

IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 321 of 2015

BETWEEN

ADRIU MISIKI of 15 Hedstrom Place, Suva, Solicitor.

PLAINTIFF

AND

COMMISSIONER OF POLICE, Police Headquarters,

Vinod Patel Building, Nasinu.

FIRST DEFENDANT

AND

ATTORNEY GENERAL OF FIJI, Suvavou House, Voctoria Parade, Suva.

SECOND DEFENDANT

Counsel : Mr K. Maisomoa with Mr N. Bulisea for the Plaintiff
Ms T. Baravilala for the Defendants

Date of Hearing : 17th July, 2017

Date of Judgment : 29th August, 2017

JUDGMENT

- [1] The plaintiff instituted these proceedings to recover damages from the 1st defendant for wrongful and malicious prosecution.
- [2] The case of the plaintiff is that on 10th February, 2010 he was arrested by the police on a charge of rape and took him to the Raiwaqa police station. In the course of the caution interview the plaintiff has told the police the time at which the alleged offence was committed he was somewhere else (defence of alibi) and the caution interview was suspended to verify his alibi. It is a fact admitted by the witnesses for the defendant that the alibi of the plaintiff was not verified. Later the officers have conducted an identification parade to identify the suspect at Cost-U-Less super market.
- [3] Witness Mansoor Ali Sahib the officer who conducted the identification parade stated in his testimony that there are three different methods of holding an identification parade, they are; (1) the suspect stand in a parade with eight others and the victim identifies the suspect; (2) Photo identification; and (3) the suspect moves around in a public place for the victim to come and identify. In the instant case since the plaintiff refused to stand in a parade with the limited resources available such as transport he had decided to conduct the identification parade in the Cost-U-Less super market where the victim identified the plaintiff and he was taken back to the police station.

The next day the plaintiff was produced before the Magistrate and was bailed out. It is common ground that at the conclusion of the trial the Magistrate found the plaintiff not guilty and he was acquitted.

[4] For a plaintiff to succeed in an action for malicious prosecution he must show:

1. that the defendant prosecuted him;
2. that the prosecution ended in the plaintiff's favour;
3. that there was no reasonable or probable cause for the prosecution; and
4. that the defendant is actuated by malice. (*Tort Law by Nicholas J. MacBride & Roderick Bagshaw – 4th Edition, 2012 at page 706*)

[5] The same principles were followed in the case of **Khan v Khan** [2016] FJHC 344; HBC037.2011 (29 April 2016).

[6] Since the fact that the plaintiff was prosecuted by the officers of the Fiji Police Force and that the plaintiff was acquitted is admitted by the parties the court will now proceed to consider whether the plaintiff has been successful in satisfying the court on the 3rd and 4th grounds above.

[7] A prosecutor could be said to have had a reasonable and probable cause to prosecute a person for an offence if, when he brought the prosecution:

- i. he thought that the person prosecuted had probably committed that offence; and
- ii. it was reasonable for the prosecutor to think this, given the evidence available to him at the time he prosecuted that person.

[8] The following definition of reasonable and probable cause, given by Hawkins J in **Hicks v Faulkner** (1878) 8 QBD 167 at 171 was quoted with approval by Lord Atkin in **Herniman v Smith** [1938] AC 305 at 316:

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 ordinary 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.

- [9] In the instant case the police arrested the plaintiff and charged him in the Magistrate's court on a complaint made by girl named Vani Baleisuva that the plaintiff and another person had an unlawful carnal knowledge. The plaintiff was identified by her when the he came to the Government Building and the police arrested him. The prosecution of the plaintiff was not initiated by the police. It was Vani Baleisuva who set the police in motion and had him arrested. The police officers have done their duty expected of them by a citizen by arresting the plaintiff on a complaint and prosecuting him. There was identification by the victim who made the complaint and there was also evidence that the plaintiff was involved in the incident complained of. The victim identified the plaintiff as the person who had unlawful carnal knowledge for the second time at the identification parade. The circumstance which led the police to arrest the plaintiff and prosecute him is sufficient to arrive at the conclusion that the police had materials to reasonably believe that there was sufficient evidence to prosecute him. The subsequent acquittal from the charges alone is not sufficient for the court to conclude that the police did not have reasons to think that the plaintiff did not probably commit the offence.
- [10] The next question for determination is whether the officers of the 1st defendant were actuated by malice in prosecuting the plaintiff. The burden is on the plaintiff to establish that the prosecution was done maliciously. Malice here refers to the defendant's motive, and includes any motive other than the desire to secure ends of justice.
- [11] **Stevens v the Midland Counties Railway Company and Lander** [1854] EngR 661, (1854) 10 Exch 352, (1854) 156 ER 480 – Any motive other than that of simply

instituting a prosecution for the simple purpose of bringing a person to justice, is a malicious motive on the part of the person who acts in that way.

- [12] The learned counsel for the defendants cited the following paragraph from Halsbury's Laws of England Volume 45(2):

A malicious prosecution is an abuse of the process of the court by wrongfully setting the law in motion on a criminal charge. To be actionable as a tort the process must have been without reasonable and probable cause, must have been carried on maliciously and must have terminated in the claimant's favour.

- [13] **Gibbs v Rea** [1998] AC 786 is a case of maliciously procuring a search warrant. A majority of the Privy Council felt able to infer malice in a case where there was no evidence that the police officer in question had reasonable grounds for suspecting the plaintiff for any crime. If the defendant has persuaded a judge to issue a warrant by suggesting that there were grounds for suspicion when he knew there were none to procure the warrants in that state of mind was to employ the court process for an improper purpose.
- [14] In **Keegan and Others v Chief Constable of Merseyside** [2003] 1 WLR 936 the police had information suggesting (wrongly) that a fugitive resided at an address. An armed raid followed, and the claimant occupant sought damages. It was held that the tort of malicious procurement of a search warrant required it to be established both, that there was no reasonable or probable cause for requesting the search warrant and that there was some improper motive.
- [15] In **Glinski v McIver** [1962] AC 726, [1962] All ER 696 the court considered the tort of malicious prosecution when committed by a police officer, saying, 'But these cases must be carefully watched so as to see that there really is some evidence from his conduct that he knew it was a groundless charge. A charging officer is simply

required to make an assessment of whether there is sufficient evidence to withstand examination in the course of a fair and impartial trial’.

[16] The evidence adduced by the plaintiff does not show that the officers who arrested him on a complaint made by Vani Baleisuva, had any malicious intention to prosecute him. As I stated earlier the officers have done what the law expected them to do when a complaint is made to them by a citizen. The plaintiff alleged that the officers failed to verify his alibi. An alibi is a defence available to a person who is charged with a criminal offence, which means that he was elsewhere when the crime is alleged to have taken place. If an accused person is relying on this defence the burden is on him to establish it before the court. Mere acquittal from the criminal proceedings is not sufficient to impute malice on the officers who prosecuted him. For these reasons the court is of the view that the plaintiff in this case has not been able to show the court that the officers of the police who prosecuted him acted maliciously.


[17] Accordingly, the court makes the following orders.

ORDERS

[1] The action of the plaintiff is dismissed.

[2] The plaintiff is ordered to pay each of the defendants \$1000.00 (\$2000.00) as costs of the action.




Lyone Seneviratne

JUDGE

29th August, 2017