[2014] UKPC 29
Privy Council Appeal No 0039 of 2012

JUDGMENT

Trevor Williamson (Appellant) *v* The Attorney General of Trinidad and Tobago (Respondent)

From the Court of Appeal of The Republic of Trinidad and Tobago

before

Lady Hale
Lord Kerr
Lord Clarke
Lord Wilson
Lord Reed

JUDGMENT DELIVERED BY
Lord Kerr
ON

3rd September 2014

Heard on 18 June 2014

Appellant	*Respondent*
Anand Beharrylal Frances Ridout (Instructed by Yaseen Ahmed)	Alan Newman QC Tom Richards (Instructed by Charles Russell LLP)

LORD KERR :

Introduction

1. On 22 July 2004, at the end of her working day, Joanne Lewis returned to her home at 6 Westbury Lane, Belmont, North Trinidad. She found that her house had been burgled. She reported the burglary to the police. They interviewed Ms Lewis's neighbour, Richard Thompson. He told them that he had seen two people removing items from Ms Lewis's home and placing them in a car. Mr Thompson had been sufficiently exercised by what he had seen to note the registration number of the car, HAW 6265. The first letter of that number, 'H', denoted that it was a taxi and police were quickly able to trace it to its owner, Kevin Lijertwood. He was able to tell police that on 22 July, the vehicle was being used by Mr Williamson to ply his trade as a taxi driver.

2. This information led to Mr Williamson being detained at his home on the evening of 28 July. He was taken to Belmont police station. He was interviewed there and gave an account of having taken a fare to Ms Lewis's home. He had been told by the man who had hired him that he had experienced problems with his family and was moving out. Although he did not enter the house, Mr Williamson accepted that he had helped to carry a number of household items to the taxi. At some stage, probably during the early hours of 29 July, Mr Williamson accompanied police to a house in Darceuil Lane to which he claimed to have delivered the man who had hired the taxi. That house was searched but neither the man who had allegedly hired the taxi nor anything belonging to Ms Lewis was found.

3. On the following day, 30 July 2004, Mr Williamson was formally interviewed by police officers and made a written statement. In it he said that he had been plying the taxi for hire in the Belmont area when he was stopped by a person whom he did not know. He was hired to do a private job which involved "moving some things". He described going with the fare to Westbury Lane, collecting household items there and then taking him to the house at Darceuil Lane. Later on the same day at the police station Mr Thompson identified Mr Williamson as the person who had helped to load items from Ms Lewis' house into the taxi. Thereafter he was charged with housebreaking and larceny and taken before the Magistrates' Court where he was remanded in custody. He was granted bail on 11 October 2004.

4. The appellant appeared before the Magistrates' Court no fewer than sixteen times following his initial remand. On all but three of those, the prosecutor, Police Constable Caldeira, failed to appear and no explanation was given for his non-appearance.

Eventually, on 24 August 2005, following yet another failure by the prosecutor to appear, the magistrate dismissed the charge against Mr Williamson. On the 10 occasions that Mr Williamson appeared in court while in custody on remand, the police officer appeared only twice.

The Proceedings

5. On 21 August 2006 Mr Williamson began proceedings against the state for wrongful arrest, false imprisonment and malicious prosecution. After a trial before Tiwary-Reddy J in June and July 2007 his claim was dismissed. Reasons for the dismissal of the claim were given in a written judgment dated 3 July 2008.

6. The claim for malicious prosecution was dismissed, the judge holding that the police officer had reasonable and probable cause for prosecuting Mr Williamson. She also found that there was no direct evidence of malice and, since a lack of reasonable and probable cause had not been established, it could not be inferred. On the wrongful arrest claim, the judge set out the circumstances of the police investigation of the burglary, and held that there was ample evidence for the police to suspect Mr Williamson of having committed the crime of housebreaking and larceny. He had been lawfully arrested, therefore. And since he had been lawfully arrested, there was lawful authority to justify his imprisonment. His claim for compensation for false imprisonment was therefore also dismissed.

7. The appellant appealed Tiwary-Reddy J's judgment to the Court of Appeal. On 27 July 2011, the Court of Appeal (Kangaloo, Jamadar and Yorke-Soo Hon JJA) dismissed the appeal. The court found that Mr Williamson should have been charged as a secondary participant in a joint enterprise to break and enter Ms Lewis's premises rather than as a principal. There was no evidence that he had entered the house. It was held, therefore, that there was no reasonable and probable cause for the prosecution. The court went on to find, however, that there was no direct evidence of malice nor could it be inferred. It therefore dismissed Mr Williamson's appeal against the dismissal of his malicious prosecution claim.

The appeal to the Board

8. Before the Board, Mr Beharrylal, who did not appear for Mr Williamson in the courts below, presented submissions of great skill and tenacity on his behalf. He argued that since there was such a glaring absence of reasonable and probable cause to prosecute Mr Williamson, malice on the part of the prosecutor should be inferred. The evidence to support the charge was so plainly inadequate, Mr Beharrylal submitted, that by persisting in it, the prosecutor must be regarded as having been actuated by malice. He suggested that the circumstances of the entire incident, as revealed by the police

inquiries and Mr Williamson's ready co-operation were clearly indicative of innocence. These circumstances, when taken together with the apparent reluctance of the police to prosecute by their repeated failure to attend court, could only mean that they had no belief in any real possibility of Mr Williamson's being convicted.

9. In this connection, Mr Beharrylal referred the Board to the 2000 Code of Practice for prosecutors for England and Wales which, as the case of *Panday v The Attorney General* HCA 2525 of 2003 confirmed, was the code which was applied by prosecutors in Trinidad and Tobago at the relevant time. That code required prosecutors to be satisfied that there was a realistic prospect of conviction before proceeding with a prosecution – see para 14. Counsel submitted that it was impossible that the prosecutor in the present case could have been so satisfied and that the inference that this was a malicious prosecution was therefore irresistible.

10. Although false imprisonment does not appear to have been pursued as a separate head of claim in the Court of Appeal, Mr Beharrylal contended that it remained a viable element of Mr Williamson's appeal. He accepted that, although the police officer's evidence about arrest was, at best, confused, a valid arrest had in fact taken place at Mr Williamson's home on 28 July 2004. He also accepted that, as soon as Mr Williamson had been charged and taken before a court on 30 July, no question of false imprisonment could thereafter arise. Counsel submitted, however, that inquiries into the matter were effectively completed when Mr Williamson had given his account to the police on late 28 July or early on the 29th, certainly no later than when he had taken them to Darceuil Lane, and that the respondent had failed to justify Mr Williamson's detention between the conclusion of the inquiries and Mr Williamson's having been taken before the Magistrates' Court. Irrespective of the outcome of the malicious prosecution claim, therefore, Mr Williamson was entitled to compensation for that period which Mr Beharrylal put at some 36 hours. He calculated that this period began at 11.59 pm on 28 July and ended with Mr Williamson's having been charged at 1.30 pm on 30 July.

Discussion

11. In order to make out a claim for malicious prosecution, it must be shown, among other things, that the prosecutor lacked reasonable and probable cause for the prosecution and that he was actuated by malice. These particular elements constitute significant challenge by way of proof. It has to be shown that there was no reasonable or probable cause for the launch of the proceedings. This requires the proof of a negative proposition, normally among the most difficult of evidential requirements. Secondly, malice must be established. A good working definition of what is required for proof of malice in the criminal context is to be found in *A v NSW* [2007] HCA 10; 230 CLR 500, at para 91:

> "What is clear is that, to constitute malice, the dominant purpose of the prosecutor must be a purpose other than the proper invocation of the criminal law - an 'illegitimate or oblique motive'. That improper purpose must be the sole or dominant purpose actuating the prosecutor"

12. An improper and wrongful motive lies at the heart of the tort, therefore. It must be the driving force behind the prosecution. In other words, it has to be shown that the prosecutor's motives is for a purpose other than bringing a person to justice: *Stevens v Midland Counties Railway Company* (1854) 10 Exch 352, 356 per Alderson B and *Gibbs v Rea* [1998] AC 786, 797D. The wrongful motive involves an intention to manipulate or abuse the legal system *Crawford Adjusters Ltd (Cayman) v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17, [2014] AC 366 at para 101, *Gregory v Portsmouth City Council* [2000] 1 AC; 426C; *Proulx v Quebec* [2001] 3 SCR 9. Proving malice is a "high hurdle" for the claimant to pass: *Crawford Adjusters* para 72a per Lord Wilson.

13. Malice can be inferred from a lack of reasonable and probable cause – *Brown v Hawkes* [1891] 2 QB 718, 723. But a finding of malice is always dependent on the facts of the individual case. It is for the tribunal of fact to make the finding according to its assessment of the evidence.

14. On the question of reasonable and probable cause, or the lack of it, a prosecutor must have 'an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed': *Hicks v Faulkner* (1878) 8 QBD 167, 171 per Hawkins J, approved by the House of Lords in *Herniman v Smith* [1938] AC 305, 316 per Lord Atkin. The honest belief required of the prosecutor is a belief not that the accused is guilty as a matter of certainty, but that there is a proper case to lay before the court: *Glinski v McIver* [1962] AC 726, 758 per Lord Denning.

15. The Court of Appeal found that the prosecutor did not have reasonable and probable cause to proceed with the charge that was in fact preferred against Mr Williamson because he should have been charged as a secondary participant in a joint enterprise. It is not necessary for the Board to consider the correctness of that view in light of its conclusion on the question of malice.

16. On one view, the evidence against Mr Williamson, taken in the round and including his co-operation with the police, could be regarded as indicative of his innocence of the charge. On the other hand, his activities and that of his passenger were sufficient to arouse the suspicions of Mr Thompson. And taking household goods to the

taxi when, apparently, the owner of the house was not present, might well be regarded as at least untoward, if not downright suspicious. If Mr Williamson had in fact been complicit in the theft of the goods, he had a ready explanation if questioned about it, namely, that he was an innocent taxi driver. The rehearsal of that explanation did not establish his innocence. It is what an astute police officer would have expected a person who was in fact guilty of the offence to say, although it is, of course, also consistent with innocence. But it does not irresistibly and inevitably lead to that conclusion. And one must bear in mind that the person who hired the taxi was not found at the address to which Mr Williamson took police and where, he said, he had left him. In these circumstances, to have continued to harbour suspicions about Mr Williamson, even after he had given his explanation, cannot make Constable Caldeira's decision to proceed with the charge obviously unreasonable.

17. This conclusion bears directly on the question whether the prosecution can be inferred to be malicious. Where there is absolutely no basis for suspicion, especially where that is accompanied by an apparent reluctance to proceed with the charge, one might draw such an inference. But that was not remotely the position here. Of course, the failure of Constable Caldeira to appear on the various occasions that Mr Williamson came before the Magistrates' Court is reprehensible but this is not nearly sufficient, in the Board's view, to allow the inference to be drawn that his intention was to manipulate the legal system or to pursue the prosecution for a wholly extraneous and improper motive.

18. Remembering that it is for the tribunal of fact to make a finding on the question of malice, it is to be noted that Constable Caldeira, in his witness statement of 31 January 2007, prepared for the High Court proceedings, had averred that he had reasonable and probable cause for laying charges against and prosecuting Mr Williamson and had acted throughout in good faith and without malice. He was not challenged on those averments. In those circumstances, the Board finds it unsurprising that both the High Court and the Court of Appeal were not prepared to draw the inference that he had acted with malice in proceeding with the prosecution against Mr Williamson. His appeal against the finding that he had not made out a case of malicious prosecution must be dismissed.

19. Mr Beharrylal conceded that Mr Williamson had been arrested at his home on 28 July 2004. The Board considers that this concession was correctly made. In the first place in his witness statement, Mr Williamson himself said that he had been arrested. Secondly, Constable Caldeira gave evidence that he went with other officers to Mr Williamson's home to "make the arrest", although a short time later he said that Mr Williamson was not in fact arrested but was "detained for questioning". It is, of course, the position that there is no power to "detain for questioning". The power to arrest is contained in section 3(4) of the Criminal Law Act, chapter 10:04 which provides that where "a police officer, with reasonable cause, suspects that an arrestable offence has been committed, he may arrest without warrant anyone whom he, with reasonable cause

suspects to be guilty of the offence." There is no statutory power to detain solely for the purpose of questioning.

20. It is clear that, however Constable Caldeira chose to describe it, Mr Williamson's detention and his being taken into custody amounted to an arrest. The plain fact of the matter is that Mr Williamson was detained and was under compulsion to come to the police station and he knew the reasons that this was required of him. That was, as Mr Beharrylal accepted, sufficient to constitute a valid arrest. As Viscount Simon put it in *Christie v Leachinsky* [1947] AC 573, 587-588, "The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained … a person is … required to submit to restraints on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed."

21. The respondent did not accept that the Court of Appeal was right to conclude that the laying of the "wrong" charge deprived the prosecuting officer of reasonable and probable cause to prosecute. It submitted that, in any event, it was beyond argument that the reasonableness of an officer's suspicion at the time of arrest cannot be undermined by some defect in the charges eventually laid against the suspect. The Board accepts this submission, which was not challenged on behalf of Mr Williamson. In *Christie v Leachinsky* at page 593 Lord Simonds said, "it is not an essential condition of lawful arrest that the constable should at the time of arrest formulate any charge at all, much less the charge which may ultimately be found in the indictment".

22. Given that the arrest was valid, counsel for Mr Williamson accepted that, if the case for malicious prosecution failed, the only claim in respect of false imprisonment which could be advanced was that between the time that inquiries were complete and a charge being preferred against Mr Williamson and his being brought before a court, his detention had not been justified. It was accepted that the false imprisonment claim had not been formulated in that way before the High Court or the Court of Appeal but it was claimed that it did not need to be since it was for the detaining authority to justify all periods of detention – *Dallison v Caffery* [1965] 1 QB 348 and *Holgate-Mohammed v Duke* [1984] AC 437.

23. While in a false imprisonment claim the onus of establishing that detention is justified rests with the detaining authority, the Board is satisfied that, for that onus to arise, it is necessary for a person detained on foot of an admittedly valid arrest to raise the issue of the legality of his detention during a specific period such as is now canvassed on behalf of Mr Williamson. In fact, according to Constable Caldeira's statement, inquiries continued during 29 and 30 July 2004. These included an invitation to Mr Williamson to take part in an identification parade, an invitation which he refused;

the taking of his written statement; and his identification at the police station by Mr Thompson.

24. It need hardly be said that the police do not have power to detain suspects indefinitely. Section 4(a) of the Constitution of Trinidad and Tobago guarantees the right to individual liberty and section 5(2)(a) provides that Parliament may not authorise or effect the arbitrary detention, imprisonment or exile of any person. Section 5(2)(c)(iii) forbids Parliament from depriving a person who has been arrested or detained of the right to be brought promptly before an appropriate judicial authority. The combined effect of these provisions is that an arrested person such as Mr Williamson has a constitutional right to be brought promptly before a court after he has been charged. Such evidence as is available does not support any lack of promptitude in bringing Mr Williamson before the court. He first appeared before the Magistrates' Court on 30 July 2004 and, as already indicated, Constable Caldeira had said that inquiries continued on 29 and 30 July.

25. If the specific issue of the validity of Mr Williamson's detention between the completion of inquiries and the time of his being charged and brought before a court had been raised on Mr Williamson's behalf, evidence could have been adduced to show that inquiries continued throughout the period between his detention and charging. It is not open to Mr Williamson to raise that issue for the first time on the hearing of the appeal before the Board when the time for investigating the claim and the calling of evidence on the point has long since passed. The Board is satisfied, therefore, that Mr Williamson's appeal against the dismissal of his claim of false imprisonment must also fail.