SILVA
v.
SILVA

COURT OF APPEAL
WIGNESWARAN, J. AND
TILAKAWARDANE, J.
CA NO. 485/90 (F)
DC BALAPITIYA NO. M/691
DECEMBER 05 AND 12, 2000

Malicious prosecution – Onus of proof on plaintiff – Malice – Acquittal – Does it lead to the inference that the case was false – Animus injuriandi – Penal Code s. 486.

The plaintiff-appellant instituted action on the ground of malicious prosecution seeking damages from the defendant-respondent, who had filed private plaint in the Magistrate's Court on a charge of criminal intimidation against the plaintiff in terms of s. 486 of the Penal Code. The accused plaintiff-appellant was acquitted. The District Court dismissed the action of the plaintiff-appellant.

Held:

(1) In a case of malicious prosecution the onus of proof is on the plaintiff, he must prove/on a preponderance of evidence or on a balance of probabilities that –
   (i) there was a prosecution on a charge that was false.
   (ii) such prosecution was instituted maliciously or with *animus injuriandi* and not with a view to vindicate public justice.
   (iii) there was want of reasonable or probable cause for such action.
   (iv) the prosecution terminated in favour of the plaintiff as against the complainant.

(2) The burden to prove that the action was filed maliciously was on the plaintiff.

(3) Malice is a feature of the mind and must be gathered from the circumstances. One should not presume the existence of a delict so long as it is possible to suppose the contrary.

(4) An *animus injuriandi* cannot be presumed from the fact that the prosecution was found to be false and that the accused had been acquitted.

(5) An enmity or bad feeling between the parties does not suffice to prove malice. No burden lies on the defendant to prove the absence of malice.

(6) An acquittal does not lead to the necessary inference that the case was therefore false and lacked a reasonable or probable cause. It also does not lead to the necessary conclusion that there was no other evidence.

APPEAL from the judgment of the District Court of Balapitiya.

Cases referred to:

1. *Corea v. Peiris* – 12 NLR 147.
2. *Peries v. Marikkar* – 3 CWR 158.
3. *Sado v. Nona Baba* – 11 NLR 162.
4. *Meedin v. Mohideen* – 3 NLR 27.
5. *Corea v. Peiris* – 10 NLR 321.
6. *Candamby v. Aberan* – 2 Matara 83.
7. *Sandaram v. Kanakapulle* – 1 CLW 66.

Romesh de Silva PC with *Hiran de Alwis* and *Sugath Caldera* for plaintiff -appellant.
N. B. D. S. Wijesekera for the defendant-respondent.

Cur. adv. vult.

February 02, 2001

SHIRANEE TILAKAWARDANE, J.

This appeal has been preferred by the plaintiff-appellant against the judgment of the District Judge, Balapitiya, dated 30. 07. 1990, wherein he had dismissed the plaintiff's action with costs in a sum of Rs. 1,000.

The plaintiff instituted action on the ground of malicious prosecution, seeking damages in a sum of Rs. 2,000,000, interest thereon, and costs.

The aforesaid action of malicious prosecution was based on a private plaint filed by the defendant in MC Balapitiya case No. 21608 on a charge of criminal intimidation against the plaintiff in terms of

section 486 of the Penal Code (P12 at page 294 of the record). The Magistrate, Balapitiya, in case No. 21608 made an Order on 19. 03. 1986 acquitting the accused (plaintiff-appellant in this appeal).

The said order of acquittal was based on certain inherent infirmities in the evidence of the witnesses for the prosecution. The Order also adverted to a doubt that had arisen on the totality of the evidence, and that the prosecution had in the circumstances failed to prove its case on the required standard of proof, viz. beyond reasonable doubt. Upon the acquittal of the accused, he thereupon instituted this action in the District Court of Balapitiya against the defendant-respondent for malicious prosecution.

It is to be noted that the aforesaid order made no positive finding that the action had been either false and/or that it had been instituted maliciously. It merely held that the plaintiff had failed to lead independent evidence of the two other eyewitnesses to the incident, but leading only the evidence of the daughter of the plaintiff and the plaintiff himself. The Magistrate rationalized that on the basis of the evidence there was suspicion that the witnesses may have been partial. Therefore, he gave the benefit of the doubt relating to the prosecution case in favour of the accused and made an order of acquittal. The prosecution had admittedly not lodged any Appeal against this Order.

In a case of malicious prosecution whilst the onus of proof is on the plaintiff, he must prove on a preponderance of evidence or on a balance of probabilities that–

- there was a prosecution on a charge that was false,
- such prosecution was instituted maliciously or with *animo injuriandi* and not with a view to vindicate public justice,
- there was want of reasonable or probable cause for such action,
- the prosecution terminated in favour of the plaintiff as against the complainant.

There is no dispute between parties that the action referred to above was filed in the Magistrate's Court of Balapitiya and that it ended with the acquittal of the accused. (plaintiff-appellant in this action).

The burden to prove that the action was filed maliciously was on the plaintiff. Malice is a feature of the mind and must be gathered from the circumstances. In cases of doubt it cannot be presumed nor can it make itself apparent or be proved otherwise than by the nature of the act itself. One should not presume the existence of a delict so long as it is possible to suppose the contrary. (Page 59 *De Injuriis Et Famosis Libellis.* VOET, BK. 47 title 10).

It is within the right of every person to institute criminal proceedings against another whom he believes to have committed a crime and to give information of the commission of a crime in order that the wrongdoer might be apprehended and punished. In such cases the Law will presume that his action was *bona fide*. The responsibility to prove malice is a necessary ingredient of an action for malicious prosecution as the Law presumes that actions were *bona fide* inspite of acquittal. (*Corea v. Peiris*[1]). An *animus injuriandi* cannot be presumed from the fact that the prosecution was found to be false and that the accused had been acquitted. (*Peiris v. Marikkar*[2]; *Sado v. Nona Baba*[3]). Indeed it is not sufficient for the plaintiff to prove merely the absence of a reasonable and probable cause. From such absence malice might be inferred, but it is not a necessary inference. It is only a circumstance from which malice may, if other circumstances concur or are not inconsistent with it, be deduced – (*Meedin v. Mohideen*[4]).

It is noteworthy that the Order of the Magistrate adverted to above does not make any finding that the prosecution was malicious and/or false.

An enmity or bad feeling between the parties does not suffice to prove malice. The motives of the informants or the trurth of the facts the informant tells are to a great extent beside the point. (*Corea v. Peiris*[5]). No burden lies on the defendant to prove the absence of malice.

The fact that an incident occurred on 22. 09. 1984 has never been denied. On the facts disclosed about the incident there was a strong likelihood that in like circumstances any reasonable man of ordinary prudence would have rationally lodged a complaint.

The plaintiff-appellant who gave evidence at the trial in the District Court, denied his presence at the scene of the alleged incident and stated that at the relevant time he was at the house of his brother which was situated some considerable distance away. He averred that the defendent knowing this had falsely implicated him deliberately and maliciously. The learned District Judge had rejected this submission. Several reasons have been cited. He had failed to set up this *alibi* promtly and it was therefore belated. In his statement given to the Balapitiya Police on 24. 09. 1984 (P15), though he denied being at home at the time of the incident, he never made mention of the fact that he was at the relevant time at his brother's house. Therefore, in the absence of these facts being furnished to the Police, no contemporaneous statement of his brother was recorded. The statement to the Balapitiya Police was the first available opportunity given to the plaintiff to record his *alibi*, and he had failed to do so. Even at the trial though his brother was a listed witness he was not called to give evidence. Instead, he called his father who did not even mention his *alibi* in his examination in chief, despite referring to the Magistrate's Court case (vide page 168 of the brief). He only adverted to it under cross-examination.

The evidence of the father is pertinent in that whilst he corroborated the case of the prosecution that an incident did occur on the date as alleged by them, his testimony was only that his son the plaintiff was not involved. He does not corroborate the *alibi*, that his son the plaintiff was at his brother's house during the relevant time. In all the circumstances there appeared clearly a basis for the rejection of the evidence pertaining to *alibi* by the District Judge.

The plaintiff must also always prove that the defendant without reasonable or probable cause instituted the prosecution. Learned President's Counsel for the plaintiff-appellant submitted that if the case was found to be false then there was proof of malice and a lack of reasonable and probable cause. This is not tenable. Even where it is proved that the defendant was actuated by malice, the burden still lay on the plaintiff to prove the absence of reasonable and probable cause. The burden does not shift on to the defendant to prove that there was a reasonable and probable cause for the charge and he honestly believed it to be a true one. (*Candamby v. Aberan*[6]).

It is important to note that there had been no finding by the Magistrate that the prosecution case had been false. His findings were not that there was no basis for the charge but rather that he was giving the accused the benefit of the doubt and therefore acquitting him. Furthermore, at the close of the prosecution case, a defense had been called, and this indicates that there was at least a *prima facie* case, a case sufficient to call for a defense. The plaintiff-appellant's Counsel also suggested that the absence of an appeal must mean that the prosecution was satisfied that the case was false. This is certainly not the only irresistible conclusion. The failure to file an appeal may also be for other diverse and material reasons.

The acquittal of an accused is not conclusive as to his innocence and it would be open to the defendant in a civil case for malicious prosecution to show that the plaintiff was, in fact, guilty of the charge made against him. The reasons for the acquittal or discharge of the plaintiff in the earlier case are not admissible in a subsequent action for malicious prosecution unless by consent. (*Sandaram v. Kanakapulle*[7]).

An acquittal does not lead to the necessary inference that the case was therefore false and lacked a 'reasonable or probable cause'. It also does not lead to the necessary conclusion that there was no other evidence. It merely means that there was insufficient evidence

to meet the required standard in a criminal case of proof beyond a reasonable doubt. The submission of the plaintiff-appellant that the acquittal in itself proved that it was a false case and that it meant that the plaintiff had not threatened the defendant and that such an allegation was therefore false, cannot therefore be accepted.

The President's Counsel appearing for the plaintiff-appellant has also suggested that this Court should infer that the case was false, as even the Police had not instituted an action on the complaint. But, mere failure of the Police to file a case, in the absence of any other facts does not logically or necessarily lead to a conclusion or inference that the case was false. Other more pertinent reasons may or may not have intervened. The suggestion had been made that since the plaintiff was seeking a job with the Police force the plaintiff may have interfered with the Police. There is no direct evidence of this. But, it is significant that the statement of Norman Gunawardane who had been mentioned as an important eyewitness in P14 (the 1st statement), had not been contemporaneously recorded by the Police. The records do not even reflect that any efforts had been made to trace this witness thus encumbering the prosecution case. The failure of the prosecution to call this eyewitness was explained by the defendant. He stated that he could not trace this witness at the time of the trial. This may well not have arisen if the investigating officers had recorded this witness's statement at the time of the complaint.

In all these circumstances set out above we see no reason to interfere with the findings of the judgment of the District Judge, Balapitiya. The appeal is refused. We also make Order for taxed costs to be paid by the plaintiff-appellant to the defendant-respondent.

WIGNESWARAN, J. – I agree.

Appeal dismissed.