IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

C.A 289/1998 (F)
D.C. Colombo 18466/MR

A. H. G. Ameen
No. 441/4, Galle Road,
Colombo 4.

PLAINTIFF

Vs.

1. M. H. M. Salahudeen
2. M. Z. Fawmey

both of No. 20, Madampitiya Road
Colombo 15.

DEFENDANTS

AND

A. H. G. Ameen
No. 441/4, Galle Road,
Colombo 4.

PLAINTIFF-APPELLANT

Vs.

1. M. H. M. Salahudeen
2. M. Z. Fawmey

both of No. 20, Madampitiya Road
Colombo 15.

DEFENDANTS-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: Faiza Mustapha with Farook Thahir for the Appellant

2nd Defendant-Respondent is absent and unrepresented

ARGUED ON: 30.03.2012

DECIDED ON: 28.08.2012

GOONERATNE J.

The Plaintiff-Appellant in this case is an Attorney-at-Law and a Quazi for Colombo North appointed by the Judicial Service Commission. The Appellant allege that 1st & 2nd Defendant-Appellants being father and son respectively instigated and caused the arrest of Plaintiff by the officers of the Bribery Commission, sequel to a false complaint made by them. According to the Petition of Appeal he was arrested on 17.1.1996 and produced before the Chief Magistrate of Colombo in case No. B/8577and had been remanded and enlarged on bail on 23.01.1996. The Appellant's position is that his arrest was caused by the 1st & 2nd Defendants pursuant to a false and malicious complaint against him, for allegedly soliciting and

accepting a gratification of Rs. 500/-. Plaintiff-Appellant further contends that the Bribery Commissioner having becoming aware that the complaint was false had subsequently informed the Plaintiff in writing that the Commission does not propose to prosecute him (paragraph 6 of the Petition of Appeal). Plaintiff-Appellant by his plaint of 2.9.1996 filed action for damages in a sum of Rs. 5 million against the Respondents for malicious instigating and causing his arrests by the Commissioner.

Parties proceeded to trail on 6 admissions and on 15 issues. However the learned District Judge permitted the preliminary issue No. 13 on non disclosure of cause of action, to be tried initially and the case had been decided on written submissions tendered by both parties. The trial Judge by his order of 6.5.1998 held in favour of the Defendant-Respondent by answering issue No. 13 (in two parts) in the negative and dismissed the Plaintiff's action.

At the hearing before this Court the Appellant was represented by counsel. The 2nd Defendant-Respondent was absent and unrepresented, though duly noticed. Prior to the date of hearing learned counsel for Plaintiff-Appellant informed this court that the 1st Defendant-Respondent had expired and he does not wish to proceed against the intended legal representative of the 1st Defendant and indicated to court that he would

proceed against the 2nd Defendant-Respondent (vide Journal Entry of 29.11.1911). In the written submissions filed in the original court the Defendants have submitted (according to the Petition of Appeal and the written submissions of Appellant) the following:

(a) the ingredients necessary to file a case of malicious prosecution are absent.
(b) Plaintiff is precluded in filing action in terms of Section 9(2) of the Act No. 19 of 1994.

I have perused the written submissions of the Plaintiff-Appellant which refer to the following;

(a) The learned District Judge has mistaken the action filed by the Plaintiff for an action founded on malicious prosecution whereas it is a case of malicious arrest.
(b) The learned District Judge has erred in law when he arrived at the finding that the ingredients necessary to establish a case of malicious prosecution have not been pleaded.
(c) The learned District Judge has erred in law when he held that the Plaintiff is precluded from instituting this action in view of section 9(2) of Act No. 19 of 1994.
(d) The learned District Judge has failed to appreciate or address his mind to the authorities cited in the written submissions field on behalf of the Plaintiff-Appellant.

The facts narrated in detail are that (gathered from the plaint)

(a) The wife of the 2nd defendant filed an application for divorce, and such divorce case was heard by the Quizi the Plaintiff. After recording of evidence Plaintiff reserved judgment for 29.10.1995.

(b) Prior to delivery of judgment Plaintiff-Appellant received a letter dated 9.10.1995 addressed to the Inspector General of Police requesting the Plaintiff to postpone the delivery of judgment but the Plaintiff disregarded same as delivered judgment (paragraph 5 of plaint)

(c) Few days later from the date of delivery of judgment the 1st & 2nd Defendant came to the office of the Plaintiff and found fault and protested to the judgment delivered. Plaintiff had explained his position but the Defendants became hostile and abused the Plaintiff.

(d) Both Defendants visited Plaintiff's office on several days to obtain a copy of the proceedings.

(e) Copy obtained on payment of Rs. 500/- and the 1st Defendant with 3 others (officers of the Bribery Department) entered the office of Plaintiff and confronted Plaintiff.

(f) Thereafter as explained in the plaint steps taken to arrest the Plaintiff and produced before Magistrate.

On perusing the proceedings before the learned District Judge I find that matter in (a) – (f) had been cristelised into issues and recorded by the District Judge as issues of Plaintiff.

The above matters suggested in the form of issues are all primary facts which need to have been verified by court by permitting parties to lead evidence. The position of the Plaintiff-Appellant was that having initiated the process of arrest and producing the party concerned, the Bribery Commissioner did not pursue the case to proceed with a prosecution against the Plaintiff-Appellant since it was a false case instigated by the Respondents. These are matters that should have been verified on oath.

The learned District Judge dismissed the case on the basis that the plaint does not disclose a cause of action, which I observe is not very correct on the reasoning generally by the trial Judge based on a malicious prosecution. There is a difference in the case of malicious arrest.

According to the facts presented (which should have been verified) the prosecution was initiated but not launched i.e no charge sheet presented since the Bribery Commissioner did not wish to proceed. As such this is a clear case of malicious arrest. The learned trial Judge's reasoning could have been accepted and applied if the case was a case of malicious prosecution, where the ingredients suggested should be established. This position is dealt in the case of Alwis Vs. Ahangama 2000 (3) SLR 225-247... at pgs 226/227

Held:

1. In the absence of a prosecution, the Court of Appeal erred in granting relief to the plaintiff on the basis that the plaintiff's cause of action was malicious prosecution. But the plaintiff's action was maintainable being an action in respect of an injuria allegedly committed by the defendant by (a) maliciously, and (b) without reasonable and probable cause (c) making a defamatory complaint (of theft) against the plaintiff, (d) which resulted in legal proceedings against the plaintiff (namely, his arrest and production in the Magistrate's Court. For the Roman Dutch Law action for inquiry it is sufficient if the defendant set the authorities in motion to the detriment of the plaintiff.

Per Fernando, J.

".... Actio injuriarum is much wider than the English Law action for malicious prosecution"

2. The allegation of theft was to the defendant's knowledge false.

3. The defendant had no reasonable or probable cause for alleging that the plates had been stolen.

Per Fernando J.

"The fact that the defendant's motive was to recover property belonging to the CEB which was urgently needed for a public purpose makes no difference; that would have been good reason to ask the police for help to trace and recover the missing goods, but not to allege that they had been stolen.

4..The plaintiff established malice.

Per Fernando J.

".... he made a false allegation of theft, which he could not reasonably have believed; and which was not merely reckless, but which he knew to be false. Further he must have known that an allegation of theft of CEB property worth Rs. 500,000 was very likely to result in an arrest. There was thus animus injuriandi."

5. The sum of Rs. 500,000 awarded by the Court of Appeal as damages was quite excessive. Even though the allegation of theft was improper, the circumstances are consistent with an excess of zeal, undeserving of such severe strictures. The plaintiff would be sufficiently compensated by an award of Rs. 100,000, with legal interest from the date of the judgment of the Supreme Court.

In many decided cases it has been held that the Roman Dutch Law concept of actio injuriam is wider than the English Law of Malicious prosecution, as I understood by perusing the case law.

In Kalu Banda Vs. Rajakaruna 2002 (3) SLR 44..

The plaintiff-respondent instituted action seeking damages alleging that the defendant petitioner without any reasonable and probable cause maliciously prosecuted him by instituting criminal proceedings in the Magistrate's Court. The criminal action in which the plaintiff-respondent was being prosecuted had not been terminated. The defendant-petitioner contended that, no cause of action had accrued to the plaintiff-respondent to sue him in a civil action for malicious prosecution as the criminal action had not been terminated at the time the present civil action for malicious prosecution was instituted against him. The District Court held that the action is maintainable.

Held:

(1) As far as the present civil action is concerned, it is the institution of criminal proceedings maliciously without any reasonable and probable cause that had caused the plaintiff to institute Court proceedings.

(2) The plaintiff-respondent's claim is not based on malicious prosecution as understood in the English Law but founded on principles of actio injuriam known tot eh Roman Dutch Law

Peiris Vs. Chitty 16 CLW 58...

Held: (i) That in an action for malicious arrest the plaintiff must show:

(a) that his arrest on a criminal charge was instigated, authorized or effected by the defendant,

(b) that the defendant acted maliciously and

(c) that the defendant acted without reasonable and probable cause

(ii) that the police information book is not a document in respect of which privilege can be claimed under sections 123 and 125 of the Evidence Ordinance.

(iii) That the provisions of section 122(3) of the Criminal Procedure Code does not preclude the admission of a statement in the information book in a civil proceeding.

(iv) That statements recorded in the information book can be used under section 155(c) of the Evidence Ordinance in civil proceedings to impeach the credit of a witness.

The learned trial Judge has also in his order referred to Section 9 of Act No. 19 of 1994 pertaining to privileges and immunities of persons appearing before the commission. It was the trial Judge's view that this section would give certain privileges to the Defendant-Respondent and that no civil case could be instituted against them.

The said section reads thus:

9. (1) No person shall, in respect of any statement made, information or answer given, or any document or other thing produced, to or before, the Commission, be liable to any action, prosecution or other proceeding, civil or criminal, in any court.

(2) No evidence of a statement made, or answer or information given, by any person, to, or before, the Commission shall be admissible against such person in any action, prosecution or other proceeding, civil or criminal, in any court:

Provided that nothing in the proceeding provisions of this section shall-

(i) abridge or affect, or be deemed or construed to abridge or affect the liability of any person to any action, prosecution or penalty for any offence under Chapter XI of the Penal Code read with section 18 of this act or for an offence under this Act;

(ii) Prohibit or be deemed or construed to prohibit the publication or disclosure of the name, or of the statement or of any part of the statement of any person for the purposes of any such action or prosecution, or

(iii) Affect the admissibility of any statement admissibility under section 15.

I do not think this provision could be extended and applied to the case in hand and take among the rights of a citizen who had been prosecuted maliciously or arrested for no cogent reason and or done so maliciously. Even if one argues otherwise supporting the views of the trial Judge, in order to resort to the said section the several ingredients and requirements contained in the said section has to be checked and verified before a decision is taken on same, i.e only after a proper investigation of material relevant to the section based on evidence that the so called immunity in the section could be considered or applied. To begin with the section may not apply at all in the circumstances of the case in hand?

In all the above facts and circumstances this court is of the view that the learned District Judge was in grave error in dismissing the plaint at the very outset without embarking on a proper verification of evidence at a proper trial. This case could not have been decided at a preliminary hearing. Further the trial Judge has not been able to appreciate the difference of a

case of malicious arrest and malicious prosecution. As such, I set aside the order of the learned District Judge dated 6.5.1998. I direct that case be sent back to the District Court for re-trial de nova.

Order set aside and case sent for re-trial

JUDGE OF THE COURT OF APPEAL