IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Andra Hannadige Sarathchandra,
No. 56, Horakandamulla Road,
Matugama.
Plaintiff

SC APPEAL NO: SC/APPEAL/63/2023
SC LA NO: SC/HCCA/LA/160/2021
HCCA NO: WP/HCCA/KAL/113/2016(F)
DC MATUGAMA NO: 1703/MR

Vs.

1. Ceylon Electricity Board,
   Sri Chittampalam A. Gardiner
   Mawatha, Colombo 02.
2. Wijesuriya Gunawardena
   Mahawaduge Teeman Perera
3. Wanigatungage Tudor
4. Lalith Silva
5. Mahanama Abeywickrama
   All of Ceylon Electricity Board,
   Sri Chittampalam A. Gardnier
   Mawatha, Colombo 02.
6. Galhandi Deepal Wanigaratne
   Regional Electrical Engineer,
   Ceylon Electricity Board,

Kalutara District Office,
Kalutara North.
Defendants

AND BETWEEN

1. Ceylon Electricity Board,
   Sri Chittampalam A. Gardiner
   Mawatha, Colombo 02.
2. Wijesuriya Gunawardena
   Mahawaduge Teeman Perera
3. Wanigatungage Tudor
4. Lalith Silva
5. Mahanama Abeywickrama
   All of Ceylon Electricity Board,
   Sri Chittampalam A. Gardnier
   Mawatha, Colombo 02.
6. Galhandi Deepal Wanigaratne
   Regional Electrical Engineer,
   Ceylon Electricity Board,
   Kalutara District Office,
   Kalutara North.

Defendant-Appellants

Vs.

Andra Hannadige Sarathchandra,
No. 56, Horakandamulla Road,
Matugama.
Plaintiff-Respondent

AND NOW BETWEEN

Andra Hannadige Sarathchandra,
No. 56, Horakandamulla Road,

Matugama.
Plaintiff-Respondent-Appellant

Vs.

1. Ceylon Electricity Board,
   Sri Chittampalam A. Gardiner
   Mawatha, Colombo 02.
2. Wijesuriya Gunawardena
   Mahawaduge Teeman Perera
3. Wanigatungage Tudor
4. Lalith Silva
5. Mahanama Abeywickrama
   All of Ceylon Electricity Board,
   Sri Chittampalam A. Gardnier
   Mawatha, Colombo 02.
6. Galhandi Deepal Wanigaratne
   Regional Electrical Engineer,
   Ceylon Electricity Board,
   Kalutara District Office,
   Kalutara North.
   Defendant-Appellant-Respondents

Before: Hon. Justice P. Padman Surasena
Hon. Justice Mahinda Samayawardhena
Hon. Justice K. Priyantha Fernando

Counsel: Ashiq Hassim with Madushani Jayasinghe for the Plaintiff-Respondent-Appellant.
Sumathi Dharmawardena, P.C. and A.S.G. with Sabrina Ahmed, S.C. for the Defendant-Appellant-Respondents.

Argued on: 17.10.2023

Written Submissions:

By the Plaintiff-Respondent-Appellant on 07.12.2023
By the Defendant-Appellant-Respondents on 13.10.2023 and 28.12.2023

Decided on: 03.04.2024

Samayawardhena, J.

Background

This is an action for malicious prosecution based on *actio injuriarum*. The plaintiff was charged in the Magistrate's Court under the Electricity Act for theft of electricity by tampering with electric meters of his business premises. After trial, he was acquitted. Thereafter he filed action in the District Court seeking damages against six defendants. The 1st defendant is the Ceylon Electricity Board and the 2nd-6th defendants are its employees. The 2nd defendant led the team that raided the premises, with the 3rd to 5th defendants accompanying him to assist. The 6th defendant engineer has not participated in the raid but has estimated the probable loss to the Electricity Board.

After trial, the District Court entered judgment for the plaintiff. On appeal, the High Court of Civil Appeal reversed it. Hence this appeal by the plaintiff to this Court.

The 2nd and 6th defendants have died when the trial was in progress in the District Court (journal entry No. 53 dated 25.09.2013) but the trial has proceeded as usual without considering whether substitution is necessary and whether cause of action survives against the other defendants. There is no reference in the judgment of the District Court

about the death of the 2nd and 6th defendants. The District Judge entered judgment against all the defendants.

When the matter was supported for leave before this Court on 30.03.2023, as evidenced by the proceedings of that date, learned Additional Solicitor General for the defendant-respondents raised a preliminary objection to the maintainability of the appeal based on the death of the 2nd and 6th defendants pending trial and proceeding with the trial without taking any steps in that regard. Learned counsel for the plaintiff informed this Court that he wished to continue with the appeal without proceeding against the 2nd and 6th defendants. I will briefly deal with this preliminary objection at the end of this judgment.

The ingredients of the tort of malicious prosecution

Malicious prosecution attempts to strike a balance between individual protection from harassment by litigation and promoting cooperation in law enforcement. Prof. J.G. Fleming, *The Law of Torts*, 7th edn (1987), page 579, elucidates the rationale behind the tort of malicious prosecution in the following manner:

> *The tort of malicious prosecution is dominated by the problem of balancing two countervailing interests of high social importance: the desire to safeguard the individual from being harassed by unjustifiable litigation and the policy of encouraging citizens to aid in law enforcement. On one side, it needs no emphasis that the launching of scandalous charges is apt to expose the accused to serious injury, involving his honour and self-respect as well as his reputation and credit in the community. Malicious prosecution, therefore, bears close resemblance to defamation, both being infringements of essentially the same complex of interests on the part of the plaintiff. On the other side, however, is the competing*

> *interest of society in the efficient enforcement of the criminal law, which requires that private persons who co-operate in bringing would-be offenders to justice, should be adequately protected against the prejudice which is likely to ensue from termination of the prosecution in favour of the accused.*

Prof. R.G. McKerron has dedicated Chapter XIV (pages 302-309) of his masterpiece, *The Law of Delict – A Treatise on the Principles of Liability for Civil Wrongs in the Law of South Africa*, 4th edn (1952), on malicious prosecution. He states:

> *In an action for malicious prosecution or other malicious abuse of process, the plaintiff must prove: (1) that the defendant instituted the proceedings; (2) that the defendant acted without reasonable and probable cause; (3) that the defendant was actuated by malice; and (4) in the case of certain classes of proceedings, that the proceedings terminated in his favour.*

In order to succeed in a lawsuit for damages on malicious prosecution, the plaintiff must prove that the defendant:

(a) Instituted or initiated legal proceedings against the plaintiff;
(b) acted without reasonable and probable cause;
(c) acted with malicious intent;
(d) that the proceedings concluded in favour of the plaintiff; and
(e) resulted in actual injury to reputation or the person or pecuniary interests of the plaintiff.

The burden lies on the plaintiff to prove all of them, and there is no corresponding burden on the defendant to disprove them. For instance, even if the defendant had acted maliciously in instituting proceedings, if there was reasonable and probable cause for the prosecution, the plaintiff's action will fail.

Institution of proceedings

Under the first element, the institution of proceedings, the plaintiff must prove that the defendant initiated, instituted or continued legal proceedings, thereby demonstrating that it was the defendant who set the law in motion against him. It can be proved that the defendant directly instituted the proceedings or that the proceedings were instituted at his instigation. In the case of the latter, the identification of the appropriate defendant is not always straightforward. In the House of Lords case of *Glinski v. Mclver* [1962] AC 726, Viscount Radcliffe at pages 756-757 and Lord Devlin at page 775 observed that the prosecutor who effectively sets criminal proceedings in motion, should accept the form of responsibility or accountability imposed by the tort of malicious prosecution.

The defendant must have been actively instrumental in setting the law in motion. Prof. J.G. Fleming states at page 582 "*To incur liability, the defendant must play an active role in the conduct of the proceedings, as by instigating or setting them in motion*". In *Saravanamuttu v. Kanagasabai* (1942) 43 NLR 357 at 539, Howard C.J. stated that "*there must be something more than a mere giving of information to the Police or other authority who institutes a prosecution. There must be the formulation of a charge or something in the way of solicitation, request or incitement of proceedings*."

In *Commercial Union Assurance Co of NZ Ltd v. Lamont* [1989] 3 NZLR 187, the Court of Appeal of New Zealand stated that a person may be regarded as the prosecutor if he puts the police in possession of information which virtually compels an officer to bring a charge. McMullin J. held at 207-208:

> *As a general rule a prosecution will be considered to be brought when the information is laid and by the person who lays it. In the result, in prosecutions under the Crimes Act of 1961, as was Mr. Lamont's, the police will generally be treated as the prosecutor and no action for malicious prosecution will lie against the person on whose information the police have acted. But in some cases the person who supplied the information to the police may be regarded as the prosecutor if, inter alia, he puts the police in possession of information which virtually compels an officer to lay an information; if he deliberately deceives the police by supplying false information in the absence of which the police would not have proceeded; or if he withholds information in the knowledge of which the police would not prosecute.*

The defendant cannot easily take up the position that it is up to the police to institute proceedings after investigating a complaint and therefore a cause of action on malicious prosecution cannot be maintained against him. In *Martin v. Watson* [1996] AC 74, a woman complained to the police that her neighbour had indecently exposed himself to her. The police initiated legal proceedings. At the hearing before the Magistrate's Court, the prosecution failed to produce any evidence, resulting in the dismissal of the case. The House of Lords held that, since the facts relating to the alleged offence were solely within the complainant's knowledge, and the complainant had in substance procured the prosecution, with the police officer filing the case without exercising any independent discretion, the complainant could be sued for malicious prosecution, and upheld the award of damages against her.

In *Haturusinghe v. Kudaduraya* (1954) 56 NLR 60 at 64, Fernando A.J. held:

> *I am of opinion that a first information given to the Police is sufficient to found an action for malicious prosecution if it actually contains a clear allegation that the plaintiff committed an offence, or, in other words, if it formulates a charge against the plaintiff. While it is correct that the Police have a discretion whether or not to prosecute, it is nevertheless their duty to prosecute if they form the opinion that the allegation may be true. If they do form such an opinion, particularly in a case where there appears to be corroboration from a source named by the informant, he can surely not be permitted to plead that the Police should not have acted upon his allegation.*

A defendant may incur liability not only for initiating proceedings but also for adopting or continuing with the proceedings. Thus, a prosecution, commenced under a *bona fide* belief in the guilt of the accused, may become actionable if, at a later stage, the prosecutor acquires positive knowledge of the accused's innocence yet persists in seeking a conviction. (*Fitzjohn v. Mackinder* (1861) 9 C.B. (N.S.) 505 at 531)

Absence of probable and reasonable cause

The plaintiff must prove that the defendant instituted the proceedings without reasonable and probable cause. Reasonable and probable cause refers to an honest belief, based on reasonable grounds, that the initiation of the proceedings was justified. In assessing whether there was reasonable and probable cause for bringing a charge, it is necessary to conduct both an objective and subjective assessment.

The objective sufficiency of the material considered by the prosecutor must be assessed in light of all of the facts of the particular case. In *Hicks v. Faulkner* (1878) 8 QBD 167 at 171, Hawkins J. defined reasonable and probable cause as "*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."

The element of reasonable and probable cause is not abstract or purely objective. The question is whether the prosecutor had reasonable and probable cause to do what he did; not whether, regardless of the prosecutor's knowledge or belief, there was reasonable and probable cause for a charge to be framed.

The plaintiff must establish that the defendant did not honestly form the view that there was a proper case for prosecution or formed that view on an insufficient basis. On behalf of the High Court of Australia, in *A v. New South Wales* [2007] HCA 10, Gleeson C.J., Gummow, Kirby, Hayne, Heydon and Crennan JJ. stated at paragraph 80:

> *In cases where the prosecutor acted on material provided by third parties, a relevant question in an action for malicious prosecution will be whether the prosecutor is shown not to have honestly concluded that the material was such as to warrant setting the processes of the criminal law in motion. (There may also be a real and lively question about the objective sufficiency of the material, but that may be left to one side for the moment.) In deciding the subjective question, the various checks and balances for which the processes of the criminal law provide are important. In particular, if the prosecutor was shown to be of the view that the charge would likely fail at committal, or would likely be abandoned by the Director of Public Prosecutions, if or when that officer became involved in the prosecution, absence of reasonable and probable cause would be demonstrated. But unless the prosecutor is shown either not to have honestly formed the view that there was a proper case for*

> *prosecution, or to have formed that view on an insufficient basis, the element of absence of reasonable and probable cause is not established.*

The proof of absence of probable and reasonable cause is a heavier burden, as the plaintiff is expected to prove the negative. In *Haturusinghe v. Kudaduraya* (*supra*), Fernando A.J. at pages 64-65 considered this as a "somewhat unusual burden" cast on the plaintiff, and states that in determining whether or not the plaintiff had discharged this burden, the Court needs to take into account all factors. Each case must depend upon its own circumstances.

> *In order to succeed in an action for malicious prosecution, the plaintiff must prove that the defendant acted without reasonable and probable cause. The burden is clearly on the plaintiff. Corea v. Pieris (1908) 10 N.L.R. 321; (1909) 12 N.L.R. 147 (P.C.). Indeed Winfield [Law of Tort, 4th Ed.] at p. 617 points out that in this respect "the plaintiff is compelled to undertake a task commonly supposed to be impossible – to prove a negative". It is necessary therefore to examine the manner in which the learned District Judge has approached the question of lack of reasonable and probable cause. He examines the evidence both of the plaintiff and the defendant and concludes that the charge was a false one, and therefore that it was made without reasonable and probable cause. I do not think however that this conclusion was justified having regard to the circumstances in which the complaint was made – circumstances which the Judge should have considered in determining whether or not the plaintiff had discharged the somewhat unusual burden cast on him in an action of this description. The plaintiff had himself admitted an exchange of blows between himself and the defendant on the morning in question, but he nevertheless made no complaint*

of the assault to the authorities. On the other hand the defendant made a very prompt complaint to the Headman and then to the Police. This indicates the probability that the incident of the morning had caused more resentment in the mind of the defendant than in that of the plaintiff. If the defendant did so resent the blows which the plaintiff admits were exchanged it might well be that in that state of mind his allegation of theft was an embellishment made merely in anger. "It may, I think be assumed", says Cave J. in Brown v. Hawkes (1891) 2 Q.B.D. at p. 722, "that the defendant was angry; but so far from this being a wrong or indirect motive, it is one of the motives on which the law relies to secure the prosecution of offenders, against the criminal law". Then there was evidence that the defendant did at the time of the incident and in the presence of the plaintiff refer to the loss of his purse. The learned Judge has failed to consider the question whether the purse was actually lost, and if so whether the allegation of theft may have been made mistakenly. The fact that the defendant attempted subsequently to substantiate this allegation in his evidence to the Magistrate does not lead to the necessary inference that the original complaint was made without reasonable and probable cause. I think that the learned Judge should also have taken into consideration the fact that although the defendant made an allegation that the plaintiff took his purse, it was in the main a complaint of assault, which latter complaint could not possibly have been held to have been made without reasonable and probable cause. I think therefore that the plaintiff has failed to discharge the burden of proving that the complaint was made without reasonable and probable cause.

The fact that the proof of the lack of probable and reasonable cause depends on the facts and circumstances of each individual case was

underscored in *A v. New South Wales* (*supra*) at paragraph 61 in the following manner:

> *Because the absence of reasonable and probable cause is understood as containing both subjective and objective elements, one of the chief forensic difficulties confronting a plaintiff is how to establish what the prosecutor (the defendant in the civil proceeding) had in his or her mind when instituting or maintaining the prosecution. Absent some admission by the defendant, the plaintiff must make the case by inference and, if the defendant gives evidence, by cross-examination. The shape of the forensic contest in the particular case will inevitably dictate the way in which the plaintiff puts the argument that absence of reasonable and probable cause is established. In particular, what, if anything, the defendant prosecutor says in court, or has said out of court, about why he or she launched the prosecution, will loom very large in the plaintiff's contentions about absence of reasonable and probable cause. It must be recognised that much of what is said in the decided cases about want of reasonable and probable cause is moulded by the nature of the forensic contest in the particular case.*

The prosecutor must believe that the accused is probably guilty of the offence. This belief must be based on information available to the prosecutor indicating such guilt, rather than mere speculation or conjecture. In *Herniman v. Smith* [1938] AC 305 at 319, Lord Atkin stated:

> *It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is reasonable and probable cause for a prosecution.*

In the case of *Karunaratne v. Karunaratne* (1959) 63 NLR 365 at 370, Basnayake C.J. emphasised the burden cast on the plaintiff in action for malicious prosecution in the following terms:

> *In the instant case the plaintiff has failed to establish anything more than a mere giving of information to the police authorities, and is therefore not entitled to succeed. To succeed in an action of this nature the plaintiff must establish that the charge was false, and false to the knowledge of the person giving the information, that it was made with a view to prosecution, that it was made animo injuriandi and not with a view to vindicate public justice, and that it was made without probable cause. In the instant case the plaintiff has failed to discharge the burden that rests on him.*

Justice Tilakawardane in *Silva v. Silva* [2002] 2 Sri LR 29 and Justice Salam in *Jayawickrema v. Lanka Electricity Board* [2007] 2 Sri LR 406 highlighted these criteria as fundamental components in cases involving malicious prosecution.

Proof of malice

In essence, in an action for malicious prosecution, the plaintiff must prove on a balance of probabilities that the unsuccessful prosecution was initiated by the defendant without reasonable and probable cause and with malice. Absence of reasonable and probable cause may, in a given case, be evidence of malice but not decisive. The positive requirement of malice, and the negative requirement of absence of reasonable and probable cause, remain as separate elements which the plaintiff must prove in order to succeed in an action for malicious prosecution.

The critical element in a case of malicious prosecution is proof of malice on the part of the defendant and not proof of unsuccessful prosecution, which can happen due to various reasons, including negligence on the

part of the police to prosecute the case diligently and thereby failure to prove the charge beyond a reasonable doubt. The failure to prove the charge does not *ipso facto* prove malice. The tort of malicious prosecution is not available to all who have been unsuccessfully prosecuted.

Malice is a broader concept than ill-will or spite; it signifies an "improper purpose", one not intended for lawful enforcement of the law. Anything other than a desire to uphold justice falls within the ambit of malice. Prof. J.G. Fleming whilst stating at page 590 that *"Malice" has proved a slippery word in the law of torts, and should long have been replaced by "improper purpose"* explains:

> *At the root of it is the notion that the only proper purpose for the institution of criminal proceedings is to bring an offender to justice and thereby aid in the enforcement of the law, and that a prosecutor who is primarily animated by a different aim steps outside the pale, if the proceedings also happen to be destitute of reasonable cause.*

Malice is a state of mind and implies an intent to injure a person. Hence it involves ascertainment of the intention in instituting legal proceedings. It may be practically difficult to prove malice by direct evidence. The proof of malice will often be a matter of inference from other facts established in Court.

Black's Law Dictionary (11th edition) pages 1145-1146 defines "malice" as follows:

> *malice, n. (14c) 1. The intent, without justification or excuse, to commit a wrongful act. 2. Reckless disregard of the law or of a person's legal rights. – Also termed abandoned and malignant heart; abandoned heart; malignant and abandoned heart. 3. Ill will; wickedness of heart. This sense is most typical in nonlegal contexts.*

"Malice means in law wrongful intention. It includes any intent which the law deems wrongful, and which therefore serves as a ground of liability. Any act done with such an intent is, in the language of the law, malicious, and this legal usage has etymology in its favour. The Latin malitia means badness, physical or moral – wickedness in disposition or in conduct not specifically or exclusively ill-will or malevolence; hence the malice of English law, including all forms of evil purpose, design, intent, or motive. [But] intent is of two kinds, being either immediate or ulterior, the ulterior intent being commonly distinguished as the motive. The term malice is applied in law to both these forms of intent, and the result is a somewhat puzzling ambiguity which requires careful notice. When we say that an act is done maliciously, we mean one of two distinct things. We mean either that it is done intentionally, or that it is done with some wrongful motive." John Salmond, Jurisprudence 384 (Glanville L. Williams ed., 10th ed. 1947).

"[M]alice in the legal sense imports (1) the absence of all elements of justification, excuse or recognized mitigation, and (2) the presence of either (a) an actual intent to cause the particular harm which is produced or harm of the same general nature, or (b) the wanton and willful doing of an act with awareness of a plain and strong likelihood that such harm may result... The Model Penal Code does not use 'malice' because those who formulated the Code had a blind prejudice against the word. This is very regrettable because it represents a useful concept despite some unfortunate language employed at times in the effort to express it." Rollin M. Perkins & Ronald N. Boyce, Criminal Law 860 (3d ed. 1982).

Prof. R.G. McKerron, at page 307 states:

> *The plaintiff must prove that the defendant was actuated by malice. [Hart v. Cohen 16 S.C. 363] By malice is to be understood "not necessarily personal spite and ill-will, but any improper or indirect motive". [per Kotze, J.P. in Fyne v. African Realty Trust 1906 E.D.C. 257] Thus, in the wrong of malicious prosecution malice may be defined as some motive other than a desire to bring to justice a person whom one honestly believes to be guilty. [Brown v. Hawkes 1891 2 Q.B. 723]*

In *A v. New South Wales* (*supra*) it was held at paragraphs 91 and 92 that what the plaintiff has to prove in order to establish malice in an action for malicious prosecution is that the defendant acted for 'a purpose other than a proper purpose':

> *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.*
>
> *Purposes held to be capable of constituting malice (other than spite or ill will) have included to punish the defendant and to stop a civil action brought by the accused against the prosecutor. But because there is no limit to the kinds of other purposes that may move one person to prosecute another, malice can be defined only by a negative proposition: a purpose other than a proper purpose. And as with absence of reasonable and probable cause, to attempt to identify exhaustively when the processes of the criminal law may properly be invoked (beyond the general proposition that they should be invoked with reasonable and probable cause) would direct attention away from what it is that the plaintiff has to prove in order*

> *to establish malice in an action for malicious prosecution – a purpose other than a proper purpose.*

In *A v. New South Wales*, which I quoted in my judgment several times, A, a New South Wales police service employee, was charged with homosexual intercourse with his 12 and 10-year-old stepsons, D and C, when they were aged eight and nine respectively. The complaint was by an unidentified complainant. The 2nd respondent police officer was part of the joint investigation team. At committal proceedings, C admitted his evidence was false and that he lied to help his brother D who disliked A intensely. The Magistrate discharged A on both counts, concluding there was no reasonable prospect that a jury could convict him. A commenced proceedings for malicious prosecution. The District Court *inter alia* accepted the evidence of A's solicitor where the 2nd defendant told the solicitor after the Magistrate's Court case that he (the 2nd defendant) regretted charging A, which he did under pressure since A was a police employee and if it had been up to him, he would not have done so. The District Court held with A and awarded compensation for malicious prosecution. On appeal, the Court of Appeal set aside the judgment of the District Court. The High Court restored the judgment of the District Court and stated at paragraph 108:

> *The second respondent said that he had been under "pressure" to charge the appellant "because he worked for the Police Service" and that "if it was up to me I wouldn't have charged him". Whether these words were said and, if they were, what was meant by them, were issues to be determined by the trial judge according to the whole of the evidence led at trial. It was open to the trial judge to conclude, as he did, that the words were said, and that they were intended, not as words of solace, but as a true reflection of the second respondent's frame of mind at the time he laid the charges. It was*

> *therefore open to the trial judge to conclude, as he did, that the charges were laid not for the purpose of bringing a wrongdoer to justice but for some other purpose. That other purpose was described as "succumbing to pressure".*

Clerk & Lindsell on Torts, 17th edn (1995), at page 757 states:

> *The term 'malice' in this form of action is not to be considered in the sense of spite or hatred against an individual, but of malus animus, and as denoting that the party is actuated by improper and indirect motives. The proper motive for a prosecution is, of course, a desire to secure the ends of justice. If a plaintiff satisfies a jury, either negatively that this was not the true or predominant motive of the defendant or affirmatively that something else was, he proves his case on the point. Mere absence of proper motive is generally evidenced by the absence of reasonable and probable cause. The jury, however, are not bound to infer malice from unreasonableness; and in considering what is unreasonable they are not bound to take the ruling of the judge.*

Application of the law to the facts of the case

In the instant case, the defendants' position was that they acted *bona fide* on a complaint received by the Ceylon Electricity Board and did not particularly target the plaintiff with malice. The raid in question was conducted alongside other raids on the same day. They maintained that they were simply exercising their powers under the Electricity Act, and that due process was followed during the raid. Furthermore, there is no evidence of verbal abuse or altercation between the parties during the raid. The 2nd defendant, who was the team leader, decided that the electric meters had been tampered with. The 2nd defendant stated in his

evidence that he had over ten years of experience as an investigation officer and had conducted approximately 6000 investigations.

In the context of a public prosecution initiated by a police officer or another authority, where the prosecutor lacks personal interest in the matter and has no personal knowledge of the parties, and is merely fulfilling a public duty, these factors, along with the institutional framework within which the decision to prosecute is made, are pertinent in determining the presence of malice.

The main, if not sole, reason for the District Judge to conclude that the defendants, particularly the 2nd defendant, acted maliciously is their failure to obtain expert opinion or scientific evidence confirming tampering with the meters prior to initiating proceedings in the Magistrate's Court.

> මීලඟට සලකා බැලිය යුතු වැදගත්ම කරුණ මෙම 2 සිට 5 දක්වා විත්තිකරුවන් විදුලිය විසන්දි කිරීමේදී ද්වේශ සහගතව ක්‍රියා කර ඇත්ද යන්නයි. මේ අනුව මෙම නඩුවේ ඉදිරිපත් වූ පැමිණිලිකරුගේ සාක්ෂිය අනුව 2 සිට 5 දක්වා විත්තිකරුවන් සහ පොලිස් නිළධාරියෙකු පැමිණ පැමිණිලිකරුගේ ආයතනයට සපයා තිබූ විදුලි මනු තුනෙන් දෙකක් අඩුවෙන් ක්‍රියා කරන බවට සහ මුද්‍රා දෙකක වෙනස්කම් ඇති බවට පවසා පැමිණිලිකරුව අත්අඩංගුවට ගෙන මහේස්ත්‍රාත් අධිකරණයට ඉදිරිපත් කර ඇත.
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> මේ අනුව මහේස්ත්‍රාත් අධිකරණයේදී මෙම නඩුවේ පැමිණිලිකරුට එරෙහිව පවරා තිබූ නඩුවෙන් ප්‍රමාණවත් සාක්ෂි නොමැති වීම මත පැමිණිලිකරු නිදොස් කොට නිදහස් කර ඇත. මෙම නඩුවේ පැමිණිලිකරුගේ සාක්ෂිය දීර්ඝ ලෙස විත්තිය විසින් හරස් ප්‍රශ්න වලට භාජනය කර ඇති නමුත්, විත්තිය විසින් අදාල විදුලි මනුහි සඳහන් මුද්‍රා ව්‍යාජ බවට තහවුරු කර ගන්නා ලද කිසිදු විශේෂඥ සහතිකයක් පැමිණිලිකරුට ඉදිරිපත් කොට හරස් ප්‍රශ්න අසා නොමැත. එමෙන්ම මහේස්ත්‍රාත් අධිකරණයේ නඩු වාර්තාව ද ඉදිරිපත් කර ඇති අතර, එකී නඩු වාර්තාව ද පරීක්ෂා කර බැලීමේදී අදාල දෝෂ සහිත ලෙස පවසනු ලබන විදුලි මනු දෙක මෙසේ දෝෂ සහිත බවට සහ එකී මුද්‍රා දෝෂ සහිත බවට කිසිදු විශේෂඥ ආකාරයේ තහවුරු කර ගන්නා ලද වාර්තාවක් ඉදිරිපත් කර නොමැති බවට පැහැදිලිව පෙනී යයි. එසේම මෙම නඩුවේ විත්තිකරුට අදාල විදුලි මනු දෙක හා මුද්‍රා

සම්බන්ධව, නිසි රසායනාගාරයකට යොමුකර එහි තත්වය සම්බන්ධව වාර්තාවක් ලබාගෙන, ඒ මත පැමිණිලිකරුට එරෙහිව නඩු පැවරීමට අවස්ථාව තිබුණි. එසේ නොකර 2 හා 3 විත්තිකරුවන්ගේ පරීක්ෂාවෙන් පසුව පමණක් පැමිණිලිකරුට එරෙහිව නඩු පැවරීමට කටයුතු කිරීම සැබෑ ලෙසම ඔවුන්ට පවරා ඇති බලය අයුතු හා අසාධාරණ ලෙස භාවිතා කිරීමක් බව පැමිණිල්ලේ සාක්ෂි අනුව ඔප්පුවී ඇත. ඒ අනුව ඉතාමත් පැහැදිලිව මෙම නඩුවේ විත්තිකරුවන්ට පැමිණිලිකරුගේ ආයතනට ලබා දී තිබූ විදුලි සම්බන්ධතාවයට අදාල විදුලි මනුවල දෝෂ සහිතව ක්‍රියා කරන බවට සහ එහි මුද්‍රා ව්‍යාජ බවට ඔප්පු කිරීමට පිළිගත හැකි කිසිදු විශේෂඥ සාක්ෂියක් නොමැතිව පැමිණිලිකරුගේ ආයතනයට ලබාදී තිබූ විදුලි සම්බන්ධතාව විසන්දි කර පැමිණිලිකරුට විරුද්ධව මහේස්ත්‍රාත් අධිකරණයේ නඩු පවරා තිබූ බව පැමිණිලිකරුගේ සාක්ෂිය විශ්ලේෂණය කර බැලීමේදී පෙනී යයි. එසේම 2 හා 3 විත්තිකරුවන් අදාල මනුවල පවතින දෝෂ සම්බන්ධව තීරණයකට හා නිගමනයකට එළඹීම සඳහා විශේෂඥතාවයකින් යුත් පුද්ගලයන් නොවේ. ඒ අනුව මෙම නඩුවේ විත්තිකරුවන් විසින් පැමිණිලිකරුට මහේස්ත්‍රාත් අධිකරණයේ නඩු පැවරීමට කටයුතු කර ඇත්තේ ආදාල මුද්‍රා ව්‍යාජ බව හෝ අදාල විදුලි මණු අඩුවෙන් දුවන බවට හෝ කිසිදු ආකාරයකින් විශේෂඥ තාවයකින් තහවුරු කර ගැනීමෙන් පසුව නොවේ ඒ අනුව මෙම නඩුවේ 1 වෙනි විත්තිකරුගේ සේවකයින් වන 2 සිට 6 දක්වා වන විත්තිකරුවන් පැමිණිලිකරුට එරෙහිව මහේස්ත්‍රාත් අධිකරණයේ නඩු පැවරීමේදී පැමිණිලිකරුට එරෙහිව නඩු පැවරීමට තරම් ප්‍රමාණවත් කරුණු තිබෙන බවට කිසිදු තහවුරු කර ගැනීමක් නොමැතිව හුදෙක්ම 2 වෙනි විත්තිකරුගේ අවශ්‍යතාවය මත අනෙකුත් විත්තිකරුවන් සමඟ එක්ව පැමිණිලිකරුට විරුද්ධව නඩු පවරා ඇති බව පැමිණිල්ලේ සමස්ථ සාක්ෂි විශ්ලේෂණය කර බැලීමේදී පැහැදිලිව ඔප්පු වී ඇත.

Mere failure by the defendants to obtain expert opinion or scientific evidence confirming tampering with the meters does not establish that the prosecution was malicious.

The overzealousness of law enforcement authorities to swiftly apprehend wrongdoers does not amount to malice, nor does incompetence, irresponsibility or negligence on the part of the defendants. In order to constitute malicious prosecution, the plaintiff must prove that the defendants acted with intentional malice.

In *Proulx v. Quebec (Attorney General)* (2001) 206 DLR (4th) 1 (SCC), the Supreme Court of Canada held at paragraph 35:

> *As such, a suit for malicious prosecution must be based on more than recklessness or gross negligence. Rather, it requires evidence that reveals a willful and intentional effort on the Crown's part to abuse or distort its proper role within the criminal justice system. In the civil law of Quebec, this is captured by the notion of "intentional fault". The key to a malicious prosecution is malice, but the concept of malice in this context includes prosecutorial conduct that is fueled by an "improper purpose" or, in the words of Lamer J. in Nelles, supra, a purpose "inconsistent with the status of minister of justice."*

The Court affirmed this view in *Miazga v. Kvello Estate* [2009] 3 SCR 339 (SCC) at paragraphs 80-81:

> *While the absence of a subjective belief in reasonable and probable cause is relevant to the malice inquiry, it does not equate with malice and does not dispense with the requirement of proof of an improper purpose. By requiring proof of an improper purpose, the malice element ensures that liability will not be imposed in cases where a prosecutor proceeds, absent reasonable and probable grounds, by reason of incompetence, inexperience, honest mistake, negligence or even gross negligence.*

South African courts have followed the same approach. In *Minister of Justice and Constitutional Development and Others v. Moleko* [2008] 3 All SA 47 (SCA), the Supreme Court of Appeal of South Africa held at paragraph 64:

> *The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at*

least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (dolus eventualis). Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice.

Although it is the plaintiff's burden to prove malice, in this case, the District Judge has shifted the burden onto the defendants to disprove it. There is no presumption of malice in the institution of legal proceedings. The District Judge states "මේ අනුව මෙම නඩුවේ විත්තියේ සාක්ෂි අනුව සලකා බැලිය යුතු වැදගත්ම කරුණ වනුයේ විත්තිකරුවන් විසින් ද්වේෂ සහගතව සහ අසත්භාවයෙන් යුතුව කටයුතු කර නොමැති බවට ඔප්පු කර ඇත්ද යන්නයි." After analysing the defence evidence in the light of want of scientific evidence, the District Judge states "මේ අනුව මෙම නඩුවේ විත්තියේ සමස්ථ සාක්ෂි සලකා බැලීමේදී මෙම නඩුවේ විත්තිකරුවන් පැමිණිලිකරුට විරුද්ධව නඩු පැවරීමේදී පැමිණිලිකරුට එරෙහිව නඩු පැවරීමට ප්‍රමාණවත් කරුණු විත්තිකරුවන්ට තිබූ බවට ඔප්පු කිරීමට විත්තිකරුවන් විත්තියේ සාක්ෂි මඟින් අපොහොසත්ව ඇත." This is a misapplication of the burden of proof.

The plaintiff in his evidence admitted that the 3rd-5th defendants did not act maliciously against him and they were merely carrying out the directions given by the 2nd defendant who was the team leader.

ප්‍ර: 2-5 දක්වා විත්තිකරුවන් ආවා එදා නඩුවේ පරිශ්‍රයට කියලා.

උ: ඔව්.

ප්‍ර: තමා 2002.05.03 වන දිනට පෙර ඔය 2-5 විත්තිකරුවන්ගෙන් එක්කෙනෙකු හරි දැන සිටියාද?

උ: නැහැ.

ප්‍ර: ඔවුන් මොනවද කරන්නේ රාජකාරය තමා දැන සිටියාද?

උ: නැහැ.

ප්‍ර: සාක්ෂිකරු තමා ඔවුන් ගැන කිසිම දෙයක් දන්නේ නැහැ.

උ: නැහැ.

ප්‍ර: ඔවුන් තමන් ගැන කිසිම දෙයක් දන්නවාද කියලා තමුන් දන්නවාද?

උ: දන්නේ නැහැ.

ප්‍ර: සාක්ෂිකරු තමා කිව්වා සීල් කැඩුවා කියලා.

උ: ඔව්.

ප්‍ර: තමුන්ව අත්අඩංගුවට ගත්තා.

උ: ඔව්.

ප්‍ර: විදුලි සැපයුමට මොකද කලේ?

උ: විසන්ධි කලා.

ප්‍ර: කවුද?

උ: ටීමන් පෙරේරා.

ප්‍ර: ඔය ආපු අනික් 3 දෙනා ඒ කියන්නේ ටීමන් 2 වන විත්තිකරු නේද?

උ: ඔව්.

ප්‍ර. තමා ටීමන් 2 වන විත්තිකරු හැටියට නම් කරලා තියෙන්නේ?

උ: ඔව්.

ප්‍ර: 3 වන විත්තිකරු ටියුඩර්, ලලිත්, මහානාම ඔවුන් ආවා. වී.ටී. පෙරේරා ට උදව් කරන්න ඔවුන් යටතේ සේවය කරන්න කියලා කිව්වොත් හරිද?

උ: හරි.

ප්‍ර: ටීමන් පෙරේරා උපදෙස් මත ක්‍රියාත්මක කලේ?

උ: ටියුඩර් මහතාට තමයි ටීමන් නියෝග කලේ විදුලිය විසන්ධි කරන්න කියලා.

ප්‍ර: එතකොට මෙම 3-5 දක්වා විත්තිකරුවන් කිසිම විටකින් තමා කියන හැටියට ඔවුන් කලේ 2 වන විත්තිකරු කියපු දේ. බලය ක්‍රියාත්මක කල නිලධාරියා හැටියට හිටියේ 2 වන විත්තිකරු.

උ: ඔව්.

ප්‍ර: ඔවුන් හිතාමතාම ඔවුන් කිසිම තමාට යමක් කලේ නැහැ. එයාලා කලේ 2 වන විත්තිකරු කියපු දේ.

උ: ඔව්.

ප්‍ර: චෝදනා පත්‍රය පිළියෙල කෙලේ, අත්සන් කලේ 2 වන විත්තිකරු.

උ: චෝදනා පත්‍රය පිළියෙල කලේ 2 වන විත්තිකරු. අත්සන් කලේ පොලිසි නිලධාරියා.

ප්‍ර: 3, 4, 5 විත්තිකරුවන් මේකට කිසිම සම්බන්ධයක් නැහැ චෝදනා පත්‍රයට.

උ: නැහැ.

ප්‍ර: 6 වන විත්තිකරු කියන්නේ, ගල්ලහන්දි දිපාල් වනිගරත්න කොහොමද සම්බන්ධ වුනේ? එදා සිටියාද?

උ: එදා සිටියේ නැහැ.

ප්‍ර: තමාගේ පරිශ්‍රයට පැමිණියේ නැහැ.

උ: නැහැ.

ප්‍ර: කොහොමද සම්බන්ධ වුනේ?

උ: විදුලි ඉංජිනේරු මහතා මට විරුද්ධව ඇස්තමේන්තු කලා.

The 2nd defendant also in his evidence clearly stated that the 3rd-5th defendants carried out his orders. The 4th and 5th defendants were labourers.

මා සමග සම්බන්ධ වූ 3, 4, 5 විත්තිකරුවන්ද මගේ නායකත්වය යටතේ විමර්ශන කටයුතු වලට සම්බන්ධ වුනා. මම 02 වන විත්තිකරු. 03 වන විත්තිකරු වනිගතුංගගේ ටියුඩර්. ඔහු මගේ උපදෙස් අනුව මීටර් කවර සහ සීල් ගැලෙව්වා. විදුලිය විසන්ධි කර වයර් පරීක්ෂා කලා. අසාමාන්‍ය තත්වයක් පෙන්නුම් කලා. මෙම නඩුවට අදාලව සැපයුම් වයර් පරීක්ෂා කලා. අසාමාන්‍ය තත්වයක් නැහැ කිව්වා. මීටර් කවර සහ ටර්මිනර් කවර ගලවා දුන්නේ මගේ උපදෙස් පරිදි. ලොඩ් සම්බන්ධකර බැලුවා මීටරයට. කම්බි තුනක් තියෙනවා. සිදහලුවලට බැර සැපයුම ලබා දී පරීක්ෂා කලා. මම ටියුඩර්ට රාජකාරී පැවරුවා. මම මනු පරීක්ෂා කරන විට පැමිණිලිකරුත් සිටියා. 4 සහ 5 විත්තිකරුවන්ට බඩු බාහිර සැපයීම කරනවා. ඔවුන්ගේ තනතුර කම්කරු. වනිගතුංග විදුලි කාර්මික නිලධාරී. ඔහු බඩු ගෙන්වනවා. කම්කරුවෙක් ලවා අවශ්‍ය බඩු ගෙන්වා ගන්නවා. 4, 5 විත්තිකරුවන් මා සමග රාජකාරී කළේ කම්කරුවන් හැටියට.

According to the evidence of the 3rd defendant, the 3rd defendant was also a labourer who has studied up to Grade 6.

The 3rd-5th respondents have not set the law in motion for the plaintiff to be prosecuted before the Magistrate's Court, nor is there any evidence that the 3rd-5th respondents were actuated by malice. There is no case against the 3rd-5th respondents for malicious prosecution.

The plaintiff has also failed to prove malice on the part of the 2nd respondent in instituting legal proceedings before the Magistrate's Court.

Even assuming that malice was proved against the 2nd respondent, as I stated at the beginning, upon the death of the 2nd defendant halfway

through the trial, the plaintiff abandoned the case against the 2nd defendant (despite the case having reached the state of *litis contestatio*). Hence the cause of action based on malicious prosecution cannot succeed against the 1st defendant.

After the argument before this Court, the plaintiff has also died. In view of the above conclusion, there is no necessity to make an order regarding substitution although learned counsel for the plaintiff-appellant states that substitution is possible since the action has reached the stage of *litis contestatio* prior to the death.

Conclusion

The 1st-4th questions of law were raised by the plaintiff and the 5th and 6th questions were raised by the defendants. Those questions and the answers thereto are as follows:

(1) Did the High Court of Civil Appeal err in law in concluding that the plaintiff failed to prove that the defendants have set the law in motion to prosecute the plaintiff?

A. Yes. However, the High Court has later accepted that the defendants have set the law in motion when it stated "the defendant by making the complaint against the plaintiff had not acted maliciously." This goes to show the basis of the High Court judgment.

(2) Did the High Court of Civil Appeal err in law in holding that there was no sufficient evidence to establish a wrongful intent (*animus injuriandi*) or *dolus* on the part of the defendants?

A. No. There was no sufficient evidence to establish that the defendants acted maliciously.

(3) Did the High Court of Civil Appeal err in law in holding that the plaintiff failed to prove that the defendants acted maliciously and without reasonable and probable cause?

A. No.

(4) Was there a valid notice of appeal and petition of appeal filed by the respondents before the High Court?

A. No such objection had been taken before the High Court. In any event, such defects are curable.

(5) Does the cause of action of the plaintiff survive against the 1st, 3rd, 4th and 5th respondents?

A. On the facts and circumstances of this case, no.

(6) Are the judgments of the District Court and the High Court nullity against the other defendants as the 2nd and 6th defendants were dead at the time the judgments were pronounced?

A. No.

I affirm the judgment of the High Court and dismiss the appeal but without costs.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

K. Priyantha Fernando, J.
I agree.

Judge of the Supreme Court