

(1947) 08 PAT CK 0010

Patna High Court

Case No: None

Darsan Pande

APPELLANT

Vs

Ghaghu Pande and
Others

RESPONDENT

Date of Decision: Aug. 5, 1947

Citation: AIR 1948 Patna 167

Hon'ble Judges: Das, J

Bench: Division Bench

Judgement

Das, J.

This second appeal arises out of an action for malicious prosecution. The defendant is the appellant before me. He had filed a complaint against the respondents alleging that they had committed offences under various sections of the Penal Code. The respondents were summoned to stand their trial and after a trial lasting for about a year they were acquitted by the criminal Court. The respondents then brought the present action for malicious prosecution. The Courts below have decreed the suit, the learned Munsif allowing Rs. 160 for the expenses incurred in the criminal litigation and Rs. 490 as damages for loss of prestige and physical and mental discomfort. The learned Subordinate Judge who heard the appeal has reduced the amount of damages. Learned Counsel for the appellant has not very seriously raised before me the question of the amount of damages, and learned Counsel for the respondents on whose behalf a cross-objection was filed regarding the amount of damages has not seriously pressed the cross-objection. Therefore, if the decision of the Courts below is right in other respects, it would be unnecessary to consider the question of the amount allowed as damages by the Court of Appeal below.

2. There is no dispute in this case that a criminal proceeding was instituted against the respondents on the complaint of the appellant, nor is there any dispute that the said proceeding terminated in favour of the respondents. These two facts are not in

doubt. It may, therefore, be taken as beyond dispute that the respondents have proved (1) that they were prosecuted by the appellant and (2) that the proceedings complained of terminated in favour of the respondents. The points which it is necessary for the plaintiff to substantiate in an action for malicious prosecution are no longer in doubt; they have been decided over and over again.

3. It has been laid down in numerous decisions that besides the two points mentioned above the plaintiff must also prove that the prosecution was instituted against him without any reasonable and probable cause, and that it was instituted with a malicious intention, that is, not with the mere intention of carrying the law into effect, but with an intention which was wrongful in point of fact. It is with regard to these two points that learned Counsel for the appellant has seriously pressed his arguments before me. His contentions so far as I have understood them, are threefold, firstly, he has contended that the Court of Appeal below was wrong in drawing a particular presumption as to the absence of a reasonable and probable cause from the innocence of the respondents as established by the acquittal in the criminal Court, on the basis of a decision of this Court in *Taharat Karim v. Abdul Khaliq* AIR 1938 Pat. 529; secondly, he has contended that the Court of Appeal below has committed an error of record with regard to the evidence of one of the witnesses for the respondents (P.W. 2), and thirdly, he has contended that the Court of Appeal below has committed an error in law in inferring malice, the kind of malice which is required to sustain an action for malicious prosecution, from mere absence of a reasonable and probable cause, in other words, it is contended that the Court of Appeal below has really come to no finding on the question of malice and it is suggested that this clearly vitiates the decision, of the Court of Appeal below.

4. I take up these contentions in the order in which I have mentioned them. Dealing with the point of the absence of a reasonable and probable cause the learned Subordinate Judge has expressed himself as follows:

It has been argued before me by the pleader for the appellant that the plaintiffs have failed to prove that there was no reasonable and probable cause for the filing of the complaint and that it was done maliciously. He has argued that the onus of proving this lay upon the plaintiffs and they had failed to discharge this onus. There does not appear to be any dispute in this case about the fact that Darsan (appellant before me) had filed a complaint against the plaintiffs; that the plaintiffs were put on trial on account of that complaint and that they were ultimately acquitted. The learned Munsif relied upon a decision of our own High Court reported in *Taharat Karim v. Abdul Khaliq* A.I.R.1938 Pat. 529 and he found that as the facts alleged were within the personal knowledge of the defendant and the facts were found to be false, so there was a presumption not only that the plaintiffs were innocent but that there was also no reasonable and probable cause for the accusation.

5. The learned Subordinate Judge has then quoted an extract from the said decision and has pointed out that in the criminal case the allegation was that the offences had been committed in the presence of and against the person of the present appellant--facts which were within his personal knowledge and, therefore, the principle laid down in *Taharat Karim v. Abdul Khaliq* AIR 1938 Pat. 529 applied and there should be a presumption that the present appellant had no reasonable and probable cause for the accusation.

6. Learned Counsel for the appellant contends that this view is not correct, and that it has coloured the other decision of the learned Subordinate Judge to the effect that the respondents had satisfactorily proved that the present appellant had invented and instigated the whole story for the prosecution. Learned Counsel has also challenged the correctness of the decision referred to above, and has suggested that if I entertain any doubt about the correctness of the said decision, the matter should at least be placed before a larger Bench. I have very carefully considered the argument which has been presented before me and in view of the manner in which it has been presented, I consider that there is need for expressing oneself very clearly in the matter. The question of the burden of proof in an action for malicious prosecution was gone into very thoroughly and carefully by the Court of Appeal in England in the leading case in *Abrath v. North Eastern* (1883) 11 Q.B.D. 440. It was pointed out there that it was not enough for the plaintiff to show, in order to support the claim which he had made, that he was innocent of the charge upon which he was tried; he had to show that the prosecution was instituted against him by the defendants without any reasonable or probable cause and with a malicious intention in the mind of the defendants. It was further observed that the burden of proving each one of the points mentioned above lay upon the plaintiff and, speaking generally, if the plaintiff merely proved that he was innocent and gave no evidence of the circumstances under which the prosecution was instituted, he was bound to fail. These observations were made with reference to the facts of that case where a medical man was prosecuted by the Railway Company on certain information having been given to the Directors of the Company which prima facie showed a conspiracy between the medical man and a person who got damages on account of injuries alleged to have been sustained in a railway collision. One of the questions which was put to the jury in that case was if the defendants had taken reasonable care to inform themselves of the true state of the case. Cave J. (as he then was) in summing up to the jury, had told that it was for the plaintiff to prove that the Railway Company did not take reasonable care to inform themselves. The question was if this direction to the jury was erroneous in law. The Court of Appeal held that it was not, and that the burden of proving each of the three major points which arose in an action for malicious prosecution lay on the plaintiff and that if in order to show the absence of reasonable and probable cause there are minor questions which are necessary to determine, the burden of proving each of these minor questions lies on the plaintiff, just as much as the burden of proving the

whole does. Bewen L.J. pointed out, however, that there might be special circumstances which along with the fact of innocence, established by the acquittal in criminal proceeding, might show that there was the want of reasonable and probable cause. I can do no better than quote the observations of Bewen, L.J. while dealing with this matter:

Something has been said about innocence being proof, prima facie, of want of reasonable and probable cause. I, do not think it is. When mere innocence wears that aspect, it is because the fact of innocence involves with it other circumstances which show that there was the want of reasonable and probable cause; as, for example, when the prosecutor must know whether the story which he is telling against the man whom he is prosecuting is false or true. In such a case, if the accused is innocent, it follows that the prosecutor must be telling a falsehood, and there must be want of reasonable and probable cause. Or if the circumstances proved are such that the prosecutor must know whether the accused is guilty or innocent, if he exercises reasonable care, it is only an identical proposition to infer that if the accused is innocent there must have been a want of reasonable and probable care. Except in cases of that kind, it is never true that mere innocence is proof of want of reasonable and probable pause. It must be innocence accompanied by such circumstances as raise the presumption that there was a want of reasonable and probable cause.

7. I think that it is these observations which their Lordships had in mind when they said in *Taharat Karim v. North Khaliq* AIR 1938 Pat. 529 that where the accusation against the plaintiff was in respect of an offence which the defendant claimed to have been committed and the trial ended in acquittal on the merits, the presumption would be not only that the plaintiff was innocent but also that there was no reasonable and probable cause for the accusation. I may note here that their Lordships were dealing with a first appeal in that case, and after referring to the presumption they discussed the evidence and came to the conclusion that the accusation brought against the plaintiff was false and without any reasonable and probable cause. The observations of Bewen L.J. show very clearly that innocence per se does not raise the presumption as to want of reasonable and probable cause. Innocence coupled with other circumstances such as these mentioned by his Lordship may raise a presumption as to want of reasonable and probable cause. The decision in *Taharat Karim v. Abdul Khaliq* AIR 1938 Pat. 529 had these exceptional circumstances in view when laying down the principle that a presumption may arise in certain cases as to want of reasonable and probable cause from the innocence of the plaintiff. In my opinion, the decision in *Taharat Karim v. Abdul Khaliq* AIR 1938 Pat. 529 is correct, if I may say so with respect, and does not go against the general principle that the plaintiff must prove in an action for malicious prosecution that the prosecution was instituted against him without any reasonable and probable cause; the onus is undoubtedly on the plaintiff, but may be discharged by showing that the fact of innocence in a particular case involves with it other circumstances which

show that there was the absence of reasonable and probable cause. This is exactly what has happened in the present case. The appellant alleged that he had been threatened etc. The allegations have been found to be false. The appellant must have, known that the story which he was telling against the man whom he was prosecuting was false. It follows, therefore, that there was a want of reasonable and probable cause.

8. There has been some controversy before me if the respondents must again establish in the civil Court their innocence of the, criminal charges preferred against them. Whatever doubt there may have been regarding this point previously, the decision of their Lordships of the Judicial Committee in *Balbhaddar Singh v. Budri Sah* A.I.R 1926 P.C. 46 has, I think, set the matter at rest. That was an appeal from the decision of the Judicial Commissioner of Oudh. The Judicial Commissioner had formulated four propositions which the plaintiff had to prove in an action for malicious prosecution. The second proposition so formulated was that he was innocent of the charge upon which he was tried. Their Lordships pointed out that this was a wrong view of the law, and they said that the second proposition should be

that the proceedings complained of terminated in favour of the plaintiff if from their nature they were capable of so terminating.

9. Their Lordships further observed that it was sufficient for the appellants before their Lordships (that is, the plaintiffs) to prove that the criminal proceedings had terminated in their favour, and that opened the way for the proof of the next proposition that the respondents (before their Lordships) had instigated the proceedings maliciously and without probable cause. I am of the view that the learned Additional Subordinate Judge had committed no error in law when he found that in the circumstances of the case before him there was a presumption that the complaint was filed without a reasonable and probable cause.

10. The learned Subordinate Judge has not based his decision mainly on such a presumption. He has considered the evidence independently and irrespective of the presumption and on a consideration of that evidence he has come to the definite conclusion that the complaint was filed without any reasonable and probable cause and that the present appellant had invented and instigated the whole story for the prosecution. This finding of the learned Subordinate Judge is based on the evidence of three witnesses for the respondents and that of the appellant himself. It has been contended before me that the learned Subordinate Judge has committed an error of record with regard to the evidence of P.W. 2. My attention has been drawn to the statement in cross-examination of this witness to the effect that he had no knowledge of the facts of the criminal case. The learned Subordinate Judge has stated in his judgment that P.W. 2 had given evidence to the same effect as the other two witnesses. It has been argued before me that this statement of the learned Subordinate Judge is an error of record. I am unable to accept this

contention. The statement made in cross-examination of the witness has to be read along with his statements in examination-in-chief. The witness had clearly stated in examination-in-chief that the criminal proceeding was false and no such occurrence had taken place as was alleged by the appellant. When no such event as alleged by the appellant had taken place, the witness was not wrong when he said that he had no knowledge of the facts of the criminal case. I do not think that the learned Subordinate Judge has committed any error of record with regard to the evidence of P.W. 2.

11. This brings me to the last contention, namely, if the learned Subordinate Judge has committed an error in law as respects the finding of malice. It is contended that the learned Subordinate Judge has not found malice independent of the absence of a reasonable and probable cause. Learned Counsel for the appellant has strongly relied on the following observations of their Lordships of the Judicial Committee in AIR 1944 1 (Privy Council) . The observations will be found at p. 4 of the report.

In order to succeed in an action for malicious prosecution the plaintiff must in the first instance prove two things (1) that the defendant was malicious and (ii) that he acted without reasonable and probable cause. Malice has been said to mean any wrong or indirect motive, but prosecution is not malicious merely because it is inspired by anger. However, wrongheaded a prosecutor may be, if he honestly thinks that the accused has been guilty of a criminal offence he cannot be the instigator of malicious prosecution. But malice alone is not enough, there must also be shown to be absence of reasonable and probable cause.

12. It is contended that the learned Subordinate Judge should have found malice independent and irrespective of his finding as to the absence of a reasonable and probable cause, and the learned Subordinate Judge is wrong in inferring malice merely from the absence of a reasonable and probable cause. This contention also appears to me to be without substance. The learned Subordinate Judge has pointed out that the respondents had taken the lease of a piece of land on 25th June 1942. The house of the present appellant fell within that land, and on the very next day the appellant made a false complaint without any reasonable and probable cause. As has been pointed out in *Shama Bibi v. Chairman of Baranagore Municipality* (10) Cri.L.J. 410, a mere absence of reasonable and probable cause does not justify, as a matter of law, the conclusion that the prosecution was malicious, though it is quite conceivable that the evidence which is sufficient to prove absence of reasonable and probable cause may also establish malice. As observed" by their Lordships of the Judicial Committee in AIR 1944 1 (Privy Council) the two questions are in most cases interwoven, and there may be circumstances which show that there was not merely the want of a reasonable and probable cause but also malice of the kind required in an action for malicious prosecution. The learned Subordinate Judge has found that the present appellant had invented and instigated the whole story for the prosecution and that his motive was an improper motive, namely, a wish to injure

the respondents rather than to vindicate the law, This wish to injure the respondents arose out of the fact that they had taken settlement of a piece of land on which stood the house of the appellant.

13. Dealing with the question of malice in *Brown v. Hawkes* (1891) 2 Q.B. 718 Cave J. (as he then was) had observed:

Now malice, in its widest; and vaguest sense, has been said to mean any wrong or indirect motive, and malice can be proved either by showing what the motive was and that it was wrong or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor.

Dealing further with the question if want of reasonable and probable cause may itself show malice his Lordship stated as follows:

Of course, there may be such plain want of reasonable and probable cause that the jury may come to the conclusion that the prosecutor could not honestly have believed in the charge he made, and in that case want of reasonable, and probable cause is evidence of malice. But I am not prepared to assent to the proposition that, where there is want of reasonable and probable cause, the jury may always find malice, no matter what the circumstances may be.

14. The question, therefore, depends on the circumstances of each particular case. It would be wrong to say as a general proposition that malice would be inferred from the absence of a reasonable and probable cause. As observed by their Lordships of the Judicial Committee in *AIR 1944 1* (Privy Council) there may be malice, but no absence of reasonable and probable cause. Conversely, the absence of reasonable and probable cause is not per se evidence of malice, but the same circumstances in a particular case may show both that is, absence of a reasonable and probable cause and malice, the two questions being interwoven in most cases.

15. The contentions raised on behalf of the appellant having failed, the appeal is without substance and must be dismissed with costs, and I order accordingly. The cross objection is also dismissed.