

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

Y. P. Sirisoma,
1/35, Veediya Bandara Mawatha,
Ethul Kotte.

Plaintiff

C.A. No. 359 / 97 F

Vs.

D.C. Colombo No. 14740 / MR

Samarakone Arachchige Gunaratne,
Bribery Commissioner's Department,
Colombo 7.

Defendant

AND NOW BETWEEN

Samarakone Arachchige Gunaratne,
Bribery Commissioner's Department,
Colombo 7.

Defendant Appellant

Vs

Y. P. Sirisoma,
1/35, Veediya Bandara Mawatha,
Ethul Kotte.

Plaintiff Respondent

BEFORE : UPALY ABEYRATHNE, J.

COUNSELS : Vikum De Abrew SSC for the Defendant
Appellant
M.D.N.G. Dissanayake for the Plaintiff
Respondent

ARGUED ON : 28.06.2012

DECIDED ON : 30.05.2013

UPALY ABEYRATHNE, J.

The Plaintiff Respondent (hereinafter referred to as the Respondent) instituted the said action against the Defendant Appellant (hereinafter referred to as the Appellant) in the District Court of Colombo seeking to recover a sum of Rs. 01 Million as damages for malicious prosecution.

The Appellant filed answer denying the averments contained in the plaint and prayed for a dismissal of the Respondent's action. The Appellant further averred that the Bribery Commissioner had decided to forward a charge sheet under Section 70 (c) of the Bribery Act as a result of an investigation carried out by the Bribery Commissioner's Department and there were sufficient materials and prima facie evidence to forward a charge sheet.

The learned Additional District Judge has delivered a judgment in favour of the Respondent. This appeal is from the said judgment.

At the outset I must place on record that where no malicious or corrupt motive in prosecuting an action was alleged or proved, no action for damages will lie, even though inconvenience and pecuniary loss have been caused. In an action for a malicious prosecution the plaintiff must prove that the charge must have been false, there must have been wanting of probable cause to justify the accusation, there have been malice on the part of the informant, and the plaintiff must have sustained damage either in his person or reputation or by pecuniary loss.

Lascelles ACJ in *Corea Vs Peiris* 9 NLR 276 stated that "the conditions which are necessary to success in an action of malicious prosecution are laid down as follows by Lord Justice Bowen in *Abrath v. North-Eastern Railway Co.* (1883)11 Q.B.D. 440. In order to establish his cause of action it is incumbent upon the plaintiff to prove - (1) that he was innocent, and that his innocence was pronounced by the tribunal before which the accusation was made; (2) that there was a want of reasonable and probable cause for the prosecution, or, as it may otherwise be stated, that the circumstances of the case were such as to be in the eyes of the Judge inconsistent with the existence of reasonable and probable cause; (3) that the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice.

In the case of *Silva Vs Silva* [2002] 2 S.L.R. 29 it was held that "In a case of malicious prosecution the onus of proof is on the plaintiff, he must prove on a preponderance of evidence or on a balance of probabilities that;

- (i) there was a prosecution on a charge that was false,
- (ii) such prosecution was instituted maliciously or with animus injuriandi and not with a view to vindicate public justice,
- (iii) there was want of reasonable or probable cause for such action,

- (iv) the prosecution terminated in favour of the plaintiff as against the complainant.”

The burden to prove that the action was filed maliciously is on the plaintiff. Malice is a feature of the mind and must be gathered from the circumstances. In cases of doubt it cannot be presumed nor can it make itself apparent or be proved otherwise than by the nature of the act itself. One should not presume the existence of a delict so long as it is possible to suppose the contrary. (Page 59 De Injuriis Et Famosis Libeliis.VOET, BK. 47 title 10).

In a case of malicious prosecution the plaintiff must prove that the defendant instituted or instigated the proceedings in a criminal court. Therefore in the present case the burden is on the Respondent to prove that the Appellant has instituted or instigated the proceedings in the Magistrate's Court. According to P 2 the Appellant was the 4th witness of the Magistrate's Court case. The Appellant in his evidence has stated that he had only conducted the inquiry on the instruction of the Bribery Commissioner and the matter of forwarding a charge sheet was a function of the Bribery Commissioner and the Legal Department and he had not involved in instituting or instigating the proceedings in the Magistrate's Court. This evidence had not been contradicted by the evidence of the Respondent. Hence it clearly seems from the said evidence that the Appellant had not instituted or instigated the proceedings against the Respondent in the Magistrate's Court.

In an action for malicious prosecution in order to establish that the Defendant set the criminal law in motion against the Plaintiff there must be something more than the mere conducting of the investigation. There must be a formulation of a charge or something in the way of solicitation, request or incitement of proceedings on the part of the Defendant.

In the case of Ghouse Vs Samsudeen 45 N.L.R. 417 where, in an action for malicious prosecution it is proved that the defendant merely stated certain facts to the police in form of a complaint and that the police acted on their own responsibility and took the initiative in charging the plaintiff, it was held that the defendant had not instituted the prosecution and that the plaintiff had no cause of action against him.”

In the case of Moss Vs Wilson (1906) 8 NLR 368 Woodrenton J observed that there is no doubt as to what the essential elements of the action for malicious prosecution are. The plaintiff must prove that a charge was made to a judicial officer, that the charge was false-its falsity being demonstrated, where prosecution has followed, by the plaintiff's acquittal-that the charge was made without reasonable cause, and that the defendant himself did not honestly believe it to be true. The mere absence of reasonable or probable cause or even the presence of positive recklessness in the conduct of the defendant is not sufficient to establish *dolus malus*, unless these elements show conclusively that he must have acted in bad faith. Moreover, as the burden of proof rests at all stages on the plaintiff, the defendant is entitled to the benefit of any reasonable doubt which the balance of the evidence may disclose. In support of these propositions, I may refer to the cases of Meedin v. Mohideen (1897) 3 NLR 27 and Christiana v. Andiappapulle (1898), 1 Balasingham, 58.

On the other hand the Respondent must prove that there was a want of reasonable and probable cause for the prosecution, or, as it may otherwise be stated, that the circumstances of the case were such as to be in the eyes of the Judge inconsistent with the existence of reasonable and probable cause. Upon this requirement I have noted the evidence of the Respondent at page 81 of the brief and the document produced marked V 1. V 1 was a letter sent to the Bribery

Commissioner by the Respondent in which the Respondent had admitted that he had erroneously stated in the Declaration of Assets that he had made an investment of Rs 100,000/- at the Sampath Bank in 1991, but he had only one investment amounting to Rs. 99,991.50 up to the date of declaration. This evidence undoubtedly stands across the way of absence of probable and reasonable cause.

In the said circumstances I set aside the judgment of the learned Additional District Judge dated 27.06.1997 and dismiss the action of the Respondent. I allow the appeal of the Appellant with costs.

Appeal allowed.

Judge of the Court of Appeal