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Present: Fisher C.J. and Drieberg J.

SELVATHURAI *v.* SOMASUNDERAM.

116—D. C. Trincomalee, 1,284.

Malicious prosecution—Reasonable and probable cauuse—Mere honest belief in facts of charge—No basis for criminal charge—Malice.

In an action to recover damages for malicious prosecution, a mere honest belief on the part of the defendant in certain facts, which afford no basis for a criminal charge, coupled with the laying of a charge, cannot be regarded as reasonable and probable cause for making the charge.

Where, despite the dismissal of the charge by the Magistrate, the defendant endeavoured to reopen proceedings by petitioning the Attorney-General,—

Held, that persistance in the charge amounted to malice on the part of the defendant.

THIS was an action to recover damages from the defendant for having falsely and maliciously charged the plaintiff in the Police Court of Trincomalee with the offence of cheating. The circumstances under which the charge was laid are set out in the judgment. The learned District Judge held that there was reasonable and probable cause for instituting the charge and dismissed the plaintiff's action.

R. L. Pereira, K.C. (with *Subramaniam*), for plaintiff, appellant.—The facts proved do not disclose the offence of cheating. The mere honest belief on the part of the complainant that the accused has committed the offence is insufficient when the essential elements of the offence are not disclosed (*Nathan, vol. III. para. 1646*). Attempt to recover money by threat of criminal prosecution when there was only a civil remedy is malice (*3 Nathan, para. 1645*).Persistence in a charge after a competent trial had acquitted amounts to malice (*3 Nathan, para. 1650*).

H. V. Perera (with *Rajakariar*), for defendant, respondent.—The question is whether the defendant has acted *bona fide*. The evidence leaves no doubt as to that. If he acted *bona fide* then the action

cannot be maintained. The defendant has altered his position to his prejudice in parting with the cheque for Rs. 1,000. There is no evidence of malice at all. The defendant honestly thought that he had been cheated.

October 14, 1929. FISHER C.J.—

This action was brought by the plaintiff to recover damages from the defendant for having on November 2, 1927, falsely and maliciously and without any reasonable and probable cause brought a charge of cheating against him under section 400 of the Ceylon Penal Code. The defendant, in his statement to the Magistrate, when applying for process after discribing himself as a money lender, said: "The accused owes me about Rs. 2,000 for which he gave me a cheque on August 24, 1927, drawn on the Chartered Bank. I sent the cheque to be cashed. It was returned dishonoured. I informed the accused that the cheque had been dishonoured and returned. He has not paid the amount yet. He has cheated me. I produce the cheque." The charge formulated against the accused was: "That you did at Trincomalee, within the jurisdiction of this Court, on or about August 24, 1927, issue the cheque marked A for Rs. 2,000 in favour of a certain V. K. Somasunderam or order, promising and undertaking to deposit the amount mentioned therein on September 23, 1927 whereas you have not done so either on that day or subsequently, and thereby you have fradulently and dishonestly cheated the said Somasunderam and that you have thereby committed an offence punishable under section 400 of the Ceylon Penal Code."

The offence of cheating is defined by section 398 of the Ceylon Penal Code as follows: "Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation, or property, or damage or loss to the Government, is said to 'cheat,'" and section 400 provides that "whoever cheets shall be punished with imprisonment . . . . for a term which may extend to one year, or with fine, or with both."

The plaintiff proved that he was acquitted on the charge made against him, thereby complying with the first requirement in an action for malicious prosecution. He had to prove further, inasmuch as there is a presumption that the prosecution was duly instituted, (1) that the defendant had no reasonable and probable cause for instituting criminal proceedings, and (2) that he was actuated by malice in so doing. With regard to (1), the date on

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which the offence is alleged to have been committed is August 24, 1927, and in considering whether the plaintiff discharged the onus which lay upon him, we have, in my opinion, to concentrate our attention mainly on what took place, and on what was in the defendant's mind on that day. The events leading up to the interview which took place on August 24 are as follows: The defendant had purchased at a sale under a mortgage decree (action No. 1,176) an undivided share in certain property which was the subject matter of a partition suit in which the appellant was plaintiff. An order for sale was made in the partition suit and on July 9, 1927, the property was put up for sale. The respondent attended the sale and his account of what happened is as follows: "I was present when the second land was sold. Objection was raised when I wanted to bid. I showed D 1 (order confirming the sale in 1,176). I asked the Fiscal's officer to stay the sale. Plaintiff and others talked together and then spoke to me. They said plaintiff would guarantee payment under writ in 1,176. Plaintiff also said that he would pay that amount. Canagasabapathy (the defendant in 1,176) is plaintiff's brother-in-law. Plaintiff agreed to pay for his brother-in-law. I agreed to this. I was asked not to bid or to obstruct the sale. I agreed. When my bid was objected to I asked the other co-owners to keep up the price. Plaintiff wanted to buy the property. Plaintiff made no condition about the payment. I was asked to recover from plaintiff the sum due to my father under 1,176. He gave me the money in two cheques, Rs. 1,000 and Rs. 300. The Rs. 300 to be paid a week later, the Rs. 1,000 in six weeks' time. He asked nothing else. No reference was made to case No. 1,211. I gave a receipt for the money due on 1,176 after I received the cheques. I cashed the Rs. 300 cheque. Rs. 1,000 was due on August 27. At no time did I make any promise not to proceed in case 1,211. I did not promise not to issue writ. My father had moved for writ in 1,211 before these cheques were issued." The action 1,211 was an action by the defendant's father against the plaintiff and his wife on a promissory note dated August 3, 1925, in which decree for the principal Rs. 7,000 and interest had been entered in 1927. Both the plaintiff and Mr. Rajaratnam differ from the defendant as to the conditions under which the cheques for Rs. 1,000 and Rs. 300 were given and the learned Judge accepted their version of what took place, but in the view I take of this case I do not think it is necessary to pursue this matter.

What took place on August 24 is related in the evidence of the plaintiff, Mr. Rajaratnam, and the defendant.

The plaintiff's account is as follows: "I went to Mr. Rajaratnam. Defendant was there. I talked to him. He said his father had told him to get Rs. 1,000 on the pro-note decree. He never asked

me for that before. I agreed, after a talk, to give a cheque for Rs. 2,000 and be met on September 23. Rs. 1,000 was for the cheque already in his possession, which he was to return, and the second Rs. 1,000 was for the pro-note decree."

Mr. Rajaratnam's account is as follows: "He (plaintiff) came and met defendant in my office. There was an arrangement about a Rs. 2,000 cheque. This was to include the previous Rs. 1,000 cheque, and the other Rs. 1,000 was to be payment on the decree. The cheque was to be presented about a month later. Plaintiff made promises of further payments, he requested to have further time. Defendant may have given the impression that he would not press the decree. This would be justified. I advised plaintiff to raise money to pay."

The defendant's account is as follows: "Plaintiff saw me after I cashed the Rs. 300 at Mr. Rajaratnam's office on August 24, 1927. He asked me not to send the Rs. 1,000 cheque as he had no money. He asked me to wait and he would give me Rs. 2,000 cheque in payment in addition of money due on 1,211. Mr. Rajaratnam also asked me to wait. There was no talk of giving time for settlement in 1,211. The Rs. 2,000 cheque was to be presented on September 23, 1927," and in cross-examination he said: "On August 24 the Rs. 2,000 arrangement was made in Mr. Rajaratnam's presence. Until then I did not know that the Rs. 1,000 would not be met. Mr. Rajaratnam did not tell me plaintiff was annoyed. In the Rs. 2,000, Rs. 1,000 is included as part of 1,211. This cheque was not to be paid for a month . . . . Plaintiff may have thought that I would not go on with execution in 1,211 in view of Rs. 1,000 in the Rs. 2,000 cheque."

It was suggested in argument that in returning the Rs. 1,000 cheque the defendant altered his position to his own detriment and that that constituted the necessary element in the offence of cheating referred to in the latter part of section 398. But in view of the defendant's statement in his evidence that he was expressly told by the plaintiff that he was unable to meet the Rs. 1,000 cheque that suggestion need not further be considered. It is possible, though hardly likely, that the defendant thought that mere failure to meet the cheque on the due date constituted cheating. But that in itself does not constitute cheating within the meaning of section 398, and, even if the defendant honestly believed that it did, that would not affect the question we are considering for as stated in *Nathan (vol. III., ch. V., section 1646)*: "The mere honest belief in certain facts which afford no basis whatever for a criminal charge, coupled with the laying of such a charge, will not be regarded as reasonable conduct on the defendant's part."

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The evidence of what took place at the interview on August 24 shows that the defendant, who was fully aware of the plaintiff's financial position on that day and of his obligations under the decree in case 1,176 and in respect of his purchase at the sale on July 9, gave further time to the plaintiff for paying the Rs. 1,000, in consideration of his agreeing to pay in addition Rs. 1,000 on account of his debt to the defendant's father in 1,211. There was no statement by the plaintiff as to his solvency, there was merely the agreement to pay, while, according to the defendant's own story, there was no alteration to his prejudice of his own position. Nothing therefore happened on August 24 which justified the defendant in thinking that the plaintiff had committed the offence of cheating on that day, and his statement to the Magistrate indicates that the failure to pay the amount of the Rs. 2,000 cheque was the only thing which operated on his mind in bringing the charge. The evidence therefore in my opinion proves that the defendant acted without reasonable and probable cause.

With regard to the question of malice, I think there is evidence of malice in this case. In applying to the Magistrate for process, the immediate issue of a warrant was pressed for without any apparent justification. It is also in evidence that notwithstanding the dismissal of the charge by the Magistrate the defendant continued his endeavours to institute criminal proceedings by petitioning the Attorney-General to direct the Magistrate to hold an inquiry. In stating the offence in the petition he says: "He granted a cheque for Rs. 2,000 which was dishonoured." He also suggests that the Magistrate discharged the accused without any inquiry. This was not the case. In dismissing the charge the learned Magistrate said: "After hearing the complainant I find that the accused cannot be charged for cheating. It appears that there have been several transactions between the parties, that one of civil nature. The cheque on the face of which was to be presented on September 23, 1927. There is nothing before the Court that the cheque was presented on that day. I was under the impression on the day I allowed process that for money actually lent by the complainant to the accused that this cheque was issued. Now it does not appear so. I refer the complainant to the Civil Court. The cheque is returned, and the accused is discharged." I think also, in view of P 12, that the defendant was using criminal process with an indirect motive, namely, to bring pressure on the plaintiff to pay his debt. The direct responsibility of the defendant for the insertion of the account of the proceedings in the newspaper has not been proved, and, however material it may be in regard to the question of damages, with which we are not now concerned, it is not material on the question of malice.

In the result, in my opinion, the learned Judge should have found for the plaintiff on the issues as to want of reasonable and probable cause and malice. The appeal is allowed, and the action will be remitted for the purpose of determining the amount of damages which the defendant ought to pay. The costs of the trial in the District Court will be left to be determined by the Judge when he deals with the question of damages. The plaintiff is entitled to the costs of this appeal in any event.

DRIEBERG J.—I agree.

Appeal allowed.