THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P154 of 2019
Claim No. CV 2016-00769

Between

BRIAN LYNCH

Appellant

And

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent

PANEL:

N. Bereaux, JA

M. Mohammed, JA

M. Wilson, JA

APPEARANCES:

Mr. Brian Busby appeared on behalf of the Appellant.

Ms. Tricia Ramlogan and Ms. Kadine Matthew appeared on behalf of the Respondent.

DATE OF DELIVERY: July 31, 2023

I have read the judgment of M. Mohammed JA. I agree with it and have nothing to add.

……

Nolan Bereaux

Justice of Appeal

JUDGMENT

Delivered by M. Mohammed, JA

Introduction

1. The appellant, Brian Lynch, brought a claim for damages for false imprisonment and malicious prosecution against the respondent, The Attorney General of Trinidad and Tobago. The appellant's case was that on December 14, 2010, he went to 21 Hibiscus Drive to do some repairs at a house in respect of which he was the landlord. At that time the house was unoccupied. The appellant was in one of the bedrooms to the back of the house preparing his tools when at about 3:00pm a party of police officers, whose identities were unknown to him, unlawfully entered the house. The police officers surrounded him and asked him what he had to smoke. The appellant responded that he had nothing and that he was about to start doing repair work to the house. One of the police officers then asked that handcuffs be placed on him because the officer had found something. The police officer said that he had found a "roach" which the appellant interpreted to mean the butt of a marijuana cigarette, commonly called a "joint". The appellant's case was that he had no drugs of any description in his possession or in the house at 21 Hibiscus Drive. His case was that the police officers never showed him any "roach" that was allegedly found in the house. The police officers proceeded to arrest the appellant. All of the police officers who entered the house were of African descent and none of the police officers were of East Indian descent[1].

[1] See The Record of Appeal (Statement of Case) at page 51

2. On March 20, 2019, the trial judge dismissed the appellant's claim and ordered judgment in favour of the respondent. The appellant was ordered to pay the respondent's costs in the sum of $14,000.00. The judge gave written reasons for his decision on April 8, 2019.

3. By Notice of Appeal filed on May 2, 2019, the appellant appealed the trial judge's decision.

4. The broad issue in this appeal is whether the judge was plainly wrong in his finding of fact that there was reasonable cause for the appellant's arrest and detention and reasonable and probable cause for his prosecution.

Background

The Recanted Defence

5. At the outset, it is apposite to observe that this case involved a most peculiar and unexplained feature in that there was a complete change in the defence filed on behalf of the respondent.

6. On November 30, 2016, the respondent's initial defence, certified as being true, was filed. It stated that on December 14, 2010, Sgt. Ali (formerly PC Ali) who was in the company of other police officers, received certain information from an informant, that persons were using drugs at an abandoned house located along Hibiscus Drive. The officers proceeded to that location and when they arrived, they entered the house via an entryway for which there was no door. The appellant was found at that location in possession of a quantity of dried plant like material resembling marijuana and was arrested, handcuffed, placed into a police vehicle and conveyed to the Mon Repos Police Station.

7. On January 30, 2017, the appellant requested certain particulars of the defence, including the names and regimental numbers of the police officers who reported to the Hibiscus Drive premises and spoke to the appellant and in addition, any police records as to the arrival of himself, Sgt. Ali and other police officers at the Mon Repos Police Station[2].

[2] See The Record of Appeal at pages 84-88

8. By Notice filed on March 10, 2017, the respondent responded to the request and stated that it could not provide the requested information as the relevant Station Diary could not be located and that checks for same were ongoing.

9. On December 11 2017, without any explanatory context as to what had transpired in the intervening period, the respondent filed its amended defence, also certified as being true, in the following terms, (but for the word "amended"), identical to the certification contained in the initial defence;

> "*I, Kadine Matthew, /f/ Chief State Solicitor filing attorney-at-law for the Defendant, certify that all the facts set out in this Amended defence are true to the best of my knowledge, instructions, information and belief. <u>The facts set out in this Amended defence were provided by the agents of the State who were directly involved in the matters described herein</u>. It is impractical for the Defendant to give this certificate as he is sued in a representative capacity on behalf of the State, which is responsible for the Trinidad and Tobago Police Service and was not directly involved in the matters described herein*"[3]. (emphasis added)

The amended defence was the platform for the respondent's general version of events set out subsequently in this judgment at paragraphs 19 to 22. The gist of that amended defence was that on December 14 2010, Sgt. Ali and PC Bisnath were on mobile exercise duty in a police vehicle, when at around 6:30am, while driving along Hibiscus Drive in Pleasantville, they observed the appellant walking along the roadway and behaving in a suspicious manner. The police vehicle was stopped. Both police officers came out and approached the appellant and identified themselves to him. Sgt. Ali, in the presence of PC Bisnath, then searched the appellant's person and found in the right front pocket of his pair of pants, a clear plastic bag containing a plant like material resembling that of marijuana. That version was self-evidently, greatly at odds with the terms of the initial defence filed by the respondent.

10. In the appellant's reply in the pleadings, he asserted that what was stated in the amended defence was a total fabrication and a complete departure from the defence originally put forward and which original defence was certified as being true.

[3] See The Record of Appeal at pages 67 & 75

The Trial

11. At the trial, the parties proffered diametrically opposed versions of the event which led to the appellant's arrest.

The Appellant's version

12. The appellant lived at Hibiscus Drive, Pleasantville in San Fernando in a home belonging to him and his siblings. He began living at those premises in the year 2013 after his previous home was destroyed by fire. The subject premises belonged to his father who had died. The appellant said that after the death of his mother, he put up the house for rent. In December 2010, the house was vacant as the tenant who was occupying it had moved out.

13. On December 14, 2010 the appellant went to the premises to carry out some repair work with a view to putting it up for rent again. He stated that there was no door to the house since on one occasion in February 2010, police officers had broken it down and entered the house and arrested him. There was no door securing the house since that time as, according to the appellant's evidence in cross-examination, he was unable to replace the door since he was in custody.

14. At around 3:00pm, the appellant was in one of the bedrooms to the back of the house sorting out his tools when he heard someone shout *"police".* He left the bedroom and walked towards the front of the house. He saw a man and a woman inside of the house. He did not give them permission to enter the house. The man and the woman were of African descent and were not dressed in police uniform. Other persons, some of whom were clad in police uniform, entered the house and surrounded the appellant. None of the officers who came into the house was of East Indian descent. The officers asked him what he had to smoke and the appellant responded that he had nothing. Thereafter, one of the officers gave instructions to place the appellant in handcuffs as he claimed he had found a "roach". The appellant understood this to mean that the officer had found the butt of a marijuana cigarette which is commonly referred to as a "joint". This "roach" that was allegedly discovered was never shown to the appellant. The appellant was conveyed to the Mon Repos Police Station where he was kept overnight in a cell.

15. On the next morning, the appellant was taken to the San Fernando Magistrates' Court to answer the charge of possession of a dangerous drug, namely cannabis sativa, commonly called marijuana, contrary to section 5(1) of the Dangerous Drugs Act Chapter 11:25. Sgt. Ali appeared as the police complainant in the matter. The appellant claimed that Sgt. Ali, who is of East Indian descent, was not among the party of police officers who entered his property and arrested him. The first time that he saw Sgt. Ali was at the Magistrates' Court. The appellant initially pleaded guilty to the offence as he believed that he was charged for possession of the butt of a marijuana cigarette. He considered that this was an easier route compared to the time he would have to spend awaiting a trial. However, he later realised that the exhibit produced by Sgt. Ali was not the butt of a marijuana cigarette but rather loose, plant-like material. At that point, the appellant indicated to the magistrate that he was never informed by the police that they had found loose, plant-like material resembling marijuana at his home and that he was told that they had found a "roach". This led the magistrate to change the appellant's plea to that of "not guilty".

16. The appellant was remanded into custody. He was granted bail with a surety to be approved by the Clerk of the Peace in the sum of $15,000.00. He remained in custody until May 3, 2011 when he obtained bail and was released on a continuing bond. The appellant stated that the matter was called twenty-five times in the Magistrates' Court. Sgt. Ali did not appear on nineteen of those occasions and on March 16, 2012, the matter was dismissed for want of prosecution.

17. According to the appellant, when he was arrested on the day in question, he was not provided an opportunity to secure his tools which he left at the premises, which were lost. The total cost of those tools amounted to $837.00. He was unable to produce the receipts for the tools as they had been destroyed when his previous home burnt down. As well, when he was arrested, he had the sum of $1,700.00 on his person which was taken from him by the police officers at the police station. That sum was never returned to him.

18. The appellant averred that he was falsely imprisoned from the time of his arrest on December 14, 2010 to May 3, 2011 and that the charge against him was brought maliciously and without any reasonable and probable cause.

The Respondent's Version

19. The respondent, in its amended defence filed on December 11, 2017, asserted that on December 14, 2010, Sgt. Ali and PC Bisnath were on mobile exercise duty in a police vehicle. Around 6:30am, while driving along Hibiscus Drive in Pleasantville, they observed a man, later identified as the appellant, walking along the roadway. The appellant turned and looked in the direction of the police vehicle after which he began walking at a faster pace. This aroused suspicion in Sgt. Ali who caused the police vehicle to stop. Both officers alighted from the vehicle, approached the appellant and identified themselves to him by means of their Trinidad and Tobago Police Service identification cards. Sgt. Ali, in the presence of PC Bisnath, then began a search of the appellant's person and found in the right front pocket of his pair of pants, a clear plastic bag containing a plant-like material resembling that of marijuana. Sgt. Ali informed the appellant that he was of the opinion that the plant-like material was marijuana, a dangerous drug. The appellant was cautioned and remained silent. Sgt. Ali thereafter informed the appellant of his constitutional rights and privileges and arrested him for possession of marijuana. He was conveyed to the Mon Repos Police Station.

20. The respondent's case was that Sgt. Ali did not know the appellant prior to the arrest. At paragraph 16 of his witness statement dated January 6, 2018, Sgt. Ali had stated that prior to the incident, he did not know the appellant and he had never arrested, charged, interviewed or had any interaction whatsoever with him.[4] It was contended that Sgt. Ali had reasonable and probable cause to charge and prosecute the appellant and that in doing so, he was not actuated by malice.

21. In their witness statements, Sgt. Ali and PC Bisnath referred to *"other officers"* being present with them at the relevant time. PC Bisnath stated that Sgt. Ali and himself were dressed in plain clothes. In cross-examination however, Sgt. Ali stated that there was only one other officer who was present with them. Sgt. Ali stated that they were all dressed in plain clothes. In cross-examination, PC Bisnath stated that the third officer was dressed in police uniform.

22. In Sgt. Ali's witness statement dated June 6, 2018, an extract from the Station Diary from the San Fernando Police Station dated December 14, 2010 was annexed. In that extract, it was stated that Sgt. Ali

[4] See The Record of Appeal at page 175

reported that around 6:30am (sic) on December 14, 2010, he was on mobile patrol with PC Bisnath and party (sic) along Hibiscus Drive in Pleasantville when he made the relevant observations which eventually led to the appellant being arrested in the circumstances described above[5].

The Trial Judge's Findings

23. At the trial, the appellant gave evidence on his own behalf while Sgt. Ali and PC Bisnath gave evidence on behalf of the respondent. The judge stated at paragraph 90 of his judgment that the appellant's version as to how he was arrested was diametrically opposed to the version given by the respondent and as such, he had to determine which version of events was more probable in light of the evidence.

24. The judge stated at paragraph 91 that upon an analysis of the evidence, he found that the version of events given by the witnesses called on behalf of the respondent was more probable than the version proffered by the appellant. The judge arrived at this conclusion despite there being some inconsistencies in the evidence of the police officers. The trial judge at paragraphs 92 to 108 of his judgment sought to reconcile those inconsistencies.

25. At paragraph 121 of his judgment, the judge stated that having ruled that there was reasonable and probable cause for the appellant's arrest, the issue of malice did not arise for consideration. As well, the judge concluded at paragraph 122 that since there was reasonable and probable cause to arrest and charge the appellant, it could not be said that he was falsely imprisoned during the period December 14, 2010 to May 3, 2011.

The Appeal

26. The appellant has appealed the decision of the trial judge on the following issues:
    (i) The judge's assessment of the evidence;
    (ii) The judge's finding that Sgt. Ali had reasonable and probable cause to arrest and charge him; and
    (iii) The judge's finding that he failed to prove that Sgt. Ali was actuated by malice.

[5] See The Record of Appeal at page 193.

The Role of the Appellate Court in Reviewing a Trial Judge's Findings of Fact

27. The trial judge's findings, namely that there was reasonable and probable cause for the arrest of the appellant and that the actions of the police were not actuated by malice, involved issues of mixed law and fact.

28. The appellant has challenged several of the trial judge's findings of fact. It is well-settled that an appellate court will only reverse a trial judge's findings of fact where the judge was plainly wrong to do so. There must be sufficient identifiable errors in the reasons supplied by the judge to demonstrate that he failed to properly analyze the evidence as a whole. This is the approach commended by Lord Hodge in ***Beacon Insurance Company Limited v Maharaj Bookstore Limited***[6] at paragraph 12;

> *"12. ...**It has often been said that the appeal court must be satisfied that the judge at first instance has gone "plainly wrong"**. See, for example, Lord Macmillan in Thomas v Thomas at p 491 and Lord Hope of Craighead in Thomson v Kvaerner Govan Ltd 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: Piggott Brothers & Co Ltd v Jackson [1992] ICR 85, Lord Donaldson at p 92. **Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence:** Choo Kok Beng v Choo Kok Hoe [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169."* (emphasis added)

[6] [2014] UKPC 21

29. In the decision of ***The Attorney General v Anino Garcia***[7], Bereaux JA, on the issue of the reversal of a trial judge's findings of fact, stated at paragraphs 18 and 19;

> *"[18]* ***I am therefore entirely mindful that in reversing the judge's findings of fact, I must bear in mind the trial judge's advantage. I have also considered that the fact that I may have come to a contrary conclusion on the evidence is not a sufficient basis to reverse the judge's findings, if, there is a proper evidential basis upon which the trial judge could have concluded as he did.***
>
> *[19] Bearing those matters in mind, I entertain no doubt whatsoever that the judge was plainly wrong in his conclusions of fact in this case. A Court of Appeal cannot shirk its responsibility to reverse wrongful findings of fact (whether primary or inferential) in an appropriate case.* ***Sir Andrew Leggatt in Harracksingh v. Attorney General of Trinidad and Tobago & Anor. [2004] UKPC 3 at paragraph 11 noted that a trial judge's decision may be reversed if it is so "affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."*** (emphasis added)

30. Further guidance on this issue can be found in the decision of ***Carol Ettienne v. Thelma Ettienne***[8]**,** where de la Bastide CJ stated 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."*** (emphasis added)

[7] Civil Appeal No. 86 of 2011

[8] Civil Appeal No. 116 of 1996 (unreported)

31. We proceed to consider the issues raised by the appellant in the appeal, bearing in mind the foregoing principles.

[A] The judge's assessment of the evidence

32. Counsel for the appellant, Mr. Busby, submitted that the judge took an unbalanced approach in assessing the evidence before him and thus fell into error. He submitted that the judge incorrectly treated several inconsistencies in the case for the respondent as being insignificant and/or capable of being explained.

33. Counsel for the respondent, Ms. Ramlogan, submitted that the judge's findings were unassailable. She referred to the fact that the judge would have had the benefit of observing and assessing the witnesses' demeanour. She submitted that the judge carefully analysed all of the evidence that was before him before making an informed decision in the matter.

The issue surrounding the presence and attire of the third police officer

34. The trial judge at paragraph 93 of his judgment referred to the inconsistency in the evidence of Sgt. Ali and PC Bisnath regarding the presence of a third police officer in the police vehicle at the material time and the clothing in which he was clad. The judge said;

> *"93. …Sgt. Ali during cross-examination stated that the third officer who was in the vehicle was in plain clothes whereas PC Bisnath stated during cross-examination that the third officer was in uniform. The claimant also invited the court to observe that in the San Fernando station diary extract there was no mention in the report of there being any other police officer in the company of Sgt. Ali and PC Bisnath. The court was further invited to observe that in the Amended Defence it was repeated several times that Sgt. Ali was in the company of PC Bisnath. That it was not pleaded in the Amended Defence that Sgt. Ali and PC Bisnath were in the company of any other police officer."*

35. The judge at paragraph 94 found that the police officers' testimonies were not tainted as a result of these inconsistencies. He considered the fact that the incident had occurred in the year 2010 and that the evidence was being given approximately eight years later by police officers who would have worked on several similar cases over that time. He also stated that on the evidence, it was clear that the officers had been on several exercises that morning and that it was *"exceedingly plausible that there may be reasonable inconsistency in relation to non-material facts of the kind set out above".*

The issue surrounding the number of other police officers who were present

36. The judge at paragraph 95 of his judgment referred to the accounts of Sgt. Ali and PC Bisnath in their witness statements in which they stated that at the material time, they were in the company of more than one police officer and their testimony in cross-examination in which they both stated that they were in the presence of only one officer. He referred to the evidence of Sgt. Ali in cross-examination in which he stated that the reference to more than one officer in his witness statement might have been a typographical error. The court accepted that explanation and it reminded itself once again that the officers were giving evidence almost eight years after the incident.

The issue surrounding the events which occurred after the appellant was arrested

37. The trial judge at paragraphs 96 and 97 referred to the inconsistency in the evidence of Sgt. Ali and PC Bisnath regarding what occurred after the appellant was arrested;

> *"96…during cross-examination Sgt. Ali stated that they took the claimant to the Mon Repos Police Station and left him there. Further that they left the Mon Repos police station at around 11:00 am and journeyed at the San Fernando police station. Sgt. Ali further stated that he and Bisnath returned to the Mon Repos police station later that day and in the presence of PC Bisnath and the claimant he weighed the marijuana, finger printed the claimant, charged him and served him with Notice to Prisoner.*
>
> *97. Whereas PC Bisnath during cross-examination stated that he and Sgt. Ali took the claimant to the Mon Repos police station and the marijuana was weighed, the claimant was fingerprinted, charged and served with a Notice to Prisoner and all that was done before he and Sgt. Ali left the*

Mon Repos police station. PC Bisnath further stated that when he left the Mon Repos police station he did not return to that station on that day."

38. The judge at paragraph 100 found that this inconsistency did not taint the credibility of the police officers in relation to the essential facts of the event, which was that around 6:30am on the day in question, the appellant was found walking along Hibiscus Drive in Pleasantville and upon a search being conducted on his person, a clear plastic bag containing a plant-like material resembling that of marijuana was discovered. The judge once again attributed this inconsistency to a lapse in memory due to the passage of time. The judge then made the following significant statement;

"It follows that the argument of attorney for the claimant may have *some merit in that the matters set out in the extract* may not *be entirely correct."*

39. The judge continued at paragraph 101;

"101. However, the court found that the inconsistency within the officers' testimony did not completely discredit the San Fernando station diary extract. The extract which was provided to this court contained many events which would have occurred on the said date. As such, if the part of that extract which contained the events pertaining to the claimant was a concoction, then the court would have to believe that all events recorded before and after was also a concoction having regard to the fact that many similar matters are dealt with within the walls of one single entry. A court must ask itself whether this is a reasonable belief or whether reason and common sense would dictate that in such a convoluted entry errors are likely to be made. In the court's view the latter was to be preferred and the court so found."

40. In our view, the judge in so reasoning would have briefly shifted his focus away from the Station Diary entry in respect of the present matter and ventured into the question of the legitimacy of the other unrelated entries for which there was no evidential premise in this case. The judge in so doing would have engaged in a level of speculation about the other entries. In our view, his reasoning on this issue would however not have been sufficient to invalidate his earlier finding that, "*the argument of attorney for the claimant may have some merit in that the matters set out in the extract may not be entirely correct."*

The issue as to whether the appellant was known to Sgt. Ali

41. The case for the respondent was that the appellant was not known to Sgt. Ali. In the cross-examination of Sgt. Ali, he was referred to the respondent's initial defence in which it was stated that the appellant was arrested at a house situated at Hibiscus Drive. The following exchange occurred during the cross examination of Sgt. Ali[9];

> ***Q:*** *Now you said, specifically, in that defence, well, that you went into the place 21 Hibiscus Drive. You were very clear that there was no front door. How would you have known that?*
>
> ***A:*** *I would have went (sic) to an abandoned house on that said Drive sometime prior to when I arrested the Defendant.*
>
> ***Q:*** *So you were confusing it with some other house then? Were you confusing it with some other house?*
>
> ***A:*** *I don't understand the question.*
>
> ***Q:*** *No, you said you would have went (sic) into an abandoned house so … what do you mean by that?*
>
> ***A:*** *An abandoned house on the said road with other officers.*
>
> ***Q:*** *Yeah. Well where was this abandoned house?*
>
> ***A:*** *On Hibiscus Drive.*
>
> ***Q:*** *What number Hibiscus Drive?*
>
> ***A:*** *I can't recall the number?*
>
> ***Q:*** *So you were confusing it with some other time you went in some building?*
>
> ***Judge:*** *Well, his full answer to you is that, "I went on a previous occasion to an abandoned house where I arrested the Defendant." That's what he said. That was his full answer.*
>
> ***Q:*** *Where you arrested this Defendant? Well, what you mean by "the Defendant"?*
>
> ***A:*** *The Claimant.*
>
> ***Judge:*** *The Claimant. Sorry.*

[9] See pages 52-53 of the Transcript of Evidence dated October 24, 2018.

Q: *This Claimant?*

A: *Yes.*

42. Based on the above, on the face of it, the judge accepted that Sgt. Ali's evidence was that on a previous occasion, he went to an abandoned house along Hibiscus Drive where he arrested the appellant. A review of the record reveals that there was no interjection or clarification by Counsel for the respondent on this aspect of the evidence, nor was there any re-examination on it.

43. Mr. Busby contended that the judge appeared to have resiled from what he accepted was the relevant evidence during the proceedings when he stated the following at paragraphs 106 and 107 of his judgment;

> *"106. Lastly, the claimant submitted that during cross-examination, Sgt. Ali was cross-examined on the complete change in the defence and how he knew that there was no door at the house. According to the claimant, Sgt. Ali responded stating that it was because he had previously gone to that house and arrested the claimant.* ***The claimant submitted that that evidence contradicted Sgt. Ali's evidence that he did not know the claimant and never arrested, charged, interviewed or had any interaction with him prior to the said date.***
>
> *107.* ***However, Sgt. Ali did not state during cross-examination that he had gone to the house at 21 Hibiscus Drive prior to this incident and arrested the claimant. He in fact stated that he would have gone to an abandoned house on Hibiscus drive sometime prior to when he arrested the claimant and that he could not recall what number of Hibiscus Drive that abandoned house was located. As such, Sgt. Ali did not contradict his evidence that he did not know the claimant prior to the said date.****"* (emphasis added)

44. We have perused the entirety of the transcript of the cross-examination of Sgt. Ali and have not detected at any point an assertion by him that he had arrested the appellant on a previous visit to the premises at Hibiscus Drive. Although the judge during the course of the proceedings would have slightly misstated the relevant evidence, by omitting to use the specific words of Sgt. Ali, "**on that said drive**", he nonetheless addressed his mind to the accurate evidential material before him, in his reasons at paragraph 107 set out above. Whether the judge did so with the requisite deeper level of appreciation for the magnitude of the inconsistency to be resolved, that is whether Sgt. Ali knew the appellant at all

before arresting and detaining him, is the issue that forms the crux of this appeal which we will examine at paragraphs 45 to 47.

The judge's apparent lack of analysis of the appellant's evidence

45. We have observed from a review of the judge's reasons that he did not engage in any analysis of the appellant's evidence. The judge did not state whether there were any material inconsistencies in the appellant's evidence or any other issues in his case which would have affected his credibility. The majority of the judge's reasoning would have been focused on the analysis of the evidence of the witnesses called on behalf of the respondent and the reconciliation of the discrepancies which arose in their evidence. This unbalanced approach by the trial judge has impeded this court's ability to perform an effective review of his decision.

Conclusion on [A]

46. In the context of this case which involved contrasting evidence on both sides, the judge was required to determine which version was more probable in light of the evidence. This would have necessitated an analysis of the evidence on both sides. The judge's analysis of the evidence was limited to the case for the respondent. In relation to the case for the appellant, he simply recapitulated the appellant's evidence without delving into the plausibility of the account and the credibility of the appellant.

47. One issue loomed particularly large in the trial. It was whether Sgt. Ali knew the appellant before arresting him. The judge permitted the cross examination of Sgt. Ali on the initial defence, over the objection of the attorney representing the State, noting that;

> *"**He is entitled to test it because it is directly relevant. And helpful directly for what occurred here**."*[10]
> (emphasis added)

[10] See The Record of Appeal at page 345 et seq

However, the judge failed to address his mind in any meaningful manner to the critical issue of the violently inconsistent defences, although he plainly recognized the relevance of this issue during the course of the trial. The judge's reasoning at paragraphs 106 and 107 of his judgment fell short of addressing the more fundamental issues of the extent of the divergence and the absence of any reason that could account for the recantation of the initial defence. In this regard, while counsel for the appellant had cross examined on aspects of the initial defence, he did not seek to elicit a reason for the change between the initial defence and the amended defence. It was not his obligation to do so. The obligation to provide an explanation rested with the respondent.

48. Additionally, the judge's conclusion at paragraph 108 of his judgment, that the evidence of the police officers was more probable than that of the appellant because it was supported by contemporaneous documents, evaded the larger issue to be interrogated, which was the core issue of whether or not Sgt. Ali had known the appellant before arresting him. The focus of the judge was rather on the alleged internal inconsistency in the evidence of Sgt. Ali as to whether he had arrested the appellant on a prior occasion at 21 Hibiscus Drive as opposed to previously arresting him at an abandoned house on Hibiscus Drive. The judge thus side stepped the more fundamental matter which was the very significant inconsistency between the initial defence and the amended defence, which generated the issue of whether Sgt. Ali knew the appellant at all before arresting and detaining him. The focus of the judge was excessively narrow and it led him into fundamental error. These failures in analysis constituted material omissions on the judge's part, in the context of a matter which struck at the heart of the credibility of the case for the respondent. The judge failed to appreciate the full weight and proper significance of this issue and failed to evaluate it.

49. As a consequence, the judge could not have given any consideration to the relevant consideration that the respondent's initial defence contained statements which supported the scenario depicted by the appellant in his evidence in respect of the circumstances surrounding his arrest.

50. In consideration of the foregoing, we are of the view that based on the totality of the evidence in this case, it was not reasonably open to the judge to arrive at the findings of fact which he did, and which are identified at paragraph 24 of this judgment and the conclusions flowing there from set out at paragraph

25 of this judgment. He was plainly wrong. It is therefore open to this court to consider the matter afresh and we proceed to do so.

False Imprisonment

51. In the decision of ***Ramsingh v The Attorney General of Trinidad and Tobago***[11], Lord Clarke at paragraph 8 explained the principles relevant to the tort of false imprisonment in the following way;

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

52. In the context of this case which involved diametrically opposed versions as to the circumstances surrounding the appellant's arrest, this court must determine which version is more probable having regard to the totality of the evidence. Consideration must be given to the evidence of the witnesses, the documentary evidence adduced, the pleaded cases and the inherent probability or improbability of the rival contentions.

53. We have reviewed the appellant's pleadings, his witness statement and the transcript of his cross-examination. His evidence was largely consistent and there were no material inconsistencies in his account except for one inconsistency in his evidence which was in relation to the time he had arrived at the police station after being arrested. We however do not consider this to be an inconsistency of any great moment.

[11] [2012] UKPC 16

54. This court has however, unlike the judge, frontally factored into its assessment of the respondent's case, the details of the withdrawn initial defence which would have supported material aspects of the appellant's case. In our view, it is highly significant that in the initial defence filed by the respondent, it was admitted that the police officers went to the appellant's home situated at Hibiscus Drive.

55. With regard to the amended defence, given the absence of any proffered evidential reason, it is reasonable to conclude that the appellant's request for particulars of the initial defence generated the change in defences. This inexplicable change in defences goes to the root of the credibility of the respondent's case. It was bound to render the evidence of the police officers suspect. The two diametrically opposed defences called the credibility of the respondent's witnesses into question, in the most fundamental manner.

56. In his claim, the appellant insisted that Sgt. Ali was not present when he was arrested. This is relevant to the issue of the potential fabrication of the amended defence. The difference between the initial defence and the amended defence, when contrasted, is so stark that it throws the credibility of the amended defence into serious doubt. It supports the version of the appellant that he was not in possession of marijuana as alleged and that it was "planted" on him. This serious doubt is even further exacerbated by the fact that the respondent could not produce the particulars of the police officers who were present, after the initial defence had been filed and the request for further particulars made.

57. We have also reviewed the respondent's pleadings, the witness statements of Sgt. Ali and PC Bisnath and their evidence in cross-examination. In relation to the evidence of Sgt. Ali and PC Bisnath, there were certain inconsistencies in their accounts identified at paragraphs 34 to 40 of this judgment. Given the issue of fabrication raised by the appellant's reply in the pleadings and the great variance between the initial defence and the amended defence, the cumulative impact of these inconsistencies adversely affects the credibility of the police officers in a material manner.

58. In our view, having considered the totality of the evidence as well as the manner in which the proceedings unfolded, this court is satisfied on a balance of probabilities that the version of events proffered by the appellant is more credible. On that version, we are satisfied that Sgt. Ali was not among the party of police officers who went to the appellant's premises and assisted with his arrest. As an ineluctable corollary to

this, this court is satisfied that the evidence against the appellant, given by the police officers, lacked veracity. There is no lesser inference capable of being reasonably drawn in the totality of the circumstances. We therefore accept the appellant's version which has been summarized at paragraphs 12 to 17 of this judgment and on that version, there was no reasonable cause for his arrest and detention. The appellant's claim for False Imprisonment must therefore succeed.

Malicious Prosecution

59. The tort of Malicious Prosecution contains five elements. In the very recent decision of the Judicial Committee of the Privy Council in ***Matadai Roopnarine v Attorney General of Trinidad and Tobago***[12]***,*** Lord Hamblen, at paragraph 19, referred to the decision of the Board in ***Kevin Stuart v Attorney General of Trinidad and Tobago***[13], where Lord Burrows said at paragraph 1;

> "The tort of malicious prosecution has five elements all of which must be proved on the balance of probabilities by a claimant: (1) that the defendant prosecuted the claimant (whether by criminal or civil proceedings); (2) that the prosecution ended in the claimant's favour; (3) that the prosecution lacked reasonable and probable cause; (4) that the defendant acted maliciously; and (5) that the claimant suffered damage. See, eg, *Clerk and Lindsell on Torts* (2020, 23rd edition) para 15-13; *Winfield and Jolowicz on Tort* (2020, 20th edition) para 20-006".

60. In this case, it is not in dispute that a criminal prosecution was initiated against the appellant by Sgt. Ali and that it was determined in the respondent's favour. There is also no contention that the appellant would be able to establish damage if he was successful on the issue of liability. The key issues which remain are whether, in initiating and continuing the prosecution, Sgt. Ali did so without reasonable and probable cause and whether he was actuated by malice.

[12] [2023] UKPC 30
[13] [2022] UKPC 53

Whether there was an absence of reasonable and probable cause in prosecuting the appellant

61. In the decision of ***The Attorney General of Trinidad and Tobago v Joel Roop***[14], Mendonça JA at paragraphs 47-49 considered the test of "reasonable and probable cause" in the following way;

> *"47. Reasonable and probable cause has been defined as an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed (see Hawkins J in Hicks v. Faulkner (1878) 8 QBD 167, 171 which was approved by the House of Lords in Herniman v. Smith [1938] AC 305).*
>
> *48. It is apparent from that definition that reasonable and probable cause in relation to malicious prosecution, as it is in relation to reasonable suspicion to arrest, also has subjective and objective elements. These may be summarised this way:*
>
> > *i. Did the officer who laid the charge have the requisite belief;*
> > *ii. Did the officer when exercising the power to lay the charge honestly believe in the existence of the objective circumstances which he relies on as the basis for that belief;*
> > *iii. Was his belief in the existence of these circumstances based on reasonable grounds; and*
> > *iv. Did these circumstances constitute reasonable grounds for the requisite belief.*
>
> *49. In order to have reasonable and probable cause the defendant does not have to believe that the prosecution will succeed and that a guilty verdict will be returned. It is enough that in the material on which he acted there was a proper case to lay before the court (see Glinski v. Mc Iver [1962] AC 726 and Willers v. Joyce [2016] 3 WLR 477)."*

[14] Civil Appeal No. P182 of 2015

62. In ***Kevin Stuart v Attorney General of Trinidad and Tobago (supra)***, Lord Burrows said at paragraph 26;

> "Nevertheless, and although nothing turns on it in this case, there is one point on the law which it is helpful to clarify. This concerns the question as to what the police officer's honest (and reasonably held) belief must be about in the context of deciding whether there is a lack of reasonable and probable cause. It has commonly been stated that the honest belief must be as to the accused's guilt in respect of the offence charged: see *Hicks v Faulkner* (1878) 8 QBD 167, 171, per Hawkins J, which was approved by the House of Lords in *Herniman v Smith* [1938] AC 305. But in the Board's view, the principled and correct approach was articulated by Lord Denning in the House of Lords in *Glinski v McIver* [1962] AC 726*.* He said at pp 758-759:
>
> "[T]he word 'guilty' is apt to be misleading. It suggests that in order to have reasonable and probable cause, a man who brings a prosecution, be he a police officer or a private individual, must, at his peril, believe in the *guilt* of the accused. That he must be sure of it, as a jury must, before they convict. Whereas *in truth he has only to be satisfied that there is a proper case to lay before the court*. … After all, he cannot judge whether the witnesses are telling the truth. He cannot know what defences the accused may set up. Guilt or innocence is for the tribunal and not for him ... So also with a police officer. He is concerned to bring to trial every man who should be put on trial, but he is not concerned to convict him. ...No, *the truth is that a police officer is only concerned to see that there is a case proper to be laid before the court*." (Apart from second sentence, emphasis added)"

63. In considering the matter afresh, we have taken into account the matters set out at paragraphs 54 to 57 of this judgment in which we have found that there was no reasonable cause for the appellant's arrest and detention. There was also the complete absence of any additional material that would have otherwise warranted the institution and continuation of a prosecution. Had there been such additional material, it would have been incumbent on the respondent to produce it. We accordingly find that there was an absence of reasonable and probable cause on the part of Sgt. Ali in prosecuting the appellant.

Whether Sgt. Ali acted with malice in charging the appellant.

64. In order for the appellant to succeed in his claim, it must not only be established that Sgt. Ali acted without reasonable and probable cause but also that he was actuated by malice.

65. In the decision in ***Matadai Roopnarine v The Attorney General of Trinidad and Tobago*** Lord Hamblen said at paragraph 21;

> *"Malice means an improper motive. The proper motive for a prosecution is a desire to secure the ends of justice. Malice will be established if it is shown that this was not the motive of the defendant or that something else was. Malice may be inferred from lack of reasonable and probable cause but this will depend on the facts of the individual case - see Clerk & Lindsell on Torts 23rd ed (2020), para 15-57; Williamson v The Attorney General of Trinidad and Tobago [2014] UKPC 29 at paras 11-13."*

66. In the decision of ***Manzano v The Attorney General of Trinidad and Tobago***[15], Mendonça JA stated at paragraphs 47 to 49;

> *"47. The proper motive for a prosecution is a desire to secure the ends of justice.* ***So, in the context of malicious prosecution a defendant would have acted maliciously if he initiated the prosecution through spite or ill-will or for any other motive other than to secure the ends of justice. It follows therefore that even if a claimant cannot affirmatively establish spite or ill-will or some other improper motive, he may still succeed in establishing malice if he can show an absence of proper motive.***
>
> *48.* ***Malice may be inferred from the absence of reasonable and probable cause because if there is no reasonable and probable cause for the prosecution it may be inferred that there was an absence of proper motive and hence malice.*** *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:*

[15] Civil Appeal No. 151 of 2011

> *'[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 to proof of the separate elements can or should be stated."*
>
> ***It is therefore a matter 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)."* (emphasis added)

67. In all of the circumstances of this case in which we have accepted on a balance of probabilities the appellant's version and in which we have concluded that the police were not truthful in their evidence against the appellant and that Sgt. Ali acted without reasonable and probable cause, malice can be inferred.

68. The appellant must therefore also succeed in his claim for malicious prosecution.

DISPOSITION

69. The appeal is allowed and the orders of the trial judge are set aside. The respondent is liable to the appellant for the torts of false imprisonment and malicious prosecution. The appellant is therefore entitled to damages for those torts.

70. We invite submissions on the issue of costs.

71. We also now invite submissions on the issue of damages.

……

Mark Mohammed

Justice of Appeal

I have read the judgment of M. Mohammed JA. I also agree with it and I have nothing to add.

……

Maria Wilson

Justice of Appeal