

SUPREME COURT

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NIRMALA WATI

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v.

A. HUSSAIN & CO. LTD
ASIM HUSSAIN

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[SUPREME COURT—Rooney, J.—26 September 1986]

Civil Jurisdiction

Malicious Prosecution—No action therefor until there has been a judicial proceeding—no prosecution—baseless complaint leading to arrest and detention—person making complaint responsible to detention—liability for damages.

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V. Maharaj for the Plaintiff
M. Sadiq for the Defendants

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Nirmala Wati (plaintiff) sued A. Hussain & Co. Ltd and Asim Hussain (first defendant and second defendant respectively) for malicious prosecution and false imprisonment.

On 24 December 1984, plaintiff, then an accounts clerk employed by the first defendant, as part of her duties collected from the cashier Pushpa Kanti \$3,500 which she paid into the first defendant's bank account. Later she ceased work and went home. Kanti made up a reconciliation account but by mistake it showed that the amount due to be banked exceeded the sum banked by \$1,000. The second defendant examined the reconciliation but could not account for the \$1,000. He suspected plaintiff had taken it. Without checking Kanti's reconciliation which would have shown the mistake he went to the police, reported the (apparent) loss, told the police plaintiff was in charge of banking and he suspected her. The police obtained a search warrant, searched her house and found there \$140 which they seized. The house was full of visitors. The search lasted half an hour. Plaintiff was taken to the police station and interrogated. She was shocked and frightened. While the questioning was going on, the second defendant having discovered Kanti's mistake, went to the police station and told them of his mistake. The plaintiff was freed and her \$140 given back. She had not then been charged.

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The action was for malicious prosecution and wrongful imprisonment.

No defence was raised seeking to justify the actions of the police in detaining the plaintiff.

Held: There had been no proceedings of a judicial nature taken against the plaintiff. She was not prosecuted. It followed that no action for malicious prosecution would lie. See *Austin Dowling L.R. 5 C.P. 534; Mohammed Amin v. Jogendra*

H

- A *Kumari Bannerjee* (1947) A.C. 322 at 331. As to wrongful imprisonment there was no assertion by the defendants that the arrest and detention of the plaintiff was lawful.

- B Where a person complains to the police that an offence has been committed or indicates to them a person against whom he may have reasonable cause for suspicion and the complaint is baseless, but leads to the arrest and detention of the innocent person the maker of the complaint must accept full responsibility for the actions taken on his behalf by the police.

See also Constitution of Fiji s.5(1)—

- C “No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say—

 (e) upon reasonable suspicion of his having committed, or being about to commit an offence.....”

and

- D “(6) Any person who is unlawfully arrested or detained by any other persons shall be entitled to compensation therefor from that other person, *or from any other person or authority on whose behalf that other person was acting.*”

(*Emphasis added*)

- E The learned trial Judge considered factors which bore on the ascertainment of damages.

Held: The plaintiff succeeded on the issue of wrongful imprisonment but failed on the claim for malicious prosecution, in that no charge had been laid.

Judgment for the plaintiff for \$500 with costs.

- F Cases referred to:
Mohammed Amin v. Jogendra Kumari Bannerjee (1947) A.C. 322.
Austin v. Dowling L.R. 5 C.P. 534.
Gosden v. Elphick (1849) 4 Ex. 445.
Flewster v. Royle (1808) Cap. 187.
Grinham v. Willey (1859) (4 H & N 496).
Sewell v. National Telephone Co. Ltd. (1907) 1 K.B. 557.
 G *Hopkins v. Crowe* (1836) 4 A & E 774.
Walters v. W. H. Smith & Sons Ltd. (1914) 1 K.B. 595.
Chubb v. Wimpey & Co. Ltd. (1936) 1 All E. R. 69.
Hook v. Cunard Steamship Co. Ltd. (1953) 1 All E.R. 1021
Walter v. Alltolls Ltd. (1944) 171 L.T. 372

H

ROONEY, J.

A

Judgment

This action arises out of a disgraceful episode which took place at Labasa on Christmas Eve, 1984.

The plaintiff, a young married woman, had been in the employment of the first defendant company as an accounts clerk for six years. She was entrusted with the duties of banking the daily takings, making up payrolls, attending to correspondence and similar work. She was, and was entitled to be so regarded, a responsible and trustworthy member of the staff of the defendant company.

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The second defendant, a young man of little experience, was the manager of the business and had been so employed for the previous eight months. The company also employed one Pushpa Kanti as a cashier.

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During the afternoon, the plaintiff collected approximately \$3,500 from Pushpa and paid it into the defendant company's bank account. She returned to the office with the bank deposit slip. At 1700 hours she left for her home where she was entertaining visitors, some of whom had come from Suva to spend Christmas with her and her family.

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After the shop had closed, the second defendant examined the reconciliation account prepared by Pushpa, the cashier, and the bank deposit slip returned by the plaintiff and was quick to notice that there was a discrepancy. Pushpa's note showed that the amount due to be banked exceeded the amount actually paid in by the plaintiff by exactly \$1,000.

The second defendant said "I looked for the \$1,000, he did not find any error." He searched the safe, drawers and the cash registers but could not find the missing money. He reported the loss to the police.

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In cross-examination, the second defendant admitted that he suspected the plaintiff straight away. Before going to the police, he did not check Pushpa's calculations to see if she had made any mistake. This did not even occur to him.

He knew where both the plaintiff and Pushpa lived, but, he did not think it necessary to consult either of them as he thought that the plaintiff had taken the money. He admitted that he told the police that the plaintiff was in charge of the banking and that he suspected her.

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On his return from the police station the second defendant decided, acting on the advice of his sales manager, Gulam, to check the cash register slip. He found that Pushpa had made a mistake in her calculations and this accounted for the \$1,000 which he had believed was stolen by the plaintiff.

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The second defendant rushed to the police station and told a police officer there that he had made a mistake. The officer told him that the police had already gone to the plaintiff's house. He went to her house only to find that the plaintiff was no longer there. She was already at the police station.

The second defendant said that he did not direct the police to arrest the plaintiff. He had just made a complaint to them. He admitted that he had been aware of the consequences which might follow his report to the police and agreed it was a serious matter to make such a report.

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A Although the second defendant said in evidence that he apologised to the plaintiff at the police station and told her it was not her fault, but Pushpa's, and that he was sorry, the plaintiff denies this. I am satisfied that this arrogant young man offered no excuse or apology for his disgraceful conduct. I do not believe that he considers what he has done was wrong either then or now.

B At about 1950 hours 5 policemen came to the plaintiff's house in a vehicle. They had obtained a search warrant. The house was full of visitors, friends, and relatives of the plaintiff and her husband. The house was searched for half an hour. They found \$140 in cash. The officer-in-charge of the operation, Detective Constable Munsami, told the plaintiff that she had to go to the police station. She was taken in the police car to the station. Her husband followed in another car with the children.

C The plaintiff said that she was shocked, nervous and frightened. She was being accused of taking \$1,000 when she had not done so. She was cautioned by Munsami who proceeded to record her statement. While this was going on the second defendant arrived at the police station. As a result the money taken from the house was returned and the plaintiff was allowed to go home with her husband.

D I have no doubt that the plaintiff, who was at the police station for about an hour, suffered a most disagreeable and upsetting experience and had been humiliated in front of her guests. All that had happened was the direct consequences of the second defendant's irresponsible conduct in making a false accusation against her. Any right thinking person might well feel that the plaintiff is entitled to some redress in a Court of law on account of her experience. But, this does not necessarily follow.

E First the law must be considered. Before doing so I must refer to the pleadings. The statement of claim sets out the salient facts and alleges in paragraphs 4, 5 and 6:

F "4. THAT on or about 24th day of December, 1984 at about 7 p.m. the 2nd Defendant whilst acting in his capacity as the Manager and or servant and agent of the 1st Defendants, on his own behalf and on behalf of the 1st Defendant wrongfully directed and procured Police officers to arrest the Plaintiff and take her into custody on a charge then made by the 2nd Defendant, that the Plaintiff whilst employed by the 1st Defendant as aforesaid stole from the 1st Defendant's said premises cash money in the sum of \$1,000.00 (*ONE THOUSAND DOLLARS*).

G 5. PURSUANT to the said complaint and acting upon the said direction, the said Police officers thereupon arrived at the Plaintiff's premises searched her premises for an hour in the presence of the Plaintiff's guests who were visiting her at the time and took in their custody \$140.00 cash money being the property of the Plaintiff.

H 6. ON completion of the search the said Police officers arrested the Plaintiff and took her into custody to the Labasa Police Station where the Plaintiff was detained and questioned."

H Paragraph 9 alleges wrongful imprisonment and deprivation of liberty. Paragraph 11 appears to allege some form of malicious prosecution.

The defence is for the most part a general traverse of the plaintiff's allegations. This form of pleading is to be deplored and is in conflict with Order 13 rule (3) of the Rules of the Supreme Court. Every allegation of fact which a party does not intend to admit must be specifically traversed and a general denial of such allegation or a general statement of non admission of the facts pleaded is not a sufficient traverse of them.

The allegation that the police arrested the plaintiff and took her into custody and detained her at the Labasa Police Station and that the plaintiff was wrongfully imprisoned and deprived of her liberty for a period of two and a half hours has not been specifically denied and must therefore be deemed to have been admitted. The only issue raised by the defence is that the defendants were not responsible for what occurred and it is pleaded that the police acted on their own responsibility and not pursuant to any direction or action of the defendants. Nor is it denied that the second defendant was the servant or agent of the first defendant and is vicariously liable for the actions of the second defendant. It is denied that the second defendant named the plaintiff or any other servant or clerk. It is alleged that the plaintiff's action is "frivolous and vexatious".

I shall consider first the allegation of malicious prosecution. It is a tort, maliciously and without reasonable and probable cause, to initiate against another judicial proceedings which terminate in favour of that other and which result in damage to his reputation, person, freedom or property. [*Street on Torts*, 7th Edition, 401].

In *Mohammed Amin v. Jogendra Kumari Bannerjee* (1947) A.C. 322 at 331 it is stated:

"To found an action for damages for malicious prosecution based on criminal proceedings the test is not whether the criminal proceedings have reached a stage at which they may be correctly described as a prosecution; the test is whether such proceedings have reached a stage at which damage to the plaintiff results."

Their Lordships were not prepared to go so far as some of the courts in India in saying that the mere presentation of a false complaint which first seeks to set the criminal law in motion will *per se* found an action for damages for malicious prosecution.

However, in the case of *Austin v. Dowling* L.R. 5 C.P. 534 a distinction was drawn between the acts of a ministerial as opposed to a judicial officer in determining when a prosecution is deemed to have commenced. Willes J. said at 539:

"How long did that state of false imprisonment last? So long, of course, as the plaintiff remained in the custody of a ministerial officer of the law, whose duty it was to detain him until he could be brought before a judicial officer. Until he was so brought before the judicial officer, there was no malicious prosecution. The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge

A and the imprisonment. There is, therefore, at once a line drawn between the end of the imprisonment by the ministerial officer and the commencement of the proceedings before the judicial officer."

In the present case there were no proceedings of a judicial nature taken against the plaintiff. She was not prosecuted at all. It follows that no action lies at her instance for malicious prosecution.

B In regard to false imprisonment the defendants have not pleaded that the arrest and detention of the plaintiff was lawful. The police are not parties to this action. They have not been required to justify the actions that they took against the plaintiff. It is therefore unnecessary to consider the evidence of Inspector Prasad (PW3) for what it is worth.

C I shall proceed on the premise that all interference with the liberty of the subject is *prima facie* odious. "A summary arrest and imprisonment without trial can only be justified by the clear and unambiguous terms of a statute or statutory regulation" per Barry J. in *Pike v. Waldrum* (1952) 1 Lloyds Rep. 431 at 452. On the pleadings it must be presumed that the arrest and detention of the plaintiff was unlawful, the question as to whether the police, if they had been joined as parties, could have successfully defended an action for false imprisonment does not arise in these proceedings and is not relevant to the determination of the issue before me.

D Mr Siddiq submitted that in this case all that the second defendant did was to give information to the police who thereupon acted according to their own judgment. An informer incurs no responsibility in the tort of false imprisonment.

E In *Gosden v. Elphick* (1849) 4 Ex. 445 the defendant pointed out the plaintiff to a constable as the person responsible for an accident. Alderson B was of the opinion that Elphick was liable if by his conduct he caused the plaintiff to be taken into custody following the case of *Flewster v. Royle* (1808) Camp. 187. He then went on to observe (447):

"It would come to this, that if a constable in search of a delinquent says 'which is the man?' the persons present must not point him out."

F The case is confusing, but the point taken was that people should not be discouraged from indicating a wrong-doer by fear of the consequences. But, this presupposes that an offence had been in fact committed.

G In *Grinham v. Willey* (1859) (4 H & N 496) a felony having been committed, the defendant sent for a policeman, who, on the defendant's information, and on enquiries made by himself, arrested the plaintiff. The defendant accompanied the policeman to the station and signed the charge sheet. It was held that he was not liable in an action of trespass. Pollock C.B. found that the arrest and detention were the acts of the police officer and the defendant had done nothing more than he was bound to do, viz, sign the charge sheet. The learned Baron added that he may have been liable if he acted *mala fide*, but, not otherwise. It is clear that the Judge was concerned that people are not put in peril for making a complaint when a crime has been committed.

H In *Sewell v. National Telephone Co. Ltd.* [1907] 1 K.B. 557 the plaintiff was arrested on a charge and the defendants were later contacted. They signed a charge sheet which led to the prosecution of the plaintiff. The defendant had not authorised the arrest of the plaintiff and was not liable for false imprisonment.

In *Hopkins v. Crowe* (1836) 4 A & E 774 the defendant directly induced the police officer to charge the plaintiff with cruelty to a horse. It was held that he must be considered, not as a party giving information to the officer in consequences of which the defendant was arrested, but, as a principal causing the arrest to be made. A

In *Walters v. W.H. Smith & Sons Ltd* (1914) 1 K.B. 595 it was held that a private person is justified in arresting another on suspicion of having committed a felony if, and only if, he can show that the particular felony for which he arrested the other was in fact committed, and that he had reasonable and probable cause for suspecting the other of having committed it. B

In *Chubb v. Wimpey & Co. Ltd* (1936) 1 All E.R. 69 the defendant admitted that he signed the charge sheet and that he "did give him in charge". In his brief judgment Charr J. said at 70:

"It is a well known principle of law that you can have imprisonment by police and informant, that the person who has given a man in charge cannot release himself from the obligation placed upon him." C

In Fiji there is no legal requirement that people who complain to the police about the commission of an offence are required to sign a charge sheet or take any other formal steps before the police may act in response to the complaint. A complaint is "an allegation that some person known or unknown has committed or is guilty of an offence". [Criminal Procedure Code, Cap. 21 section 2]. D

Section 21 of the Criminal Procedure Code empowers a police officer, without an order from a magistrate and without a warrant, to arrest any person whom he suspects upon reasonable grounds of having committed a cognizable offence. Larceny is such an offence. The reasonable suspicion in the officer's mind may be founded on matters within his own knowledge or on statements by another coming in a way which justify him in giving them credit. E

The authorities I have cited above lead me to conclude that where an offence has been committed, a person who complains to the police and indicates the person or persons against whom he may have reasonable and probable cause of suspicion, need have no fear that he may thereafter be held liable in tort at the suit of any person who is arrested or detained in consequences. But, where there has been no offence, there is no duty to complain to the police and thus set the law in motion. If a baseless complaint leads to the arrest and detention of another, the maker of that complaint must accept full responsibility for the actions taken on his behalf by the police. F

I am fortified in that view by a consideration of the Constitution of Fiji. Section 5(1) provides that

"No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say— G

(e) upon reasonable suspicion of his having committed, or being about to commit an offence

and

"(6) Any person who is unlawfully arrested or detained by any other persons shall be entitled to compensation therefor from that other person, or from any other person or authority on whose behalf that other person was acting." H

(Emphasis added)

A This clause must be given a wide interpretation as it is in favour of the liberty of the subject. When the police acted in this case they did so on behalf of the defendants who had laid the complaint. An unlawful arrest followed and it is not open to the defendants to escape their liability to pay compensation by placing the blame on the police. This must be so, irrespective of any consideration that might have arisen had the police officers concerned or the Attorney-General been made parties to this action. In any event, as I have observed above, no defence was raised which sought to justify the actions of the police in detaining the plaintiff.

B On the question of damages, the plaintiff is entitled to be compensated, not only for the restraint placed upon her liberty, but, for the effect on her reputation in the general circumstance prevailing. [See *Hook v. Cunard Steamship Co. Ltd.* (1953) 1 All E.R. 1021]. Any evidence which tends to aggravate or mitigate the damage to a person's reputation which flows naturally from his imprisonment must be admissible up to the moment when damages are assessed. (*Walter v. Alltools Ltd.* (1944) 171 L.T. 372 per Lawrence L.J.)

C The aggravating features in this case are that the plaintiff was detained by the police in the presence of friends and relatives and no apology was offered to her by the person responsible.

D On the other hand the effect on the plaintiff's reputation was short lived. About one week later she found employment as a cashier with another firm and has been so employed ever since.

The detention, although it constituted an unpleasant experience for the plaintiff was not of long duration.

E I award the plaintiff \$500 damages and the costs of this action. However, as the proceedings ought to have been instituted in the Magistrate's Court, the costs are limited to those which would have been awarded if the action had been commenced and heard in the Magistrate's Court at Labasa. Such costs are to be taxed by the Registrar in default of agreement.

This judgment is against both defendants jointly and severally.

Judgment for the Plaintiff.