



[2017] JMSC Civ 96

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2010HCV01115

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| BETWEEN | ISAAC MENDEZ | CLAIMANT |
| AND | CORPORAL KIRK ROACHE | 1 st DEFENDANT |
| AND | THE ATTORNEY GENERAL | 2 nd DEFENDANT |

Ms. Oraina Lawrence instructed by Kinghorn & Kinghorn for the claimant

Ms. Celia Middleton instructed by the Director of State Proceedings for the defendants

Heard: 13th & 16th March, 2017, 3rd & 5th April, 2017, & 30th June, 2017.

Malicious Prosecution – Claimant arrested and charged for breach of Copyright Act – Display of C D’s – Whether CD’s were for sale – Case dismissed for want of prosecution – Claimant brought action claiming damage for malicious prosecution - Reasonable and probable cause – Constabulary Force Act s. 33 – Copyright Act s. 10, 31 (3) (b) & 46 (1) (b).

EVAN BROWN, J

Introduction and background

[1] In or around April 2006, Cpl Kirk Roache, now Detective Sergeant, laid a criminal charge against Isaac Mendez under the **Copyright Act** for displaying copy music

compact discs (CDs) without the permission of the copyright holders. Mr. Mendez, a music producer, was the owner and operator of a record shop along the Bog Walk main road in the parish of St. Catherine.

- [2] On that day, Mr. Mendez was inside his shop when Cpl Roache entered the premises dressed in plain clothes. Cpl Roache proceeded to confiscate some of the CDs, which were in the shop and arrested Mr. Mendez and took him to the Bog Walk Police Station.
- [3] The matter went before the Linstead Resident Magistrate's Court. The charge was dismissed for want of prosecution on the 21st December, 2009, after a number of appearances in court. Mr. Mendez then brought this claim for damages for Malicious Prosecution against the Attorney General and Corporal Roache as its servant.

Case for the claimant

- [4] Mr. Mendez was sitting behind the counter in his shop when Cpl Roache entered and began to accuse him of smoking ganja without any proof. Cpl Roache then went behind the counter, to the area where Mr. Mendez stood, and took up some of the CDs. As he took them in his hand he told Mr. Mendez that charges would be laid against him for a breach of the **Copyright Act**.
- [5] The CDs were not for sale but were in the shop for his personal use. He worked at various recording studios, including Tuff Gong, where he laid rhythm tracks, recorded and did productions for himself as he was also a singer. Other artistes would also voice on those rhythms, and the end product was recorded on CDs. Mr. Mendez would play them in his shop as a way of promoting the rhythms he laid and those of other producers.
- [6] He would sometimes play CDs of artistes such as Bob Marley and Tenor Saw, which he was given permission to play. That permission came from those artistes and producers whose songs he played. At the time of his arrest, Cpl Roache did

not require of him any proof of the permission he received but proceeded to lay charges against him.

- [7] The permissions he received were not formalized, but they were given on the basis of his close business arrangement with those producers and artistes. In that arrangement, they gave him their vinyl record productions to market, and he would in turn sell them to persons from Japan and his friends from England in the music industry. They would also give him the CDs to play as a way of promoting the songs to those customers who purchased vinyl.
- [8] If anyone expressed an interest in any of the songs on the CDs, he would sell those songs to them on vinyl. Where those songs were unavailable on vinyl records or the customer was interested in buying the CD itself, Mr. Mendez said he would introduce that customer to the artistes or producers of the songs. By “introduce” he meant that he would contact the artistes or producers and expressed the customer’s interest to them.
- [9] Though he sold songs on vinyl, he said that he was promoting the CDs as they were taking over the vinyl market. He said further that he had a turntable for playing the vinyl records in his shop. However, as songs are popularly sold on CDs, the artiste and producers would release their new songs on them.

Case for the defendant

- [10] On the day of Mr. Mendez’s arrest, both Cpl Roache and Constable K. Thompson were on foot patrol in the Bog Walk area. Cpl Roache observed Mr. Mendez smoking by the entrance of his shop and displaying CDs. Upon their approach, Mr. Mendez went inside the shop. They entered the shop to confront him regarding the “spliff” and to enquire of the authenticity of the CDs he had on display. Mr. Mendez replied that the CDs were “burnt” by him and they were for sale.

- [11] Cpl Roache saw CDs on display on the shelves facing the entrance of the shop, and others behind a counter. There were CDs labelled by hand with markers and stacked on the shelves. There were also, what he termed, “original CDs”, with type written labels and sealed in packages on the shelves.
- [12] They were all stacked facing the door and there were rows behind the ones at the front. These, he said, caught his attention. He described the number of CDs he saw as “several dozens”. He said he formed the view that the CDs were for sale by the manner in which they were arranged on the shelves and placed on display.
- [13] He further observed that some of the CDs had as many as twenty artistes. Those were the “burnt” CDs. There were songs on them from artistes such as Bob Marley, Tenor Saw and overseas artistes such as Al Greene. Cpl Roache then enquired of the permission he had to sell those CDs. Mr. Mendez did not give him an answer that was satisfactory in his estimation.
- [14] By that, he meant, that Mr. Mendez could not say with certainty which artistes gave him permission. Neither could he produce any written authorization from the Jamaica Federation of Musicians. He concluded that Mr. Mendez had no permission to sell them. Mr. Mendez also did not tell him that they were for his personal use.
- [15] In relation to the offence under the **Copyright Act**, Cpl Roache was instructed by the Linstead Resident Magistrate’s Court to obtain statements from those persons whose copyright was breached. Pursuant to that instruction, he contacted the following institutions in an attempt to ascertain statements: Tuff Gong, Jamaica Federation of Musicians and the Organised Crime Division. His efforts however were unsuccessful, leading to the eventual dismissal by the court.

- [16] Though he did not receive any written statements, he was able to establish contact with some of the organisations and artistes. He also went to Tuff Gong and the Jamaica Federation of Musicians to inquire of Mr. Mendez's permission to sell their products. None of the artistes and organisations, that he contacted, knew of Mr. Mendez. Also, none of them gave him permission to make copies of their music to sell.
- [17] The Organised Crime Division, according to Cpl Roache, was to contact the overseas artistes to ascertain whether they had given any permission to Mr. Mendez. He said that they would have to contact the music companies individually, who would in turn get affidavit evidence from: the singers, songwriters, producers and anyone else who had anything to do with a particular song. This, he continued, would have taken quite a lot of time to go through that process.
- [18] Cpl Roache also experienced a similar difficulty with the Jamaica Federation of Musicians. He was informed by them that some of the artistes lived overseas and that some were on tour abroad. The result would be that it would have taken a while to acquire the requisite information for them to prepare a witness statement on the matter.
- [19] He went to Tuff Gong twice. On his first visit, he waited for over an hour to speak to either Sharon Marley or Cedella Marley on the matter. On the second visit, neither of them were there and so he did not speak to either of them. He made no more efforts to confirm whether or not Mr. Mendez had the required permission to sell those songs produced by them.

Submissions

- [20] No submissions were filed on behalf of the claimant.

Submissions on behalf of the 1st and 2nd defendants

- [21] Ms. Middleton submitted that the Mr. Mendez must satisfy the requirements of section 33 of the **Constabulary Force Act** to prove malicious prosecution. He must prove that Cpl Roache acted with malice or in the absence of reasonable and probable cause.
- [22] She placed reliance on **Wills v Voisin** (1963) 6 WIR 50 to make the argument that Mr. Mendez must prove the following to be successful: (i) That the law was set in motion against him on a charge of a criminal offence, (ii) that he was acquitted of the charge or that otherwise it was determined in his favour, (iii) that the prosecutor set the law in motion without reasonable and probable cause, and, (iv) that in so setting the law in motion, the prosecutor was actuated by malice.
- [23] She posited that it was undisputed that Cpl Roache laid charges against Mr. Mendez, and that those charges were subsequently disposed of without a trial. It is clear then that Mr. Mendez satisfied those requirements. The issues then were whether Corporal Roache acted with malice or without reasonable and probable cause in charging Mr. Mendez.
- [24] There was no evidence, she continued, that Cpl Roache acted with improper motive or ill-will to set the law in motion against Mr. Mendez. At all times, while Corporal Roache acted in the course of his duties, he was motivated to secure the ends of justice.
- [25] By virtue of section 13 of the **Constabulary Force Act**, Cpl Roache was empowered to act as he did. Under that section, police officers may arrest, detain and charge persons that they reasonably suspect of committing an offence. The construction of that section imposed a subjective test, that is, what was operating on the mind of the police officer at the time of the arrest and charge. Therefore,

the issue is whether Cpl Roache honestly believed Mr. Mendez committed an offence.

- [26] Ms. Middleton then relied on ***Glinski v McIver*** (1962) AC 726 to make the submission that a police officer is only concerned to see that there is a proper case to be laid before the court. Cpl Roache had sufficient information on which to charge Mr. Mendez with breaches of the ***Copyright Act***, she submitted.
- [27] The evidence, she argued, showed that Cpl Roache first approached Mr. Mendez upon observing him smoking a marijuana 'spliff' while he stood at the door of his shop. Upon Cpl Roache's entrance into the shop, he further observed CDs in boxes, on shelves and on the counter displayed for sale. He did not see any vinyl records in the shop.
- [28] The CDs he saw were a mixture of genuine, still in the original plastic wrappers and printed labels and others handwritten with markers to indicate what songs and artistes were on them. He made enquiries of Mr. Mendez to ascertain whether he had the required permission to market them.
- [29] It was pursuant to those answers that Mr. Mendez was charged with breaches of section 31 of the ***Copyright Act***. In that section, the copyright in a work is infringed by one who sells that product without the permission of the copyright owner. Mr. Mendez did not produce any permission to sell those and neither has he done so to date.
- [30] Ms. Middleton then relied on ***Courtenay Francis Raymond Barnett v The Attorney General***, (*unreported*) *Supreme Court, Jamaica* Suit No. CL 2001/B 051, judgment delivered on 20th May, 2002, to make the submission that the court ought to find that Mr. Mendez did not have the requisite permission. Having failed to produce the permission, Mr. Mendez did not prove that Cpl Roache acted without reasonable and probable cause or with malice in laying charges against him.

A brief statement of the applicable law

- [31] In relation to a member of the Jamaica Constabulary Force, the tort of malicious prosecution is committed where the defendant either maliciously or without reasonable and probable cause initiates a criminal prosecution against the claimant which terminates in the claimant's favour and results in damage to his reputation, property or person. (See **Clerk & Lindsell on Torts** 19th ed para 16-06; **Wills v Voisin** (1963) 6 WIR 50 at 57; **Flemming v Myers** 26 JLR 525 at 535; **Constabulary Force Act**, section 33)
- [32] The essence of the tort of malicious prosecution "lies in abuse of the process of the court by wrongfully setting the law in motion," per Sir John Beaumont in **Mohamed Amin v Jogendra Kumar Bannerjee and Others** [1947] A.C. 322 at 330 (**Mohamed Amin**). The law is wrongfully set in motion if the prosecution is brought without reasonable and probable cause and, or, with malice. In short, there must be good grounds for commencing a prosecution. So then, the availability of a claim for malicious prosecution "is designed to discourage the perversion of the machinery of justice for an improper purpose," **Mohamed Amin, supra**.

Issues

- [33] As counsel for the defendants submitted, no issue was joined that Cpl Roache initiated criminal proceedings against the claimant and that those criminal proceedings terminated in the claimant's favour. The issue for me, therefore, is whether the claimant has established, on a balance of probability, that the criminal proceedings were instituted either without reasonable and probable cause or maliciously. I will disaggregate the issue as stated and consider first whether there was no reasonable and probable cause to prosecute the claimant under the **Copyright Act**.

Analysis

[34] In so far as reasonable and probable cause is concerned, the claimant is required to both plead and prove a negative. That is, he must plead as well as prove an absence of reasonable and probable cause in the bringing of the prosecution under the **Copyright Act**. This is the opposite of the position where the claim is for false imprisonment. In that case it is the defendant who must both plead and prove that he had reasonable and probable cause to imprison the claimant.

[35] The time-honoured definition of reasonable and probable cause is that provided by Hawkins J in **Hicks v Faulkner** (1881-82) 8 QDB 167 at 171:

"Now I should define reasonable and probable cause to be, 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."

[36] Whether or not Cpl Roache had reasonable and probable cause to prosecute the claimant must be gleaned from the circumstances. There was disagreement between the parties as to what were the circumstances surrounding the commencement of the prosecution under the **Copyright Act**. Consequently, I must first resolve the conflicts in the evidence before a finding can be made that there was no reasonable and probable cause to prosecute the claimant.

[37] The claimant said that after Cpl Roache entered the shop, accused him of a breach of the **Dangerous Drugs Act**, he proceeded behind the counter where he was seated and took up CDs. Cpl Roache informed him that he was going to charge him for a breach of the **Copyright Act** while in the act of confiscating the CDs. The claimant asserted under cross-examination that Cpl Roache never required of him any proof of permission. On this account, Cpl Roach would have formed the view that the CDs were being displayed or exposed for sale and

without the permission of the copyright holders, without any inquiry of the claimant.

- [38]** Even if the CDs were visible behind the counter that fact alone would not satisfy the ingredient of being displayed or exposed for sale. Further, assuming for the sake of argument that the CDs were displayed or exposed for sale, Cpl Roache would have had no reasonable or probable cause to seize them without first ascertaining that the claimant had no permission from the copyright holders to expose them for sale.
- [39]** So then, the first question of fact to be resolved is, were the CDs displayed for sale? The claimant, in his witness statement, said it was untrue that he had the CDs displayed for sale. That was in response to the averment at paragraph 3 of the Defence. The court enquired of the claimant where in the shop he had the CDs. His response was, "round behind the counter, at different, different areas 'round behind the counter I had these CDs".
- [40]** Cpl Roache, on the other hand, said some of the CDs, estimated at several dozens, were on the shelves and stacked one behind the other in rows. There were shelves behind the counter. He was unsure whether there were shelves at the front of the shop also. So stacked, the CDs faced the door and the names of the artistes were in plain view, presumably on the ones in front. There were also CDs on the counter. Some of the CDs were in open boxes on the floor behind the counter.
- [41]** Mr. Mendez, who bears the burden of proof, did not say how the CDs were stored behind the counter. Were some of them in boxes as Cpl Roache testified? Were others, though behind the counter, kept on the shelves but not in a manner to be visible to members of the public? The claimant's denial that the CDs were not displayed for sale is supported only by his answer that the CDs were at several places behind the counter. To say the CDs were behind the counter is

inconclusive of the claim that they were not displayed for sale. It is inconclusive because they could have been on the shelves which were behind the counter.

[42] I accept that there were CDs behind the counter. However, I also accept that some of those CDs were in open boxes and others were on the shelves and stacked in the manner described by Cpl Roache. I also accept that some of the CDs were on the counter. I did not find Mr. Mendez to be a frank witness on the point. Although he knew from the time the criminal charge was laid that the allegation was that he had the CDs displayed for sale, his first reference to it in his witness statement came in the form of a rebuttal. In addition, his oral evidence in this area came after some hesitation on his part. I therefore find as a fact that the CDs were displayed for sale in the claimant's record shop.

[43] I will now consider the question of permission from the copyright holders. The claimant said Cpl Roache never required of him any such proof. According to Cpl Roache, having noticed that the 'burnt' CDs had multiple artistes on them, he asked Mr. Mendez if he had permission to sell the CDs. He gave Cpl Roache a response which Cpl Roache found "unsatisfactory". Cpl Roache explained in cross-examination that by "unsatisfactory" he meant the claimant could not give any answer as to who he made contact with, if he got any written documentation from artistes or the Jamaica Federation of Musicians.

[44] The question becomes, who do I believe? The simple answer is, the defendant. The claimant failed to convince me that he was a witness of truth. I assessed him as of average intelligence and therefore possessing the ability to comprehend the questions. In spite of that, I found him to be less than frank in cross-examination. His answers in cross-examination were not spontaneous. He was hesitant, sometimes repeating the questions as he gave himself time to conjure the answer.

[45] In particular, I did not believe him that all the CDs were there for his personal use and promotion of the musical works for either himself or his associates. If they

were for promotion, it is doubtful how prospective purchasers were to become aware of the product. There was no sign up on the shop and the music could not be heard beyond the four corners of the shop. Furthermore, there was no need to play CDs of the vinyl records because there was a turntable in the shop. The claimant vacillated between asserting that the CDs were for promoting the vinyl records and claiming that CDs were now taking over the market; hence, he was marketing CDs.

[46] So then, the circumstances which confronted Cpl Roache were these. After he entered the shop he noticed several copy or burnt CDs with the names of multiple artistes displayed for sale. His enquiry of the claimant revealed that the claimant did not have the requisite permission from the copyright holders to display or expose them for sale.

[47] Under the **Copyright Act, 1993**, section 10, copyright in a musical work is protected for a period of fifty years from the calendar year in which the author died. That was amended to ninety-five years in 2015. It is an infringement of the copyright in a work for anyone to sell, offer or expose for sale any article which he knows or has reason to believe is an infringing copy of the right, without the licence of the copyright owner (see section 31(3) (b) of the **Copyright Act**). The person who, during the course of a business, "sells, ... offers or exposes for sale" any article at a time when copyright subsists in the work, which he knows or has reason to believe is an infringing copy of that work, commits an offence (see section 46 (1) (b) of the **Copyright Act**).

[48] When the circumstances which operated on the mind of Cpl Roache are considered against the background of the provisions of the **Copyright Act** referred to in the preceding paragraph, it is apparent that at the very least there was a *prima facie* breach of the **Copyright Act**. The CDs were obvious copies of musical works. Cpl Roache was therefore entitled to ask the claimant if he had permission from the various artistes to sell or expose for sale their works. The

enquiry of whether the claimant had permission was based on the reasonable assumption that copyright subsisted in the works.

- [49] Since it is accepted that the circumstances disclosed a *prima facie* case, then that is as far as Cpl Roache needed to go. In the view of the learned authors of **Clerk & Lindsell**, *op.cit.* para. 16-26, a person is not bound to ensure before instituting a prosecution that there is evidence to secure a conviction. Evidence amounting to a *prima facie* case might well be sufficient to establish reasonable and probable cause. Indeed, the requirement is the establishment of facts upon which the claimant was probably, not actually, guilty of an offence.
- [50] Cpl Roache said he formed the view that the CDs were for sale because of how they were stacked on the shelves. In all the circumstances that was an honestly held belief. The circumstances which faced Cpl Roache, which I have found to be true, were such as would have led any ordinarily prudent and cautious man, placed in the position of Cpl Roache, to believe that Mr. Mendez was probably guilty of the crime imputed.
- [51] That being my finding, the second part of the issue may be disposed of with the pronouncement that there is no evidence of malice. I conclude, therefore, that the claimant has failed to establish that Cpl Roache acted either without reasonable and probable cause or with malice, in commencing the prosecution under the **Copyright Act**. Judgment is therefore entered for the defendants. Costs are awarded to the defendants, to be taxed if not agreed.