

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1986/A188

BETWEEN	KENNETH ATKINSON	PLAINTIFF
AND	ASSISTANT SUPERINTENDENT DUDLEY REYNOLDS	FIRST DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	SECOND DEFENDANT

Mrs. Ursula Khan for Plaintiff

E.H. O'Ness and Frank Williams for Defendants

HEARD: NOVEMBER 19, 20, 1990

CORAM: WOLFE J.

On the 20th day of November, 1990 I gave judgment for the defendants with costs to be taxed if not agreed in the suit herein and promised to put my reasons for so doing, in writing. That promise is now being fulfilled.

The plaintiff herein is a travelling salesman residing at No.1 Forsythe Drive in the parish of Saint Andrew. The plaintiff had previously been the Managing Director and majority shareholder of Novelty Plastics Limited. He held 93 per cent. of the issued shares.

At the hearing the plaintiff gave evidence that as a result of a message received he contacted the first defendant at the Central Police Station and spoke to him. On that occasion the first defendant informed him that he wished to speak to him about certain pieces of machinery. An appointment was set up and both the plaintiff and the first defendant met on the following day.

At this meeting the first defendant informed the plaintiff that one Tony Bridge had reported to him that he, the plaintiff, had stolen machinery belonging to him. The plaintiff informed the first defendant that the report was baseless, and that the machinery was the property of Novelty Plastics Limited, a company duly incorporated under the Companies Act of Jamaica, of which he was the majority shareholder. He further informed Assistant Superintendent Reynolds that Tony Bridge and Keith Shervington, formerly shareholders in Novelty Plastics Limited, had sold all their shares to the plaintiff some two years prior to the allegation. The transaction had even resulted in legal proceedings being instituted to compel the transfer of the shares by Bridge. Apparently Reynolds was unimpressed and the plaintiff, anxious to exonerate himself, advised Reynolds to check with his lawyer

and the Registrar of Companies to verify his account. If the plaintiff is to be believed, Reynolds in no uncertain terms told him that he would do no such thing and advised him that the only option open to him was to deliver up the machines or face being arrested. Reynolds afforded him time to consider the matter and to continue his investigations.

The plaintiff immediately contacted his lawyer who in turn contacted Reynolds. In the presence of the plaintiff the un-named lawyer told Reynolds that the matter was a civil matter and verified what the **plaintiff** had told Reynolds at the Central Police Station meeting.

The plaintiff next heard from Reynolds in February 1984 when he was informed to report to the Half Way Tree Court House, where he would be arrested and placed before the court. The plaintiff, accompanied by his lawyer, obliged. He was arrested and placed before the court as promised. He pleaded not guilty to the charge of larceny and was granted bail in the sum of Fifty Thousand (\$50,000.00). He was further ordered to surrender his passport to the police and to report to the Central Police Station once weekly until the matter was finally disposed of.

The plaintiff attended court on some sixteen occasions and on the 28th November, 1985 A No Order was made. Information No.1300/84, on which the plaintiff was charged, was tendered and admitted **in evidence**, by Consent, as Exhibit I. The endorsement thereon reads:

On 28/11/85

"No Order made
insufficient evidence for a criminal
action. Civil proceedings advised".

Sgd. L.E. Vanderpump
R.M. St. Andrew.

By way of comment, I observe that the endorsement supported the view held by the plaintiff's ~~attorney-at-law~~ and which view was communicated to Reynolds. The arrest and prosecution of the case had a traumatic effect on the plaintiff's life. He was affected both personally and financially. He **became** very depressed and worried. He was unable to sleep. He lost appetite. Whenever he appeared in public people jeered him and called him a thief. He had to retreat to living the life of a recluse. In today's Jamaica where villains and drug barons have

become the role models and where honest men are a dying specie, I find it difficult to accept that the plaintiff was jeered and labelled thief by persons. As a judge presiding over the Criminal Courts of this country the experience is that cheers are wild when robbers and dishonest men are acquitted. A verdict of guilty is usually received with wails of distress and abuse by a large following of persons. Reporting to Central weekly was a source of embarrassment to the plaintiff. This I can well understand. The plaintiff's friends deserted him. The cost of providing himself with legal representation amounted to Ten Thousand Dollars. Receipts issued from the law offices of K. Churchill Neita were admitted in evidence in support of the payment.

The above summary of the evidence was the basis on which the plaintiff sought to recover damages against the defendants for Trespass and/or Malicious Prosecution.

It is convenient to make reference to paragraphs 3, 6 - 8 of the plaintiff's statement of claim.

Paragraph 3. "On the said 27th day of February, 1984 the first-named defendant falsely, maliciously and without reasonable and or/ probable cause arrested the plaintiff and charged him with larceny..... "

Paragraph 6. "That the said prosecution of the plaintiff was malicious and there was no reasonable and/or probable cause for the said prosecution or its continuance for over 21 months."

Paragraph 7. That due to the negligence of the first-named defendant in making proper enquiries and investigations, his conduct and actions were malicious."

Paragraph 8. "That despite the available evidence the prosecution continued and remained pending for over 21 months."

As a matter of completeness I must mention that the plaintiff called a character witness in the person of Mr. Hubert Smith, a mechanic, of 21 Munsterr Road, Kingston 3.

The first named defendant, Assistant Superintendent Reynolds, testified that he received certain information as a result of which he went to Novelty Trading Company Limited where he saw and spoke to Tony Bridge. A report was made

to him by Bridge, as a result of which he commenced investigations into a case of larceny of a quantity of machines and equipment the property of Novelty Trading Company Limited. He saw and spoke to the plaintiff informing him of the allegations made by Bridge and that the plaintiff was alleged to have stolen the machines. The plaintiff's response to the allegation was a flat denial of any knowledge of the machinery. Reynolds said he further asked the plaintiff what he had done with the machinery. Again the plaintiff denied removing the machinery from Bell Road. The investigations were continued and upon conclusion the first named defendant said he discussed the file with Mr. Patrick Brooks, a Crown Counsel in the Director of Public Prosecutions Department. Based upon advice received from Mr. Brooks he obtained a warrant for the arrest of the plaintiff. The warrant was duly executed by arresting the plaintiff. The first defendant denied he had told plaintiff that he must deliver up the machines or face arrest.

It is important to note that the machinery which was removed from Bell Road was recovered from 21 Munster Road, Kingston 3, the said address of the witness Hubert Smith, who had given evidence on behalf of the plaintiff.

The plaintiff's case as presented was that if the first defendant had taken time to investigate the version given to him by the plaintiff he would have seen that the matter involved an issue between party and party and that no criminal offence had been committed. Further had the first defendant heeded the advice of the plaintiff's lawyer that the matter was of a civil nature the arrest would have been avoided.

Let me observe that an inspection of the records at the Registrar of Companies office would not have assisted in the issue as to the owner of the machines. The evidence of Keith Shervington which I accept as true is that prior to the sale of the shares certain debts owed by Novelty Plastics Company Limited were liquidated by way of an over draft at the bank. As a collateral for this facility the bank took a debenture, a bill of sale and the personal guarantee of Tony Bridge over the machinery owned by Novelty Plastic Company Limited. When the shares were sold the plaintiff undertook to liquidate the indebtedness to the bank. He failed to honour the undertaking. The bank called the loan. Tony Bridge

liquidated the debt which he had guaranteed and which the plaintiff had undertaken to liquidate by using funds owned by Novelty Trading Company Limited. The plaintiff was aware of this transaction.

The plaintiff himself testified that the machines had been removed by him to 21 Munster Road as he had intended to surrender them to the bank. It is only fair to mention that the plaintiff denied that any of the police officers had asked him about the whereabouts of the machine and that he had denied knowledge of their whereabouts. A question which arises is this, if he had intended to surrender the goods to the bank why did he remove them to 21 Munster Road. These matters go to the credit of the plaintiff and his conduct, in deciding whether or not the first defendant had reasonable and proper cause to arrest and prosecute him.

It is unbelievable that in the investigations the police officers would not have enquired as to the whereabouts of the machine. Certainly if he had divulged to the police where the machines were it would not have been necessary to obtain a search warrant to search 21 Munster Road to recover the machines.

The plaintiff did not impress as a reliable witness. It was clear that his evidence as to the conversation with Reynolds was tailored to give the impression that the police was acting maliciously.

If the police were acting with malice would they have invited him to come to Half Way Tree Court for the arrest to be affected? Would they have placed him before court immediately? Would they not have opposed bail until the machines were recovered? It must be borne in mind the machines were not recovered until 5th May, 1985. The police even accompanied the plaintiff to his home to get his passport to facilitate his early release from custody. I have asked these questions because the tenor of the plaintiff's case was that the defendant not only acted without reasonable and proper cause but that he was motivated by improper motive, namely, the desire to protect Tony Bridge's interest regardless.

To succeed in his claim for malicious prosecution the plaintiff must prove:

1. That the proceedings was instituted or continued by the defendant.

2. That the defendant acted without reasonable and probable cause.
3. That the defendant acted maliciously.
4. That the proceedings were terminated in favour of the plaintiff.
5. That the plaintiff has suffered damage.

I will now examine the evidence to see if the five (5) conditions mentioned above have been established.

1. Information No. 1300/84 admitted in evidence as Exhibit 1 by consent clearly indicates that the first defendant Detective Inspector Reynolds, as he then was, was the informant and the person who laid the complaint against the plaintiff. I therefore found that condition No. 1 was established on the basis that it was the first defendant who set the law in motion against the plaintiff.

2. Want of Reasonable and Probable Cause.

Reasonable and probable cause means an honest belief in the guilt of the accused based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would lead any ordinary prudent and cautious man placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime imputed. See Heniman v Smith [1938] A.C. 305 H.L.

The Learned Author of Halsbury's Law of England 3rd Edition Volume 25 paragraph 699 had this to say:

"It has been suggested that there may be exceptions to the rule that a belief in the guilt of the accused is necessary in order to constitute reasonable and probable cause for a prosecution, for example where the prosecution feels that the case is so black against the accused that he must prosecute, although he refuses out of fairness of mind to believe the accused guilty until the court finds him so, or where the prosecutor acts on legal advice that the evidence justifies a prosecution."

The evidence before me is that the first defendant received a report from Tony Bridge concerning the theft of the machines. He spoke with the plaintiff who denied that he had stolen the machine and further stated that he did not know of the whereabouts of the machines. The machine is subsequently found at the home of Hubert Smith at 21 Munster Road. Hubert Smith it will be recalled gave evidence of character on behalf of the plaintiff. He also testified as to the effect the arrest had on the plaintiff.

In deciding whether or not the first defendant had reasonable and probable cause for instituting the proceedings against the plaintiff I am not unmindful of the fact that the plaintiff's attorney-at-law had advised the first defendant that the matter was essentially of a civil nature but then one could hardly expect that the first defendant would rely on advice given by the plaintiff's attorney-at-law when there is a Department of Public Prosecutions whose duties include advising the police in matters of^a criminal nature. The first defendant sought and obtained the advice of a qualified member of staff of this department and acting upon such advice instituted the proceedings. In addition to this advice the plaintiff categorically stated that he honestly believed in the guilt of the plaintiff. In Snowden v Tempest [1951] 2 The Times L.R. p. 1201 at p. 1205 Denning L.J. observed.

"To determine the question of reasonable and probable cause the Judge must first find out what were the facts as known to the prosecutor, asking the jury to determine any dispute on that matter, and then the Judge must ask himself whether those facts amounted to reasonable and probable cause."

Denning L.J. continued by citing with approval the view expressed by Lord Atkin in Herniman v Smith ([1938] A.C. 305 at p.317) .

"The facts upon which the prosecutor acted should be ascertained; in principle, other factors on which he did not act appear to be irrelevant. When the Judge knows the facts operating on the prosecutor's mind, he must then decide whether they afford a reasonable or probable cause for prosecuting the accused. If these facts do afford reasonable and probable cause, then the prosecution is justified, and it is not, as a rule, necessary for inquiry to be made into the prosecutors belief. The state of his belief goes to malice, but not, as a rule, to reasonable and probable cause. This view is supported by the observations of the Lord Chief Justice in Tims v John Lewis and Co. Ltd. ([1951] 2 KB at p472:

"The question whether there was a reasonable or probable cause is not, I think, to be determined subjectively, as has been suggested. It is a question which objectively the court has to decide on the evidence before it."

On the question of whether or not an honest belief in the guilt of the accused is a necessary element in finding that the prosecutor had reasonable

or probable Denning L.J. in Tempest v Snowden supra said:

"It is sometimes said that, to have reasonable and probable cause there must be an honest belief in the guilt of the accused. But I do not think that that should be regarded as a universal proposition applicable to all cases. It depends on the particular case. There are many justifiable prosecutions where the prosecutor has not himself formed any concluded belief as to the guilt of the accused. If he is a very fairminded man, he may well say to himself: "The case is so black against the man that I feel that I must prosecute, but I am not going to believe him to be guilty unless the court finds him to be so". Such a man would, I should have thought, have reasonable and probable cause for instituting a prosecution even though he did not affirmatively believe the other to be guilty."

Having had the opportunity of seeing and hearing both the plaintiff and the first defendant I am satisfied that the version testified to by the defendant is true and that the facts as they were known to the defendant provided him with reasonable and probable cause for instituting the proceedings against the plaintiff. The subsequent action of the Director of Public Prosecution is no proof that the first defendant did not have reasonable and probable cause.

3. That the defendant acted maliciously.

It is settled law that once it is established that the prosecutor had reasonable and probable cause for instituting the proceedings then even if he is actuated by the most express malice he is not liable. I have already indicated that I am of the view that the facts as known to the first defendant provided him with reasonable and probable cause in instituting the proceedings.

Earlier on in this judgement I referred to the conduct of the first defendant in the manner in which he affected the arrest of the accused. He invited the accused to attend at the Half Way Tree Court. He placed him before the Court immediately. He accompanied the accused to his home to facilitate the handing over of his travelling documents which was a term and condition of his bail. Such conduct in my view negatives the allegation of malice on the part of the first defendant. I reject as untrue the evidence of the plaintiff that the first defendant told him "that he was not checking anything and that he should either face arrest or hand over the machines and that is not everytime his lawyer could protect him."

4. That the proceedings were terminated in favour of the plaintiff.

I am satisfied that the endorsement on information 1300/84 Exhibit 1 is unequivocal evidence that the proceedings were terminated in favour of the plaintiff. See Khan v Singh (1960) 2 W.I.R. p441. Having regard to my earlier findings that the proceedings were instituted with reasonable and probable cause and that the first defendant was not actuated by malice when he instituted the proceedings the action by the plaintiff must of necessity fail.

5. That the plaintiff has suffered damage.

Had I found that there was an absence of reasonable and probable cause I would have undoubtedly found that the plaintiff had suffered damage as a result of the institution of the proceedings.