1944 *Present:* **Howard C.J. and Keuneman J.**

GHOUSE, Appellant, *and* SAMSUDEEN, Respondent.

38—D. C. Colombo, 14,125.

Malicious prosecution—Defendant gives information to Police—Police take the initiative in charging the plaintiff—No cause of action against defendant.

Where, in an action for malicious prosecution it is proved that the defendant merely stated certain facts to the Police in the form of a complaint and that the Police acted on their own responsibility and took the initiative in charging the plaintiff,—

Held, that the defendant had not instituted the prosecution and that the plaintiff had no cause of action against him.

APPEAL from a judgment of the District Judge of Colombo.

H. V. Perera, *K.C.* (with him *H. W. Thambiah*), for the defendant, appellant.

N. E. Weerasooria, *K. C.* (with him *E. G. Wickremenayake*), for the plaintiff, respondent.

Cur. adv. vult.

[1] *4 N. L. R. 328 at 333.* [2] *1 S. C. C. 9.* [3] *16 N. L. R. 321.*

July 27, 1944. HOWARD C.J.—

In this case the defendant appeals from the decision of the District Judge awarding the plaintiff by way of damages a sum of Rs. 765 for causing the plaintiff to be arrested, detained and prosecuted maliciously and without reasonable and probable cause. In coming to this decision the learned Judge held that (1) the defendant set the law in motion leading to the arrest and prosecution of the plaintiff, (2) the plaintiff is innocent of the charge for which he was arrested and prosecuted, (3) there was a want of reasonable and probable cause, (4) the proceedings were instituted in a malicious spirit.

In *Corea v. Peiris* [1] it was held by Lascelles A.C.J. that the law in Ceylon with regard to action for malicious prosecution is the same as that in force in England. When *Corea v. Pieris* came before Their Lordships of the Privy Council (*12 N. L. R. 147*) Lord Atkinson, at page 148, accepted the conclusion arrived at by the Supreme Court that the principles of the Roman-Dutch Law on the essentials for an action for malicious prosecution are practically identical with the principles of English law. This conclusion has always been followed by the Supreme Court of Ceylon. One of the leading English cases on actions for malicious prosecution is *Abrath v. The North-Eastern Railway Company*[2]. In his judgment at page 455 Bowen L.J. stated that the burden of proof imposed on a plaintiff in such an action was as follows:—

> "This action is for malicious prosecution, and in an action for malicious prosecution the plaintiff has to prove, first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be in the eyes of the Judge inconsistent with the existence of reasonable and probable cause; and, lastly, that the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice. All those three propositions the plaintiff has to make out, and if any step is necessary to make out any one of those three propositions, the burden of making good that step rests upon the plaintiff."

This dictum of Bowen L.J. was followed in *Ramen Chettiar v. Punchiappuhamy*[3] where it was held that in an action for malicious prosecution the plaintiff is not bound to prove his innocence or the falsity of the charge apart from proving the termination of criminal proceedings in his favour. Mr. Perera has argued that, though the plaintiff was acquitted by a competent Court, yet he was in fact guilty, such guilt being a necessary inference from his action and statement to the Police. He was, however, acquitted by the Court and is entitled to the full benefit of such acquittal. I am of opinion, therefore, that the learned Judge was correct so far as this conclusion was concerned.

The question as to whether the learned Judge came to a correct conclusion with regard to his other findings is not an easy one to decide.

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

[2] *11 Q. B. D 440.*

[3] *40 N. L. R. 118.*

We cannot lose sight of the fact that the learned Judge had the opportunity of seeing the witnesses called by the plaintiff and adjudicating upon their credibility after studying their demeanour in the witness box. In this connection it also has to be borne in mind that the defendant did not go into the witness box and state on oath the source of his information, his belief in such information and that he had no indirect motive when he made his complaint (P 3) to the Police on May 12, 1942. In these circumstances we should hesitate before we come to the conclusion that the learned Judge's findings of fact are incorrect. The burden of satisfying the Court that there was a want of reasonable care lies upon the plaintiff because the proof of that want of reasonable care is a necessary part of the larger question, of which the burden of proof lies upon him, namely, that there was a want of reasonable and probable cause to institute the prosecution. The burden also of proving that the defendant had not taken reasonable care to inform himself of the true facts of the case lay on the plaintiff. It is conceded by both sides that the proceeds of the two cheques drawn on the Chartered Bank of India by the defendant in favour of the plaintiff on May 4, 1942, were to be employed so far as Rs. 2,000 were concerned as a deposit with the Municipal Authorities and the remaining Rs. 1,000 for expenses in re-opening the Pilawoos Hotel. It is not denied by the plaintiff that on May 12, 1942, the two cheques had been cashed and no deposit had been made with the Municipal Authorities. It was in these circumstances that the defendant made his complaint to the Police. In holding that the plaintiff has proved the absence of reasonable and probable cause, the learned Judge says in his judgment that the defendant in his statement to the Police, has made an incorrect statement when he says he had not been able to see the plaintiff up to the date on which he complained to the Police. The learned Judge comes to this conclusion because the evidence of the plaintiff that the defendant came to see him on May 11, 1942, at 6 P.M. is supported by the witness Bhari. He also draws an inference that the defendant did pay this visit because of the evidence of Mohideen who says that he conveyed certain information to the defendant about 5 or 5.30 P.M. and such information, according to the learned Judge, would cause him to go to the plaintiff. With regard to the evidence of the plaintiff and Bhari on this point, the learned Judge has not addressed his mind to the question as to whether such evidence can be accepted. Having regard to the statement made by the plaintiff to the Police, any evidence tendered by him could only be received with the greatest hesitation. The learned Judge seems also to have been unmindful of a very grave discrepancy between the evidence of the plaintiff as given in Court with regard to this alleged visit of the defendant on the 11th and the statement he made to the Police. To the Police he said that about 6 P.M. he saw the defendant at *his* (the defendant's) house and informed him of what had happened to the money and told him he would repay him the money due on the pro-note and the defendant said "When are you going to repay the money?" and he and not plaintiff went away. To the Court he said as follows:—

"On May 11th at about 6 P.M. the defendant came to my house. I was talking to Bhari at the time. He came and asked me if I had

received a reply. I told him not yet. Then he said that God had saved him, that Mukthar had come to know about this business, that in the deed of partnership between Mukthar and himself there was a clause that if Ghouse joined as partner in any other business, Mukthar can claim damages. He asked me to drop it and asked me to return the money. I said Rs. 1,000 had already been spent and the balance was with me, that is Rs. 2,000. He demanded the Rs. 2,000 and I asked him for the note. He said the note was in the shop that he had not brought it and that I could trust him and give him the money. I told him as he could not trust me he took the note for Rs. 5,000 and gave me Rs. 3,000 and I said give me a receipt acknowledging receipt of the Rs. 5,000.

With regard to the Rs. 1,000 he asked me to give it later and I said that at his request all these expenses had been incurred and that therefore I could not return a cent of that money. Then he suggested that I should bear Rs. 500 and he Rs. 500. I did not agree to that also. Then he got angry and when I asked for the receipt he went away saying I will teach you a lesson.''

In view of this discrepancy I do not think that the learned Judge was right in accepting the evidence of the plaintiff on the point even though Bhari testifies to the fact that the defendant visited the plaintiff's house about 6 P.M. on the 11th. Nor do I consider that it was a necessary inference that the defendant would seek out the plaintiff on receiving information from Mohideen. Nor has it been established that the defendant made no effort to find the plaintiff before making his complaint to the Police. If the defendant had made inquiries of Mr. Kannangara and Mr. Sherrard, he would still have been in the position of knowing that his cheques had been cashed and no deposit had been made. In these circumstances can it be said that the plaintiff has discharged the burden imposed upon him of proving that the defendant had not taken reasonable care to inform himself of the true facts of the case? Can it be said that the defendant in going to the Police and stating what he did has not conducted himself as a reasonable man of ordinary prudence? I do not think it can. The Judge's conclusion on this finding cannot, in my opinion, be supported. The question of malice does not, therefore, arise.

Although my finding on the question of reasonable and probable cause is sufficient to decide this appeal, I think it is questionable as to whether in this case it can be said that the plaintiff has proved that the defendant instituted the prosecution against him. In *Saravanamuttu v. Kanagasabai*[1] it was held that there must be something more than the mere giving of information to the Police or other authority who instituted the prosecution. There must be the formulation of a charge or something in the way of solicitation, request or incitement of proceedings. It is true that the defendant stated certain facts to the Police in the form of a complaint. The heading to this complaint ''Cheating in respect of cash Rs. 3,000'' must be regarded as the handiwork of the Police and not of the defendant. So must P 4, the report made by Inspector Pakeer to the Magistrate. The Inspector in his evidence takes full responsibility

[1] *43 N. L. R. 357.*

for going to the Magistrate and says that he acted on his own initiative. It is said that by lending his car and going in it he showed an undue interest in the matter and that his actions amounted to more than the mere giving of information. I do not think it has been established that he instituted the proceedings.

For the reasons I have given the judgment of the learned Judge is set aside and judgment must be entered dismissing the plaintiff's claim together with costs in this Court and the Court below.

KEUNEMAN J.—I agree.

Appeal allowed.