Hilary Term
[2017] UKPC 3
Privy Council Appeal No 0014 of 2014

JUDGMENT

Sandra Juman (Appellant) *v* The Attorney General of Trinidad and Tobago and another (Respondents) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Mance
Lord Reed
Lord Hughes
Lord Hodge
Lord Toulson

JUDGMENT GIVEN ON

20 February 2017

Heard on 1 December 2016

Appellant	*Respondents*
James Badenoch QC Ted Roopnarine Suzanne Lambert Prakash Ramadhar Mickey Dindial (Instructed by Gowling WLG (UK) LLP (London))	Tom Richards (Instructed by Charles Russell Speechlys LLP)

LORD TOULSON:

1. On 1 October 1998 the appellant, Ms Sandra Juman, was arrested with others by the first respondent, Police Constable Abbott, at premises in Pond Street, La Romain, Trinidad, on suspicion of unlawful possession of firearms and ammunition found there. She and the others arrested were taken to the San Fernando Police Station and charged by the first respondent with having in their possession two firearms and one round of ammunition without a licence, contrary to section 6(1) of the Firearms Act, Chapter 16.01 of the Laws of Trinidad and Tobago.

2. The appellant and the others were kept in custody overnight and taken next day before a magistrate, who ordered her release on bail. After about 20 appearances at court the case was tried on 10 August 2000 and the charges against the appellant were dismissed at the close of the prosecution's evidence on a submission of no case to answer.

3. On 18 April 2001 the appellant began civil proceedings against PC Abbott and the Attorney General, the second respondent, as vicariously liable for the conduct of PC Abbott, on a variety of grounds including malicious prosecution. Over seven years later the action was tried by Shah J. The evidence was heard on 20 October 2008 and submissions were made on 4 December 2008, after which the judge delivered an immediate oral judgment. He upheld her claim for false imprisonment, for which he awarded damages of $17,000, but dismissed her claim for malicious prosecution. The judge found that he was satisfied on the evidence that the first respondent acted with reasonable and probable cause, and without malice, in charging the appellant. It is well established that in order to succeed in a claim of malicious prosecution the claimant must establish that the defendant acted both (a) without reasonable and probable cause and (b) maliciously, as those expressions have been interpreted.

4. Each side appealed against different aspects of the judgment. The appeal was first heard on 4 May 2012 before Kangaloo, Narine and Smith JJA and was adjourned part heard for further submission. Unfortunately Kangaloo JA died, and the appeal was re-heard on 23 May 2013 before Mendonca, Smith and Rajnauth-Lee JJA. At the re-hearing the only issue pursued was the appellant's appeal against the dismissal of her claim for malicious prosecution. At the close of the arguments the court dismissed Ms Juman's appeal. Rajnauth-Lee JA gave brief oral reasons, prefaced by stating that, if it became necessary, the court would reduce its reasons into writing with amplification.

5. On 11 November 2013 the appellant obtained final leave to appeal as of right to the Board. On 20 December 2013 the Court of Appeal gave a fuller written statement

of its reasons for dismissing the appeal, delivered by Rajnauth-Lee JA. The appellant seeks to challenge the findings of the trial judge and the Court of Appeal on the existence of reasonable and probable cause and absence of malice.

Firearms Act

6. Part 1 of the Act creates various offences, including unlicensed possession of a firearm or ammunition. Section 5(2) provided at the material time:

> "In any prosecution for an offence under this Part … a person who is proved to have had in his possession or under his control anything whatsoever in or on which is found any firearm or ammunition shall, until the contrary is proved, be deemed to have been in possession of such firearm or ammunition."

The search of the premises

7. The first respondent was told by an informer that a man called Steve Seebaran had arms and ammunition at the premises. He obtained a warrant to search the premises. The search was carried out by the first respondent and three other police officers. Apart from the police, there were six people present, including Mr Seebaran and the appellant. The evidence of the first respondent in the criminal and civil proceedings was that he asked if they all lived on the premises and they all said that they did. He then told them that the police were going to carry out a search. During the search the appellant was assisted by someone else because she is blind, as the first respondent realised by the end of the search. The building was a two storey wooden structure with the two floors connected by an external staircase. The appellant was downstairs at the time of the arrival of the police. The firearms and ammunition were found in a bag in a downstairs living room. Mr Seebaran immediately said that they were his and that he had brought them to the premises. The six people were all arrested and taken to the police station, where they were charged. Mr Seebaran pleaded guilty on his first appearance before a magistrate.

Shah J's findings

8. The first respondent said in his witness statement, at para 8, that his reasons for charging the appellant were that 1) he found her in occupation of the premises, where she admitted that she lived, and 2) it was his understanding of the Firearms Act that it was sufficient to prove that a person occupied premises where arms or ammunition were found for the court to be able to find that the person was in possession of them. In his evidence in the criminal proceedings the first respondent had spoken of the premises

having an upstairs and downstairs apartment, but in his evidence in the civil action he said that nobody had suggested, and he did not believe, that they were separate and independent residences. There was only one kitchen area, which was upstairs, and likewise there was only one dining area, which was upstairs. The appellant's case was that the two floors were separate premises and that she occupied only the upstairs apartment, but the judge said that after hearing the evidence in its entirety he had come to the "inescapable conclusion that both the upstairs and downstairs of this house constituted one household." He added that those who appreciated the subtleties that underpin the culture of Trinidad and Tobago, especially persons of Indian descent, would have no difficulty in understanding that the persons living upstairs and downstairs were living together as one family. The judge also rejected the arguments that Mr Seebaran's admission of possession, and the appellant's blindness, meant that the first respondent could not have reasonable cause to charge her with joint possession. He found that, having seen the various witnesses in the witness box, he was "quite satisfied that PC Abbott acted with the requisite reasonable and probable cause in charging the [appellant] and all those present and his actions were not tainted with the brush of malice."

Court of Appeal's review of the judge's findings

9. The transcript shows that counsel then appearing for the appellant did not challenge the trial judge's finding that the appellant was an occupier of the whole premises, nor did he dispute that the words "had in his possession or under his control anything whatsoever in or on which is found any firearm or ammunition" in section 5(2) of the Firearms Act were apt to include immovable property. (At the first hearing of the appeal he briefly suggested that the possession must be exclusive, but he did not pursue that argument.) His argument was that the deeming effect of section 5(2) was negated by a combination of facts known to the first respondent, and that in the factual circumstances he had no reasonable and probable cause to charge the appellant. The particular facts on which he relied were that: 1) the search was prompted by intelligence that Mr Seebaran was in possession of firearms and ammunition at the premises; 2) when the firearms and ammunition were found, Mr Seebaran immediately admitted that they were his; and 3) the appellant was blind. He further submitted, a fortiori, that there was no reasonable and probable cause to continue the prosecution of the appellant after Mr Seebaran pleaded guilty. As to malice, he submitted that this could be inferred from the absence of reasonable and probable cause.

10. In both her ex tempore judgment and her fuller written reasons Rajnauth-Lee JA said that the test of reasonable and probable cause was whether the charging officer believed that there was a case fit to be tried and whether there was objectively evidence to justify such a belief, citing *Glinski v McIver* [1962] AC 726. The court accepted that the first respondent held an honest belief that there was a case against the appellant fit to be tried, because he believed her to be an occupant of a single residence on which the firearms and ammunition were found and because of his belief as to the effect of the

deeming provision of the Act; and that it was reasonably open to him to form that view. The appellant could rebut the deeming provision by showing that she did not know or suspect that the offending article was in or on the thing referred to, but that would be a matter for the magistrate to decide. As to the factual circumstances relied on by the appellant, more than one person could be in possession or control of a firearm, and the appellant's blindness did not inevitably lead to the conclusion that she was ignorant about the firearms and ammunition. Rajnauth-Lee JA said that the question of malice therefore became irrelevant, but that the court had considered it. While an inference of malice might in some cases be drawn from an absence of reasonable and probable cause, nothing in the cross examination of the first respondent had cast doubt on what he said in para 8 of his witness statement, and the court did not consider that any improper motive could be inferred in the circumstances of this case.

Grounds of appeal to the Board

11. Mr James Badenoch QC for the appellant submitted that the evidence fell altogether short of showing that there was reasonable and probable cause to prosecute her. He accepted that if the first respondent had reasonable cause to believe that the appellant was an occupant of the whole premises including the downstairs room where the firearms and ammunition were found, the deeming provision in section 5(2) would have been relevant, but he submitted that there was no evidence that the six people all occupied the whole premises. The fact that the appellant was downstairs at the time of the arrival of the police did not mean that she was more than a visitor, and no attempt was made to find out which part she occupied.

12. As to malice, it was not suggested that the first respondent had a positive improper motive, but Mr Badenoch submitted that his decision to prosecute her was reckless and unthinking; he simply assumed that the statutory deeming provision enabled him to charge her, without making basic inquiries into the circumstances. The decision to prosecute, in Mr Badenoch's submission, did not proceed from a reasonably formed belief in adequately investigated evidence, but from an unreasoned and unjustified belief that he could. It was submitted that such reckless indifference was equivalent to malice. Mr Badenoch relied in particular on a passage from the decision of the Board in the admiralty case of *The Evangelismos* (1858) Swa 378, 12 Moore PC 352 (cited with approval by Lord Clarke in *Willers v Joyce* [2016] 3 WLR 477, para 69), where it was said that "there may be cases in which there is either mala fides or that crassa negligentia, which implies malice, which would justify a Court of Admiralty giving damages [for wrongful arrest of a vessel], as in an action brought at Common law damages may be obtained".

Analysis

13. The Court of Appeal accurately summarised the test of reasonable and probable cause. (See *Willers v Joyce*, para 54.) The appellant's complaint is all about how the trial judge and the Court of Appeal applied it on the evidence. Mr Badenoch's forcefully presented submissions amounted to a re-argument of the case on its facts.

14. An appeal to the Board is a review, not a rehearing. The limited role of an appellate court when asked to review the factual findings of a lower court has been expounded and emphasised in authorities too many to mention. Their effect was summarised by Lord Reed in *Henderson v Foxwith Investments Ltd* [2014] 1 WLR 2600, para 67, as follows:

> "in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

15. Further, it is the well-established practice of the Board not to interfere with concurrent findings of fact of two lower tribunals. The practice is not cast-iron, but it will be departed from only in cases of a most unusual nature: *Devi v Roy* [1946] AC 508, 521, and *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11, paras 4 to 8.

16. This case is far removed from one where it would be right for the Board to depart from that settled practice. There was nothing complex or exceptional about the case. The trial judge heard the evidence, accepted the first respondent's account of the facts and his reasons for prosecuting the appellant, considered that he acted with reasonable cause and acquitted him of malice. The Court of Appeal considered carefully the criticisms made by the appellant, examined the evidence (including the judge's note of the first respondent's cross examination) and came to the same conclusion as the judge.

17. The question of malice therefore does not arise, but the Board would reject the appellant's attempt to treat the first respondent's alleged failure to carry out sufficient investigation before charging the appellant as amounting or equivalent to malice; or similarly the attempt to treat "recklessness" as tantamount to malice. "Reckless" is a word which can bear a variety of meanings in different contexts. It is not a suitable yardstick for the element of malice in malicious prosecution.

18. The essence of malice was described in the leading judgment in *Willers v Joyce* at para 55:

> "As applied to malicious prosecution, it requires the claimant to prove that the defendant deliberately misused the process of the court. The most obvious case is where the claimant can prove that the defendant brought the proceedings in the knowledge that they were without foundation … But the authorities show that there may be other instances of abuse. A person, for example, may be indifferent whether the allegation is supportable and may bring the proceedings, not for the bona fide purpose of trying that issue, but to secure some extraneous benefit to which he has no colour of a right. The critical feature which has to be proved is that the proceedings instituted by the defendant were not a bona fide use of the court's process."

19. A failure to take steps which it would be elementary for any reasonable person to take before instituting proceedings might in some circumstances serve evidentially as a pointer towards deliberate misuse of the court's process, but sloppiness of itself is very different from malice. In the present case there was no cause to doubt that the first respondent believed, rightly or wrongly, that there were sufficient grounds to prosecute, or that the object of charging the appellant was to place the matter before the magistrate for the court to decide the question of her guilt; and there was no suggestion that he had any ulterior improper motive. Even if the court had decided that objectively the first respondent lacked reasonable and probable cause to prosecute the appellant, there was no basis to hold that he acted with malice.

20. The appeal is therefore dismissed. The parties should make any written submission on costs within 28 days.