1931 *Present:* Akbar J.

SUNDARAM *v.* KANAKAPULLE.

105—C. R. Panwila, 7,548.

Malicious prosecution—Defendant charged with giving false information—Plea of guilt—Not conclusive on the issue of malice.

In an action to recover damages for malicious prosecution, the fact that the defendant had pleaded guilty, in a prosecution under sections 180 and 208 of the Penal Code, in respect of the original charge preferred by him, is not conclusive on the issue whether such charge was false and malicious.

APPEAL from a judgment of the Commissioner of Requests, Panwila.

E. Navaratnam, for defendant, appellant.

D. S. L. P. Abeysekere, for plaintiff, respondent.

October 30, 1931. AKBAR J.—

This is an action for malicious prosecution. Two issues were framed, namely:—

1. Did defendant act falsely and maliciously in charging the plaintiff and others with assault and robbery in P. C., Panwila, No. 16,735?
2. Damages.

At the beginning of the trial the learned Judge recorded certain admissions by both parties, one being that the defendant charged the plaintiff and others in the case above mentioned with assault and robbery and that the plaintiff and others were acquitted; the second admission being that the defendant was in turn charged by the Police under sections 180 and 208 of the Penal Code and that he pleaded guilty as his witnesses did not support him and that he was sentenced to imprisonment till the rising of the Court and that further the defendant was also charged in connection with the same transactions with using abusive words on a previous day and that he was convicted and fined on this charge. Further, it appears that there are four other cases pending against the defendant for damages in connection with the P. C., Panwila, No. 16,735, and that these four cases have been set aside to be decided on the result

in this case. In my opinion this case should go back for a retrial before another Judge, not only on the two issues framed in this case but also on a further issue whether the defendant acted without reasonable and probable cause in instituting P. C., Panwila, No. 16,735. I say that this case should be retried for the following reasons. After the framing of the issues the learned Commissioner on the authority of *Ratnayake v. Fonseka*[1] held that the fact that the defendant had pleaded guilty when he was charged under sections 180 and 208 C. P. C. was conclusive on the 1st issue, namely, that the defendant had acted falsely and maliciously in charging the plaintiff in P. C., Panwila, 16,735, and he allowed evidence to be led only on the *quantum* of damages. In fact, before the defendant gave evidence, he made it quite clear that he would not permit any question on the merits of the previous P. C. cases and that the defendant could only give evidence in mitigation of damages. So that the first issue was decided against the defendant because he had pleaded guilty under sections 180 and 208 of the Penal Code and he was debarred from leading any evidence on that issue to rebut malice. In spite of the Judge disallowing questions with regard to the P. C. cases he imported his own knowledge of the cases in his judgment, because it appears that the learned Judge himself decided the three Police Court cases referred to by me above. It has been held in the case of *Patterson v. Samudiri*[2] by the Supreme Court that depositions in the Police Court cases could be admitted in their entirety only by consent of parties and that, under no circumstance could the reasons for the acquittal or discharge of the accused be regarded as relevant or admissible in the subsequent action for malicious prosecution. The Supreme Court referred to section 154 of the Civil Procedure Code and the judgment proceeded as follows:—"The entire body of the proceedings before the Police Court was in my opinion wrongly admitted in evidence and it must have influenced the Judge's decision on the facts. It may be necessary to read in evidence the formal order of acquittal if the defendant denies the plaintiff was acquitted. In the present case even that was unnecessary as the defendant admitted in his answer that plaintiff had been acquitted by the Police Magistrate." According to these remarks, it was deemed undesirable that a trial Judge in an action for malicious prosecution should even look at the reasons for the acquittal or discharge in the criminal proceedings, because such reasons might tend to prejudice the Judge's mind against the defendant. It will be obvious therefore that when a trial Judge in a malicious prosecution case happens to be the very Judge who tried not only the criminal case which led to the action for malicious prosecution but also two other cases going to the root of the issues to be tried, the prejudice to the defendant must have been incalculable. The following extract will show the extent of the prejudice:—"According to my recollection, the defendant, in stating in his answer that his witnesses did not support him, has endeavoured to camouflage the true state of affairs, this part of his pleadings is, to put it mildly, a very gross under-statement of the truth. Not merely did his witnesses not support him, they gave him the lie direct, flatly contradicting him in various material points, with the result that

[1] *29 N. L. R. p. 397.* [2] *8 L. R. p. 32.*

his then legal adviser decided to lead no further evidence, and all the accused were acquitted and the case held not to be true

" Further, in the counter-case, for using obscene words arising out of the same incident—which case was fought out to the bitter end by this defendant as accused—another person was charged and pleaded " guilty." and defendant, who pleaded " not guilty " and gave evidence on his own behalf (and, I believe, called two witnesses) was disbelieved and convicted. Defendant was subsequently charged by the Police in P. C., Panwila, case No. 16,843, under sections 180 and 208 C. P. C., neither in that case nor in the case on the charge of using obscene words did he take any objection to the case being heard by me." Justice must not only be done in a case but it must seem to have been done.

As regards the case reported in *29 N. L. R., p. 397*, on which the Judge ruled that the defendant could not lead evidence in his favour on the first issue, I do not think that case has any application because that case was not an action for malicious prosecution as usually understood. There the plaintiff was a convicted criminal, who asserted and tried to prove in an action for damages that his conviction was obtained by fraud and collusion and the Supreme Court gave effect to the English principle of law that such an action could not be brought so long as the conviction stood unreversed. This case is quite a different one. This is an action for malicious prosecution where the plaintiff was acquitted and he cannot succeed unless he proves malice (see the case of *Corea v. Pieris*[1]). In the case of *Pedris v. The Manufacturers Life Insurance Co., Ltd.*[2], it was held by the Supreme Court that a conviction was only *primâ facie* evidence of guilt. It is true that, according to the judgment of the *29 N. L. R.* case, in the special circumstances of that case, namely, where the plaintiff is a convicted criminal and is seeking to recover damages, on the ground that his conviction was wrongly obtained, the Court upheld the principle that, in such a case, a conviction was conclusive proof of guilt; but this exceptional principle cannot be applied in the circumstance of this case to close the mouth of the defendant, especially when his plea of guilty appears to have been a qualified plea. The principle enunciated in the *19 N. L. R.* case should, I think, be followed here. Further, in an action for malicious prosecution it is incumbent on the plaintiff to prove malice on the part of the defendant in instituting the criminal proceedings against him. The fact that the defendant pleaded guilty when he was charged under sections 180 and 208 of the Penal Code is, no doubt, an element against him, but it is still open to him to prove that he had no malicious intent in instituting the criminal case against the plaintiff. As a matter of fact, on the admission recorded in this case the defendant pleaded guilty under sections 180 and 208 because his witnesses would not support him. I think that the judgment in this case should be set aside and the case sent back for a retrial before another Judge on the three issues I have indicated. The appellant is entitled to the costs of this appeal, but the costs incurred so far in the lower Court will abide the result of the retrial.

Set aside.

[1] *9 N. L. R. p. 276.*

[2] *19 N. L. R. p. 321.*