

JAYAWICKREMA
v
LANKA ELECTRICITY BOARD AND ANOTHER

COURT OF APPEAL.
ABDUL SALAM, J.
CA 450/2003
D.C. GAMPAHA 39198/M
SEPTEMBER 20, 2007

Malicious Prosecution – Reasonable and Probable cause – Ingredients necessary – Disconnection of electricity supply – Illegally extending supply to disconnected area – Electricity Act – Sections 59(1), 67 – Amended by Act No.15 of 1984 – Sections 4 and 5 – Acquitted in Magistrate’s Court. – Code of Criminal Procedure Section 136(b) – Malicious arrest? – Malicious proceedings? – Animus injuriandi.

Due to non-payment of electricity bills, the defendant discontinued the electricity supply to the main house, whilst the plaintiff retained the supply to the remaining portion. Upon a complaint raised; after inspection to ascertain whether the plaintiff had illegally extended the supply of electricity to the area, covered by the disconnection being satisfied as to the genuineness of the complaint, the 1st respondent withdrew the supply of electricity to the remaining section of the house as well. The plaintiff was then charged in the Magistrate’s Court for the alleged violation of the provisions of the Electricity Act. After trial he was acquitted. The plaintiff thereafter filed an action to recover damage arising from malicious arrest followed by malicious proceedings. The trial Court dismissed the plaintiff’s action.

Held:

- (1) In a malicious prosecution case, it is fundamental that the plaintiff is obliged to establish the following.
 - (a) The defendant had instigated the proceedings.
 - (b) That those proceedings culminated in the plaintiff's favour.
 - (c) That the defendant's conduct was without reasonable and probable cause.
 - (d) That the prosecution was tainted with malice.
 - (e) That the plaintiff has suffered damages as a result.
- (2) Irrespective of the outcome of the criminal proceedings and the maintainability of the charges preferred against the plaintiff, the plaintiff himself has admitted that he has violated the provisions of the law by extending the supply of electricity. The police had been influenced by the following considerations, when they decided to arrest the plaintiff and charge him.
 - (i) the inspection carried out by the 2nd defendant in the presence of the police officer.
 - (ii) discontinuance of supply of electricity to a portion of the house of the plaintiff.
 - (iii) admission made by the defendant that he had violated the terms of the contract pertaining to the supply of electricity, by means of an unauthorised extension
- (3) The acquittal of the plaintiff apparently was based on the non-production of the wire alleged to have been used by the plaintiff for the commission of the offence and certain contradictions.
- (4) It is settled law that no cause of action shall accrue for the institution of the malicious prosecution unless criminal proceedings are initiated without reasonable and probable cause. Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstance which assuming them to be true, would reasonably lead any ordinarily prudently and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.

(5) To succeed in an action of this nature the plaintiff must establish that the charge was false and false to the knowledge of the persons 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 purpose and that it was made without a probable cause.

Per Abdul Salam, J.

"The material relevant shows nothing more than the defendants having set rolling a stone of reasonable suspicion pertaining to the commission of an offence against the plaintiff, as permitted by law, which alone is insufficient to hold the defendants' responsible for malicious prosecution, malicious arrest or causing nuisance".

Per Abdul Salam, J.

"It is true that the District Judge has failed to consider the evidence adduced by the plaintiff in its proper perspective, however, it must be observed that even if she had considered the evidence in the manner suggested, yet she could not have come to a different finding to what she in fact arrived at".

APPEAL from a judgment of the District Court of Gampaha.

Cases referred to:

1. *Sarawanamuttu v Kanagasabai* 43 NLR 357.
2. *Hicks v Faulkner* 1881 8 QBJ 167 at 171.
3. *Karunaratne v Karunaratne* 63 NLR 365.
4. *Corea v Peiris* 9 NLR 276, 277.

Chandana Premathilake for plaintiff-appellant.

Sobita Rajakaruna SSC for defendant-respondent.

Cur.adv.vult.

October 1, 2007

ABDUL SALAM, J.

This is an appeal from the judgment of the District Judge of Gampaha dismissing the action of the plaintiff which was founded *inter alia* on malicious prosecution. The plaintiff-appellant (hereinafter referred to as the "plaintiff") instituted action against the 1st defendant-respondent (hereinafter

referred to as the 1st defendant and the 2nd defendant) to recover damages, arising from an alleged malicious prosecution, causing nuisance and for wrongful disconnection of the electricity supply to the premises of the plaintiff.

Briefly stated the facts were these:-

The plaintiff entered into two separate agreements with the 1st defendant for the use of electricity at his residence, by means of two separate meters bearing Nos. 48614701 and 48596911. Accordingly the 1st defendant supplied electricity to the plaintiff to two different sections of the plaintiff's residence.

Due to non-payment of electricity bills, the 1st defendant discontinued the electricity supply to the main section of the plaintiff's house, while the plaintiff retained the supply to the remaining portion of the same. Upon a complaint received, the 1st defendant carried out an inspection through the 2nd defendant, to make certain as to whether the plaintiff had illegally extended the supply of electricity to the area, covered by the disconnection. Being satisfied as to the genuineness of the complaint, the 1st defendant withdrew the supply of electricity to the remaining section of the plaintiff's house as well.

Subsequently, the plaintiff was arrested by Sapugaskanda police and produced before the Magistrate's Court of Gampaha. The plaintiff admitted having extended the supply of electricity. The reason assigned for the extension was the compelling necessity to use a toilet situated within that part of the house from which the supply of electricity had been earlier suspended. The plaintiff was then charged in the Magistrate's Court for the alleged violation of certain provisions of the Electricity Act. After trial he was acquitted by the learned Magistrate. The plaintiff then filed the present suit against defendants in order to safeguard his interests and to recover damages arising from malicious arrest followed by malicious proceedings.

The defendants in their answer *inter alia* took up the position that on information received, an inspection was carried out, at the residence of the plaintiff and it was, *plainly evident* that the plaintiff had extended electricity from the adjoining premises to the mother portion of the house from which the supply of electricity had been disconnected on a previous occasion. Hence, the defendants were compelled to disconnect the remaining electricity line of the plaintiff.

As regards the alleged malicious arrest, the defendants maintained that the plaintiff was arrested by Sapugaskanda police, as he had committed a cognizable offence. The defendants specifically took up the position that the said arrest of the plaintiff and the resultant criminal proceedings instituted by Sapugaskanda Police were not tainted with malice as asserted in the plaint. As a matter of law the defendants raised the question as to the maintainability of the action, in view of Section 59(1) of the Electricity Act.

It is common ground that the plaintiff had entered into two separate agreements with the Ceylon Electricity Board for the supply of electricity to his residence. The learned Senior State Counsel, on behalf of the defendants, has contended that the admission made by the plaintiff, as to the extension of the supply of electricity from the backside meter using a half millimeter wire, to have an additional lamp should be considered as being fatal to the plaintiff's case. He has urged that irrespective of the fact that the extension was limited to one lamp, the mere violation of the Electricity Act, by extending the supply of electricity, renders the extension as illegal.

The learned District Judge after trial dismissed the plaintiff's action, due to the failure on the part of the plaintiff to establish the ingredients necessary to succeed in a malicious prosecution suit. She in her judgment concluded that the defendant has not committed any offences under the Electricity Act. The plaintiff contends that the judgment of the learned District Judge is contrary to law, in that she could not have

come to the decision she reached, having come to the conclusion that the plaintiff has not committed any offence under the Electricity Act. The learned Counsel of the plaintiff has further submitted that the judgment of the learned District Judge contains only a narration of the evidence and not an analysis of it. He has further urged that the learned District Judge was totally unmindful of the legal principles applicable to illegal arrest, malicious prosecution and corporate liability in that regard. The learned Counsel of the plaintiff strenuously argued that even though the learned District Judge has generally narrated or reiterated the facts satisfactorily, she has come to several erroneous inferences and conclusions.

In a malicious prosecution case, it is fundamental, that the plaintiff is obliged to establish the following.

1. the defendant had instigated the proceedings.
2. that those proceedings culminated in the plaintiffs favour.
3. that the defendants conduct was without reasonable and probable cause.
4. that the prosecution was tainted with malice.
5. that the plaintiff has suffered damages as a result.

The defendants have not seriously denied the imputation that the 2nd defendant on behalf of his employer the 1st defendant provided the information to the police, regarding the alleged illegal extension of electricity. It is significant to note that the Magistrate Court proceedings had commenced at the instance of the police under Section 136(b) of the Code of Criminal Procedure Act and not by way of a private plaint. Admittedly, it is the police officer who has taken the plaintiff into custody on the first information provided by the 2nd defendant. On a reading of the first information, it is quite clear that the 2nd defendant has merely stated the facts as he believed them to the police. On a reading of the evidence adduced at the trial

it appears to me, as being unsafe to hold the defendants accountable, for initiating criminal proceedings against the plaintiff, as they have not played any significant role to the extent of being actively instrumental in bringing a criminal prosecution. Admittedly, the 2nd defendant has had no personal interest in the matter. The 1st defendant is a statutory body, enjoying the monopoly over the supply of electrical energy. In doing so the 1st defendant had certain statutory obligations to ensure that the consumers do not violate the provisions of the Ceylon Electricity Board Act and also the terms and conditions of the agreements entered into by them for consumption of electricity.

It is laid down that in an action for malicious prosecution the plaintiff must prove that the criminal proceedings were instituted by the defendant, that is to say, that the defendant set the law in motion against the plaintiff. In order to establish that the defendants set the criminal law in motion against the plaintiff there must be something more than the mere giving of information to the police. As has been laid down in the case of *Sarawanamuttu v Kanagasabai*¹⁾ there must be the formulation of a charge or something in the way of solicitation, request or incitement of proceedings. Admittedly the 2nd defendant has not made any solicitation, request or incitement of criminal proceedings other than making a first complaint, regarding the inspection carried out by him, in response to a complaint received by the 1st defendant.

The evidence led at the trial points to the fact that the plaintiff was arrested by Sapugaskanda police and later charged by the same police on behalf of the State. Irrespective of the outcome of the criminal proceedings and the maintainability of the charges preferred against the plaintiff, the plaintiff himself has admitted that he has violated the provisions of the law by extending the supply of electricity. On a careful scrutiny of the material available it appears that the police had been influenced by the following considerations, when they decided to arrest the plaintiff and charge him in the Magistrate's Court.

- a) The inspection carried out by the 2nd defendant in the presence of a police officer.
- b) Discontinuance of supply of electricity to a portion of the house of the plaintiff.
- c) Admission made by the defendant that he had violated the terms of the contract pertaining to the supply of electricity, by means of an unauthorised extension.

In the above circumstances, in my judgment it is hardly possible, even if the learned District Judge had properly looked out for proof of ingredients relating to "malicious prosecution", to attribute liability on the defendants for having set the criminal law in motion.

According to the amended charge sheet marked as P19, the plaintiff stood charged in the Magistrate Court, for illegally and without the prior approval of the General Manager or any other authorized officers of the Electricity Board of Sri Lanka, extending the supply of electricity from one section of his house to another section from which the supply of electricity had been withdrawn (for default of payment of bills) an offence punishable under Section 67 of the Electricity Act read together with Sections 4 and 5 of the Electricity (Amendment) Act No. 15 of 1984.

The learned Magistrate after trial acquitted the defendant, mainly due to the failure on the part of the prosecution to produce the wire, alleged to have been used for the extension of electricity and certain contradictions that created a reasonable doubt in his mind, as to the guilt of the accused.

The plaintiff has submitted that he was charged in the Magistrate's Court under a wrong section, which was inapplicable to the alleged extension. He has further emphasized that the learned District Judge having analyzed the evidence, came to the conclusion that the plaintiff has not committed any offence, referred to in the charge sheet P19.

Learned District Judge in this regard observed that the only offence the defendant could have committed was under Section 67(E) which provided that whoever supplies **any other person with any part of the energy supplied to him by the licensee or the board shall be guilty of an offence ...** (Emphasis is mine). As has been observed by the learned District Judge, the plaintiff cannot be even remotely be held liable for violating Section 67(E) as he had not supplied energy to any other person as envisaged by Section 67(E). In other words what has been alleged against the plaintiff was that he had supplied energy by means of an extension wire to a section of his house.

The learned Counsel of the plaintiff has submitted that as the criminal proceedings had culminated in an acquittal, it was totally unnecessary for the District Judge to have reconsidered the same in her judgment though she has concluded that for an offence under Section 67(E) to be committed, the plaintiff should have supplied any other person with the energy supplied to him by the CEB. On the contrary, the allegation was that he extended the line from one part of his house to the other section of the house regulated by two different meters. This act of the plaintiff, it was submitted by the learned Counsel is not an offence.

No doubt, the learned District Judge has delved into details regarding the extension of the electricity supply; with a view to find out whether in fact he had committed an offence, under the Electricity Act or any other law. At the end of a careful and precise exercise, she came to the conclusion that no offence had been committed by the plaintiff. Even though the finding of the learned District Judge on this matter is favourable to the plaintiff, learned Counsel has attacked the same on the basis that such a finding is totally uncalled for. It is to be observed that the learned Magistrate in his order acquitting the accused has not considered as to whether the evidence adduced against the plaintiff had revealed the commission of an offence *vide P20*. The acquittal of the plaintiff apparently was based on

the non production of the wire alleged to have been used by the plaintiff for the commission of the offence and certain contradictions arose in the presentation of the case for the prosecution.

Learned Counsel of the plaintiff has strenuously argued on the basis that the Trial Judge has failed to consider, "malicious arrest" as a ground for awarding damages. The Counsel of the plaintiff has also contended that the Trial Judge has misapplied the provisions of Section 59(1) of the Electricity Board Act which protects an officer who acts in good faith.

It is appropriate at this stage to focus the attention to the argument advanced on behalf of the plaintiff that the Trial Judge has failed to consider the different aspects of the evidence placed by the plaintiff. It is true that the learned District Judge has failed to consider the evidence adduced by the plaintiff in its proper perspective. However, it must be observed that even if she had considered the evidence, in the manner suggested by the learned Counsel of the plaintiff, yet she could not have come to a different finding to what she in fact arrived at.

It is quite surprising that the learned District Judge has not properly addressed her mind to find out proof in the plaintiffs case itself, as to the existence of "want of reasonable and probable cause", in initiating criminal proceedings. It is settled law that no cause of action shall accrue for the institution of malicious prosecution suit, (however malicious the criminal proceedings may be) unless criminal proceedings are initiated without reasonable and probable cause. This is considered to be a difficult area in a malicious prosecution suit. It is so because it is at this stage the plaintiff embarks upon the manifestly difficult task of establishing the negative.

A typical explanation of the expression "reasonable and probable cause" is that of Hawkins J. in the case of *Hicks v Faulkner*⁽²⁾ at 171, which reads as follows:

"I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

Our courts have on many occasions examined the ingredients necessary to establish a cause of action for malicious prosecution. It is pertinent to note the *dicta* of Basnayake C.J. in the case of *Karunaratne v Karunaratne*⁽³⁾ which emphasized the need to look for negative proof that has to come from the plaintiff. The relevant part of the said judgment reads as follows:

"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 a probable cause".

Having perused the proceedings had before the learned District Judge, I find it difficult to arrive at the conclusion that the plaintiff had proved the criminal prosecution initiated against him to be false to the knowledge of the 2nd defendant in view of the admitted extension of the supply of electricity by the plaintiff. It is significant to note that the admission made was not the mere extension of electricity but an admission that it was illegal to the knowledge of the plaintiff himself.

One of the earliest authorities which laid down the ingredients necessary in an action for malicious prosecution can be usefully referred to from the judgment of *Corea v Peiris*⁽⁴⁾ at 277 in which the ingredients were summarized as follows:

"in order to establish his cause of action it is incumbent upon the plaintiff to prove (1) that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made, (2) that there was a want of a reasonable and probable cause by the prosecution, or as it may otherwise be stated, that the circumstances of the case were such as to be in the eyes of the judges inconsistent with the existence of reasonable or probable cause, (3) the proceedings of which the complaints were initiated were with the malicious spirit that is from an indirect and improper motive and not in furtherance of justice."

The authorities cited above leave no doubt that it is essential for a cause of action for malicious prosecution to plead and establish that the defendant was instrumental in the institution of prosecution in the sense of formulating a charge or something in the nature of solicitation, request or incitement of the proceedings as set out by His Lordship Howard C.J. in the case of *Sarawanamuttu*. (*supra*)

The complaint made by the 2nd defendant in his capacity as an officer of the 1st defendant has been marked as P17. According to P17 the complaint has been made upon the completion of the inspection. The plaintiff too in his evidence has admitted that he has done the extension of the supply of electricity illegally. The question that arises for consideration at this stage is not whether the extension was actually legal, but was it considered as being illegal in the circumstances. The plaintiff himself thought that it was illegal. In such a situation I find it difficult to blame the 2nd defendant for having considered it as illegal due to mis-apprehension of the law or mistake of fact.

The plaintiff in his attempt to justify the said extension had the occasion to state that he had to go to the toilet frequently during night as he was suffering from diabetes and high blood pressure. The said extension according to him was to

overcome this difficulty. The learned additional Solicitor-General has submitted that the act complained of against the plaintiff namely extending the electricity supply into an area covered by the suspension of the supply of electricity is a flagrant violation of the terms and conditions of the remaining contract with the defendant.

The fact that the plaintiff admittedly had extended the supply without the approval of the 1st defendant, the admission made by the plaintiff that to his knowledge such extension was unlawful, the circumstances which led the plaintiff to have such extension of the electricity supply, the fact that the plaintiff had allegedly defaulted the payment of electricity bills pertaining to a section of the same house and the nature of the official duty performed by the 2nd defendant in his capacity as the electrical superintendent of statutory body, point to the existence of reasonable and probable cause for setting the law in motion against the plaintiff. The plaintiff has failed to adduce sufficient evidence to warrant the conclusion that there was absence of reasonable and probable cause in relation to the prosecution initiated against him. The material revealed in the course of the trial, shows nothing more than the defendants having set rolling a stone of reasonable suspicion (pertaining to the commission of an offence) against the plaintiff, as permitted by law, which alone is insufficient to hold the defendants responsible for malicious prosecution, malicious arrest or causing nuisance.

In view of the above circumstances, it is my considered opinion that even if the learned District Judge had properly addressed her mind to the relevant issues and analyzed the evidence as required by law, yet the conclusion would be the same as what she had decided by the judgment under appeal.

In view of the above, the question as to the applicability of Section 59 of the Ceylon Electricity Board Act does not arise for consideration.

For the foregoing reasons, the appeal of the plaintiff is dismissed.

Taking into consideration the health condition of the plaintiff, I make no order as to costs.

Appeal dismissed.