Present: Pereira J.

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FERNANDO *v.* PERERA.

470—C. R. Negombo, 19,796.

False charge of theft—Action by accused against complainant for damages consequent on seizure of property by police at the instance of complainant—Proof of malice not necessary.

Defendant charged the plaintiff before the police with the theft of two cart wheels and caused the police to seize and remove the wheels. The plaintiff was acquitted by the Police Court on the charge of theft. In an action by the plaintiff against defendant to recover damages consequent on his being temporarily deprived of his wheels,—

Held, that it was not necessary to prove malice in the defendant to entitle the plaintiff to recover damages.

THE facts appear sufficiently from the judgment.

Mahadeva with him *Bawa, K.C.*, for the plaintiff, appellant.—Plaintiff sues for damages resulting from the temporary deprivation of the use of the wheels. Under the circumstances plaintiff need

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not prove malice to succeed in this action. (*De Alwis v. Murugappa Chetty.*[1]) *Bona fides* is no defence to an action for damages resulting from injury to property. If, for example, A breaks B's watch in the belief that the watch is his, A is nevertheless liable in damages to B.

A. St. V. Jayewardene (with him *De Alwis*), for the defendant, respondent.—The facts of this case are very different from the facts in *De Alwis v. Murugappa Chetty.*[1] There the Fiscal seized the goods when pointed out by the defendant, who was the judgment-creditor. The Fiscal had no option but to seize the property pointed out. The act of the Fiscal was the act of the judgment-creditor.

In this case the police seized the wheels on a complaint made by the defendant. The police officer must exercise his discretion before seizing property said to be stolen. The act of the police officer is not the act of the defendant. Counsel cited *3 Nathan, sections 1648-1650.*

Mahadeva submitted *Austin v. Dowling.*[2]

Cur. adv. vult.

February 6, 1913. PEREIRA J.—

In this case the plaintiff says that the defendant caused the police to seize and remove the two wheels of a two-wheeled cart belonging to the plaintiff; that subsequently the defendant charged the plaintiff before the Police Court with the theft of those two wheels; that the plaintiff was tried by the Police Court on the charge preferred by the defendant and acquitted; and that he (the plaintiff), by reason of these acts of the defendant, sustained damage, which he now claims from the defendant. The damage claimed is not damage consequent on any injury to the plaintiff's honour, reputation, or feelings, but damage consequent on his being temporarily deprived of his property, and on his being obliged to incur expense in connection with the litigation that ensued. The Commissioner dismissed the plaintiff's claim on the ground that he had not averred, nor was he prepared to prove, malice on the part of the defendant in acting as he did, and from this decision the plaintiff has appealed. I may at once say that the plaintiff's counsel confined his claim to only so much damage as was sustained by the plaintiff by reason of the defendant's action in having the plaintiff's two wheels seized and detained by the police, and did not press his claim to damages caused by reason of any action by the Police Court after the defendant had preferred to it his charge against the plaintiff. The question is whether the wrong committed by the defendant in moving the police to act as mentioned above is actionable, unless it can be shown that the defendant was actuated by malice or evil intention. Now, a wrong or *injuria* is, generally speaking, an infringement of one's

[1] *(1909) 12 N. L. R. 353.*

[2] *(1870) 5 C. P. 540.*

right to inviolability of person and property. In a more specific sense it was applied to any word or deed calculated to hurt the feelings of another, or to injure him in his honour, dignity, or reputation. It is in this latter sense that the term " *injuria* " is used by Voet in his title " *De injuriis et famosis libellis* " (see *Voet 49, 10, 1*), and although Voet in that title makes mention of the case of such injuries as the " seizure and sale by one person of the goods of another who is not his debtor as if they were goods of his debtor " (section 7), it is clear that his treatment of such acts is limited to the consideration of that aspect of them that involves injury to one's honour, dignity, reputation or feelings. It is clear that in this sense *injuria* is not actionable, unless the offending party can be said to have had the *animus injuriandi;* but I am not aware that *injuria* in the more general sense mentioned above is any the less actionable than *quasi delicts* under the Roman law, because malice or evil intention cannot be attributed to the offender. Chief Justice Maasdorp in his work on *Cape Law* observes (*vol. III., p. 80*) that in South Africa, in the case of an action for malicious prosecution, the principles and practice in force in English Courts are followed, which, he says, are in entire accordance with the general principles of Roman-Dutch law. I think the same may be said of Ceylon.

One of the essential requisites of this form of action in England is proof that the defendant acted maliciously and without reasonable or probable cause. I am not sure that under the Roman-Dutch law proof of *animus injuriandi* can be said to be necessary in such an action, when the damage claimed is limited to loss of property or of its temporary use, or the temporary loss of liberty by reason of the false prosecution. No issue on this point is involved in the present case, and I need not discuss it here; but it is clear that even under the English law it is only in the event of an actual prosecution, and not of mere information to the police, that malice need be averred and proved against the defendant. In *Austin v. Dowling* [1] Willes J. observed: " The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a Magistrate, one makes a charge against another, whereupon the Magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment. There is, therefore, at once a line drawn between the end of the imprisonment by the ministerial officer and the commencement of the proceedings before the judicial officer. It is fallacious to inquire whether or not the one is severable from the other until you find some inseparable connection between them.

[1] *(1870) 5 C. P. 540.*

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It may very well happen in the Superior Courts which have jurisdiction over both descriptions of actions where a plaintiff, having been once before a Magistrate, may be content to bring his action for false imprisonment only. In such a case the Judge would tell the jury to give damages for the false imprisonment only, and not for what came under the cognizance of the Magistrate." In the present case, as in that cited, the information given by the defendant to the police cannot be given the effect of a malicious prosecution. The same considerations do not apply to the two proceedings, and I do not think that malice or evil intent in the defendant need be established to entitle the plaintiff to damage for the seizure and detention of his two cart wheels by the police at the instance of the defendant. The decision in *De Alwis v. Murugappa Chetty* [1] is to some extent, in point. There Hutchinson C.J. observed: " If one seizes A's goods wrongfully and without having any writ or warrant, he makes himself liable to an action for damages. No evidence of malice is necessary, and it is no defence that he acted under a mistake. Does it make any difference if he had a writ for the seizure of B's goods or person and by mistake seized A's? On principle I should say no."

I set aside the order appealed from and remit the case for the trial of the issue whether the defendant caused the police to seize and remove the two wheels of the plaintiff's cart, and, if so, what loss the plaintiff sustained, and such other relevant issues that the Court may think it necessary to frame on the cause of action mentioned above.

The plaintiff will have his costs so far in both Courts.

Set aside and sent back.

[1] *(1909) 12 N. L. R. 353.*