Trinity Term
[2023] UKPC 30
Privy Council Appeal No 0057 of 2022

JUDGMENT

Matadai Roopnarine (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 Hodge
Lord Lloyd-Jones
Lord Hamblen
Lord Leggatt
Lady Rose

JUDGMENT GIVEN ON
27 July 2023

Heard on 7 June 2023

Appellant
Anand Ramlogan SC
Kate O'Raghallaigh
Adam Riley
(Instructed by Robert Abdool-Mitchell of Freedom Law Chambers (San Fernando, Trinidad))

Respondent
Robert Strang
(Instructed by Charles Russell Speechlys LLP (London))

LORD HAMBLEN:

1. This appeal concerns what is necessary to establish a case of malicious prosecution and whether the courts below were wrong to hold that no such case had been made out on the evidence in the present case.

The factual background

2. On 5 February 2000 the appellant, Mr Matadai Roopnarine, was charged with conspiring with others in September 1999 to forge documents in relation to the grant of bail for Gason Pierre, a person charged with drug trafficking offences.

3. On 13 February 2000 at Scarborough Magistrates' Court, Tobago, the appellant pleaded not guilty to the charges and bail was set in the sum of TT$500,000. The appellant was remanded in custody for seven months before he was able to obtain bail.

4. Between 2003 and 2005 the appellant appeared in the Magistrates' Court at various hearings of the preliminary inquiry. During those hearings evidence was given by police witnesses Corporal Mohammed (who had laid the charges against the appellant), Senior Superintendent Piggott (SS Piggott) and Assistant Superintendent Boyd (AS Boyd).

5. In early 2008 Corporal Mohammed died. On 14 April 2008, before the preliminary inquiry had been concluded, notices of discontinuance were filed at the Magistrates' Court by the Director of Public Prosecutions.

6. On 3 May 2011 the appellant issued a claim for malicious prosecution against the respondent Attorney General, as representative of the State. The particulars of claim alleged that: (i) the police had concocted or fabricated evidence against him; (ii) they had failed to investigate the matter properly; (iii) they had attempted to introduce false evidence at the trial; (iv) Corporal Mohammed had failed to conduct proper or sufficient enquiries and had allowed him to be prosecuted based on insufficient or concocted evidence, and had continued the prosecution despite the lack of credible or sufficient evidence; (v) evidence was given in the knowledge that it was false; and (vi) the police acted recklessly in the arrest and prosecution of the appellant.

7. In the Attorney General's defence the following particulars of reasonable and probable cause for bringing the prosecution were provided:

> "I. The Special Investigations Unit of the Criminal Investigations Department was set up in 1999 to probe the corrupt practices if Justices of the Peace and matters relating to the granting of bail. The Unit would review all documentation pertaining to the grant of bail, for example, protocol of deeds, recognisance of bail and other relevant documents.
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> II. Upon examining the paperwork relating to the grant of bail to Ian Cudjoe, Gason Pierre and Krishendath Hajarie, irregularities were noticed. There were three joint owners of the property namely, Samdaye Barlo, Balliram Ramlochan and Roopnarine Ramlochan and all of them would have to consent and stand bail. As a consequence, interviews were conducted and signed statements taken from Balliram Ramlochan and Roopnarine Ramlochan. They denied ever taking bail and denied they were the holders of said passports used in the procedure.
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> III. Additionally, Samdaye Barlo gave a statement that she was approached by Jason, a neighbour, who asked her for her identification card and deed and took her to Tobago without informing her of the reason for the trip. She said that he told her to sign pieces of paper but she did not know she was taking bail and neither of her brothers were with her. A true copy of a statutory declaration of Samdaye Barlo is hereto annexed and marked 'C'.
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> IV. A Certificate of Analysis obtained from the Forensics Department concluded that it was probable that the questioned signatures 'Balliram Ramlochan' on the Oath Justifying Bail #2950/99, the Statutory Declaration and the Recognizance of Bail #2950/99 were executed by the Claimant.
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> V. Statements were also taken from Magistrate Ayres Caesar and Gail Frazer, Acting Assistant, Clerk of the Peace. Checks

were made at the Immigration Department that showed the passport numbers attributed to Balliram Ramlochan and Roopnarine Ramfochan on the bail documents were false."

8. In February 2012 the appellant and the respondent provided lists of documents. The respondent's list included notes of evidence from the preliminary inquiry.

9. In May 2012 witness statements of the appellant, SS Piggott and AS Boyd were filed.

10. The claim was heard in the High Court before Harris J on 19 March 2013. The appellant gave evidence and was cross-examined.

11. At trial the appellant gave evidence which was consistent with his statement of case and witness statement, which included the following:

(1) In or around October 1999 the appellant was approached by a friend, Kenneth Parmassar, who indicated that he knew someone in Tobago who needed help to secure bail.

(2) The appellant asked his friend, Kazim Azim Ali, for his help to secure bail for someone in Tobago, to which he agreed.

(3) Sometime later on a day that the appellant could not remember, the appellant visited Tobago with Kazim, Kenneth and Kenneth's wife and mother-in-law. Upon arrival in Tobago they visited Kentucky Fried Chicken where the appellant remained. The others proceeded to the Scarborough Magistrates' Court. After about two hours everyone returned. Kenneth gave the appellant TT$1,500 and the appellant and Kazim left and returned to Trinidad. He gave Kazim TT$800 and they went home. He never went to the Scarborough Magistrates' Court and never met the Justice of the Peace.

(4) In or about November 1999 the appellant was at home when three police officers visited him and advised that they were in possession of a search warrant. The officers searched the appellant's home for about 15 minutes. A few days later the appellant accompanied the officers to the Freeport Police

Station where he was interviewed by Corporal Mohammed and was informed that he was being investigated for impersonating Balliram Ramlochan and Roopnarine Ramlochan. The appellant protested his innocence. He was asked to provide a hand-writing specimen which he duly did.

(5) On 5 February 2000 police officers once again searched the appellant's home, at or about 5:00 am, and refused to provide a search warrant.

(6) Later the same day, the appellant was arrested at his workplace at the Brechin Castle Sugar Factory and he was taken to the Port of Spain administration building, where he was questioned. He continued to protest his innocence. He was later charged with various conspiracy offences which, eight years later, were discontinued.

12. During cross-examination the appellant accepted that he helped to secure bail for a person named Gason Pierre.

13. At the close of the appellant's case the respondent made a successful submission of no case to answer, having elected to call no evidence, and the claim was dismissed.

The decisions of the lower courts

14. In the written reasons for his decision, the judge, directing himself by reference to the House of Lords decision in *Glinski v McIver* [1962] AC 726 ("*Glinski"*), identified the issue which he had to determine as being "whether what was before the prosecutor, could have led the prosecutor to 'reasonably have concluded' … that there was reasonable and probable cause to proceed with the matter". He found that the appellant had not made out a prima facie case of no reasonable and probable cause, observing that the appellant's evidence went to "show that he had explanation contrary to what's alleged against him and that he was innocent and knew nothing of what he was charged for" but not to showing lack of reasonable and probable cause. On that issue he found that "evidence has not been forthcoming" and so he was not in a position to make any determination. The claim was therefore dismissed.

15. Notice of Appeal was filed on 30 April 2013 but the appeal did not come on for hearing until 21 May 2021, over eight years later. On 20 October 2021 the Court of Appeal gave judgment dismissing the appeal by a majority (Pemberton and Lucky JJA; Smith JA dissenting).

16. Having looked at the evidence led by the appellant "at all angles", the majority decided that the judge was entitled to conclude that there was insufficient evidence to establish a prima facie case of lack of reasonable and probable cause. Their conclusion at para 65 was:

> "…we too find that there was no circumstantial basis that could have been used to cross the threshold of 'slender' evidence. This is not a matter of a weak prima facie case, it was, as found by the trial judge, to be no prima facie case at all."

17. The majority further decided that, since the appellant had failed to establish a prima facie case of lack of reasonable and probable cause, the allegation that the prosecution was actuated by malice must also fail.

18. In his dissenting judgment Smith JA reached a different conclusion on the evidence. He placed particular reliance upon the Board's decision in *Gibbs v Rea* [1998] AC 786 and the weight which can be placed on the silence of a defendant in circumstances calling for a response.

The legal framework

The tort of malicious prosecution

19. As stated in the Board's recent decision in *Stuart v Attorney General of Trinidad and Tobago* [2022] UKPC 53, [2023] 4 WLR 21 ("*Stuart*") at para 1:

> "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,* 23rd ed (2020), para 15-13; *Winfield and Jolowicz on Tort* 20th ed (2020), para 20-006."

20. As explained in *Stuart* at para 26, reasonable and probable cause means an honest belief based on reasonable grounds that there is a proper case to lay before the court – see *Glinski* at pp 758-759 per Lord Denning.

21. Malice means an improper motive. The proper motive for a prosecution is a desire to secure the ends of justice. Malice will be established if it is shown that this was not the motive of the defendant or that something else was. Malice may be inferred from lack of reasonable and probable cause but this will depend on the facts of the individual case – see *Clerk & Lindsell on Torts,* 23rd ed (2020), para 15-57; *Williamson v Attorney General of Trinidad and Tobago* [2014] UKPC 29 at paras 11-13.

Proof of absence of reasonable and probable cause

22. In order to establish that the relevant person did not have an honest belief based on reasonable grounds that there was a proper case to lay before the court it will generally be necessary for the claimant to identify the nature of the information upon which the decision to do so was made. As explained in *Clerk & Lindsell* at para 15-35:

> "The question of reasonable and probable cause may create difficulties in the conduct of a trial: first, it involves the proof of a negative, and secondly, in dealing with it the judge has to take on himself a duty of an exceptional nature. The claimant has, in the first place, to give some evidence tending to establish an absence of reasonable and probable cause which is operating on the mind of the defendant. To do this, the claimant must identify the circumstances in which the prosecution was instituted. It is not enough to prove that the real facts established no criminal liability against him, unless it also appears that those facts were within the personal knowledge of the defendant. If they were not, the claimant must show the nature of the information on which the defendant acted, which is sometimes done by putting in the depositions which were before the magistrate."

23. This is borne out by the cases to which the editors of *Clerk & Lindsell* refer, such as *Abrath v North Eastern Railway Co* (1883) 11 QBD 440 ("*Abrath*") and *Glinski*.

24. In *Abrath* Brett MR at pp 449-450 stated:

> "In order to shew that there was an absence of reasonable and probable cause for instituting the prosecution for conspiracy, I cannot doubt that the plaintiff was bound to give some evidence of the circumstances under which the prosecution was instituted, and I wholly differ from the suggestion that it is sufficient for the plaintiff to shew that he was innocent of conspiracy, and that in the end there was no substantial ground for charging him with conspiracy. If the plaintiff merely proved that, and gave no evidence of the circumstances under which the prosecution was instituted, it seems that the plaintiff would fail; and a judge could not be asked, without some evidence of the circumstances under which the prosecution was instituted, to say that there was an absence of reasonable and probable cause. The evidence, which is to determine the question whether there was reasonable and probable cause, must consist of the existing facts or the circumstances under which the prosecution was instituted."

25. In *Glinski* Lord Denning at p 760 stated:

> "First, there are many cases where the facts and information known to the prosecutor are not in doubt. The plaintiff has himself to put them before the court because the burden is on him to show there was no reasonable and probable cause. The mere fact of acquittal gets him nowhere. He will therefore refer to the depositions which were taken before the magistrate: or he may refer, as here, to the statements taken by the police from the witnesses: and he will argue from thence that there was no reasonable or probable cause."

Submissions of no case in civil proceedings

26. Where in a civil trial a defendant indicates a wish to make a submission of no case to answer following the conclusion of the claimant's case, the defendant will generally be required to elect to call no evidence, as happened in this case. A judge

should rarely, if ever, entertain a submission of no case without requiring such an election – see *Boyce v Wyatt Engineering* [2001] EWCA Civ 692 ("*Boyce"*) at paras 4-6 per Mance LJ and *Benham Ltd v Kythria Investments Ltd* [2003] EWCA Civ 1794 ("*Benham"*) at paras 31-32 per Simon Brown LJ. That is because, if the defendant reserves the right to call evidence, the submission is tantamount to an application for summary judgment made by the defendant in the middle of the trial where the question is whether the claim has a real prospect of success. For the reasons given by Simon Brown LJ in *Benham*, the dangers and disadvantages will almost invariably outweigh any supposed advantages of entertaining such an application rather than proceeding to hear all the evidence.

27. If such an election to call no evidence is made, then the judge decides the case on the balance of probabilities on the evidence before the court as in any other trial. As Mance LJ explained in *Boyce*:

> "…where a defendant is put to his election, that is the end of the matter as regards evidence. The judge will not hear any further evidence which might give cause to reconsider findings made on the basis of the claimant's case alone. The case either fails or succeeds…"

28. Where a defendant calls no evidence, it may be legitimate, depending on the circumstances, to draw adverse inferences from the failure to do so: see eg *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] 1 WLR 2863, para 41. But that will only be so if the claimant has adduced some evidence at least which might reasonably be thought to call for an answer. Sometimes even weak evidence may be sufficient for this purpose. As Simon Brown LJ stated in *Benham* at para 30:

> "…in those cases where the defendant elects to call no evidence…the only issue then is whether the claimant has established his claim on the balance of probabilities. But it must be recognised that he may have done so by establishing no more than a weak *prima facie* case which has then been strengthened to the necessary standard of proof by the adverse inferences to be drawn from the defendant's election. Such adverse inferences can in other words tip the balance of probability in the claimant's favour."

The Issues

29. The agreed issues on the appeal are whether the Court of Appeal erred in holding that the judge was entitled to find that the appellant had failed to lead the evidence necessary to establish (i) that the prosecution of the appellant had been instituted without reasonable and probable cause and (ii) that the prosecution was actuated by malice.

Whether the Court of Appeal erred in holding that the judge was entitled to find that the appellant had failed to lead the evidence necessary to establish that the prosecution of the appellant had been instituted without reasonable and probable cause

30. The respondent submitted that this is an appeal against concurrent findings of fact and, as the Board has frequently stated, its practice is not to engage with challenges to concurrent findings of fact save in exceptional circumstances – see, for example, *Devi v Roy* [1946] AC 508 at 521 and, more recently, *Sancus Financial Holdings Ltd v Holm* [2022] UKPC 41, [2022] 1 WLR 5181, at paras 2-8. The Board rejects that submission.

31. A decision as to whether a prosecution has been brought without reasonable and probable cause involves a value judgment. It does not simply involve the making of primary findings of fact. As such it does not fall within the *Devi v Roy* practice – see *Betaudier v Attorney General of Trinidad and Tobago* [2021] UKPC 7 at para 16; *Water and Sewerage Authority of Trinidad and Tobago v Sahadath* [2022] UKPC 56 at paras 19-26.

32. In the present case the Board is concerned with an appeal against an evaluative judgment made by both the lower courts. The Court of Appeal did not simply hold that the judge was entitled to reach the conclusion which he did. Having considered the evidence the majority reached the same conclusion – see para 65.

33. The main ground upon which both the judge and the majority of the Court of Appeal concluded that absence of reasonable and probable cause had not been established was that the appellant had led no evidence as to the circumstances in

which the prosecution had been instituted. There was therefore no evidence upon which the court could make such a determination.

34. As made clear in the passages cited above from *Clerk & Lindsell, Abrath and Glinksi* the claimant "must identify the circumstances in which the prosecution was instituted" and "show the nature of the information on which the defendant acted" – *Clerk & Lindsell.* This involves giving some evidence as to those circumstances and that information - *Abrath*. The claimant has to put before the court "the facts and information known to the prosecutor" – *Glinski.*

35. In his statement of claim the appellant made allegations which included fabricating evidence, attempting to introduce false evidence and perjury. No proper particulars were given of these serious allegations, or indeed of any of the generalised allegations made. The facts pleaded were essentially the search of the appellant's home, his arrest, interview and charge, his plea of not guilty and the discontinuance of the prosecution.

36. The appellant's witness statement and oral evidence was similarly focused on his dealings with the police rather than the nature of the information on which they were acting. It described the search of his home, his questioning on three occasions by the police, the taking of samples of his handwriting, the shame and embarrassment caused to him by his arrest at work, his charge despite protestations of innocence, the overcrowded and filthy conditions in which he was held on remand and the discontinuance of the prosecution.

37. Although no one has doubted the truthfulness of this evidence, those matters are not key to establishing his pleaded claim. The appellant knew from the respondent's pleaded defence and the evidence of the police officers at the preliminary inquiry before the Magistrates the nature of the information on which they had acted. At the malicious prosecution trial, however, no evidence was led as to these matters. There was no or no proper inquiry into, for example, the statements said to have been taken from Balliram Ramlochan and Roopnarine Ramlochan, the statement said to have been made by Samdaye Barlo and her statutory declaration, the certificate of analysis from which the respondent asserted it had concluded that it was probable that the signature of Balliram Ramlochan was executed by the appellant, the statements taken from Magistrate Ayers-Caesar and Gail Frazer, Acting Assistant Clerk of the Peace, or the checks with the Immigration Department which were said to show that false passport numbers had been given. No account was given to Harris J by the appellant of the evidence given by SS Piggott and AS Boyd at the preliminary inquiry, nor were the disclosed notes of evidence taken before the Magistrates put in evidence before Harris J.

38. At the hearing of the appeal before the Board, Mr Anand Ramlogan SC for the appellant focused on the respondent's pleaded case and sought to show that there was nothing to implicate the appellant in the alleged crime. Samdaye Barlo's statutory declaration identified that she was accompanied to the magistrates' court by someone called Jason and a friend of his but it was submitted that there was no good reason to suppose that either was the appellant. The certificate of handwriting analysis exhibited to the pleading did not refer to the appellant and indeed related to an entirely different case (#2450/99 rather than #2950/99). As such, there was no evidence to show that the appellant was or might have been the forger of the signatures. He also criticised the respondent for failing at any time to give a plausible reason for the discontinuance of the prosecution other than the complete absence of any evidence against the appellant. This was not, however, the way in which the appellant's case was put at the malicious prosecution trial. If it had been then, for example, the failure to produce the correctly numbered certificate and the question of whether such a certificate, if indeed it existed, showed any connection to the appellant would have needed to be addressed by the respondent.

39. Mr Ramlogan placed strong reliance upon Smith JA's conclusion that there was a prima facie case to answer. This was based upon Smith JA's conclusion that the evidence before the judge indicated the following:

> "i. The Appellant had innocently assisted Kenneth Parmassar to secure bail for a friend of Mr Parmassar.
>
> ii. There was no illegality shown or alleged in this transaction.
>
> iii. There was no evidence of any conspiracy with anyone or as alleged in the charges brought against the Appellant.
>
> iv. The Appellant always protested his innocence, attempted to co-operate with the Police, and denied involvement in any conspiracy or any knowledge of any conspiracy as alleged or at all.
>
> v. Yet the police prosecuted the Appellant for an unproved and unsubstantiated conspiracy.
>
> vi. The prosecution was eventually ended by the D.P.P. (for reasons unknown).

vii. The Appellant had suffered loss and damage as a result of this unsubstantiated and unproved prosecution."

40. This summary does not address the nature of the information on which the police were acting, the respondent's pleaded case or the police officers' evidence at the preliminary inquiry. What matters is not the evidence before the judge of conspiracy but rather the evidence before him that the police had no evidence of conspiracy or put no such evidence before the Magistrate.

41. Mr Ramlogan also sought to rely, as had Smith JA in his dissenting judgment, on the Board's decision in *Gibbs v Rea.* That case concerned an appeal from the decision of the Court of Appeal of the Cayman Islands which upheld a claim for the malicious procurement of a search warrant which had been obtained on the basis that there were reasonable grounds for suspecting that the plaintiff had carried on or benefited from drug trafficking. The appeal was dismissed by a majority of the Board (Lord Steyn, Lord Hutton and Gault J; Lord Goff of Chieveley and Lord Hope of Craighead dissenting). The majority held that there was a circumstantial case that there were no grounds on which the plaintiff could reasonably have been suspected of drug trafficking or benefitting therefrom and hence no proper basis for seeking the warrant. The plaintiff's case called for an answer and the first defendant's silence in circumstances in which he would be expected to answer could and did convert evidence tending to establish the plaintiff's claim into proof of it.

42. The obvious distinguishing feature of *Gibbs v Rea* is that it was there held that there was a case which called for an answer whereas in the present case that first base was not reached. In *Gibbs v Rea* there were, moreover, exceptional facts which supported the drawing of an inference from silence. In particular, the only account of the reasons for suspicion was given ex parte by the investigating officer to the Magistrate who authorised the search warrant; after the search turned up nothing, the police did not interview the plaintiff, nor arrest him on any charge; his subsequent repeated requests for the information upon which the warrant had been obtained were refused; the police offered no explanation for the refusal and continued to withhold the information throughout the proceedings although there was nothing in the evidence which would indicate why it might be thought to be confidential. Further, there was no police file and no record of what took place in court when the search warrant was obtained. *Gibbs v Rea* is therefore of no assistance to the appellant and Smith JA's reliance upon it was misplaced.

43. Mr Ramlogan further relied on the fact that absence of reasonable and probable cause involves proof of a negative and, in general, only slight evidence is required to

do so, as stated in *Halsbury's Laws of England,* 5th ed, vol 97A, (2021), para 327. This was recognised by the majority of the Court of Appeal who cited that passage in full:

> "In proving the absence of reasonable and probable cause in a claim for damages for malicious prosecution the claimant has to prove a negative, and, in general, need only give slight evidence of that.
>
> However, absence of reasonable and probable cause cannot be inferred from the most express malice. The mere innocence of the claimant is not prima facie proof of its absence, and the fact that no indictment was preferred, or that the defendant did not give evidence at the trial although he was present in court, does not prove it."

44. As both the judge and the majority held, the reason why the appellant failed to prove the absence of reasonable and probable cause was not the weakness of the appellant's evidence but rather the absence of any evidence from him directed at the key issue of the circumstances in which the prosecution was instituted and the nature of the information on which the prosecutors acted. On this issue "that evidence has not been forthcoming", as the judge found, and there was "no prima facie case at all", as the Court of Appeal held.

45. For all these reasons, the Board is satisfied that the judge was entitled to find that absence of reasonable and probable cause had not been established and the Court of Appeal was justified in upholding and affirming that judgment. Since the appellant's case on malice depended upon an inference being drawn from absence of reasonable and probable cause, it necessarily follows that malice was not established either, as the Court of Appeal held.

Conclusion

46. Although the appeal must be dismissed, the Board has considerable sympathy for the plight of the appellant and has concerns about the history of his case. Although the proceedings against him were eventually discontinued, he was remanded in custody for seven months in relation to the charges made, he had those serious charges hanging over him for over eight years and then had to await a further eight years for his appeal in these proceedings to be heard. In the circumstances the Board's

provisional view is that there is a strong case for the costs of this appeal to be borne by the State in any event.