1954 *Present :* **Sansoni J. and Fernando A.J.**

W. HATURUSINGHE, Appellant, *and* G. W. KUDADURAYA, Respondent

S. C. 433—D. C. Kandy, M. R. 2,833

Malicious prosecution—Prosecution by Police—Acquittal—Liability in tort of person who gave first information of alleged offence—Criminal Procedure Code, ss. 121, 122—" Reasonable and probable cause ".

Where the Police institute a prosecution in consequence of information given to them by a person under section 121 of the Criminal Procedure Code and the accused is acquitted at the trial, the first information given to the Police (as distinct from a statement made under section 122 of the Criminal Procedure Code after the commencement of the Police inquiry) is sufficient to found an action for malicious prosecution if it actually contains a clear allegation that the plaintiff committed an offence, or, in other words, if it formulates a charge against the plaintiff. In such a case, the informant cannot be permitted to plead that the Police should not have acted upon his allegation.

In an action for malicious prosecution the plaintiff has the burden of proving a negative, i.e., that the defendant acted without reasonable and probable cause. In determining whether the burden has been discharged, regard should be had to all the circumstances in which the defendant acted.

APPEAL from a judgment of the District Court, Kandy.

Colvin R. de Silva, with *T. W. Rajaratnam*, for the defendant appellant.

H. W. Jayewardene, Q.C., with *D. R. P. Goonetilleke*, for the plaintiff respondent.

Cur. adv. vult.

September 21, 1954. FERNANDO A.J.—

This is the fifth case instituted in Court in consequence of a trivial incident which occurred in 1947, and one must hope, though vainly perhaps, that it is the last of the series.

The plaintiff in this action was in 1947 charged with robbery of a leather purse in proceedings instituted by one Sergeant Perera of the Galagedera Police under S. 148 (1) (*b*) of the Criminal Procedure Code and was acquitted. The prosecution was instituted in consequence of a statement or complaint made to the Police by the defendant in the following terms :— " This morning about 6.30 a.m. I was going to Kandy with some documents regarding two civil cases fixed for 22.8.49 and to pay some surveyors fees to Mr. Murray of Kandy. I carried Rs. 200 in my leather purse. All were in 13 ten rupee notes and four five rupee notes which bear no marks of identification and as I was going along the road, at Niyangoda, near the cemetery I met Kudaduraya who got on the road from the cemetery. When I saw him he had no club in his hand and then he pulled out a ' kitul ' club from his waist and hit me twice but I avoided the blows by getting onto a side. I caught hold of his club and we both struggled and at the struggle the right hand sleeve of my coat was torn, and we both fell into the culvert when he, Kudaduraya, pulled out my leather purse with cash from the right inner pocket. I raised cries, when Kotuwegedera Kirihamy and another man named Ranhamy came there on the road and caught Kudaduraya. One Ranasinghe and another man Naide also came there and separated us. My pencil also was fallen down and Ranasinghe picked it up but Kudaduraya took it away. I then went and informed the V. H. I sustained a bruise on the left knee as a result of falling down. My inner coat pocket was torn ".

The plaintiff now sues the defendant in an action for malicious prosecution and the learned District Judge has entered judgment in favour of the plaintiff for Rs. 750. Counsel for the defendant in appeal has raised several questions of law, including one of some general importance in regard to actions for malicious prosecution.

The essentials in an action for malicious prosecution under English law or Roman Dutch Law are substantially similar. Winfield (*Law of Tort, 4th Ed., p. 611*) states that the plaintiff must prove (1) that the defendant prosecuted him ; and (2) that the prosecution ended in the plaintiff's favour ; and (3) that the prosecution lacked reasonable and probable cause ; and (4) that the defendant acted maliciously. With regard to the first requisite it is clear law that a person can be sued in such an action even though he was not the actual prosecutor, that is to say the actual person who in Ceylon makes a complaint or report to the Court under S. 148 of the Criminal Procedure Code. A person can be made defendant in the action if he was " actively instrumental in putting the law in force ". Hence, a statement made to the Police may in certain circumstances found an action for malicious prosecution if the Police thereafter institute a prosecution in Court. The important contention of Counsel for the appellant was that in order to be held liable in such

a case, it is not sufficient that the person merely made the allegation that the accused had committed an offence ; he must in addition have actively instigated or incited the institution of the prosecution. This contention was supported by reference to several decisions of this Court. In *Uduma Lebbe Marikar v. Adumay Sarango* [1] Clarence J. said, " All that the 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 the defendant solicited the Inspector to prosecute ". In *Kotalawela v. Perera* [2] Fernando A.J. expressed himself as follows :—" 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. 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 ". In *Saravanamuttu v. Kanagasabai* [3] Howard C.J. said that " *there must be something more than a mere giving of information to the Police* or other authority who institutes a prosecution. *There must be the formulation of a charge or something in the way of solicitation, request or incitement of proceedings* ".

Considered by themselves these dicta would seem to indicate that a person who makes a complaint to the Police which clearly implicates another as the offender would not be liable in an action for malicious prosecution if he takes no further steps to induce the prosecution. But when the facts of the two more recent cases are examined, it becomes clear that in each of them the defendant was not the person who gave " information " to the Police within the meaning of S. 121 of the Criminal Procedure Code, but rather a person who made statements under S. 122 after the commencement of the Police inquiry. The only recent case where the defendant had given the first information was that of *Hendrick Appuhamy v. Matto Singho* [4] where however the contents of the first information were not available to the Court. Keuneman J. there said (at p. 460) " No evidence in fact has been given as to the actual information given to the Police by the defendant, nor as to the circumstances under which that information was given. No Police officer has been called, and we do not know whether this was the first information given to the Police, and whether, in giving the information, the defendant in fact formulated a charge against the plaintiff, based upon his

[1] *(1883) 5 S. C. C. 230.*
[2] *(1936) 39 N. L. R. 10 at p. 13.*
[3] *(1942) 43 N. L. R. 357 at p. 359.*
[4] *(1943) 44 N. L. R. 459.*

knowledge ". This passage does not to my mind indicate that the learned Judge took the view that the first information by itself would not have sufficed to found the action for malicious prosecution ; it appears on the contrary to be open to the construction that if in giving first information the defendant in fact formulated a charge against the plaintiff based upon his own knowledge he might well have been held to be the real prosecutor. Counsel for the appellant relied strongly on the following statement in a judgment of the Privy Council in *Tewari v. Bhagat Singh* [1] which was also cited by Keuneman J., " If a complainant did not go beyond giving what he believed to be correct information to the Police and the Police, without further interference on his part (except giving such honest assistance as they might require) thought fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But, if the charge was false to the knowledge of the complainant, if he misled the Police by bringing suborned witnesses to support it, if he influenced the Police to assist him in sending an innocent man for trial before the Magistrate, it would be equally improper to allow him to escape liability because the prosecution had not technically been conducted by him. The question in all cases of this kind must be—Who was the prosecutor ? And the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion was not the criterion ; the conduct of the complainant, before and after making the charge, must also be taken into consideration ". What is clear from this passage is that a complainant will not be liable if he merely gives *what he believed to be correct information* to the Police. But the judgment of the Privy Council does not clearly set out the law applicable in a case where the charge made to the Police by the complainant was false to his knowledge. The passage appears to be open to either construction, namely that such a charge by itself is sufficient to found the action for malicious prosecution or alternatively that there must be some further improper conduct on the part of the complainant.

Counsel for the respondent has invited us to hold that the former is the correct view. He contends that there is a distinction between what is popularly called a first information and a statement recorded under S. 122 of the Code during the course of the Police inquiry. He referred to the case of *Wijegunatilleke v. Joni Appu* [2] where it was held that false statement in the course of an inquiry by the Police under Chapter XII of the Code is a statement made on a privileged occasion and cannot found an action for damages. (In fact S. 122 clearly provides that such a statement cannot be used otherwise than (*a*) to prove that the witness made a different statement at a different time or to refresh the memory of the person recording it or (*b*) as evidence in a charge of perjury.) Counsel accordingly contends that the necessity for some further misconduct on the part of the person making such a statement to the Police arises because the statement itself is shut out by the law from constituting evidence of " setting the law in motion against the plaintiff ", but that there is no such necessity in the case of a first information if in fact the information consists of the formulation of a charge against the plaintiff.

[1] *(1907–8) 24 T. L. R. 884.*

[2] *(1920) 22 N. L. R. 231.*

The passage cited above from the judgment of Howard C.J. appears to bear out this view; the mere giving of information to the Police is not sufficient without "something more", that is, either (*a*) the formulation of a charge or (*b*) a solicitation request or incitement. Although there is no recent case directly in point, I find that in *Podisingho v. Appuhamy* [1], it was held sufficient that the defendant set the authorities in motion to the detriment of the plaintiff.

I am of opinion that a first information given to the Police is sufficient to found an action for malicious prosecution if it actually contains a clear allegation that the plaintiff committed an offence, or, in other words, if it formulates a charge against the plaintiff. While it is correct that the Police have a discretion whether or not to prosecute, it is nevertheless their duty to prosecute if they form the opinion that the allegation may be true. If they do form such an opinion, particularly in a case where there appears to be corroboration from a source named by the informant, he can surely not be permitted to plead that the Police should not have acted upon his allegation.

In the case before us the defendant made a clear accusation of theft against the plaintiff, and there is in addition evidence that he insisted that the Sergeant should institute proceedings, a course which the Sergeant took when he found that the defendant's story appeared to be corroborated. I think therefore that the complaint was sufficient to found the action.

Counsel for the appellant has also argued that the defendant only made an allegation of theft and assault and that since the allegation did not amount to a statement of facts sufficient to constitute robbery within the meaning of S. 379 of the Penal Code, he cannot be held responsible for the action of the Police who instituted a charge of robbery and not the charge of theft. I do not propose to deal with this point at any length because I have formed the view that the appeal must succeed on other grounds. It is sufficient to say that since there was an allegation both of assault and of theft, the defendant cannot be allowed to seek shelter beneath the misconstruction of his allegation by the Police. Furthermore, the charge of robbery was sufficient to enable the Magistrate to convict of theft, and it must be assumed in the absence of such a conviction that theft was not established. The example (suggested by myself) of a prosecution for rape based upon a complaint of mere assault is not I think relevant because a person who complains of simple assault cannot properly be said to have set the law in motion on a charge of rape.

In order to succeed in an action for malicious prosecution, the plaintiff must prove that the defendant acted without reasonable and probable cause. The burden is clearly on the plaintiff, *Corea v. Pieris* [2]. Indeed *Winfield* at p. 617 points out that in this respect "the plaintiff is compelled

[1] *(1904) 3 Bal. 145.*
[2] *(1908) 10 N. L. R. 321; (1910) 12 N. L. R. 147 (P. C.).*

to undertake a task commonly supposed to be impossible—to prove a negative". It is necessary therefore to examine the manner in which the learned District Judge has approached the question of lack of reasonable and probable cause. He examines the evidence both of the plaintiff and the defendant and concludes that the charge was a false one, and therefore that it was made without reasonable and probable cause. I do not think however that this conclusion was justified having regard to the circumstances in which the complaint was made—circumstances which the Judge should have considered in determining whether or not the plaintiff had discharged the somewhat unusual burden cast on him in an action of this description. The plaintiff had himself admitted an exchange of blows between himself and the defendant on the morning in question, but he nevertheless made no complaint of the assault to the authorities. On the other hand the defendant made a very prompt complaint to the Headman and then to the Police. This indicates the probability that the incident of the morning had caused more resentment in the mind of the defendant than in that of the plaintiff. If the defendant did so resent the blows which the plaintiff admits were exchanged it might well be that in that state of mind his allegation of theft was an embellishment made merely in anger. "It may, I think be assumed", says Cave J. in *Brown v. Hawkes* [1], "that the defendant was angry; but so far from this being a wrong or indirect motive, it is one of the motives on which the law relies to secure the prosecution of offenders against the criminal law". Then there was evidence that the defendant did at the time of the incident and in the presence of the plaintiff refer to the loss of his purse. The learned Judge has failed to consider the question whether the purse was actually lost, and if so whether the allegation of theft may have been made mistakenly. The fact that the defendant attempted subsequently to substantiate this allegation in his evidence to the Magistrate does not lead to the necessary inference that the original complaint was made without reasonable and probable cause. I think that the learned Judge should also have taken into consideration the fact that although the defendant made an allegation that the plaintiff took his purse, it was in the main a complaint of assault, which latter complaint could not possibly have been held to have been made without reasonable and probable cause. I think therefore that the plaintiff has failed to discharge the burden of proving that the complaint was made without reasonable and probable cause.

For these reasons the judgment and decree are set aside and the plaintiff's action dismissed with costs in both Courts.

SANSONI J.—I agree.

Appeal allowed.

[1] *(1891) 2 Q. B. D. at p. 722.*