1937 *Present :* **Moseley J. and Fernando A. J.**

RAMEN CHETTIAR *v.* PUNCHIAPPUHAMY.

259—D. C. Kandy, 44,132.

Malicious prosecution—Burden of proof—Plaintiff not bound to prove his innocence—Roman-Dutch law.

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.

Moss v. Wilson (8 N. L. R. 366) ; Corea v. Peiris (9 N. L. R. 276) referred to.

APPEAL from a judgment of the District Judge of Kandy.

H. V. Perera, K.C. (with him *Molligoda*), for defendant, appellant.

N. E. Weerasooria (with him *Ranawake, Cyril Perera* and *Wikramanayake*), for plaintiff, respondent.

November 25, 1937. FERNANDO A.J.—

This was an action for malicious prosecution, and the learned District Judge was of opinion that in order to succeed in such an action, the plaintiff had to prove—(1) that he was prosecuted, (2) that he was acquitted, (3) that the defendant was actuated by malice express or implied, and (4) that the defendant had no reasonable and probable cause for prosecuting the plaintiff. It was common ground that the plaintiff was prosecuted, and the prosecution against the plaintiff was withdrawn by Proctor for the defendant. On the question of malice, the learned District Judge held that there was implied malice, and that express malice could also be inferred against the defendant. On the question of reasonable and probable cause, the learned Judge held that the defendant had no justification in making the charge or persisting in it. He accordingly entered judgment for the plaintiff in a sum of Rs. 500 and costs.

On the evidence, the learned Judge held that a number of persons entered upon a land which was in the possession of the defendant, that they ejected the defendant's agent, and his labourers, and that they plucked tea from the land. He also held that there was no evidence on which the defendant who was not present at the time could have entertained any reasonable belief that the plaintiff took part in the activities of the crowd.

Counsel for the appellant at the beginning of the argument stated that the main defence of the defendant was that he had accepted a statement made to him by Palaniandy and that in prosecuting the plaintiff, he acted in good faith, on that statement. As the learned District Judge points out, the defendant in his evidence before the Police Magistrate, did not state that he was acting on a statement made by Palaniandy. Palaniandy in his evidence did not state that the plaintiff formed one of the members of the unlawful assembly which had driven out his coolies. It was suggested that his evidence in the District Court had been coloured by the fact that there had been litigation between himself and the

defendant, but no such suggestion can be made with regard to the statement P 5 which was recorded at the Police Station. It appears from P 5 that Palaniandy came to the Police Station with the defendant and all he could say was that he saw about 15 persons come to the land and pluck tea. He mentions a conversation with Y. L. Appuhamy who had sent the people, but says nothing at all about the plaintiff. In fact the only name mentioned by him is that of Y. L. Appuhamy. In the Police Court, however, the defendant charged seven persons by name the second of them being this plaintiff, and the evidence given by the defendant was direct evidence against the plaintiff. It is impossible to believe that Palaniandy at the Police Station would not have given details as to the persons and events to which he could testify, and it seems clear that the defendant in charging these seven persons could not have been relying entirely on the statement made to him by Palaniandy.

In an action for malicious prosecution the plaintiff must prove that a charge was made to a Judicial Officer, that the charge was false—its falsity being demonstrated, where prosecution has followed, by the plaintiff's acquittal—that the charge was made without reasonable cause and that the defendant himself did not honestly believe it to be true, (see Wood Renton J. in *Moss v. Wilson,*[1]) and it is clear that he has stated the essential elements of an action for malicious prosecution from a number of English authorities that he cites, as well as from two local cases.

In the case of *Corea v. Peiris*[2], Lascelles A.C.J., following the judgment in *Abrath v. North Eastern Railway Company*[3], states that 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 prosecution was made, (2) that there was a want of reasonable and probable cause for the prosecution, (3) that the proceedings were initiated in a malicious spirit. To my mind there is no essential difference between these two decisions. They both set out that one of the essential elements in an action for malicious prosecution is the termination of the criminal prosecution in favour of the plaintiff, and as Wood Renton J. said, the plaintiff must prove that the charge was false, and the manner in which he can so prove its falsity is by proving that the prosecution was followed by the plaintiff's acquittal. When the case of *Corea v. Peiris* came before their Lordships of the Privy Council, Lord Atkinson accepted the conclusion arrived at by the Supreme Court that the principles of the Roman-Dutch law on the subjects of the essentials for an action for malicious prosecution are practically identical with the principles of the English law, and we have not been referred to any decision in England or here which sets out that the plaintiff's action must fail if he cannot prove at the trial of the action for malicious prosecution that he was innocent in fact, in addition to proving that the proceedings terminated in his favour.

Counsel for the appellant next contended that the position under the Roman-Dutch law in this respect was different to the position under the English law. It is stated at page 81 of the Fourth Volume of the *Institutes of Cape Law*, that the Courts laid down certain essential requisites for the action for malicious prosecution and that the plaintiff must allege

[1] *8 N. L. R. 368.* [2] *9 N. L. R. 276.*

[3] *(1863) 11 Q. B. D. 79.*

in his declaration and must be prepared to prove, *inter alia*, that the criminal charge laid against him by the defendant was false in fact, and has been decided to be so, by a competent Court or by the Public Prosecutor. He refers to the case of *Lenue* against *Zwartboi, 13 S. C 403*, but it would appear from a long passage from the judgment in that case quoted in *Nathan, vol. III, p. 1690*, that that judgment decided that if the Public Prosecutor refuses to prosecute, there is a sufficient termination of the proceedings to enable the plaintiff to proceed for malicious prosecution. It is also clear from the following passage of *Maasdorp* that the plaintiff need not except by proving the termination of the proceedings further prove his innocence or the falsity of the charge, for *Maasdorp* proceeds at page 81 in these words, " the first thing then to be proved is that the criminal proceedings complained of were set in motion by the defendant ". As regards the second essential, it is not necessary that the plaintiff shall have actually undergone a trial and been acquitted. It will be sufficient if the Public Prosecutor has declined to proceed, and as regards the third and fourth essentials, it is absolutely indispensable for the purposes of this action that the prosecution shall have been instituted both maliciously and without reasonable and probable cause.

I would, therefore, hold that the contention for the appellant that the onus of proving the falsity in fact of the charge apart from the termination of the proceedings in his favour lay on the plaintiff must fail. It may be possible for a defendant in such an action to prove that the charge was true in fact, and it may be that evidence to this effect will enable him to show that the charge was made on reasonable and probable cause.

It was also contended by Counsel that plaintiff had failed to prove malice on the part of the defendant, but the learned District Judge held, and in my opinion correctly held, that there was implied malice, and that from the evidence in this case, express malice could also be inferred. I would accordingly dismiss the appeal with costs.

MOSELEY J.—I agree.

Appeal dismissed.