1913.

Present: Pereira J. and Ennis J.

DIONIS *v.* SILVA.

352—D. C. Galle, 11,212.

Malicious prosecution—Actio de injuria—*Burden of proof that the plaintiff was innocent—Nature of evidence required to prove innocence.*

On a complaint made by the defendant against the plaintiff the Magistrate refused to issue summons. The plaintiff brought the present action against the defendant claiming damages for malicious prosecution.

Held, that there was no prosecution inasmuch as the Magistrate refused summons. Where a Magistrate refuses summons, having gone through the preliminaries required by the Code, the proceeding must not be regarded as a prosecution. To constitute a prosecution the accused should be before the Court.

Held further, that since there was no prosecution and a consequent acquittal or discharge of the accused, the Police Court proceedings are not of much avail to the plaintiff to establish his innocence. He must do so *aliunde*.

THE facts are set out in the judgment of the learned District Judge (L. W. C. Schrader, Esq.):—

1. This is an action for malicious prosecution. The first defendant lodged a criminal charge against the plaintiff for having cut him. To maintain the action the charge must have been false in fact, and so determined by the proper Criminal Court before which it came. The Court in this case did not even entertain the charge. It cannot be said that it adjudicated that it was false.

2. The onus in an action of this sort is on the plaintiff to prove that he was innocent (*9 N. L. R. 276*). He has not done so. The evidence of the vaccinator does not cover the whole of the row, in fact he witnessed only the beginning of it. Williamhamy, who gave evidence in the Gansabhawa case, did not wait even till the arrival of the vaccinator. And Pinhamy, who has given evidence in this case, is not mentioned before in Salman's case. No reliance can therefore be put on his evidence, nor would it prove that plaintiff was not there. He says he saw a crowd. For that case it is not likely he took in everybody and could say plaintiff was not present.

3. As a general rule, if a false charge is presented in the Police Court against a second party, which the Police Magistrate does not entertain, it can hardly be said that the accused party has any cause of complaint. He might possibly charge his accused with defamation, but from the false prosecution he obviously has suffered no wrong.

In regard to the police inquiry, all that occurred was that pla was detained at the police station in custody that day pending inqui. That was an actionable wrong, if in point of fact he has proved charge mailciously false. Now, Salman's evidence is very unsatisfac v. He says that he became unconscious and cannot say

whether the plaintiff came or not, and he could not say how the quarrel ended. That is too much for the Court to believe, and it makes it impossible to hold that plaintiff never was there.

5. Case dismissed with costs.

The plaintiff appealed.

E. W. Jayewardene, for the plaintiff, appellant.—The plaintiff was arrested by the station house officer and detained in the police station. Subsequently he was charged in the Police Court and acquitted. Proof of the mere presence of the plaintiff on the scene did not justify the suspicion on the part of the defendant that plaintiff caused the hurt. Malice may be inferred from the circumstances.

If an acquittal is proved, the onus of proving that plaintiff caused the hurt is shifted on to the defendant (*de Villiers de injuriis 208*). [Pereira J.—The fact that plaintiff is acquitted does not throw on the defendant the onus of justifying the prosecution. Plaintiff must still prove his innocence (*Corea v. Pieris* [1]).] That is so, but the acquittal gives rise to a very strong presumption of innocence.

A. St. V. Jayewardene, for the defendant, respondent.—It is for the plaintiff to prove his innocence. He has not done so. Mere proof of acquittal is not sufficient. There was no prosecution of the plaintiff, as there was no issue of summons, and as plaintiff did not appear in Court. The mere lodging of a complaint is not a prosecution (*Gopal Khan Jan v. Bholanath Khettry* [2]). There is no evidence of malice in this case.

E. W. Jayewardene, in reply.—The giving of false information is sufficient to maintain an action for *injuria*. It may be that plaintiff was not present in Court, or that there was a refusal to issue summons; still in substance the proceedings amounted to a prosecution. On this point English law is applicable to India, and not to Ceylon. In Ceylon it is not necessary to prove the technical prosecution. *Gopal Khan Jan v. Bholanath Khettry* would not apply here. In India a prosecution would not give a cause of action, here it would.

Cur. adv. vult.

February 21, 1913. PEREIRA J.—

The first issue in this case is, "Did the plaintiff cause hurt to the first defendant with a knife?" If this is to be considered to be an action for damages for malicious prosecution, the burden on this issue would rest comparatively lightly on the plaintiff. That is to say, a strong presumption would arise in his favour on his producing the order of the Criminal Court discharging him, and on his making oath himself that he did not cause hurt. The plaintiff gave evidence on oath, and also produced the order in his favour made in the

[1] (*1906*) *9 N. L. R. 276.*

[2] *I. L. R. 38 Cal. 880.*

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criminal case. The defendant thereupon gave evidence himself, and on a consideration of all the evidence led the District Judge was of opinion that its weight was on the side of the defendant. In other words, he held that the plaintiff had failed to prove that he had not caused hurt to the defendant. I have read the evidence, and I am not prepared to say that the District Judge arrived at a wrong conclusion. It has been contended by counsel for the respondent that the proceeding in the Police Court instituted by the defendant cannot be regarded as a prosecution; and in view of the authority that he has cited, namely, *Gopal Khan Jan v. Bholanath Khettry*,[1] I am inclined to think that there was really no prosecution of the plaintiff. From that case it is clear that where a Police Magistrate refuses summons, having gone through the preliminaries required by the Code, the proceeding is not to be regarded as a prosecution. In fact, to constitute a prosecution the accused should be before the Court. Under our Criminal Procedure Code it is open to a Magistrate to refuse summons in a case after examination of the plaintiff and such other witnesses as he may produce. That appears to be what happened in the present case, and therefore the proceeding in the Police Court can hardly be termed a prosecution. In that view the evidence led by the plaintiff to prove his innocence, even taking no account of the evidence for the defence, could hardly be said to be sufficient to discharge the burden on him.

I would dismiss the appeal with costs.

ENNIS J.—

I am entirely of the same opinion. This is not an action for malicious prosecution, but an action for damages for injury caused by proceedings before prosecution.

In these circumstances, I consider that the amount of evidence required to prove that the plaintiff was innocent would be greater than in a case of malicious prosecution, in which case the acquittal or discharge, which was the result of that prosecution, could be relied on. In this case plaintiff has not produced evidence which could justify a Court in holding that he was innocent.

I would therefore make the same order.

Appeal dismissed.

[1] *I. L. R. 38 Cal. 880.*