of exemplary damages is disallowed given that no malice or improper motive has been found. The sum of eighteen hundred dollars (\$1,800.00) special damages which Mr. Ratiram rightly conceded was wrongly awarded, is also disallowed.

The Court of Appeal's approach

[12] To reverse findings of fact by a lower court, the Court of Appeal must identify a material error in the judge's evaluation of the evidence which undermined the judge's conclusions. As de la Bastide CJ said in **Carol Ettienne v. Thelma Ettienne, Civil Appeal No. 116 of 1996** (unreported) at page 8:

“For his finding to be upset there must be some demonstrable flaw in the process by which he reached it. It may be for instance that he drew an inference which was not justified or failed to draw an inference which was. Another ground on which the appeal court may interfere is that the trial judge failed to take account of some relevant piece of evidence or to appreciate its proper significance, or conversely that he took into account something which he ought not to have taken into account or attributed to it a significance which it did not rightly have.”

In my judgment the judge failed to properly analyse the evidence in its entirety and drew inferences from the evidence of ASP Mohammed and PC Phillips which were not justified. The judge committed several errors:

- (i) She misconstrued the evidence of ASP Mohammed in cross-examination and:
 - (a) wrongly concluded that his failure to obtain a written report/statement from PC Phillips demonstrated a lack of reasonable and probable cause to charge.
 - (b) wrongly imputed malice to his instruction and that of ACP Fredericks that Stuart should be charged.
- (ii) She misconstrued the evidence of PC Phillips in cross-examination and:
 - (a) wrongly concluded that his admissions in cross-examination were inconsistencies which indicated a lack of reasonable and probable cause to charge.
 - (b) wrongly imputed that he had fabricated evidence and
 - (c) wrongly imputed to him malice in his decision to charge the respondent.

In view of those errors it falls to the Court of Appeal to look at the matter afresh.

The Law

[13] Absence of reasonable and probable cause is required to be proven in claims of both false imprisonment and malicious prosecution but the onus of proof is different for each cause of action. In a claim for false imprisonment, it falls to the arresting officer to show the existence of reasonable and probable cause for the arrest. In a case of malicious prosecution it falls initially to a claimant to show an absence of reasonable and probable cause. Additionally, while the arresting officer may rely on the same facts to justify arrest and prosecution, the reliance may be misplaced. This is because facts which justify an initial arrest may not necessarily justify a further decision to prosecute. See Phillips JA in **Irish v. Barry [1965] 8 W.I.R. 177** at 195F where he contrasts the two bases of assessment of reasonable and probable cause in malicious prosecution and in false imprisonment.

False imprisonment

[14] An arrest is a trespass to the person and is a restriction of liberty. Once the prisoner proves that his liberty was restrained it is for the police officer to show justification. See Wooding CJ in **Irish v. Barry (supra)** at 181C. The respondent's arrest and detention are not in dispute. In seeking to justify the arrest, the Attorney General has relied on section 12(1) of the Anti-Gang Act which provides:

“A police officer may arrest without a warrant a person whom he has reasonable cause to believe to be a gang member or whom he has reasonable cause to believe has committed an offence under this Act.”

[15] It thus fell to the Attorney General to show that PC Phillips had reasonable and probable cause to believe that Stuart had committed an offence under section 5(1) of the Act. The judge took the view that PC Phillips' acting on information

without more, did not satisfy section 12 of the Act on the issue of reasonable and probable cause. While the judge was correct so to hold, she did not analyse the evidence in the manner required including failing to consider the evidence of Stuart (except on the issue of damages). She also wrongly imputed to Phillips that he had fabricated evidence against Stuart.

Reasonable cause to arrest

[16] As to what is required of a police officer when exercising his powers of arrest see the dictum of Phillips JA in **Irish v. Barry (supra)** at page 192 B:

“It is, in my opinion, absolutely essential to bear in mind that it was not the function of the appellant to make a final determination of the issue of the respondent's guilt or innocence, which was eventually resolved in his favour by the magistrate.

*In this connection I can do no better than quote the following extract from the judgment of Lord Wright in **McArdle v Egan** ([1933] All ER Rep 611, 150 LT 412, 98 JP 103, 32 LGR 85, 30 Cox, CC 67, CA, 1st Digest Supp) ([1933] All ER Rep at p 613):*

‘It is, no doubt, very important that the liberty of the subject should be preserved from undue interference, and in this case the charge has been withdrawn and it is not suggested that he was guilty of the offence. On the other hand, it has got to be remembered that, in the public interest, it is very important that police officers should be protected in the reasonable and proper execution of their duty; they should not be hampered or terrified by being unfairly criticised if they act on a reasonable suspicion. Although the amount here is very small, I think the question of principle is very

important. It has to be remembered that police officers, in determining whether or not to arrest, are not finally to decide the guilt or innocence of the person arrested. Their functions are not judicial, but ministerial, and it may well be that if they hesitate too long when they have a proper and sufficient ground of suspicion against an individual, they may lose an opportunity of arresting him, because in many cases steps have to be taken at once in order to preserve evidence. I am not saying that as in any way justifying hasty or ill-advised conduct. Far from that, but once there is what appears to be a reasonable suspicion against a particular individual, the police officer is not bound, as I understand the law, to hold his hand in order to make further inquiries if all that is involved is to make assurance doubly sure.’”

It will be necessary to examine the evidence which PC Phillips had at the time of the arrest in order to assess whether he had reasonable and probable cause to arrest Stuart. That would ordinarily include details of the “*information*” he obtained from sources and informants.

[17] The provisions of the Anti-Gang Act are also relevant. Section 4 of the Act provides as follows:

“ “gang” means a combination of two or more persons, whether formally or informally organized, that, through its membership or through an agent, engages in any gang-related activity;...

...“gang member” means a person who belongs to a gang, or a person who knowingly acts in the capacity of an agent for or an accessory to, or voluntarily associates himself with any gang-

related activity, whether in a preparatory, executory or concealment phase of any such activity, or a person who knowingly performs, aids, or abets any such activity;

“gang-related activity” means any criminal activity, enterprise, pursuit or undertaking in relation to any of the offences listed in the First Schedule acquiesced in, or consented or agreed to, or directed, ordered, authorized, requested or ratified by any gang member, including a gang leader;”

The first schedule lists some twenty-six gang-related activity offences. Item # 20 refers to “*Trafficking in a dangerous drug or being in possession of a dangerous drug for the purpose of trafficking*” as a gang-related activity offence. The Dangerous Drugs Act Chap 11:25 defines “*dangerous drugs*” as “*a narcotic drug listed in the First Schedule or a thing that contains such a drug or a psychotropic substance listed in the Second Schedule or a thing that contains such a substance*” (see section 3). The combined effect of the first schedule (to the Anti-Gang Act) and of the Dangerous Drugs Act is to make trafficking in a narcotic drug or being in possession of any such drug for the purpose of trafficking a gang-related activity offence. In this case, it is narcotic drug trafficking with which we are concerned.

Section 5(1)(a) of the Anti-Gang Act provides:

“It is hereby declared that gangs are unlawful and any person –

(a) who is a member of a gang; or

(b) ...

commits an offence and is liable on summary conviction to imprisonment for ten years and on any subsequent conviction on indictment to imprisonment for twenty years.”

It is readily apparent from these provisions that proving gang membership in a

court of law is no slam dunk. It requires a careful compilation of the evidence showing how the gang is organised, how the gang activity is perpetrated through gang members and their respective roles in such activity. Evidence at trial must be carefully led to show the nexus between the gang, the members and the activity. In a case where the gang-related activity relates to narcotics, evidence of actual sales of the narcotics is required to prove the gang-related activity. Mere surveillance without more may not suffice. It is not enough to simply observe the accused making “interactions” with other persons. The evidence must be that narcotics were sold by the accused to someone. This would include proof of exchange of money and the actual price paid. Undercover detection may be necessary. The best evidence would no doubt be that of a former member of the gang who has direct knowledge of its activities.

[18] Taking into account the definitions of gang, gang member and gang-related activity, it was necessary for the appellant to show that PC Phillips had a reasonable basis for suspecting that:

- (i) Stuart belonged to a gang consisting of his wife, Kerwin Rocke and himself; and that he, in combination with his wife, or Kerwin Rocke, or both, engaged in the sale of narcotic drugs (being a gang-related activity) either through all or any of them or through an agent;
- (ii) or that Stuart acted as an agent for, or as an accessory of, the gang, or voluntarily associated himself with the gang-related activity (the sale of a narcotic drug)
- (i) or that Stuart acquiesced in, consented or agreed to, or directed, ordered, authorised, requested or ratified the sale of narcotics.

[19] To prove reasonable suspicion it is important to show a nexus between the gang members, in this case, Stuart, Stuart’s wife and Kerwin Rocke. It is necessary to provide evidence showing that there was a reasonable basis for suspecting the three alleged gang members were acting in concert to sell a narcotic drug. Evidence of their respective roles as gang members in the activity would also be required. Was he responsible simply for selling the narcotics? Was

he responsible for making contact with purchasers? Was the wife's role merely to provide the facade of legitimacy by selling in the shop? What role did Roche play? It is not enough simply to show Stuart acting alone (unless the evidence also pointed to agency). If that was the only evidence, then he should have been arrested for the sale of narcotics and not for being a gang member.

[20] The best evidence no doubt would be information emanating from a former member of the gang intimately acquainted with Stuart's role, by virtue of his own participation in the activity or, a confession from Stuart himself. If a former gang member is the source of that information he could be identified as a "*former gang member*" without necessarily naming him so as to allow the court to judge the basis of reasonable suspicion.

[21] But details of the gang activity and gang membership, the nexus between the activity and the gang member and his role in the gang and in the activity, are required. The facts put forward by PC Phillips never approached the detail required. The evidence on which PC Phillips purported to arrest Stuart was as follows:

- (i) Since December 2010, Phillips had been receiving information concerning criminal activities in the Marabella area. Information about Stuart came to him during this time through his (Phillips') personal involvement and through other officers and informants. He habitually patrolled the area in which Stuart lived. It is an area known for having persons involved in the drug trade. The nature of the "*information*" was not revealed.
- (ii) He also received "*information*" from other police officers that Stuart had been arrested on various occasions for offences which included drug offences and gang related activity. He was also aware that Stuart's criminal alias was "*Peck*" and that he had many pending cases in the criminal court that related to his activities as a member of a group of persons involved in criminal activities. The nature of these "*activities*" was not specified.

- (iii) Between February 2011 and August 2011, on many occasions before Stuart's arrest, he conducted surveillance in marked and unmarked police vehicles and by foot patrols at and around Stuart's residence at No. 23, Union Park East, Marabella. Along with other police officers, he also conducted surveillance exercises approximately one hundred metres from Stuart's premises which included positioning themselves to capture persons who were purchasing drugs from him. They would sometimes find these persons with narcotics and he would, at times, observe the respondent "*having interactions*" with these persons. The nature of these "*interactions*" was not specified.

- (iv) Around 20th August 2011 he received information from several informants in the area who gave him certain information which included that Stuart had sold drugs to them and was a member of a gang. No details of the gang and how it operated were given.

- (v) On 27th August 2011, he had "*information*" from various sources about Stuart's gang activities. This "*information*" included that he was involved in the sale of narcotics with other persons such as his wife and Kerwin Rocke, that he operated out of Union Park but had connections and communicated with other persons outside Union Park in order to organize his illegal trade and that he kept his narcotics in the vicinity of his home where he had a shop. Stuart used the shop as a front to carry out his illegal activities.

[22] The following additional evidence emerged from cross-examination:

- (i) On five to ten occasions prior to 27th August 2011, during a period of one year, he made unsuccessful attempts to arrest Stuart in respect of narcotics offences and the sale of narcotics.
- (ii) On these occasions he actually witnessed him engaging in what he believed to be the sale of narcotics.
- (iii) On three to four occasions prior to his arrest he searched Stuart's premises

but found no illegal substance on the premises. On one such occasion however, they found an illegal substance close to his property.

- (iv) During surveillance he would see Stuart making “*certain interactions with persons*” but he never saw Stuart’s wife engaging in similar activity. It was “*information*” given to him which led him to believe that Stuart’s wife was also a member of the gang.
- (v) He had arrested people to whom Stuart sold drugs and five to six of them told him that they bought the drugs from Stuart.
- (vi) He had witnessed conversations between Stuart and Rocke. But that is not what led him to believe that they were jointly engaged in the drug trade. It was “*information*” that led him to so believe. The details of that “*information*” were not provided.
- (vii) His surveillance of Stuart never revealed the identities of the persons outside of Union Park who had conversations and communications with Stuart, although he was aware of one man to whom he referred by his alias.
- (viii) Nothing illegal was found on Stuart’s premises on the 27th August 2011 even though the premises were searched.
- (ix) When he charged Stuart on 27th August 2011, the gang related activity was the sale of drugs. He did not see him selling narcotics on 27th August, 2011. At the time he charged Stuart he had no statement from anyone saying that they saw him selling narcotics on the 27th. Neither did he have a confession from him.
- (x) On the several occasions on which he had seen Stuart giving something to persons and receiving something in return, he concluded that he was engaging in the sale of narcotics.

[23] The question therefore is whether this was sufficient evidence of Stuart’s involvement in a gang and in gang-related activity to constitute reasonable and probable cause for his arrest on 27th August. The fact of Stuart’s convictions for drug dealing, which he admitted under cross-examination, would factor into the equation. But in this case more was required because his arrest was for gang membership and not drug dealing *simpliciter*. A large part of PC Phillips’

justification for arresting Stuart was “*information received*”, but the actual details of the information were never provided. As the judge rightly noted, it was not enough for PC Phillips to act on “*information*” without more. Details of what the information consisted of should have been led in evidence so that the court could assess whether that information provided a reasonable basis for arresting Stuart.

[24] The information detailed at paragraphs 21(iv), (v), 22(iv), (v) and (vi) above speak to Stuart’s involvement in a gang and gang related activity. No details are provided. Paragraphs 21(iv) and (v) refer to information from informants or sources. The particulars of how these sources came by this information are not indicated. Were they gang members or former gang members directly acquainted with Stuart? Were they informants who had provided valuable information in the past? Surely these details could be provided without endangering the sources. Paragraph 21(v) refers to Phillips’ evidence that Stuart, his wife and Rocke were members of the gang but details of their roles are not set out. Moreover, Phillips’ own evidence is that he was not satisfied that the information he had about Stuart’s wife was sufficient to arrest her. The information at paragraph 22(vi) again is vague and lacking in detail. Paragraph 22(v) is quite specific and is sufficient to suggest that he engaged in the sale of drugs which is a gang-related activity but without any nexus to the gang and gang members this did not amount to an offence under the provisions of the Act.

[25] In my judgment the evidence as revealed in the witness statement and in cross-examination went to showing that, at best, there was some basis for suspecting that Stuart was involved in the sale of narcotics. But it did not sufficiently, or at all, link him to a gang or to gang membership and even that evidence was not of itself clear cut. For example, none of PC Phillips’ searches of Stuart’s premises produced any illegal drugs. One search found illegal drugs close to his premises. That was conclusive of nothing. Further, PC Phillips never found Stuart in possession of narcotics. Far more detail of his selling of narcotics (including actual sales) and his connection with a gang was required. Accordingly, even accepting that PC Phillips was exercising a ministerial duty as

opposed to a judicial duty, the evidence in this case barely rose above speculation. I thus find that there was no reasonable and probable cause to arrest Mr. Stuart.

Malicious Prosecution

[26] **Clerk and Lindsell on Torts** (21st edition) page 1182, paragraph 16-09 sets out the requirements for proving malicious prosecution. Under the rubric “Essentials of the tort of malicious prosecution” it states:

“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 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.”

A failure to prove any of these four elements results in a dismissal of the claim. The decision in this case turned, however, on whether there was an absence of reasonable and probable cause to charge and whether there was malice. Malice would be irrelevant of course if the respondent was unable to show absence of reasonable and probable cause.

Reasonable and probable cause to charge

[27] The question of reasonable and probable cause in regard to a malicious prosecution was considered by this court in **Manzano v. The Attorney General of Trinidad and Tobago**, Civil Appeal No. 151 of 2011 (Mendonça, Bereaux and Rajnauth-Lee, JJA). Mendonça JA giving the decision of the court set out the law at paragraphs 22 to 29. He stated in effect that:

- (i) The police officer must have an honest belief in the accused's guilt, founded on facts which would reasonably lead any ordinary prudent man to conclude that the accused was guilty of the offence with which he is charged.
- (ii) The test has both a subjective and objective element. Reasonable cause must appear from the facts but the officer must also be clear in his own mind that there is a proper basis for the charge.

Two questions thus arise: whether PC Phillips had an honest belief that on the material which was available to him at the time of the charge, there was a fit case to be tried and whether viewed objectively the material on which the charge was founded amounted to reasonable and probable cause to prosecute Stuart.

Mr. Martineau SC contended that the judge wrongly placed on the appellant the burden of proving reasonable and probable cause. This certainly appears to be the case at paragraph 26 of the judgment, where she said:

“It is incumbent upon the Defendant in proving that he acted with reasonable and probable cause to establish the reasonable grounds upon which his honest belief in the guilt of the accused is based”.

However at paragraph 17 of the judgment the judge stated the law correctly:

“...if a claimant is able to establish on a balance of probabilities that the prosecutor acted without reasonable and probable cause, the claimant must also establish on the evidence that the prosecutor was actuated by malice.”

Here the judge acknowledged that the initial burden of proof lay with the respondent.

[28] That burden is not easily discharged. In **Williamson v. The Attorney General of Trinidad and Tobago** [2014] UKPC 29, (2014) 85 WIR 452 at paragraph 11 Lord Kerr opined:

“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.”

Malicious prosecution is therefore not an easy allegation to sustain. The burden is heightened by the requirement of proving malice which is also on the claimant. Under cross-examination Stuart denied that he was involved in any gang activity. While it was ultimately a question of the judge’s assessment of his credibility, the burden then shifted to PC Phillips to show reasonable and probable cause for the prosecution.

[29] In **Gibbs v Rea [1998] A.C. 786** the Privy Council considered this issue of shifting burdens. That was an appeal which concerned the tort of procuring the issue of a search warrant without reasonable cause and with malice, a tort “*akin to malicious prosecution*” (page 797). Gault J, giving the judgment of the majority stated at pages 798 to 799:

“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: Reg. v. Inland Revenue Commissioners, Ex parte T.C. Coombs & Co. [1989] S.T.C. 520, 532; Tan v. Cameron [1992] 2 A.C. 205, 225E. 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 with it 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: Cotton v. James, 1 B. & Ad. 128, 130, 135; Taylor v. Willans (1831) 2 B. & Ad. 845; Reg. v. Inland Revenue Commissioners, Ex parte T.C. Coombs & Co. [1991] 2 A.C. 283, 300F.”

In this case the appellant chose to rely on the evidence of PC Phillips and ASP Mohammed and they were presented for cross-examination after the respondent was himself cross-examined. It then fell to the judge to assess Stuart's credibility and that of PC Phillips and ASP Mohammed and come to her conclusions having regard to the evidence as a whole. While the evidence of PC Phillips and Stuart was critical to the issue of reasonable and probable cause, the judge also had to weigh Stuart's evidence in the balance. This she did not do, except on the issue of damages.

[30] There are also several aspects of the judge's reasoning with which I take issue. She found that PC Phillips' evidence was “*riddled with so many inconsistencies that [she did] not consider him to be either credit worthy or reliable.*” She found the fact that PC Phillips “*attempted to buttress, strengthen and fabricate new evidence*” against Stuart was “*a strong basis for concluding*” that Phillips fabricated the case against Stuart and that he had no reasonable and probable cause to charge him. The inconsistencies referred to by the judge were in effect admissions by PC Phillips that he had omitted to record certain events in his diary or to include them in his witness statement. They went to credibility and the judge would have been entitled to take them into account in deciding on PC Phillips' credibility but they were not “*inconsistencies*” as such.

[31] The judge however concluded without any proper basis that these admissions demonstrated that PC Phillips fabricated evidence against Stuart. Certainly there were admissions by PC Phillips which may have affected his credibility but it is a quantum leap to impute that he fabricated evidence. In the first place, fabrication of evidence by PC Phillips was never pleaded by the respondent. Neither did Mr. Ratiram specifically put to PC Phillips in cross-examination that he had fabricated evidence. There was no foundation for such an imputation. Indeed some of PC Phillips' admissions came from facts put to him in cross-examination by Mr. Ratiram. No doubt, those facts would have come from instructions given to counsel by Stuart himself.

[32] Further, the judge seemed to think that the results of PC Phillips' investigations needed to be closely supervised because of his inexperience. Hence ASP Mohammed should have asked for a written report. But even if PC Phillips' inexperience produced a deficient investigation it does not follow that there was an improper motive. Indeed, the finding by the judge that PC Phillips was inexperienced should lead naturally to the conclusion that any deficiency in his investigation was due to inexperience rather than an improper motive. Further, the production of a written statement by PC Phillips would not guarantee that its contents were not fabricated. The judge's imputation of an improper motive to ASP Mohammed and ACP Fredericks was without foundation. There was nothing on the evidence to justify it, neither did she find or indicate what the improper motive was. The contention that a police officer is actuated by an improper motive is quite a serious allegation. There must be a proper evidential basis upon which to do so, especially when such a finding is made by inference. Secondly, even if there was such evidence ascribed to ASP Mohammed and ACP Fredericks (and there was none) the test is whether the charging officer (PC Phillips) was actuated by such a motive. The motives of ASP Mohammed and ACP Fredericks are irrelevant. I shall return to this fact finding of improper motive at paragraph 38 when I address the question of malice.

Was there reasonable and probable cause to charge?

[33] I turn then to whether there was reasonable and probable cause to charge the respondent. Based on my earlier finding that there was no reasonable and probable cause to arrest, the appellant's case stands on unstable ground but PC Phillips deposed that after he had arrested and detained Stuart, he went on to review the Anti-Gang Act and conducted further enquiries, including returning to the Union Park area on 29th August 2011 and interviewing Stuart's wife and other persons in regard to the information he had received. He also documented his investigations as part of the investigative file. He obtained the record of pending cases and particulars of Stuart's convictions and attached it to the file. He considered the written transcript of an interview of Stuart while in custody. He considered notes made during a debriefing of police officers after the police exercise had ended. When he completed his investigations he compiled a file containing the information he had obtained and sent it to his senior officers, requesting advice as to the further prosecution of the matter. He said that he sought the advice because he considered that the respondent had committed an offence under the Anti-Gang Act. He was subsequently instructed to charge Stuart.

[34] PC Phillips' actions in conducting further investigations and seeking advice from his seniors certainly go towards his honest belief in the guilt of the respondent but viewed objectively, the evidence does not show that there was reasonable and probable cause to prosecute. The additional investigations conducted by PC Phillips added nothing to the evidence existing at the time of arrest. PC Phillips did not reveal the results of his additional inquiries in the Union Park area, neither did he reveal the results of his interview of Stuart's wife. Stuart's convictions and pending charges, by themselves, do not assist in showing his association with a gang. There was no proper factual basis upon which it could be contended that there was reasonable and probable cause to charge Stuart.

I turn then to the question of malice.

Malice

[35] As to what constitutes malice for the purposes of malicious prosecution, see Lord Kerr in **Williamson (supra)** at paragraphs 11 - 12:

“A good working definition of what is required for proof of malice in the criminal context is to be found in A v NSW [2007] HCA 10, (2007) 230 CLR 500 (at [91]):

‘What is clear is that, to constitute malice, the dominant purpose of the prosecutor must be a purpose other than the proper invocation of the criminal law—an “illegitimate or oblique motive”. That improper purpose must be the sole or dominant purpose actuating the prosecutor’

[12] An improper and wrongful motive lies at the heart of the tort, therefore. It must be the driving force behind the prosecution. In other words, it has to be shown that the prosecutor's motive is for a purpose other than bringing a person to justice: Stevens v Midland Counties Railway Company (1854) 10 Exch 352 at 356 per Alderson B and Gibbs v Rea (1998) 52 WIR 102 at 111, [1998] AC 786 at 797. The wrongful motive involves an intention to manipulate or abuse the legal system: Crawford Adjusters Ltd (Cayman) v Sagicor General Insurance (Cayman) Ltd [2013] UKPC 17, (2013) 83 WIR 157, [2014] AC 366 (at [101]); Gregory v Portsmouth City Council [2000] 1 All ER 560 at 565, [2000] 1 AC 419 at 426; Proulx v Quebec (A-G) 2001 SCC 66, [2001] 3 SCR 9. Proving malice is a 'high hurdle' for the claimant to pass: Crawford Adjusters (2013) 83 WIR 157 at [72](a) per Lord Wilson.”

As I noted in paragraph 5 above, the respondent never pleaded improper motive

as a particular of malice. He pleaded a lack of evidence, leaving it to the court to infer that there being no evidence to lay the charge, it was maliciously instituted.

[36] Absence of reasonable and probable cause, in certain circumstances can lead to an inference that the laying of the charge was malicious. But such an imputation is not to be lightly made. Indeed, courts should proceed with caution. See Mendonça JA in **Manzano (supra)** where he noted:

“In A v State of New South Wales the Court however interjected this caution when inferring malice from the absence of reasonable and probable cause (at para. 90):

*‘No little difficulty arises, however, if attempts are made to relate what will suffice to prove malice to what will demonstrate absence of reasonable and probable cause. In particular, attempts to reduce that relationship to an aphorism - like, absence of reasonable cause is evidence of malice (cf **Johnstone v Sutton** (1786) 1 TR 510 at 545 per Lord Mansfield and Lord Loughborough: ‘From the want of probable cause, malice may be, and most commonly is, implied’; **Varawa v Howard Smith Co Ltd** (1911) 13 CLR 35 at 100 per Isaacs J: ‘[T]he want of reasonable and probable cause is always some, though not conclusive, evidence of malice...’ but malice is never evidence of want of reasonable cause (cf **Johnstone v Sutton** 91786) 1TR 510 at 545 per Lord Mansfield and Lord Loughborough [99 ER 1225 at 1243]: ‘From the most express malice, the want of probable cause cannot be implied...’) - may very well mislead. Proof of particular facts may supply evidence of both elements. For example, if the plaintiff demonstrates that a*

prosecution was launched on obviously insufficient material, the insufficiency of the material may support an inference of malice as well as demonstrate the absence of reasonable and probable cause. No universal rule relating proof of the separate elements can or should be stated.'

It may therefore be a question of degree whether malice should be inferred from the absence of reasonable and probable cause. If the prosecution was launched on “obviously insufficient material” that may suffice to support the inference of malice.

49. Malice may also be inferred from the absence of honest belief in the merits of the case. Indeed this can provide strong evidence of malice (see Haddrick v Heslop (1848) 116 ER 869).”

[37] The judge’s findings of improper motive in relation to both PC Phillips and his senior officers and her finding of malice are not sustainable for the reasons that I have given at paragraphs 30 to 32. The actions of PC Phillips as the charging officer do not show malice. Even if Phillips’ inexperience led to a defective investigation, neither malice nor improper motive can necessarily be inferred from it or from ASP Mohammed’s and ACP Fredericks’ oral instructions to charge. See Lord Toulson’s dictum in **Sandra Juman v. The Attorney General of Trinidad and Tobago and Anor.** [2017] UKPC 3, [2017] 2 LRC 610 starting at paragraph 17. Addressing the question of imputing malice to the manner in which the police officer carried out his investigation he said:

“...the Board would reject the appellant’s attempt to treat the first respondent’s alleged failure to carry out sufficient investigation before charging the appellant as amounting or equivalent to malice; or similarly the attempt to treat “recklessness” as tantamount to malice. “Reckless” is a word which can bear a

variety of meanings in different contexts. It is not a suitable yardstick for the element of malice in malicious prosecution.

18. The essence of malice was described in the leading judgment in *Willers v Joyce* at para 55:

“As applied to malicious prosecution, it requires the claimant to prove that the defendant deliberately misused the process of the court. The most obvious case is where the claimant can prove that the defendant brought the proceedings in the knowledge that they were without foundation ... But the authorities show that there may be other instances of abuse. A person, for example, may be indifferent whether the allegation is supportable and may bring the proceedings, not for the bona fide purpose of trying that issue, but to secure some extraneous benefit to which he has no colour of a right. The critical feature which has to be proved is that the proceedings instituted by the defendant were not a bona fide use of the court’s process.”

19. A failure to take steps which it would be elementary for any reasonable person to take before instituting proceedings might in some circumstances serve evidentially as a pointer towards deliberate misuse of the court’s process, but sloppiness of itself is very different from malice.”

A fortiori an investigation which may have been deficient because of a young officer’s inexperience does not necessarily amount to malice.

[38] I can find no basis for doubting that PC Phillips had an honest belief that there was a sufficient basis upon which to charge the respondent, however wrong he might have been. His actions bear out this belief.

He conducted surveillance of the respondent’s premises for several months. After the respondent’s arrest he conducted further investigations in the Marabella area.

Prior to charging he sought the advice of his senior officer who himself consulted with ACP Fredericks. It cannot be objectively said that when PC Phillips preferred the charge his dominant purpose was a purpose other than the proper invocation of the criminal law.

[39] In my judgment it is quite plain on the facts of this case that the three police officers involved were motivated to apply the law fairly and with bona fides. The difficulty is that the provisions of the Anti-Gang Act require close application. Group action is not always easily proven. Without inside information provided from infiltration of the gang by an undercover police officer or a former member of the gang, proof of gang membership and gang activity was always going to be a hard sell. PC Phillips conscientiously sought over the period of eight months from December 2010 to obtain the requisite evidence on the respondent. While it was not sufficient to arrest or charge, it cannot be said that he acted otherwise than in the bona fide execution of his duties. The judge's finding that his senior officers were in dereliction of duty had no evidential basis. That was an issue which did not arise on the facts of this case and would have required an examination of the circumstances under which these senior officers operated at the time. It cannot be said that the senior officers were guilty of dereliction of duty.

Damages

[40] The judge awarded the respondent the sum of three hundred thousand dollars (\$300,000.00) general damages for wrongful arrest and malicious prosecution, fifty thousand dollars (\$50,000.00) exemplary damages and eighteen hundred dollars (\$1,800.00) special damages. Mr. Ratiram rightly conceded that the special damages award was wrongly made. As to the award of general damages the judge did not apportion any sums for false imprisonment or malicious prosecution. She simply made a lump sum of three hundred thousand dollars (\$300,000.00). That figure must now be significantly reduced in view of our disallowing of the malicious prosecution claim.

[41] The respondent spent a total of approximately 33 hours in custody before he was charged and taken before the magistrate. He is entitled to damages for that period alone. The circumstances of his arrest were egregious. He was awakened and taken from his home at twelve midnight on the 27th August 2011 by policemen who banged on his door and entered his home with guns pointed at him. He was placed in a cell with a clogged toilet which emitted a stench. He had to sleep on the hard cell floor. While the period of time was relatively short, there must be some adjustment for the aggravating circumstances of his detention. I have examined the authorities on this issue. I do not consider it necessary to detail them except to say that some of the awards are high. I assess damages at fifty thousand dollars (\$50,000.00). That award shall bear interest at the rate of 2.5% from 11th January 2012 to 25th July 2017 (the date of this judgment). The award for exemplary damages is also disallowed given that I have found no malice or improper motive on the part of PC Phillips who was the prosecuting officer. We will hear the parties on costs.

Nolan P.G. Breaux
Justice of Appeal