

1943

Present: Keuneman and Jayetileke JJ.

HENDRICK APPUHAMY, Appellant, *and* MATTO SINGHO,
Respondent.

267—D. C. Colombo, 12,588.

Malicious prosecution—Information given to the Police by defendant—Prosecution of plaintiff by Police after investigation—No request by defendant to the Police to prosecute—Liability of defendant.

Where defendant gave certain information to the Police and the Police having made investigation into the information prosecuted the plaintiff, and where there was no evidence as to the nature of the information given, or as to any other act on the part of the defendant apart from the fact that he gave information,—

Held, that the defendant was not liable in damages for malicious prosecution. *Saravanamuttu v. Kanagasabai* (43 N. L. R. 357) followed.

A PPEAL from a judgment of the District Judge of Colombo.

H. V. Perera, K.C. (with him Kingsley Herat), for defendant, appellant.

L. A. Rajapakse (with him J. M. Jayemanne), for plaintiff, respondent.

Cur. adv. vult.

September 17, 1943. KEUNEMAN J.—

This is an action for malicious prosecution. The prosecution was instituted by the Police. In the plaint it was alleged that the defendant

¹ (1937) 2 C. L. J. 222.

² 44 N. L. R. 476.

wrongfully, falsely and maliciously made a complaint to the Police, and that as a result of the complaint the plaintiff was prosecuted by the Police. In his answer, the defendant, after a general denial of the allegations in the plaint, admitted that he gave certain information to the Police, which he denied was wrongful, false, or malicious, and added that the Police, having made investigation into the information so given prosecuted the plaintiff. The principal issues with which we are concerned are issues 1 and 2, namely :

“ (1) Did the defendant on May 21, 1939, make a complaint against the plaintiff to the Aturugiriya Police ?

(2) As a result of the said complaint was the plaintiff prosecuted by the Aturugiriya Police in M. C. Colombo, Case No. 38,931, on a charge of having committed criminal intimidation and committed to stand his trial before the District Court of Colombo in D. C. 186 Criminal ?

The learned District Judge held that it had to be proved, *inter alia*, that in addition to making a complaint or giving information to the Police, the defendant either requested or directed the prosecution of the plaintiff. The District Judge held that there was sufficient evidence of this in the admission in the answer, and gave judgment against the defendant.

In appeal it is argued that there is no evidence to support the finding of the District Judge on this point. No evidence in fact has been given as to the actual information given to the Police by the defendant, nor as to the circumstances under which that information was given. No Police officer has been called, and we do not know whether this was the first information given to the Police, and whether, in giving the information, the defendant in fact formulated a charge against the plaintiff, based upon his own knowledge. The plaintiff said that, in the Magistrate's Court, the defendant gave evidence against him, but here again we do not know what that evidence was, and no attempt was made to put in the evidence of the defendant as contained in the Magistrate's record. The District Judge thought that what the defendant told the Police can be gathered from the plaint P 1 in the Magistrate's Court, but I do not think the District Judge was justified in drawing the inference that the defendant gave information to the Police in the form contained in P 1. It seems clear from the proceedings that the plaint was filed not only on the information given by the defendant, but also as a result of further investigation by the Police. Nor does the fact that the defendant was the first witness called throw any light on the matter, as the District Judge thought it did.

The District Judge depended also on a statement in cross-examination by the plaintiff, to the effect that his wife told him that the Police came in search of plaintiff to his house accompanied by the defendant and defendant's father. Plaintiff's wife was not called, and it is impossible to hold that her statement, even if it was made, was true. The District Judge should have dismissed from his mind this hearsay evidence, which

at the most could only have been utilized to explain the subsequent conduct of the plaintiff, who ran away from his village thereafter.

In a recent case, *Saravanamuttu v. Kanagasabai*² Howard C.J., after dealing with previous cases, said :

“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. There must be the formulation of a charge, or something in the way of solicitation, request or incitement of proceedings.”

The decision in this case is, I think, very largely in conformity with the decision of the Privy Council, in *Tewari v. Bhagat Singh*³ cited to us on behalf of the plaintiff. I may cite this passage :

“If a complainant did not go beyond giving what he believed to be correct information to the Police and the Police, without further interference on his part (except giving such honest assistance as they might require) thought fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But, if the charge was false to the knowledge of the complainant, if he misled the Police by bringing suborned witnesses to support it, if he influenced the Police to assist him in sending an innocent man for trial before the Magistrate, it would be equally improper to allow him to escape liability because the prosecution had not technically been conducted by him. The question in all cases of this kind must be—Who was the prosecutor? And the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion was not the criterion, the conduct of the complainant, before and after making the charge, must also be taken into consideration.”

In the present case, we do not know what information was given by the defendant to the Police. Whether it included the formulation of a charge, or was based upon his personal knowledge, or was believed by him, we cannot say, because there is no evidence either way on those points. There is nothing to show that he exercised any influence upon the actions of the Police. There is nothing to suggest that he suborned witnesses. In this state of the evidence, I think there is an important and vital element missing in the case of the plaintiff. It is not possible on the whole of the evidence to hold that the defendant was the real prosecutor.

The appeal is allowed with costs, and the plaintiff's action dismissed with costs.

JAYETILEKE J.—I agree.

Appeal allowed.

¹43 N. L. R. 357.

²(1907-8) 24 T. L. R. 884.