1936 *Present :* **Moseley J. and Fernando A.J.**

KOTALAWALA *v.* PERERA.

140—D. C. Colombo, 1,965.

*Malicious prosecution—Information given by defendant—No request or direction to prosecute—Liability of informant—*Actio injuriarum *in Roman-Dutch law.*

An action for malicious prosecution will not lie in a case where the prosecution has been instituted by a public officer, unless it is shown that the defendant in addition to giving information either requested or directed the prosecution.

Uduma Lebbe Marikar v. Mudmay Sarango (5 S. C. C. 230) followed *Wijagoonetilleke v. Joni Appu (22 N. L. R. 231)* referred to.

THIS was an action to recover damages for malicious prosecution.

The plaintiff was charged and acquitted in the Police Court of Gampaha for aiding and abetting one Nadorisa in forging a cattle voucher. The defendant, the Police Vidane in whose presence Nadorisa signed the voucher, subsequently informed his superiors as well as the Police that Nadorisa impersonated a third party. Inquiries were held, both by the Mudaliyar and the Police, before a prosecution was launched. The defendant was a material witness at both inquiries.

The learned District Judge gave judgment for the plaintiff.

H. V. Perera (with him *Dodwell Goonewardena*), for defendant, appellant.—The Police Vidane was acting on a privileged occasion. He was acting in his official capacity. He merely set the law in motion. The Police used their discretion before prosecuting. In *Uduma Lebbe Marikar v. Mudmay Sarango*[1] where plaintiff brought an action against defendant for malicious prosecution and alleged in his libel that defendant had without reasonable and probable cause, caused and procured the Inspector of Police to prefer a charge of theft against plaintiff, it was held that the prosecution was brought by the Inspector of Police and not by the defendant.

The protection given on a privileged occasion continues till the end of the proceedings (*Watson v. Jones*[2]. "The privilege which protects a witness from an action of slander in respect of his evidence in the box, also protects him against the consequence of statements made to the client and solicitor in preparing the proof for trial."

Inquiries made under Chapter XII. of the Criminal Procedure Code are made on a privileged occasion, and an action for damages does not lie for false statements made. (*Wijagoonetilleke v. Joni Appu*[3]).

Nathan's *Common Law of South Africa, vol. III., p. 1643*, says the defendant must have set the criminal law in motion, that is, he must have voluntarily instituted criminal proceedings.

N. E. Weerasooria (with him *N. Nadarajah* and *Wickremanayake*), for plaintiff, respondent.—The Police Vidane was acting as an eye-witness and not in his official capacity. It was on his complaint that both the Police and the Mudaliyar took action.

If the Police Vidane had not complained of impersonation there would have been no action.

The defendant set the criminal law in motion voluntarily when he complained to the Police. He was using the Police as a medium to have the plaintiff prosecuted. Therefore the defendant was not acting on a privileged occasion and liable in damages.

In *Selvathurai v. Somasunderam*[4] it was held that a mere honest belief on the part of the defendant in certain facts, which afford no basis for a criminal charge, coupled with the laying of a charge, cannot be regarded as reasonable and probable cause for making the charge".

This case was decided entirely on a finding of fact. Your Lordship's Court should not disturb that finding. It is the practice of the Appeal Court not to reverse pure findings of fact (*King v. Guneratne*[5]).

Cur. adv. vult.

September 30, 1936. FERNANDO A.J.—

The plaintiff alleged in his plaint that the defendant caused a charge to be preferred against the plaintiff in P. C. Gampaha, No. 29,580, the charge being that the plaintiff aided and abetted one Nadorisa to commit forgery of a cattle voucher in favour of the plaintiff.

[1] *5 S. C. C. 230*
[2] *(1905) A. C. 480.*
[3] *22 N. L. R. 231.*
[4] *31 N. L. R. 296.*
[5] *37 N. L. R. 167.*

The first issue framed at the trial was, "did the defendant cause the plaintiff to be charged in P. C. Gampaha, No. 29,580?" and with regard to this issue the District Judge stated that "in his evidence in the Police Court, there can be no question that the defendant alleged that the voucher was a forgery, and when the defendant made that charge of forgery, he did so as an eyewitness". Apparently for these reasons the learned District Judge thought there could be no doubt that the defendant did cause the plaintiff to be charged with aiding and abetting the forgery. As a matter of fact, however, it would appear from the judgment that the learned District Judge was more concerned with the question whether the defendant acted maliciously and without reasonable or probable cause, than with the question whether it was the defendant himself who caused the plaintiff to be charged. In the case of *Uduma Lebbe Marikar v. Mudmay Sarango*[1], it was held that assuming that the defendant falsely and maliciously and without any reasonable or probable cause caused an Inspector of Police to charge the plaintiff with theft, the plaintiff would have no cause of action inasmuch as the Inspector himself who preferred the charge might have had good grounds for making that charge. As Clarence J. said:—"All that plaintiff has proved is that defendant gave certain information to the Police in consequence of which and of other information obtained by his own inquiries, the Inspector prosecuted the plaintiff. It does not appear that defendant solicited the Inspector to prosecute. The Inspector on receiving defendant's complaint seems to have taken the matter into his own hands and to have instituted the criminal prosecution against the plaintiff. Under these circumstances defendant clearly is not civilly responsible to plaintiff for the prosecution instituted by the Inspector".

In *Wijagoonetilleke v. Joni Appu*[2], the cause of action as set out in the plaint was that the defendant had falsely and maliciously, and without any reasonable cause given information to the Police, and caused plaintiff to be charged with riot and robbery, and that the defendant had also given false evidence at the trial, and had procured other false witnesses. Schneider J. took the view that the cause of action as set out in the plaint indicated that the action was within the scope of the *Actio Injuriarum* of the Roman-Dutch law, which is wider than the action for malicious prosecution known to the English law. "If the present action", he said "be regarded as identical with the English Law action of that name, it is bound to fail, for in the circumstances, the defendant cannot be said to have prosecuted the plaintiff". The defendant did no more than give information to the Police, and the Police after investigation prosecuted. In support of this position he referred to the case of *Uduma Lebbe Marikar v. Mudmay Sarango* (*supra*), and an Indian case. He then proceeded to discuss the other allegations made by the plaintiff in the case and held that a statement made by a witness is absolutely and unconditionally privileged so that no action can be brought against him in respect of any evidence given in Court. There is no evidence whatever, he said, that the defendant procured false witnesses. The only other question was "whether in respect of the statement made by the defendant before the Sergeant of Police he can claim the same privilege as that which the law affords to the

[1] *5 S.C. C. 230.*

[2] *22 N. L. R. 231.*

statements he made when giving evidence before the Police Court", and he held that the defendant could claim the same privilege. Following the judgment in *Sir Patrick Watson v. Jones*[1], he held that the privilege which protects a witness in respect of his evidence in the box also protects him against the consequence of statements made to the client and the solicitor in preferring the proof for trial. The position of the defendant in that action, he thought, was much stronger than the position of the defendant in *Watson v. Jones* (*supra*), because the defendant made his statement in the course of an inquiry under Chapter XII. of the Criminal Procedure Code.

Nathan's 3 *Common Law, South Africa, p. 1682* (*chapter V.*) states that where a person maliciously and without reasonable cause prosecutes another on a criminal charge, the latter on acquittal has an action for damages, and that the remedy is provided for by the *Actio Injuriarum.* The *Actio Injuriarum* was allowed in every case in which injury resulting in damage was maliciously done, or caused to be done, even though it was done during the course of a proceeding which was itself perfectly lawful. "The requisites to found an action for malicious prosecution has been settled in a series of South African cases, the effect of which is that in order to maintain such an action the plaintiff must prove—

"1. The existence of the prosecution.

"2. That there was malice in instituting the criminal proceeding.

"3. That there was an absence of reasonable and probable cause.

"4. The termination of the criminal proceeding in favour of the plaintiff".

If it be clearly shown that a private person procured a prosecution at the public instance, maliciously and without reasonable cause, an action may lie against him. It is in any case clear that where a private individual merely lays information concerning the commission of an alleged criminal offence, without requesting or directing the prosecution of any particular person, and the public prosecutor is left to exercise his own judgment as to whether a prosecution shall be instituted or not such prosecution is not traceable to the action of the person who gave the information and he cannot be held responsible for it. The defendant must have set the criminal law in motion, that is, he must have voluntarily instituted criminal proceedings (paragraphs 1641-1643). It is clear then that in South Africa an action of this kind will not lie in a case where the prosecution had been instituted by a public officer, unless it is shown that the defendant in addition to giving information either requested or directed the prosecution of any particular person.

The evidence in the case proves that the witness Abraham complained to the defendant that he had lost a cow, and the defendant conveyed that information to the Muhandiram. The Muhandiram held an inquiry himself, and this was followed by another inquiry by the Mudaliyar. The Sub-Inspector of Police who actually filed the charge in the Police Court stated that he did so on certain information obtained from a petition that was sent to him by the Muhandiram, that the petition was sent by a

[1] (*1905*) *A. C. 480.*

man called Rupasinghe, and that the Inspector held an inquiry and after the inquiry decided to take action. The plaintiff himself when questioned whether the defendant had anything to do with the charge against him, said that he did not know that the defendant had anything to do with that charge.

On this evidence it seems clear that this action cannot be maintained because there is no proof that the defendant did in fact prosecute the plaintiff, and even assuming that an action on the basis of the *Actio Injuriarum* can be brought in circumstances like these, it seems clear from the evidence that the defendant merely gave some information when questioned by the Muhandiram and by the Inspector of Police and that he did not either direct or request the prosecution of the plaintiff or of any one else. It would, therefore, follow that the defendant did not cause the plaintiff to be prosecuted.

As the action must fail on this ground, it is not necessary to discuss the other question raised in the other issues framed at the trial. I would set aside the decree of the District Court and dismiss plaintiff's action with costs here and in the Court below.

MOSELEY J.—I agree.

Appeal allowed.