



Michaelmas Term
[2022] UKPC 53
Privy Council Appeal No 0067 of 2017

JUDGMENT

**Kevin Stuart (Appellant) v Attorney General of
Trinidad and Tobago (Respondent) (Trinidad and
Tobago)**

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

before

**Lord Sales
Lord Hamblen
Lord Leggatt
Lord Burrows
Lord Stephens**

**JUDGMENT GIVEN ON
15 December 2022**

Heard on 15 November 2022

Appellant

Ernest H Koylass SC

Kevin Ratiram

Debbie Roopchand

(Instructed by Duke Street Chambers (San Fernando))

Respondent

Thomas Roe KC

(Instructed by Charles Russell Speechlys LLP (London))

LORD BURROWS (with whom Lord Sales, Lord Hamblen, Lord Leggatt and Lord Stephens agree):

1. Introduction

1. The central question on this appeal is whether the Court of Appeal was entitled to overturn certain factual findings of the trial judge in relation to the tort of malicious prosecution. The tort of malicious prosecution has five elements all of which must be proved on the balance of probabilities by a claimant: (1) that the defendant prosecuted the claimant (whether by criminal or civil proceedings); (2) that the prosecution ended in the claimant's favour; (3) that the prosecution lacked reasonable and probable cause; (4) that the defendant acted maliciously; and (5) that the claimant suffered damage. See, eg, *Clerk and Lindsell on Torts* (2020, 23rd edition) para 15-13; *Winfield and Jolowicz on Tort* (2020, 20th edition) para 20-006. This appeal is concerned with factual findings made by Charles J, but overturned by the Court of Appeal, in respect of the third and fourth of those elements.

2. Charles J (CV2012-00113, 30 June 2015) held that the defendant, the Attorney General of Trinidad and Tobago, was vicariously liable (under the State Liability and Proceedings Act) for the malicious prosecution of the claimant, Kevin Stuart, by a police officer, PC Nicholas Phillips. She found, on the facts, that PC Phillips had acted maliciously and that was closely linked to her finding that, in respect of the third element of the tort, PC Phillips did not have the relevant honest belief. The Court of Appeal (Bereaux JA giving the judgment, with whom Moosai and Jones JJA agreed: Civil Appeal No P162 of 2015, 25 July 2017) overturned her findings of fact on lack of honest belief and malice and decided, as a consequence, that the tort of malicious prosecution was not made out. The claimant now appeals to the Board.

3. It is important to note at the outset that it was not suggested by the Court of Appeal, and has not been suggested by either party on this appeal, that Charles J misdirected herself on the law in respect of malicious prosecution. The sole dispute is whether the Court of Appeal was correct to have overturned Charles J's findings of fact on lack of honest belief and malice.

2. Central facts that are not in dispute

4. The Anti-Gang Act (No 10 of 2011) came into force in Trinidad and Tobago on 15 August 2011. Less than a week later, on 21 August 2011, a state of emergency was declared in Trinidad and Tobago.

5. On 27 August 2011, the claimant was arrested at his home in Marabella by a group of police officers, including PC Phillips. The arrest was in purported exercise of the powers conferred on a police officer, by section 12(1) of the Anti-Gang Act, to arrest a person whom the police officer reasonably believed to be a gang member or to have committed an offence under that Act.

6. The claimant was taken in custody to Marabella Police Station. On 28 August 2011, he was interviewed as to his alleged involvement in gang-related activities, which the claimant denied.

7. On 29 August 2011, PC Phillips charged the claimant with the offence of being a gang member (being such a member on Saturday 27 August 2011, at Union Park East, Marabella) contrary to section 5(1)(a) of the Anti-Gang Act.

8. Later on the same day (29 August 2011), the claimant was brought before a magistrate. On the charge being read to him, he pleaded "Not Guilty". He was denied bail pursuant to the provisions of the Bail (Amendment) Act 2011 (under which bail was not to be granted to a person charged with an offence under the Anti-Gang Act) and was remanded in custody until 29 September 2011.

9. On 28 September 2011, the Director of Public Prosecutions ("DPP") filed a notice discontinuing the proceedings against the claimant. On 29 September 2011, the claimant appeared before the Magistrates' Court. The DPP, for the prosecution, informed the court of his filing of a notice of discontinuance expressed to be on the basis of there being insufficient evidence to support the charge. The magistrate thereupon formally discharged the claimant who was released from custody later that day.

10. On 11 January 2012, the claimant commenced an action in the High Court for false imprisonment, including wrongful arrest, and malicious prosecution.

3. The judgment of Charles J

11. Charles J held that the defendant was liable for false imprisonment, including wrongful arrest, and malicious prosecution. The Board is not concerned with the false imprisonment because Charles J's decision on that tort (covering the period between the arrest and being charged and brought before the magistrate) was upheld by the Court of Appeal and there has been no cross-appeal by the defendant against that ruling. Charles J awarded for both torts a single sum comprising

compensatory general damages (including aggravated damages) of \$300,000 plus exemplary damages of \$50,000 (all the references to currency in this judgment are to the Trinidad and Tobago dollar). Additionally, she awarded \$1,800 as special damages for loss of earnings (but it was accepted by the claimant in the Court of Appeal that no special damages should have been awarded).

12. As regards the tort of malicious prosecution, the two elements in dispute before Charles J were whether the claimant had proved that PC Phillips lacked reasonable and probable cause to charge the claimant of being a member of a gang, contrary to section 5(1)(a) of the Anti-Gang Act; and whether the claimant had proved that PC Phillips had acted maliciously. Charles J decided that both those elements had been proved.

13. Taking first the “lack of reasonable and probable cause” element, there is an objective aspect to this (whether PC Phillips had reasonable grounds for bringing the case to court) and a subjective aspect (whether PC Phillips had the honest belief that this was a proper case to bring to court). The claimant would succeed on this element if he could prove that PC Phillips did not have the required reasonable grounds or lacked the required honest belief. It would appear that the objective aspect of this was not seriously in dispute and hence was not focused on, as a separate matter, by Charles J. After all, as Charles J pointed out at para 40:

“... when Assistant Superintendent of Police Mohammed finally carried out his duty and reviewed the file submitted by Police Constable Phillips, he immediately realised that there was not sufficient evidence to charge the Claimant...”

As has already been mentioned, it is also an agreed fact that the DPP dropped the case before the magistrate, at the first substantive hearing, for insufficiency of evidence. In the light of those facts, it was a straightforward conclusion that PC Phillips did not have reasonable grounds for the charge.

14. But central to this appeal is that, irrespective of that objective aspect, Charles J found – and this was a factual finding – that PC Phillips lacked the required honest belief. In deciding this, Charles J had the benefit of the live evidence of PC Phillips as well as his witness statement. She found him a very unsatisfactory witness. In important respects, his live evidence was inconsistent with his witness statement. In particular, his live evidence contained new important details that had not been included in his statement. These included that he had seen the claimant selling drugs between February and August 2011 albeit that there was no available record of this (eg in the station diary) and he had never sought a warrant for the claimant’s arrest;

that he and other police officers had attempted to arrest the claimant on 5-10 previous occasions for selling drugs but that the claimant had evaded arrest by running away; that search warrants were executed at the premises of the claimant, albeit that no drugs were found, but he could not account for there being no record of those search warrants; that he had interviewed the claimant's wife, who he alleged was a gang member, on 29 August 2011, but he could not remember her name and there was no available record of this interview. He also claimed to have noted down in his personal diary important details of some of the above events but he could not now locate that personal diary. His evidence was also inconsistent with the evidence of Assistant Superintendent of Police Mohammed because PC Phillips said that he had submitted a written report or file to that officer before proceeding to charge the claimant: but Assistant Superintendent Mohammad testified that he had not received anything written from PC Phillips before the claimant was charged.

15. Charles J concluded that PC Phillips' testimony "was riddled with so many inconsistencies that I do not consider him to be either creditworthy or reliable" (para 45). After examining the defects in his evidence, she went on to say the following in paras 47-51:

"[47] The inconsistencies in Police Constable Phillips' evidence all relate to the important issue of whether there was reasonable and probable cause to charge the Claimant and whether Police Constable Phillips could have had an honest belief in the guilt of the Claimant in respect of the offence for which he was charged. The fact that this officer throughout his testimony attempted to buttress, strengthen and fabricate new evidence against the Claimant is a strong basis for concluding that he fabricated the case against the Claimant and that in fact he had no reasonable or probable cause to charge him. I also form the view, based on the many lies and inconsistencies in his evidence, that the prosecution of this Claimant was malicious in that there was an indirect or improper motive for proceeding with the charge against him. The fact that he was not prepared to rely on the information that he received that the Claimant's wife was involved in the trafficking of drugs and gang-related activity lends support, in my view, to the conclusion that he either had no such information or that even he did not consider such information to be reliable. ...

[48] I therefore hold that there was no reasonable and probable cause for Police Constable Phillips to charge the Claimant and to prosecute him for the offence of being a gang member involved in the trafficking of narcotics contrary to the Anti-Gang Act.

[49] I also consider that the fact that the Claimant had had previous convictions for possession and trafficking in drugs cannot form the basis for reasonable suspicion that he was a gang member involved in the trafficking of narcotics. The Claimant's record reveals that he was last convicted in 2006 for trafficking in marijuana and charged in 2009 for possession of marijuana. It was incumbent upon Police Constable Phillips as instructed by Assistant Superintendent of Police Mohammed to obtain evidence of the Claimant's involvement in offences against the Anti-Gang Act from the date that it came into force. No such evidence which could form the basis of an honest belief that the Claimant was involved in gang activity was produced by the Defendant.

[50] In my view on the facts of this case the mere receipt of information from unnamed informants without more cannot establish reasonable and probable cause to ... charge the Claimant.

[51] I also hold that the prosecution of the Claimant was malicious in that Police Constable Phillips ... [was] motivated by ... improper motives."

16. It can therefore be seen that Charles J assessed PC Phillips as being an untruthful witness and as having made up some aspects of his evidence. And in the light of this, she found that he did not have the required honest belief for the purposes of the "lack of reasonable and probable cause" element of the tort of malicious prosecution. She also concluded from the lies and inconsistencies in PC Phillips' evidence that the prosecution was malicious (ie that the "malice" element of the tort had been proved) in the sense that there was an improper motive for prosecuting the claimant. An improper motive is a motive other than bringing the claimant to justice. Charles J was in effect inferring malice from her finding that PC Phillips lacked the relevant honest belief. That malice can be inferred from a lack of reasonable and probable cause in a proper case was recognised in, eg, *Williamson v Attorney General of Trinidad and Tobago* [2014] UKPC 29 at para 13: see also, eg,

Clerk and Lindsell on Torts at para 15-57. Moreover, it was not disputed – and counsel for the defendant accepted this point in answer to a question from the Board – that, on the facts of this case, it was justifiable for Charles J to have drawn the inference of malice once she had found that PC Phillips lacked the required honest belief. It was not incumbent on the claimant to specify and prove the precise motive for the prosecution because, on the facts of this case, given the lack of honest belief, the motive could not have been a proper one.

17. It should also be borne in mind that Charles J would of course have been well aware of the background to the police activity in this case in the sense that she would have known that the Anti-Gang Act came into force on 15 August 2011 and that, on 21 August 2011, a state of emergency was declared in Trinidad and Tobago. There was the evidence of the station record indicating that on the same night as the claimant was arrested the police had attempted (without success) to arrest a number of other suspects in relation to gang-related activities (although there was no suggestion that the claimant was connected to those other suspects). There was also the following exchange, in the cross-examination of PC Phillips, in which counsel for the claimant may be regarded as having tried to pinpoint the precise motive for the prosecution of the claimant:

“Q: ... You are aware that on 21st August 2011 a state of emergency was declared in Trinidad and Tobago?

A: Correct Sir

Q: Are you also aware that the Anti-Gang Act came into effect some six days prior to that?

A: Correct Sir

Q: Would you agree that upon the state of emergency being declared you and other police officers who you interacted with began arresting people pursuant to that Act?

A: Correct Sir

Q: Did you, you yourself, feel pressured to arrest people pursuant to the Anti-Gang Act?

A: No Sir

...

Q: From your experience during the state of emergency would you say that there was a higher arrest rate than prior to the state of emergency? From your experience?

A: Yes. From my experience I would agree.

...

Q: I put it to you that at the time you charged the Claimant you had no evidence that he had been a member of a gang on 27th August 2011.

A: That is incorrect Sir.

Q: In fact you initially arrested him because he was known to the police as having a criminal past. That was the real motive for his arrest.

A: Could you repeat that again Sir.

Q: I'm saying that you arrested him initially because he was known to the police for having a criminal past, always getting charged and things like that. It was based on his past and not what you actually saw.

A: No Sir. That is incorrect Sir."

18. Finally, it should be noted that Charles J also found that PC Phillips' senior officers, Assistant Superintendent of Police Mohammed and Assistant Commissioner of Police Fredericks, had improper motives and were therefore acting maliciously (see para 51). But it is not in dispute that malice by the charging officer, PC Phillips, alone was sufficient to establish the "malice" element of the tort of malicious prosecution so that this additional finding was unnecessary. At the hearing before us,

counsel for the claimant made clear that no reliance was being placed on the beliefs or motives of PC Phillips' senior officers. The claim stands or falls purely in respect of the belief and motive of PC Phillips, as the charging officer, so that the Board can put to one side, as irrelevant to what it has to decide, the beliefs and motives of PC Phillips' senior officers.

4. The judgment of the Court of Appeal

19. The Court of Appeal overturned the decision of Charles J in respect of the tort of malicious prosecution. In contrast (and, as has been explained in para 11 above, the Board is not concerned with this), the Court of Appeal upheld her decision in relation to the tort of false imprisonment (because PC Phillips, as the arresting officer, did not have reasonable cause to believe that the claimant had committed an offence under the Anti-Gang Act) covering the period between the arrest and being charged and brought before the magistrate. The compensatory damages were reduced to \$50,000 and no exemplary damages were awarded.

20. The central question facing the Court of Appeal (in relation to malicious prosecution) was whether it was entitled to overturn the judge's findings of fact as to PC Phillips' malice and, related to that, his lack of honest belief. Bereaux JA correctly said that that would only be justified if the Court of Appeal were to "identify a material error in the judge's evaluation of the evidence which undermined the judge's conclusions" (see para 12). That is almost a direct quote from the leading case of *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* ("*Beacon Insurance*") [2014] UKPC 21, [2014] 4 All ER 418, para 12, where in the same paragraph it was explained by Lord Hodge (giving the judgment of the Board) that this is consistent with requiring the appellate court to be satisfied, in relation to findings of fact, that the trial judge was "plainly wrong".

21. Bereaux JA considered that, as regards PC Phillips (as opposed to his senior officers), there were two material errors in the reasoning of Charles J which entitled the Court of Appeal to consider afresh whether there was a lack of honest belief and malice. They were as follows:

- (i) Charles J failed to consider the evidence in its entirety (paras 11(i) and 12). More specifically, she failed to consider, and weigh in the balance, the evidence of the claimant (except on the issue of damages) (see paras 15 and 29).

(ii) Charles J misconstrued the evidence of PC Phillips in cross-examination (see para 12). In particular, she had incorrectly treated his admissions as inconsistencies and had incorrectly imputed that he had fabricated evidence (see paras 30-31 and 37). Bereaux JA said this at para 31:

“The judge ... concluded without any proper basis that these admissions demonstrated that PC Phillips fabricated evidence against Stuart. Certainly there were admissions by PC Phillips which may have affected his credibility but it is a quantum leap to impute that he fabricated evidence. In the first place, fabrication of evidence by PC Phillips was never pleaded by the [claimant]. Neither did [counsel for the claimant] specifically put to PC Phillips in cross-examination that he had fabricated evidence.”

22. The other main criticism made by Bereaux JA of Charles J’s judgment is that she had found, without supporting evidence, that the senior officers (Assistant Superintendent of Police Mohammed and Assistant Commissioner of Police Fredericks) were also motivated by malice (see para 32 of Bereaux JA’s judgment). It has been explained at para 18 above why that is not relevant on this appeal. Bereaux JA went on to indicate that, in any event, as a matter of law, it was only the motive of PC Phillips as the charging officer that could possibly count. It is not clear that Bereaux JA was correct on this. On the face of it, but without having heard any submissions on the point, it is the Board’s view that, if the senior officers were authorising the bringing of the charge by PC Phillips and themselves had an improper motive, that might have constituted relevant malice. In the Board’s view, it is also not clear that Bereaux JA was correct (at para 39) to exonerate the senior officers from acting in dereliction of duty in this case given that they did not insist on a written (rather than oral) report from PC Phillips before the charge was made. But, as has been explained, none of this is relevant to what the Board has to decide.

5. Was the Court of Appeal entitled to overturn the trial judge’s findings of fact on lack of honest belief and malice?

23. In the Board’s view, the Court of Appeal should not have overturned Charles J’s findings of fact on PC Phillips’ lack of honest belief and malice. This is for the following five reasons.

(i) As was made clear in *Beacon Insurance*, in applying the “plainly wrong” test, an appellate court should be especially slow to intervene where the findings of fact turn on an assessment of the live evidence of a witness. This is

because the trial judge has a major advantage over the appellate court which has not seen and heard that witness. Lord Hodge, giving the judgment of the Board, said the following at para 17:

“Where the honesty of a witness is a central issue in the case, one is close to the former end of the spectrum [where an appellate court can hardly ever interfere] as the advantage which the trial judge has had in assessing the credibility and reliability of oral evidence is not available to the appellate court.”

This is squarely such a case.

(ii) Bereaux JA’s criticism of Charles J for not having taken into account the entirety of the evidence is misplaced. There is nothing to suggest that she did not take into account the whole of the evidence in coming to her findings. Indeed, as was made clear by Lord Reed in the Supreme Court in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600, para 48:

“An appellate court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration...”

(iii) Bereaux JA specifically said that Charles J had not taken into account the claimant’s evidence (other than in relation to damages). But Bereaux JA did not make clear which aspects of the claimant’s evidence were relevant in relation to PC Phillips’ state of mind. On the face of it, most of the claimant’s evidence was either neutral or exculpatory. It might be said that the three previous convictions of the claimant (two for selling drugs) had some relevance. But they were expressly mentioned by Charles J at paras 6(ii) and 49. In the latter paragraph, she can be fairly interpreted as having considered the relevance of those convictions and as having concluded, as she was entitled to conclude, that they were essentially irrelevant to the offence under the Anti-Gang Act with which the claimant had been charged by PC Phillips.

(iv) Most importantly, Bereaux JA was incorrect to have found fault with Charles J’s view that PC Phillips had fabricated evidence. It was incorrect in this case to draw a sharp distinction between admissions and inconsistencies. It was clear from his cross-examination that PC Phillips’ witness statement was in several respects inaccurate and incomplete and some of his evidence was

plainly not credible. Charles J, as the judge who heard and saw his evidence being given live, was fully entitled to regard him as untruthful and as being prepared to make up evidence in order to bolster his case. There was no leap, let alone a quantum leap, in her reasoning. Moreover, although it was not directly put to PC Phillips that he was fabricating evidence, this was the clear implication from the following questions put in cross-examination:

“Q: I put it to you that on no occasion prior to August 27th 2011 did you ever try to arrest the Claimant as you stated?

A: That is incorrect Sir.

Q: At no time did you ever witness him engaging in that activity that you referred to him giving people things and getting something in return the way you described it?

A: Incorrect Sir.”

The Board accepts that the judgment of Charles J would have been improved if she had explicitly recognised that an essentially honest witness may lie so as to bolster a case that is true. However, it is not the role of an appellate court to overturn a judgment merely because it is not as clearly or fully or perfectly expressed as would be ideal.

(v) More generally, in contrast to Charles J, Bereaux JA may be thought to have lost sight of the weakness of the charge brought against the claimant when considering malicious prosecution. The case against the claimant may be said to have turned on three central elements all of which were explicitly dealt with in Charles J’s judgment: PC Phillips’ own evidence which was discredited (dealt with in paras 41-47 of her judgment); the past convictions of the claimant which were essentially irrelevant to the charge under the Anti-Gang Act (dealt with in para 49); and the information from unnamed informants which would almost certainly be inadmissible evidence (dealt with in para 50). It is not at all surprising therefore that the case was dropped as soon as it was properly looked at (see para 13 above).

(vi) It is the Board’s view that, with respect, Bereaux JA may have fallen into the error of overturning Charles J simply because his assessment of the evidence was different from hers. At paras 37-39 he made clear that, on his

assessment of the evidence, what had happened here was not malicious but rather constituted incorrect but conscientious conduct by an inexperienced police officer. But it was not open to Bereaux JA to overturn Charles J merely because he assessed the evidence in a different way to her. The assessment of the evidence and the consequent findings of fact were pre-eminently a matter for the trial judge.

24. For these reasons, the Board concludes that the Court of Appeal should not have overturned Charles J's findings of fact on PC Phillips' lack of honest belief and malice.

6. A subsidiary point on the law as to lack of honest belief

25. As was indicated at the outset (see para 3 above), this is not a case in which the trial judge is alleged to have misdirected herself on the law applicable to malicious prosecution.

26. Nevertheless, and although nothing turns on it in this case, there is one point on the law which it is helpful to clarify. This concerns the question as to what the police officer's honest (and reasonably held) belief must be about in the context of deciding whether there is a lack of reasonable and probable cause. It has commonly been stated that the honest belief must be as to the accused's guilt in respect of the offence charged: see *Hicks v Faulkner* (1878) 8 QBD 167, 171, per Hawkins J, which was approved by the House of Lords in *Herniman v Smith* [1938] AC 305. But in the Board's view, the principled and correct approach was articulated by Lord Denning in the House of Lords in *Glinski v McIver* [1962] AC 726. He said at pp 758-759:

“[T]he word 'guilty' is apt to be misleading. It suggests that in order to have reasonable and probable cause, a man who brings a prosecution, be he a police officer or a private individual, must, at his peril, believe in the *guilt* of the accused. That he must be sure of it, as a jury must, before they convict. Whereas *in truth he has only to be satisfied that there is a proper case to lay before the court.* ... After all, he cannot judge whether the witnesses are telling the truth. He cannot know what defences the accused may set up. Guilt or innocence is for the tribunal and not for him ... So also with a police officer. He is concerned to bring to trial every man who should be put on trial, but he is not concerned to convict him. ... No, *the truth is that a police officer is only concerned to see that there is a case proper to*

be laid before the court." (Apart from second sentence, emphasis added)

27. The trial judge set out that passage in full in the section of her judgment dealing with the law. But when it came to applying the law to the facts, she slipped back into the language of whether PC Phillips had an honest belief as to the guilt of the accused in respect of the offence charged (see para 47). Although Bereaux JA at one point also used the language of the police officer needing to have an honest belief in the accused's guilt (para 27(i)), he stated the test more accurately, and consistently with Lord Denning's formulation, in the following two passages at paras 27 and 38 respectively:

"Two questions thus arise: whether PC Phillips had an honest belief that on the material which was available to him at the time of the charge, there was a fit case to be tried and whether viewed objectively the material on which the charge was founded amounted to reasonable and probable cause to prosecute Stuart." (Emphasis added)

"I can find no basis for doubting that PC Phillips had an honest belief that there was a sufficient basis upon which to charge the respondent, however wrong he might have been. His actions bear out this belief." (Emphasis added)

28. In this case, there is no suggestion that anything turned on the difference between an honest belief that the claimant was guilty of the offence charged and an honest belief that there was a proper case against the claimant to bring to court in respect of the offence charged. That is, it can safely be inferred that Charles J would have reached the identical conclusion whichever of the two formulations was being applied.

7. Conclusion

29. For all the reasons given, the Board allows the appeal. The judgment and orders of Charles J will therefore be restored (with the exception of the award of special damages).