

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU 151 of 2018
High Court Civil Action No. HBC 11 2 of 2016

BETWEEN : **RAJENDRA SINGH**

Appellant

AND : **THE COMMISSIONER OF FIJI POLICE FORCE**

AND : **THE DIRECTOR OF PUBLIC PROSECUTIONS**

AND : **THE ATTORNEY GENERAL OF FIJI**

Respondents

Coram : **Lecamwasam, JA**
Almeida Guneratne, JA
Farzana Jameel, JA

Counsel : **Mr A Nand for the Appellant**
Mr A Prakash for the Respondent

Date of Hearing : **06 February, 2020**

Date of Judgment : **28 February, 2020**

JUDGMENT

Lecamwasam, JA

[1] I agree with the reasons and conclusion of Almeida Guneratne, JA.

Almeida Guneratne, JA

Prefatory Statement

[2] This case arises in the context of an action for False Imprisonment and Malicious Prosecution where criminal proceedings instituted against a person had terminated with the entering of a *Nolle Prosequi*.

[3] In regard to the aspect of False Imprisonment the conduct of the Police as a branch of the law enforcement machinery was put in issue. In so far as the segment of Malicious Prosecution is concerned the issue that arose for determination was whether even if a prosecution initially instituted might have been “without malice and on the basis of the existence of a reasonable or probable cause” in the course of the proceedings if the conduct of the law enforcement authorities showed malice and took away the existence of “a reasonable or probable cause”, whether such law enforcement authorities could be held liable for malicious prosecution.

[4] Consequently, the question for determination in this appeal is whether the action for false imprisonment and malicious prosecution by the Appellant could have been maintained or not in the facts and circumstances of this case.

[5] In the wake of that question I propose to examine the matter in the light of the following issues (which I shall deal with not necessarily in the order in which I have raised them).

(a) What constitutes false imprisonment in law and whether the facts in the present case established the same.

- (b) What are the *facta probanda* necessary to ground an action for malicious prosecution?
- (c) Given the stages of criminal proceedings beginning with an initial allegation of an offence (1st Information), investigations, the institution of proceedings in Court, what is the effect of the entering of a *nolle prosequi* on an action for false imprisonment and malicious prosecution?
- (d) Factors (a) and (b) being matters of law, what are the facts and circumstances in the present case impacting thereon?
- (e) The Grounds of Appeal urged and consideration of the submissions made by the respective counsel against and in defence of the judgment of the High Court.
- (f) Determination by this Court of the Appeal and Conclusion.

Re : the Stages of Criminal Proceedings that were gone through resulting in entering a *Nolle Prosequi*

[6] Those stages and the facts and circumstances relevant thereto may be recounted in chronological sequence as follows:

[7] On a warrant issued by a Magistrate's Court the 1st Respondent had caused a search of the Appellant's abode on 26 June, 2007 for indulging in certain criminal activities.

[8] In consequence, some items in the appellant's possession had been confiscated. For some months the Appellant had remained uncharged and deprived of the use of the said items. Subsequently, he was charged for rape in terms of Sections 149 and 150 of the Penal Code Act (Cap 17) and on one count under Section 175 thereof for unnatural offences. This was after he was arrested on 20 September, 2007 following a caution interview, having been in police custody for some 48 hours. Eventually he was produced before the Magistrate's Court of Suva on that date and remanded when judicial proceedings had commenced. After several dates in Court a *Nolle Prosequi* was entered.

Did the aforesaid facts constitute false imprisonment?

[9] I shall begin by referring to the legal requirements that constitute an action based on false imprisonment and then proceed to see whether they fit into the facts and circumstances of the present case as re-capped above.

[10] False imprisonment is made out of “a person’s freedom of movement (not necessarily in a prison) had been restricted.”

[11] That was a proposition laid down as far back as the year 1845 in the English Case of **Bird v. Jones** [1845] 7QB 742, which has stood the test of time.

The competing policies and the balancing process

[12] No doubt, there are competing public policies.

[13] On the one hand, there is the freedom of law enforcement officers. On the other is the citizen’s right to free movement.

[14] In that regard, having looked at the judgment of the High Court (vide: pp.7 to 16 of the Vol. 1 of the Copy Record) I could not find a reference to that aspect.

Definition and Elements

[15] On the basis of authoritative judicial precedents and academic literature the definition and legal elements necessary to constitute false imprisonment may be stated as follows:

Definition of False Imprisonment

[16] In my view the most comprehensive definition of false imprisonment is as stated by John Fleming. He says: *“It is the wrong of intentionally and without lawful justification subjecting another to a total restraint of movement by either actively causing his*

confinement or preventing him from exercising his privilege of leaving the place in which he is.” (Fleming on the *Law of Torts* 9th ed., LBCIS, 1998).

- [17] Most other definitions ignore the words “*without lawful justification*”. (For example, Street on Torts at p.28, 8th ed. Butterworths). To my mind that is the most important and decisive element bearing in mind the fact that we are dealing with a case of false imprisonment involving the Police.
- [18] Read together with the proposition laid down in **Bird v Jones** (supra) definition of false imprisonment expounded as far back in the year 1699 is that, “Every confinement of the person is an imprisonment, whether it be in a common prison or” **Wright v. Wilson** [1699] 1 Ld Raym 739.
- [19] Once again I hark back to the competing policies I articulated at paragraph [10] above and view the same against the background of the Appellant being arrested, kept in custody for 48 hours after a caution interview and produced before the Magistrate’s Court, the ensuing proceedings ending up with a “*Nolle Prosequi*” being entered.
- [20] Consequently, I am driven to the view that, even going as far as assuming that there might have been a *prima facie* case against the Appellant, with the entering of the *Nolle Prosequi*, the Respondents actions and/or steps were rendered “without lawful justification”.
- [21] At this point I cannot resist the comment that, “false imprisonment” smacks of a misnomer which should properly be read as a “false step” leading to a prosecution being launched and therefore became a “wrongful imprisonment” which stood as such when *Nolle Prosequi* was entered.
- [22] In those circumstances I hold that, there was false imprisonment and the learned High Court Judge erred when he held that the claim of the Appellant for false imprisonment stood dismissed. (vide: paragraph 30(1) of the Judgment, p.16 of Vol. 1 of the Copy Record.

Consequences of a finding by Court that a cause of action for false imprisonment had been established and the Reliefs the Appellant would be entitled to

- [23] False imprisonment is a form of trespass on a person affecting his liberty and freedom of movement in respect of which damages awarded are in the nature of general damages. In addition to that, such a person may be compensated for injury to feelings and loss of reputation. **Hook v Cunard Steamship Co Ltd** [1953] 1 All ER 1021.
- [24] Damages are at large and may be aggravated by the circumstances. (**Childs v. Lewis** [1924] 40 TLR 870 and **Walter v Alltools Ltd** [1944] 177 LT 371.
- [25] Exemplary damages also may be awarded against a policeman or other official who falsely imprisons a person. (vide: *Street on Torts*, Butterworths, 8th ed. p.33)

Conclusion on the cause of action based on false imprisonment

- [26] On the basis of the foregoing analysis I hold that a case based on false imprisonment has been made out (vide: as pleaded in the Appellant's Statement of Claim culminating at paragraph 11 of the said claim so pleaded as contained in page 19 Vol. 1 of the Copy Record).
- [27] Consequently, for the reasons adduced before in this Judgment I set aside the order of the High Court reflected in page 22 of the Copy Record and award a sum of \$2,500 as general, aggravated and exemplary damages.
- [28] That determination shall stand independently from whether the Appellant is entitled to succeed in his cause of action based on malicious prosecution which I shall now proceed to examine.

The Appellant's case based on Malicious Prosecution

- [29] In contrast with an action for false (wrong step/wrongful) imprisonment of a person, where "malice" does not feature as an ingredient to sustain the same, by the very concept of

“malicious prosecution”, Malice would be an essential element a plaintiff would be required to prove.

The factors that needed to be taken into consideration in that regard

- [30] The process of searching the abode of the Appellant in the first instance had been for material where the Appellant was alleged to have been connected to pornographic activities involving ‘juvenile girls’ leading eventually to his arrest. That had been caused on an allegation made by a girl’s mother, a police officer.
- [31] The said Police Officer may have had a motive and acted with malice. But she was not made a party to the action. One could not impute the said police officer’s motives to the Respondents. In the result there was no material to establish any motive other than that of instituting a prosecution for the purpose of bringing a person to justice. (**Brown v. Hawkes** [1891] 2 QB 218.)
- [32] At this point I thought it apt to look at the definition and the other elements necessary to establish “malicious prosecution”.
- [33] It is an established principle and/or requirement that, a plaintiff in a case based on malicious prosecution must prove “malice” on the part of the Respondents sued in his action, that is, “any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice.” (vide: **Brown v. Hawkes** (1891) 2 QB 218), supra.
- [34] I must confess that I spent some time grappling with that issue which struck me as an intricate issue until I was fortunate in my endeavours to find an answer to it in the English case of **Wershof v. Metropolitan Police Commissioner** [1978] 3 All ER 540, where the plaintiff proved absence of reasonable cause but failed because he could not prove malice.

[35] The upshot of that decision, which commended to me is that, even if the motives of the Respondents stood mixed a plaintiff will fail unless he establishes that the dominant purpose was something other than the vindication of the law.

[36] It follows that a plaintiff who proves malice but not want of reasonable or probable cause would still fail.

[37] I now move to the next stage for the purpose of determining this appeal.

Definition (Statement on) and the elements necessary to establish malicious prosecution

[38] ‘It is a tort maliciously and without reasonable and probable cause to initiate against another judicial proceedings which terminate a favour of that other and which result in damage to his reputation, person, freedom or property’. (Street on Torts, supra at p.433). I do confess that some repetition has been made here but I felt that it was necessary for the ensuing analysis.

[39] On the basis of that statement, the numerous judicial precedents and the academic literature placed before us, the following elements as to what constitutes malicious prosecution stand discerned.

(1) The proceedings instituted against the Appellant were terminated upon the entering of a *nolle prosequi*.

[40] That element without any doubt was established.

(2) The Defendants played an active role in the case. That also stood established.

(3) The Defendant (the Respondents) in playing that role acted with malice.

[41] On that element I have expressed a view already but that was in general terms. It is now necessary to re-visit that element in the particular facts and circumstances of the instant case.

(4) The Defendant (the Respondents in the instant case) in playing that role did so without reasonable and probable cause in having instituted the proceedings.

[42] On that element, at the time of launching the prosecution on the basis of pornographic photographs that were placed before the learned High Court Judge, I could not fault the Judge in having found that, that element had not been established. (NB. While postponing my final determination on that for the reasons that would follow later in my determination).

(5) With the result of damaging the reputation, person, freedom or property of the accused person

This element also was established in as much as if any person was to be maliciously prosecuted then this element would consequentially follow.

[43] Thus, what remained for determination were the circumstances that followed after the launching of the prosecution against the plaintiff in which regard it became incumbent on me to address the submissions made by counsel.

[44] I say that because, on the dual criteria of “absence of malice” and “the presence of reasonable or probable cause” which stood established at the time of the launching of the prosecution by the Respondents against the Appellant, the Appellant’s cause of action was liable to fail on “malicious prosecution”.

[45] However, did that put the final lid on the matter?

[46] It is in an endeavour to find an answer to that question that I looked at the facts and circumstances after the launching of the prosecution.

Submissions of the Appellant in assailing the Judgment of the High Court

[47] Re-iterating what the learned counsel for the appellant had submitted in his written submissions, he addressed this Court on the following matters:

- (a) That, the photographs showing the victim in indecent postures were not of her's but that of another.
- (b) That, as the record reveals, the Charges levelled against the Appellant were amended three times finally standing at Section 62A(1) of the Juvenile Act on the basis that the victim "looked" a juvenile.
- (c) That, in certain interim proceedings the High Court had directed the said impugned photographs to be destroyed (at page 112 of Vol. 1 of the Copy Record as per the order made by Justice Temo in the said proceedings.
- (d) That, notwithstanding the said order of the High Court, the Respondents had come to Court with the very same photographs and persisted with the prosecution launched initially.

[48] Consequently on the basis of the submissions made by Counsel the following points remained for consideration by this Court. Viz:

Though at the initial stage of the launching of the prosecution there being "absence of malice" and there being a "reasonable or probable cause" what was the effect of the subsequent conduct on the part of the Respondents in persisting with and pursuing the said proceedings against the Appellant in the light of the matters recounted at paragraph [47] above.

[49] My answer is, that subsequent persistent conduct amounted to "malicious conduct" and conduct smacking of conduct with "no reasonable" or "probable cause".

[50] Though, at the initial stage of the launching of the prosecution, the same stood *prima facie* justified the subsequent happenings as recounted above took the matter outside the purview of such *prima facie* justification.

A word on a Principle (the Rule) and Necessary Exceptions in regard to Procedure

- [51] It is true and indeed it is an established principle (or Rule) that rights of parties must be determined at the time an action is filed and parties stand suited.
- [52] But at the same time, it is also a counter principle that, that rule stands qualified in exceptional circumstances which, in my view, is the case in point given the facts and certainly as recounted above.
- [53] Accordingly, the proposition I lay down in this appeal is that, though in the initial stage of launching of a prosecution there might have been “no malice” and “there may have been a reasonable or probable cause to do so, should subsequent proceedings establish otherwise then, the said two elements being so intrinsically mixed, a Court was obliged to take into consideration, those subsequent proceedings, the test being the stage at which parties rights stood finally determined.
- [54] In that regard, those factors were before the learned High Court Judge which His Honour failed to address in his Judgment.

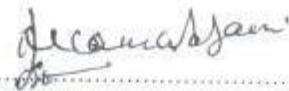
Conclusion on the Appellant’s cause of action based on Malicious Prosecution

- [55] On the basis of the reasons adduced above, I conclude in my reasoning that, the Appellant has made out a case on Malicious Prosecution.
- [56] In consequence, while allowing the Appellant’s appeal in setting aside the Judgment of the High Court on that count, I award a sum of \$5,000 as damages and costs of this appeal in a sum of \$2,500.
- [57] Given the fact that, I have earlier held in favour of the Appellant on his cause of action based on false imprisonment, I propose the following orders in this Appeal:-

- (a) The Appeal is allowed on both causes of action based on False Imprisonment and Malicious Prosecution.
- (b) Consequently, the 1st and 2nd Respondents are ordered to pay as damages on the cause of action based on False Imprisonment the sum of \$2,500 together with damages I now order in a sum of \$5,000 on the cause of action based on Malicious Prosecution, thus totalling a sum of \$7,500.
- (c) As costs of the action in the High Court and this Court I order a sum of \$2,500.
- (d) The total amount of \$10,000 as counted in paragraphs (b) to (c) above, the 1st and 2nd Respondents are ordered to pay within 28 days of Notice of this Judgment.

Jameel, JA

[58] I agree with the reasons, conclusions and proposed orders of Almeida Guneratne, JA.



Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL



Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL



Hon. Justice F. Jameel
JUSTICE OF APPEAL