

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

S. Hector de Silva
Victoria Stores,
Boossa, Galle.

PLAINTIFF

C.A No. 1016/1996
D.C. Kalutara 2951/MR

Vs.

Mohomed Haniffa Mohamed Musni
No. 50, Moor Street,
Kalutara South.

DEFENDANT

And between

S. Hector de Silva
Victoria Stores,
Boossa, Galle.

PLAINTIFF-APPELLANT

And

Mohomed Haniffa Mohamed Musni
No. 50, Moor Street,
Kalutara south.

DEFENDANT-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: Bimal Rajapakse with Ravindra Anawaratne
For Plaintiff-Appellant

Defendant-Respondent absent and unrepresented

ARGUED ON: 06.09.2011

DECIDED ON: 14.12.2011

GOONERATNE J.

This is a case of malicious prosecution and arrest claiming a sum of Rs. 350,000/-. In this appeal the Plaintiff-Appellant seeks to quash the judgment of the learned District Judge, Kalutara dated 16.10.1996 and for relief as in terms of paragraph (b) of the Petition of Appeal. The Plaint in this case was filed in the original court on or about 1987. It has taken such a long time for the trial to be concluded and this court is called upon to consider an appeal which transaction or incident took place over 2 decades ago.

In brief the position is that the Appellant and his father (late S.C de Silva) who was a contractor had made purchases of certain building

materials mainly paints from the Respondent. In the petition of appeal it is stated that the Respondent agree to accept post dated cheques for payment or value of purchases. The Appellant visited the Respondent's shop and had made purchases on behalf of his late father and furnished to Respondent blank cheques signed by his father. The father being a contractor had been found fault by the Architect for using inferior paints, and he requested the Respondent to take over the inferior paint, (what he supplied) and stopped payment of cheques. The Respondent thereafter complained to the police against the Appellant and the complaint of the Appellant was that the Respondent has instigated or got the police to arrest the Appellant and got him remanded and later bailed out. The case of the Appellant seems to be that the Respondent got the police to file a case against him in the Magistrate's Court. After several trial dates and trial being postponed on account of Respondents absence and in view of his absence the Accused-Appellant was discharged from criminal proceedings. In brief the position of the Appellant was that his father late S.C de Silva only had transactions with the Respondent and that he had nothing to do with the transaction. All cheques etc. was issued by his late father S.C de Silva, and that he had no dealings with purchasing of goods with the Respondent. Proceedings instituted against the Appellant was malicious.

In a case of this nature before I proceed to examine the judgment of the District Court and the evidence led at the trial it would be important to consider the requirements or its ingredients of malicious arrest/prosecution. In *Kotalawala vs. Perera* (1936) 1 Cey. L. J. 139, court cited Nathan and stated the requirements of malicious prosecution as follows:

- (1) The existence of the prosecution – Bringing of a prosecutor.
- (2) Malice in instituting the criminal proceedings
- (3) Absence of reasonable and probable cause of the Defendant
- (4) Termination of criminal proceedings in favour of the Plaintiff – failure of the prosecution.

As stated above an exhaustive definition would not be so relevant. In brief the Defendant should set the authorities in motion to the detriment of the Plaintiff (vide *Podisingho vs. Appuhamy* – 1904 3 Bal 145/146). The principles of the Roman Dutch Law and English Law on the subject is practically identical and the onus is on the Plaintiff to prove malice 12 NLR 147. It is not sufficient to prove mere absence of reasonable and probable cause 10 NLR 321.

Parties proceeded to trial on 17 issues. The Plaintiff-Appellants seems to prove his case as follows. Father was a contractor and he and his father both came to the Defendant's shop and made certain purchases of

paints etc. After some time Plaintiff made further purchases from the Defendant and gave his fathers cheques signed in blank to the Defendant. (post dated). This was done to enable the Defendant-Respondent to fill in the blanks and encash the cheque. When the contractor (Plaintiff's father) was engaged in doing some contract work for the Galle Bank of Ceylon the Architect had found fault with his father for using inferior paints. Plaintiff at that point had phoned the Defendant and wanted the Defendant to take the paints back which were of a inferior quality and made a complaint about inferior quality to the Defendant in that way. Defendant-Respondent refused and the Plaintiff's father had stopped payment of the cheques. When cheques were deposited it was returned dihonoured. Defendant had complained to the Kalutara Police (S.C.I.B) alleging cheating against the Plaintiff. The Plaintiff also stress that the police in arresting the Plaintiff was accompanied by the Defendant-Respondent and got him arrested at the Plaintiff's father's workshop (Regional Office of the Bank of Ceylon, Galle Fort). On the way back to Kalutara the police along with the Defendant had searched the residence of Plaintiff. The Plaintiff was produced before Kalutara Magistrate on 16.5.1981 and remanded till 20.5.1981. He was

enlarged on bail on that date and subsequently charged on 23.3.1984. He pleaded not guilty. On 2.9.1985 Plaintiff was discharged on the trial date as the Defendant Complainant was absent on the trial date.

The Plaintiff Appellant stress that the name given to the police by the Defendant was S.C de Silva of Bossa (father). The signature appearing on the cheques was that of S.C de Silva his father. Plaintiff's name is S. Hector de Silva. In this way Plaintiff imputes malice as Defendant was aware that he was not S.C de Silva and states further that it was malice on the part of Defendant. Plaintiff-appellant also urge that the Defendant instigated the police to arrest him since the complaint by Defendant was on 15th May 1981 at 7.50 a.m, naming S.C de Silva. Defendant accompanied the police on the same date and Plaintiff was arrested at about 9.00 a.m. This is to demonstrate by the Plaintiff as he describes it to be 'indecent haste'. He also state that Defendant pleadings does not suggest that he acted bona fide. Defendant was well known to Plaintiff's father. But he had falsely implicated the Plaintiff. Plaintiff also state that Defendant did not act with reasonable and probable cause, as it is apparent by his conduct.

I have considered the position of the Appellant according to the oral submissions made to this court and the material contained in the written submissions. In the written submissions of Appellant there is much emphasis on matters for determination both facts and law. I prefer to incorporate same in this judgment as follows.

1. On the facts, significantly the 1st complaint by Respondent only implicates Appellant's father (S.C de Silva). Please see P1, at page 281 of the Appeal brief. This is corroborated by an admission recorded under and in terms of section 420 of the Code of Criminal Procedure Act stating that the said cheques were all issued and signed by Appellant's father (S.C de Silva), at page 301. Unfortunately, cross examination of Appellant took about six years and meanwhile S.C de Silva also died.

2. It is also important to note that the said P1 (supra) was recorded at Kalutara South Police Station, on 15.5.1981 at 7.50 a.m. Thereafter, police came along in a car with Respondent and took Appellant away, also on 15.5.1981, at about 9.30 a.m.

3. Consequently, Appellant was made to make a statement (to Police), also on 15.5.1981 and thereafter kept in the Police lock-up. Next day (16.5.1981), Appellant was taken to the Remand jail and after being produced before the Magistrate, Appellant was imprisoned for four days and later released on bail. The proceedings in the Magistrate's Court lasted about two years and later Appellant was discharged. This evidence remains uncontradicted by Respondent

4. The necessary ingredients forming a charge of malicious criminal arrest are stated In Chitty Vs. Peries (41 N.L.R 145 at page 147) viz Plaintiff must show (i) that his arrest on a criminal charge was instigated, authorized or effected by the Defendant (ii) that the Defendant acted maliciously and (iii) that the Defendant acted without reasonable and probable cause – by Howard CJ quoting Nathan.

These ingredients have been satisfied by Appellant, inasmuch as (a) the 1st statement implicated only S.C de Silva (father of Appellant) (b) however, Respondent went with the Police in a car and showing Appellant at his Galle worksite, induced Police to arrest him (c) all the cheques were drawn by the father of Appellant from his personal Bank account (d) no evidence was led to state that Appellant induced his father to stop these payments (e) there was no relationship of principal and agent, of a partnership between these two clearly established to show that Appellant was also culpable of, inter alia, cheating and (f) malice is established inasmuch as within a few hours after making his first statement (supra), Respondent went along with the Police in a car and had appellant arrested.

I will deal with a – d above. I do not see the basis to support the case of the Appellant relying on a, b & c above. If cheques are dishonoured the Defendant-Respondent has every right to complain to the police. What is wrong in that? (a) above suggests that the 1st complaint of the Respondent only implicates Appellant's father. That position would fortify the position of the Respondent to show that he had no malice but genuinely made a complaint because he is the person who has suffered monetarily due to a transaction between them. By paragraph (b) above Appellant seeks to demonstrate the speed at which steps were taken. Is the Appellant suggesting that under normal circumstances the authorities act at a very slow pace and prosecutions take time. It would be unreasonable to hold against the

Respondent merely because he provided transport to the police. In criminal prosecutions the complainant is expected to assist the law enforcement authorities in the investigation. To draw an inference of malice on this alone would be unreasonable to the Respondent. Malice is a burden placed on the Plaintiff-Appellant and the burden is heavy and court should be very cautious in drawing any conclusion on malice.

At this point of the judgment I have to consider the version of the Respondent prior to analyzing the learned District Judge's judgment, though the Respondent was absent and unrepresented at hearing before this court.

However subsequent to the date of hearing and before pronouncing the judgment by this court, Respondent has filed written submissions on or about 28.11.2011, and I am bound to give my mind to those submissions. Respondent support the judgment of the District Judge. Respondent states that Appellant purchased some goods and cheques instead of paying money cheques were given to him and later the cheques were returned on the basis of stop payment. Respondent is justified in making a complaint to the police and stress that he is legally entitled to do so Respondent also made a cross-claim in the original court and the trial Judge

accepted such claim and dismissed Plaintiff's action. Respondent states that Appellant purchased paint, electrical items , hardware and bicycle (pg 424 – 426 of the record) Respondent allege that the Appellant having complained about low quality of the paint failed to return the paint (if remaining) and did not pay the Respondent for the items purchased.

The learned trial Judge has been very fair in his judgment although the disposal of the trial took a very long lapse of time. In the judgment the trial Judge had addresses his mind to the following admissions by the Plaintiff in evidence.

- (a) Apart from purchasing paint several other items were purchased by Plaintiff
- (b) Defendant was not paid for the items purchased.
- (c) That Plaintiff purchased to the value of Rs. 25,863/- from the Defendant and not paid money for same.
- (d) The so called low quality paints were not returned to Defendant,
- (e) Never complained to the police about low quality goods.

The following extract from the judgment is reproduced and it is to my mind the trial Judge's reasoning has been very fair.

සමහර අවස්ථාවලදී පැමිණිලිකරු මෙම චෙක්පත්වලට මුදල් නොගෙවීම පිළිබඳ විස්තර දන්නේ තමන්ගේ පියා බවට පවසන්නට යෙදී ඇත. සමහර අවස්ථාවලදී මෙම චෙක්පත් අගරු වූ බව තමන් නොදන්නා බව පවසන්නට යෙදී ඇත. සමහර අවස්ථාවලදී ඒවා අගරු වූ බවත් විත්තිකරුට මුදල් නොගෙවූ බවත් පිලිගන්නට යෙදී ඇත. විත්තිකරු විසින් පැමිණිලිකරුට චරෙතිව අසත්‍ය

වෝදනාවක් ද්වේශ සහගත ලෙස පොලිසියට කරන්නට යෙදුනා යයි අධිකරණයට නිගමනය කල නොහැක. පැමිණිලිකරු විසින් තමන්ට දෙන ලද වෙක්පත් අගරු වී නැවත පැමිණීම හේතුකොටගෙන පොලිසියට එසේ පැමිණිලි කරන්නට ක්‍රියා කල බව අධිකරණයට පෙනී යයි. මෙම වෙක්පත් විත්තිකරුට භාර දී ඇත්තේ පැමිණිලිකරුගේ පියා නොවුවත් ඒ අනුව තමන්ට වෙක්පත් භාර දුන් පුද්ගලයාට එරෙහිව විත්තිකරු ක්‍රියා කරනු ලැබ ඇත. විත්තිකරු විසින් කරන ලද එම පැමිණිල්ල මත පොලිසිය ක්‍රියාත්මක වී ඒ අනුව බී වාර්තාව කඩතර මහේස්ත්‍රාත් අධිකරණයට ඉදිරිපත් කර විත්තිකරුට එරෙහිව නඩු පැවරීමට ක්‍රියා කර ඇති බව පෙනී යයි. මෙම නඩුවේ විත්තිකරු විසින් සිතා මතා අසත්‍ය වෝදනාවක් පැමිණිලිකරුව අසිරු තත්වයකට පත් කිරීමටත් ද්වේශ සහගතව අසත්‍ය පැමිණිල්ලක් පොලිසියට කලා යයි අධිකරණයට කිසිසේත් පිලිගත නොහැක.

ඒ සම්බන්ධයෙන් පැමිණිලිකරුගේ සාක්ෂිය සලකා බැලීමේදී අනිවාර්යයෙන්ම පැමිණිලිකරුට එරෙහිව පොලිසියට පැමිණිලි කිරීම සඳහා මෙම නඩුවේ විත්තිකරුට හොඳ හේතූන් තිබෙන බව අධිකරණයට පෙනී යයි. විත්තිකරු විසින් ඒ අනුව පොලිසියට කරන ලද පැමිණිල්ල හේතුකොටගෙන පොලිසිය විසින් නඩු පැවරීමට ක්‍රියා කිරීම සලකා බැලීමේදී එය සාමාන්‍ය ක්‍රියා පටිපාටියට අනුව සිදුවන ක්‍රියා දාමයක් බව අධිකරණයේ නිගමනයයි.

පැමිණිලිකරුගේ සාක්ෂියෙන්ම ඔහු පවසා සිටියේ විත්තිකරුගෙන් ලබා ගත් මෙම නඩුවට අදාල රිසිට් පත් සහ බඩු ලැයිස්තු වලට අදාල හාන්ඩ් සම්බන්ධයෙන් විත්තිකරුට පැමිණිලිකරු විසින් මුදල් ගෙවා නොමැති බවයි.

I would reject the contention of the Appellant that he was falsely implicated by the Defendant-Respondent. What is underlying in this entire case (prior to examining ingredients of malicious prosecution) is the

default of Plaintiff. The Plaintiff never paid for the goods supplied. Cheques issued were dishonoured. Any person who receives cheques which are dishonoured has a right to complain. There is no evidence led at the trial to show that Plaintiff at least attempted to settle the bills. The counter claim of Respondent is justified in the circumstances of this case. Plaintiff has been doing the contract works with his late father. Both were involved in the business. There is ample evidence that Plaintiff made several purchases from the Defendant. Plaintiff took the initiative to deal with the Defendant. He even submitted the cheques to the Defendant though the account holder was his late father. Plaintiff cannot simply shift the burden to his father even with document P2 @. If goods were sold and delivered on credit, it has to be honoured within a reasonable period. Plaintiff was well aware of the dishonoured cheques and merely state paints were of an inferior quality. There were other items purchased by Plaintiff for which payments were due.

I do not wish to interfere with the primary facts of this case. Trial Judge has arrived at a correct conclusion. Appellate Court should not without cogent reasons interfere with primary facts. 1993(1) SLR 119; 20 NLR 332 & 282. It is not sufficient to prove mere absence of reasonable and probable cause. 10 NLR 321 1 CLW 66.

In all the circumstances of this case I affirm the judgment of the District Judge and dismiss this appeal without costs.

JUDGE OF THE COURT OF APPEAL