

1959 *Present* : **Basnayake, C.J., and K. D. de Silva, J.**

KARUNARATNE, Appellant *and* **KARUNARATNE. Respondent**

S. C. 903—D. C. Panadura, 3944

Action for malicious prosecution—Ingredients necessary—Criminal Procedure Code, ss. 21, 126, 148 (1) (b)—Penal Code, s. 418.

To succeed in an action for malicious prosecution the plaintiff must establish that the charge was false, and false to the knowledge of the person giving the information, that it was made with a view to prosecution, that it was made *animo injuriandi* and not with a view to vindicate public justice, and that it was made without probable cause.

APPEAL from a judgment of the District Court, Panadura.

H. W. Jayewardene, Q.C., with D. R. P. Goonetilleke and L. C. Seneviratne, for Defendant-Appellant.

A. C. Gunaratne, with G. L. L. de Silva, for Plaintiff-Respondent.

August 3, 1959. BASNAYAKE, C.J.—

The plaintiff instituted this action for the recovery of a sum of Rs. 5 000 as damages which he alleged he suffered in consequence of the following acts committed by the defendant :—

- (a) that the defendant complained to the Inspector of Police, Kahatuduwa, that the plaintiff with intent to cause damage to the defendant did set fire to omnibus No. CE 5520, property in the possession of the defendant, and that the plaintiff did thereby cause damage to the defendant to the extent of Rs. 1,100.
- (b) that the defendant falsely and maliciously made a complaint to the Kahatuduwa Police to induce and instigate the police to institute a criminal action against the plaintiff and the defendant further provided the police with false witnesses to support the said false complaint against the plaintiff.
- (c) that in consequence of the false complaint the plaintiff was taken into custody by the police, and
- (d) that he was charged in the Magistrate's Court of Horana in case No. 15397 of that court.

The plaintiff further alleged that the defendant acted wrongfully, unlawfully and maliciously and without reasonable and/or probable cause in making the complaint and inducing and instigating the institution of criminal proceedings against him. The defendant denied the allegations but stated that on 3rd August 1953 he gave information to the police that a bus of which he was a co-owner had been burnt and that one Charles informed him that he had seen the plaintiff and two others running away from near that bus.

At the trial the following issues were framed :—

“ 1. Did the deft on or about 3.8.53 complain to the police at Kahatuduwa that plff with intent to cause loss and damage to the deft set fire to bus CE 5520 ?

“ 2. Did the deft further provide the police with false witnesses in support of the said complaint ?

“ 3. Did deft retain a proctor to assist the police in the prosecution of the case instituted against the plff ?

“ 4. Was the plff prosecuted as a result of the said complaint in MC 15397 Horana ?

“ 5. Was plff acquitted of the said charge ?

“ 6. Was the said complaint false and malicious and without reasonable or probable cause ?

“ 7. If so, what damages is the plff entitled to recover from the deft ? ”

Briefly the facts are as follows : On 3rd August, 1953 the defendant made the following statement at the Kahatuduwa Police Station which was recorded by Police Constable (No. 407) Perera—

“ Hapuarachige Don David Karunaratne, 38 years, cultivator, live at Welmilla, comes to the station and complains, a bus belong to “ Samsen Perera Ltd. ” usually parked at my premises for the night and I am also a share holder. Last night at about 2 a.m. I was sleeping in the house. There was one Thomas sleeping in the verandah and another driver was sleeping in the other bus which was also parked in the same premises belongs to me. One Charles was also sleeping in the rear verandah. Just then I heard Charles shouting and saying the bus was on fire. I immediately got up from my sleep followed by the other inmates and came out of the house and went towards the bus which was on fire. We all started to put the fire down by pouring water and brought it under control. When everything was over Charles told me that he was waken as a result of some noise and he noticed 3 men namely Charles Mahatmaya, Abrham and Baby Singho were running away from the bus. He saw them clearly and identified them with the aid of the flame. There was none in the bus and we discovered a closed tin of petrol from under the bus. This Charles Mahatmaya is a close relation of mine and is angry with me over some land dispute and the other two suspects are not angry with me. But Abrham is working under Charles Mahatmaya as a watcher. I did not examine the bus to find out the damages but came direct to inform Police. Therefore I shall find out the damages and inform the Police later. This is all I have to state. ”

In consequence of that statement Sub-Inspector Anthonisz of the Kahatuduwa Police Station investigated the complaint, namely, of setting fire to a bus owned by Samson Perera Limited which was garaged in a shed adjoining the house of the defendant. In the course of the investigations he recorded the statements of Charles, Johannes and P. A. Martin Alwis. As the names of those witnesses were given by the defendant, the Sub-Inspector asked him to produce them before him and he did so.

It would appear that Johannes is the same person as Johanis Karunaratne who gave evidence in the criminal prosecution. In consequence of the investigations made by Sub-Inspector Anthonisz, a report under section 148 (1) (b) of the Criminal Procedure Code was made to the Magistrate's Court alleging that the plaintiff, P. Liyanage Abraham, and Panagodage Baby Singho, had set fire to bus No. CE 5520 property in the possession of the defendant and that they had thereby caused damage to the extent of Rs. 1,100. Among the witnesses who were mentioned in the report were H. A. David Karunaratne, Denupitiyage Charles and H. A. Juwanis Karunaratne. Summons were issued on the accused returnable on 17th September 1953 and on that date the police moved for a date to amend the plaint. On 1st October 1953, after recording the evidence of Sub-Inspector Anthonisz, the Magistrate, acting under section 152 (3) of the Criminal Procedure Code, decided to try the case summarily as Additional District Judge and a fresh charge was read to the accused. That charge alleged that they had committed an offence punishable under section 418 of the Penal Code. The owner of the bus Samson Perera Limited retained a lawyer to watch its interests and the prosecution was in the hands of Sub-Inspector Anthonisz. When the case came up for trial on 12th November 1953 Sub-Inspector Anthonisz had been transferred and Sub-Inspector Ekanayake led evidence for the prosecution. On that day the evidence of Johanis Karunaratne was recorded and after his cross-examination the Magistrate made the following record :—

“ At this stage the prosecuting Inspector states that he does not wish to proceed any further with this case, as the evidence of the last witness is obviously quite false, and moves to withdraw. I entirely agree with the prosecuting Inspector that this witness is speaking utter falsehood and has got himself completely tied up in the same. In the circumstances, I allow the application to withdraw, and I acquit the accused.”

The evidence recorded by the Magistrate does not justify the conclusion of the learned District Judge that there was no reasonable or probable cause for the defendant to have made a complaint to the police. The defendant at no time alleged that the plaintiff set fire to the omnibus. The complaint to the police was not that the plaintiff set fire to the bus but that Charles informed him after the fire had been put out that he had noticed three men, one of whom was the plaintiff, running away from the bus. There is also no evidence to justify the learned District Judge's conclusion that the defendant provided the police with witnesses in support of his complaint. The police after investigation decided to make a report under section 148 (1) (b) of the Criminal Procedure Code after they were satisfied that there was a case against the accused. Section 126 of the Criminal Procedure Code provides that—

“ If upon an investigation under this Chapter it appears to the officer in charge of the police station or the inquirer that there is not sufficient evidence or reasonable ground of suspicion to justify the

forwarding of the accused to a Magistrate's Court, such officer or inquirer shall if such person is in custody release him on his executing a bond with or without sureties as such officer or inquirer may direct to appear if and when so required before a Magistrate's Court having jurisdiction to try or inquire into the offence."

In the instant case the police were satisfied that a report under section 148 (1) (b) should be made. The allegation that the defendant retained a proctor to assist the police in the prosecution of the case is not borne out by the record. The record shows that a proctor was retained by the owners of the omnibus and that the prosecutor was a police officer. In regard to the issue whether the plaintiff was prosecuted as a result of the complaint it would appear that the police made a report to the Magistrate's Court under the appropriate section of the Criminal Procedure Code upon being satisfied on investigation that there was a case which should be brought to court. The learned District Judge has also held that the complaint made by the defendant was false and that there is evidence to support that finding. A good deal of evidence has been led to show that the feelings between the plaintiff and the defendant were bitter in consequence of land disputes, but that does not prove that the defendant's complaint that the bus which was garaged adjoining the defendant's house was set on fire on 3rd August 1953 is false. It was established as a fact. In the case of *Saravanamuttu v. Kanagasabai*¹ Howard C.J. sums up the principle of law on malicious prosecution thus :

"The cases that I have cited establish as a clear principle of law that there must be something more than a mere giving of information to the Police or other authority who institutes a prosecution."

In actions for malicious prosecution the provision of section 21 of the Criminal Procedure Code must not be overlooked. That section provides :

"Every person aware—

- (a) of the commission of or the intention of any other person to commit any offence punishable under the following sections of the Penal Code, namely, 114, 115, 116, 117, 118, 119, 120, 121, 122, 126, 296, 297, 371, 380, 381, 382, 383, 384, 418, 419, 435, 436, 442, 443, 444, 445, and 446 ;
- (b) of any sudden or unnatural death or death by violence, or of any death under suspicious circumstances, or of the body of any person being found dead without it being known how such person came by death,

shall in the absence of reasonable excuse—the burden of proving which shall lie upon the person so aware—forthwith give information to the nearest Magistrate's Court or to the officer in charge of the nearest police station or to a peace officer or the headman of the nearest village of such commission or intention or of such sudden unnatural or violent death or death under suspicious circumstances or of the finding of such dead body."

¹ (1942) 43 N. L. R. 357.

The offence committed was one under section 418 and the defendant being aware of it was in law bound to give information forthwith to the nearest Magistrate's Court or officer in charge of the nearest police station or to a peace officer or headman. A person who discharges a legal duty is free from liability for his act even when the discharge of his duty hurts another (*De Villiers on Injuries*, p. 39). It is only when he goes beyond the limits of his legal obligation or acts altogether outside it that he may render himself liable (*ibid.*).

In the instant case the plaintiff has failed to establish anything more than a mere giving of information to the police authorities, and is therefore not entitled to succeed. To succeed in an action of this nature the plaintiff must establish that the charge was false, and false to the knowledge of the person giving the information, that it was made with a view to prosecution, that it was made *animo injuriandi* and not with a view to vindicate public justice, and that it was made without probable cause. In the instant case the plaintiff has failed to discharge the burden that rests on him.

We therefore set aside the judgment of the learned District Judge and dismiss the plaintiff's action with costs. The defendant is entitled to the costs of the appeal.

DE SILVA, J.—I agree.

Appeal allowed.
