1940 *Present :* **Howard C. J. and de Kretser J.**

CHITTY *et. al. v.* PERIES.

360—D. C. Colombo, 8,390.

Malicious arrest—Action for damages—Instigation of arrest—Statement to Police—No privilege—Police Information Book—Statement admissible to impeach plaintiff's credit—Evidence Ordinance, s. 155 (c) (Cap. 11), Criminal Procedure Code, s. 122 (3) (Cap. 16).

Where, in an action to recover damages for malicious arrest, it was established that the 3rd defendant made a definite criminal charge against the plaintiff to the Police and as a result of the complaint made by the 3rd defendant, supported by the other defendants, the plaintiff was arrested,—

***Held*, that the defendants must be held to have instigated the plaintiff's arrest.**

The statement which was made by the plaintiff and the defendants to the Police on the day of arrest and which was entered in the Police Information Book cannot be excluded on the ground of privilege.

In civil proceedings it is open to the defendants to impeach the credit of the plaintiff by proving under section 155 (c) of the Evidence Ordinance former statements made by her to the Police.

***Wijegoonetileke v. Jonis Appu* (*22 N. L. R. 231*) and *Kotalawala v. Perera* (*39 N. L. R. 10*) distinguished.**

THIS was an action brought by the plaintiff to recover damages from the defendants for having caused the Police to arrest the plaintiff on a false charge of theft and criminal breach of trust. It would appear that a complaint was made to Police Sergeant No. 1628 Fernando by the third defendant against the plaintiff. The charge was one of criminal breach of trust of two pairs of ear-studs and a saree. As a result of this complaint, the Police Sergeant visited the house of the four defendants and recorded their statements. Thereafter the Police Sergeant decided to arrest the plaintiff.

J. E. M. Obeysekere (with him *S. Nadesan* and *N. Kumarasingham*), for the defendants, appellants.—Before this action can succeed it must be shown that the defendants, acting jointly, caused the criminal law to be put in motion, *Kotalawala v. Perera*[1]. There is no evidence that the defendants acted jointly. The evidence is that the third defendant gave certain information, which he had no reason to disbelieve, to the Police. Before an action for the recovery of damages for wrongful arrest can succeed it must be shown that the arrest was instigated, authorized or effected by the defendants (*3 Nathan 1695*). Counsel also referred to *Wijegoonetileke v. Jonis Appu*[2].

The first and second defendants only made statements to the Police when the matter was under investigation under Chapter 12 of the Criminal Procedure Code. The case of *Wijegoonetileke v. Jonis Appu* is clear authority for the proposition that statements made in the course of such an investigation are not actionable. There is no evidence that

[1] *(1936) 39 N. L. R. 10.*

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

the fourth defendant had any share or part in the arrest of the plaintiff. In any event, the suggestion of malice on the part of the first, second, and third defendants is negatived by the fact that they asked that the plaintiff be released as soon as they came to know that she had been arrested. There is no evidence that the third defendant should have known or knew that the complaint he made was false.

The District Judge is clearly wrong in refusing the production of extracts from the Information Book containing the statements made by the witnesses in the course of the investigation under Chapter 12 of the Criminal Procedure Code. Such statements are relevant under section 155 of the Evidence Ordinance for the purpose of impeaching the credit of the witnesses concerned. They can be excluded only if there is a positive rule of law forbidding their reception in evidence. Section 122 (3) of the Criminal Procedure Code expressly provides for the use of these statements to prove that a witness made a different statement at a different time.

The plea of privilege cannot possibly succeed. These statements do not come under section 123 of the Evidence Ordinance and no Public Officer attended before the Court to say that by the disclosure of these statements the public interests would suffer within the meaning of section 124 of the Evidence Ordinance. Counsel referred to *13 Hailsham, p. 727* in this connection.

This evidence having been wrongly rejected there ought at least to be a fresh trial. The damages awarded are excessive.

L. A. Rajapakse (with him *F. A. Tisseverasinghe* and *H. W. Thambiah*), for the plaintiff, respondent.—This is an action for malicious criminal arrest. It is different from an action for malicious prosecution, or the English action of false imprisonment.

It is based on the *actio injuriarum*. See *Appuhamy v. Appuhamy*[1] and its requisites are (1) that the defendants had instigated or authorized the arrest, (2) malice, and (3) want of reasonable and probable cause (*Nathan Law of Torts, p. 205*). Malice may be implied, *i.e.*, inferred from the circumstances of the case (*4 Maasdorp, pp. 122—123. Kotalawala v. Perera* (*supra*) was an action for malicious prosecution and the court held that the defendant was not liable because he did not prosecute the plaintiff.

In *Wijegoometileke v. Jonis Appu* (*supra*) it was held that the defendant had neither instigated nor authorized the arrest because he had merely reluctantly answered questions put to him by a Police Officer in the course of an investigation into a complaint made by another.

There is sufficient evidence in this case to justify the finding of fact of the trial judge that the first and second defendants authorized the third defendant to make the false complaint and that they corroborated the third defendant's statement when questioned by the police.

It is true that a former inconsistent statement of the plaintiff is *relevant* under section 155 (3) of the Evidence Ordinance, but it must be *proved* by *admissible* evidence. The defendants could have called the Police Officer to prove the former statement. They did not do this, but wanted to put in extracts from the Information Book. That is

[1] *21 N. L. R. 436.*

inadmissible being secondary evidence. The information Book contains a record made by a *Police Officer* in the course of an inquiry and it is not even signed by the person making the statement. See section 122 (1) of the Criminal Procedure Code. Section 91 of the Evidence Ordinance does not avail the defendants. Even if the Judge was wrong in his ruling on the question of privilege, as no prejudice has been caused to the defendants by such ruling the judgment should not be reversed in appeal. See section 167 of the Evidence Ordinance and section 36 of the Courts Ordinance.

Cur. adv. vult.

January 17, 1940. HOWARD C.J.—

The plaintiff-respondent in her plaint alleged that on or about April 14, 1938, the defendants wrongfully, maliciously and without reasonable or probable cause caused the Police of Colombo to arrest her on a charge of alleged theft or criminal breach of trust and misappropriation and thereby caused her much pain of body and mind and loss of reputation and honour amounting to damages which for the purposes of this action she restricted to Rs. 1,000.

The first issue framed at the trial was, " did the defendants on April 14, 1938, falsely and maliciously without reasonable or probable cause, cause the arrest of the plaintiff ? " This issue was answered by the learned District Judge in the affirmative. The facts with regard to the arrest of the plaintiff so far as relevant to this appeal are as follows :— On April 14 a complaint was made to Police Sergeant No. 1628 P. J. Fernando by the third defendant against the plaintiff. The charge was one of criminal breach of trust of two pairs of ear-studs and a saree. As the result of this complaint Sergeant Fernando visited the house of the four defendants and recorded the statements of all four defendants. The police then visited the plaintiff's house at Armour street and whilst recording her statement she ran away. She was overtaken by the Sergeant, placed in a car and taken to Kotahena Police Station about 4 P.M. where, after being searched by a female officer, she was locked up until release on bail about 9 P.M. the same day.

The law with regard to actions for malicious arrest has been laid down in (*Nathan, 1906 Edition, paragraph 1650 on page 1695*), as follows : " In an action for malicious criminal arrest, then, the plaintiff must show (1) that his arrest on a criminal charge was instigated, authorized or effected by the defendant, (2) that the defendant acted maliciously, and (3) that the defendant acted without reasonable and probable cause ". The cases of *Wijegoometileke v. Jonis Appu* [1] and *Kotalawala v. Perera* [2] were cited by Counsel in support of the argument that no action would lie against the appellants in the circumstances of this case. Although those cases related to actions for malicious prosecution and not for malicious arrest I am of opinion that they provide useful analogies with regard to the law that should be applied in this case.

So far as the application of the principle laid down by Nathan in the passage I have cited is concerned the learned District Judge has held that the arrest of the plaintiff was the direct result of the false complaint made by the third defendant and supported by the other defendants.

[1] *22 N. L. R. 231.* [2] *39 N. L. R. 10.*

It is contended by Counsel that there is not a shred of evidence on the record that any of the defendants either requested or directed the police to arrest the plaintiff and in the absence of such evidence the defendants cannot be held liable in damages. The learned Judge distinguished the case from that of *Wijegoonetileke v. Jonis Appu* in which the statement to the police by the defendant on which the action for malicious prosecution was based was made in answer to an inquiry by the police under the Provisions of Chapter XII. of the Criminal Procedure Code. I do not think that there is any doubt on the evidence that the arrest of the plaintiff was the direct result of the complaint made by the third defendant and that the learned Judge was right in distinguishing the case from that of *Wijegoonetileke v. Jonis Appu.* Similarly this case can be distinguished from that of *Kotalawala v. Perera.* In the latter case the judgment of Fernando J. makes it clear 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 anyone else. In the present case the third defendant made a definite charge against the plaintiff to the police. It was not merely as the result of information furnished by the third defendant to the police that the arrest of the plaintiff was effected. By making a criminal charge against her, the third defendant must be held to have instigated her arrest and hence so far as he is concerned the first condition formulated by Nathan as necessary for the maintenance of an action for malicious arrest has been satisfied.

I am also of opinion that the learned District Judge has come to a proper conclusion in holding on the evidence that the first and second defendants were parties to the making of the charge against the plaintiff. The defendants are all related to each other and live in the same house. They were represented at the trial by the same Counsel. The complaint was made by the third defendant with regard to articles borrowed from the first and second defendants. In his evidence the third defendant states that the first defendant asked him to see about it, on which he went to the Police Station and made a complaint. He further states that his complaint was substantiated by the first and second defendants. Sergeant Fernando also states that on the statements of the first, second, and fourth defendants he decided to arrest the plaintiff. The third defendant states moreover that he wrote on behalf of the first and second defendants asking that the charge be withdrawn. The first defendant admits that it was on something she told the third defendant that he went to the police. The second defendant failed to give evidence rebutting the suggestion that he was a party to the making of the charge. In my opinion there is an overwhelming inference to be deduced from the evidence that the first and second defendants were parties to the making of this charge. In view of the nebulous character of the evidence, particularly that of Sergeant Fernando, aganist the fourth defendant, I am of opinion that the case against him has not been established and should be dismissed.

In addition to proving that her arrest on a criminal charge was instigated, authorized or effected by the three defendants, the plaintiff in order to succeed in this action must also prove that they acted (1)

maliciously and (2) without reasonable and probable cause. The learned Judge after a review of the evidence has held that the charge was a false one in the making of which the defendants were actuated by an improper motive and was made without reasonable and probable cause. Therefore in the view of the Judge the other ingredients necessary for the successful institution of an action for malicious arrest are present. On page 1687 Nathan expresses the opinion that malice need not be express, but may be inferred from the circumstances. A defendant will be regarded as having acted maliciously if he has acted negligently or without the care which a person might reasonably be expected to exercise or without such definite information as would justify him in making a criminal charge. Whether the defendants made a false charge against the plaintiff and were actuated by improper motives are questions of fact, the answers to which must depend to a large extent on the manner in which the witnesses tendered their evidence. As pointed out by the Judge there was a conflict of evidence. After carefully considering this evidence he has come to the conclusion that the cause put forward by the defendants was a false one. It is not for this Court to disturb the trial Judge's finding of fact unless it is unsupported by the evidence. I am of opinion that the finding of the Judge derives ample support from the evidence and that malice may not only be implied but has been proved to be express.

With regard to the second issue there is no dispute. This issue is material only as to the amount of damages.

There is, however, one further matter requiring consideration. The appellants contend that they have been materially prejudiced by the order of the learned Judge during the trial that information given to the police by the defendants and the plaintiff on the day of her arrest could not be admitted in evidence on the ground that such information was privileged. The appellants contend that such evidence is material to test the veracity of witnesses and the statement of the plaintiff made to the police on the day of her arrest would contradict the case set up by her in support of her claim. The facts with regard to this ruling as they appear from the record of the proceedings are as follows: Whilst the plaintiff was tendering her evidence a representative of the Superintendent of Police, Crimes, in reply to an inquiry by the Judge stated that he was claiming privilege for the Information Book. No order was made by the Judge at this stage. At the close of the plaintiff's evidence, Counsel for the defence pressed his request for the production of the plaintiff's statement recorded in the Information Book. On the following day Crown Counsel appeared on behalf of the Attorney-General and objected to the production of the Information Book entry on the ground that it is privileged and that the law refuses inspection except in accordance with section 122 (3) of the Criminal Procedure Code. The learned Judge held that this evidence was inadmissible on the ground of privilege. In my opinion there has been considerable confusion of thought both in the mind of the Judge and Counsel appearing for the parties in dealing with this matter. Privilege can be claimed in respect of official communications under section 124 of the Evidence Ordinance. In order to sustain such a claim it is necessary that there should be some evidence

that the public officer who is being compelled to disclose the communication considers that the public interests would suffer by the disclosure. There was no such evidence in this case. Nor is it conceivable that a public officer could in respect of this particular evidence go into the witness-box and tender such evidence. For obvious reasons the claim of privilege could not be sustained under sections 123 and 125 of the Evidence Ordinance. In my opinion, therefore, the decision of the learned Judge in excluding this evidence on the ground of privilege was wrong.

In addition to the contention that the entry in the Information Book was inadmissible on the ground of privilege, it was also sought to exclude it as a statement made under section 122 of the Criminal Procedure Code. It was argued that such a statement was admissible only in the circumstances mentioned in section 122 (3) and in a Criminal Court. It may be argued, and Sohoni's commentary on the corresponding provision of the Indian Criminal Procedure Code is authority for this proposition, that this section applies only to witnesses in criminal proceedings and not to persons in the position of the plaintiff who was accused of committing a crime. If the section did not apply to the plaintiff it was, in my opinion, open to the defendants in civil proceedings under section 155 (*c*) of the Evidence Ordinance to impeach her credit by proving former statements made by her to the police. If on the other hand the section does apply to the plaintiff as a person examined by a Police Officer under sub-section (1), there is in my opinion nothing in sub-section (3) to exclude a statement made by her in such circumstances from being given in evidence under the provisions of section 155 (c) of the Evidence Ordinance. I am, therefore, of opinion that the entry of the plaintiff's statement in the Information Book was not rendered inadmissible on either of the grounds put forward by Crown Counsel. In view of the fact that Counsel for the plaintiff and not Counsel for the defendants pleaded for the admission of the first complaint in evidence and that the verdict was in favour of the plaintiff, the question of its rejection by the Judge does not arise.

Although the Information Book entry was improperly excluded as evidence in the case, I am of opinion that this in itself is not a sufficient reason for setting aside the verdict of the learned Judge or in the alternative sending the case back for retrial. Objection was taken to the production of the Information Book and such objection was upheld by the Judge. Counsel for the defendants was, however, in possession of a copy of the statement made by the plaintiff to the Police Officer and was in a position to cross-examine her on its contents. Moreover he could have called such Police Officer as a witness and asked him in the witness-box what the plaintiff had told him. In this connection I would refer to Sohoni's commentary on section 162 of the Indian Criminal Procedure Code. This section corresponds with section 122 (3) of the Ceylon Code. Defendants' Counsel did not adopt such procedure which is not, in my opinion, precluded by the provisions of section 91 of the Evidence Ordinance. In these circumstances I do not think that it can now be contended that the defendants have been prejudiced by the exclusion in evidence of the entry in the Information Book.

The question of the amount of damages being excessive was not seriously contested by Counsel for the defendants. In these circumstances I consider that this amount should stand.

Except as regards the fourth defendant the judgment and order of the learned District Judge is therefore confirmed and the appeal is dismissed with costs.

The case against fourth defendant is dismissed with costs both in this Court and the Court below.

DE KRETSER J.—I agree.

Appeal dismissed.