

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2005 HCV 01066

BETWEEN	WARRICK LATTIBEAUDIERE	CLAIMANT
AND	JAMAICA NATIONAL BUILDING SOCIETY	1 ST DEFENDANT
AND	CATHERINE BROWN	2 ND DEFENDANT
AND	JOSCELYN CAMPBELL	3 RD DEFENDANT

Mr. Rudolph Francis for the Claimant

Mr. Garth McBean for the Defendants

**Malicious Prosecution – Charge laid by police officer - Whether complainant was
the prosecutor**

November 27, 28 and December 4, 2008

BROOKS, J.

Mr. Warrick Lattibeaudiere was employed to the May Pen branch of Jamaica National Building Society. In July 1998 he was charged for conspiracy to defraud the Society. The police laid the charge in the Resident Magistrate's Court for the parish of Clarendon and Mr. Lattibeaudiere was summoned to attend court to answer to the charge. After several months of trial Mr. Lattibeaudiere was acquitted of the charge.

He now accuses two officers of the Society, Mr. Joscelyn Campbell and Miss Catherine Brown of having maliciously instituted the criminal charge against him. The officers deny instituting the prosecution, or indeed,

doing so maliciously. They say that it was a police officer, a Detective Magloria Campbell, who acted on her own initiative in prosecuting him.

The main issue to be decided is whether the prosecution was instituted by the Society's officials and if so, whether it was done maliciously and without reasonable and probable cause.

It must first be noted that in this matter, the burden of proof rests on Mr. Lattibeaudiere. He must prove on a balance of probabilities:

1. That the law was set in motion against him on a charge for a criminal offence;
2. That he was acquitted of the charge or that otherwise it was determined in his favour;
3. That when the prosecutor set the law in motion he was actuated by malice or acted without reasonable or probable cause;
4. That he suffered damage as a result.

(*per* Wooding C.J. in *Wills v Voisin* (1963) 6 WIR 50 at page 57 C)

There is no dispute in respect of either the first or second issue mentioned above. The charge was laid in 1998 and Mr. Lattibeaudiere was acquitted on March 8, 2001. It is in respect of the 3rd issue that the two main questions, mentioned above, must be assessed.

Who was the prosecutor?

Mr. Lattibeaudiere testified that it was Mr. Campbell who took the lead in questioning him about the alleged irregularities at the branch.

According to Mr. Lattibeaudiere, Mr. Campbell accused him of having conspired with a Miss Susan Trout, another branch employee, to defraud the Society of several sums of money. The accusations were made, he says, in the presence of Detective Campbell and Miss Brown.

Although Miss Brown denied that this occurred in her presence (Mr. Campbell did not testify), I find that Mr. Lattibeaudiere's testimony on that point, is credible and more probable. It is more likely that accusations would have been made by Mr. Campbell who was the society's Compliance Manager. The accusations by themselves do not, however, establish that Mr. Campbell is the virtual prosecutor.

The law regarding who is the prosecutor, for the purposes of the tort of malicious prosecution, is concisely set out in *Clerk and Lindsell on Torts* 19th Edition. There the learned editors, correctly state that the prosecutor is the person who makes an appeal to the person clothed with judicial authority. Normally, in a case where the accused is charged by the police, the prosecutor is the police officer who lays the charge. The learned editors state, at paragraph 16-08:

"...To prosecute is to set the law in motion, and the law is only set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question, and to be liable for malicious prosecution a person must be actively instrumental in so setting the law in motion...**If a charge is made to a police constable and he thereupon makes an arrest, the party making the charge, if liable at all, will be liable in an action for false imprisonment...**But if he goes before a magistrate who thereupon issues his warrant, then his liability, if any, is for malicious prosecution." (Emphasis supplied)

In the case of *Mullings v Murrell and others*, (1990) 30 J.L.R. 278 at page 282 E, Courtney Orr, J. accepted the above quotation (contained in an earlier edition of that work) as correctly stating the law. Orr, J. identified the police officer as "a ministerial officer", to whom the complaint was made.

Mr. Francis, on behalf of Mr. Lattibeaudiere, cited the case of *Martin v Watson* [1996] 1 A.C. 74 as authority for the proposition that a complainant may technically, be the prosecutor, even where it is a police officer who has laid the charge. In that case, their Lordships outlined the circumstances in which that would occur. They state, at pages 86 G - 87A of the judgment:

"...Where an individual falsely and maliciously gives a police officer information indicating that some person is guilty of a criminal offence and states that he is willing to give evidence in court of the matters in question, it is properly to be inferred that he desires and intends that the person he names should be prosecuted. Where the circumstances are such that the facts relating to the alleged offence can be within the knowledge only of the complainant...then it becomes virtually impossible for the police officer to exercise any independent discretion or judgment, and if prosecution is instituted by the police officer the proper view of the matter is that the prosecution has been procured by the complainant." (Emphasis supplied)

In the course of the judgment, the House of Lords examined a number of cases on the point. In each case that the complainant was found to be the virtual prosecutor, a salient feature was the fact that a false statement had been made to the police officer who had laid the charge. Their Lordships reviewed the judgement of Richardson, J. sitting in the New Zealand Court of Appeal in the case of *Commercial Union Assurance Co. of N.Z. Ltd. v*

Lamont [1989] 3 N.Z.L.R. 187. That learned judge, at page 196, opined that in cases involving the intervention of a police officer, close analysis was required to determine who the virtual prosecutor was. He is quoted as saying:

“In the difficult area where the defendant has given false information to the police that in itself is not a sufficient basis in law for treating the defendant as prosecutor. The conduct must at least have influenced the police decision to prosecute....**The onus properly rests on the plaintiff to establish that it was the false information tendered by a third party which led the police to prosecute before that party may be characterized as having procured the prosecution.**” (Emphasis supplied)

In my view, the criteria stipulated by their Lordships in *Martin v Watson* have not been satisfied here. Mr. Lattibueaudiere has not discharged the burden placed on him, as defined by Richardson, J. Although I find that Mr. Campbell made accusations in the presence of Detective Campbell, there is no evidence that he created a situation where Detective Campbell could not have exercised independent discretion or judgment, as to whether to prosecute. There is also no evidence of any false statement having been made.

There is evidence that documents were examined as part of the investigation of the irregularities. These provided objective evidence that the police officer could have examined. There is also evidence that Detective Campbell brought Mr. Lattibueaudiere to a police facility in Kingston where she interviewed him. This was apparently in the absence of

any of the Society's officials. It was some time after that interview that Detective Campbell served the summons on Mr. Lattibaudiere. No further intervention by Mr. Campbell was proved, or even alleged.

In the circumstances I find that Mr. Lattibaudiere has not proved, on a balance of probabilities, that Detective Campbell was acting involuntarily when she issued the summons for him to attend court. Instead, I find that she did act on her own initiative. On that finding therefore, it is Detective Campbell who was the prosecutor, and not Mr. Campbell.

That would be sufficient to dispose of the claim, since the police officer has not been made a defendant. I will, however, deal with one other bit of evidence given by Mr. Lattibaudiere. He testified that during the course of the criminal proceedings against him, he enquired of Mr. Campbell, why the Society was pursuing the case against him. He said that Mr. Campbell's answer was that "the Society's money is insured, and he had to make sure that as custodian of the money, he has to provide strong proof to the insured (sic) that criminal charges were pursued against those accused of stealing it". Mr. Francis submitted those words showed an improper motive and thereby "malice" in the institution of the proceedings. Mr. McBean, for the Society and the other defendants, submitted that statement is after the fact and therefore was not material. Mr. McBean is on good

ground. Lord Denning in *Glinski v McIver* [1962] 1 All ER 696 at p. 709 said:

"[I]n order to succeed in an action for malicious prosecution, the plaintiff must prove to the satisfaction of the court that, **at the time when the charge was made**, there was an absence of reasonable and probable cause for the prosecution." (Emphasis supplied)

I lay particular emphasis on the words, "at the time when the charge was made". Though the words used could give a hint as to the initial desire to have Mr. Lattibeaudiere prosecuted, it is not Mr. Campbell who is the prosecutor and thus the statement does not assist Mr. Lattibeaudiere's cause.

Finally, Mr. Lattibeaudiere adduced no evidence whatsoever, concerning any wrongdoing by Miss. Brown, who was the branch manager at the time. Miss Brown asserts that irregularities in respect of certain accounts were brought to her attention. She reported the matter to the Society's audit department and Mr. Campbell is the person who took the matter up on behalf of the Society. Mr. Lattibeaudiere has not alleged anything to the contrary. He has not shown that Miss Brown took any step in the prosecution against him other than the fact that she gave a statement to the police and testified at his trial.

Conclusion

Although there is no contest that the law was set in motion against Mr. Lattibeaudiere and that the proceedings were determined in his favour, he

has not proved, on a balance of probabilities, that the prosecution was initiated by the Society's officials. It was the police who laid the charge against Mr. Lattibaudiere. He has, however, not shown that the Society's officials had created a situation that it was, "virtually impossible for the police officer to have exercised independent discretion or judgment", in laying the charge.

In the circumstances, there must be judgment for the Defendants.

Ordered as follows:

1. Judgment for the defendants on the claim.
2. Costs to the defendants to be taxed if not agreed.