IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2014 HCV 01791

BETWEEN	**DAVID FOSTER**	**CLAIMANT**
A N D	**THE ATTORNEY GENERAL OF JAMAICA**	**1ST DEFENDANT**
A N D	**CORPORAL ANN JACKSON**	**2ND DEFENDANT**

IN OPEN COURT

Mrs. Marion Rose-Green Attorney-at-Law with Mrs. Andrea Lannaman Attorney-at-Law instructed by Marion Rose-Green & Co for the Claimant.

Mr. Romario Millers instructed by the Director of State Proceedings for the 1st and 2nd Defendants.

HEARD: May 1, 2023 – May 3, 2023

Tort – Malicious Prosecution – Whether or Not Investigating Officer had Reasonable and or Probable Cause to Prosecute

D. STAPLE J (Ag)

BACKGROUND

[1] This is a very unfortunate case. The uncontradicted evidence is that the Defendant was arrested, charged and prosecuted for serious sexual offences against a minor. This was between April of 2008 to 2012 when he was eventually freed of the allegations following the minor complainant recanting her statement that it was he, the Claimant, that had committed the acts against her.

[2] The complainant named another person as the true assailant and that person pleaded guilty for the same offences.

[3] The Claimant, during the period says he suffered very serious personal financial losses, mental and physical anguish, embarrassment and other suffering as a consequence of this prosecution.

[4] Indeed, the Claimant spent over 2 years in custody before being finally offered bail. It was quite an ordeal that no person should have to suffer especially where he had been adamant that he was innocent from the first day of his arrest.

[5] He brought this claim against the investigating officer and the Crown to recover damages for False Imprisonment and Malicious Prosecution.

[6] The Crown is strongly contesting the claim for Malicious Prosecution claim. They insist that the officer had reasonable and/or probable cause to arrest, charge and maintain the prosecution against the Claimant. This is so despite the fact that the complainant confessed that she had lied about the Claimant.

[7] Concerning the False Imprisonment action, counsel for the Claimant and the Defendants both agree that the claim is limited only to those few days between the date of arrest and the date of first appearance in Court when the Claimant was then held in custody pursuant to a judicial order. The parties agree that there was a breach of the duty of the arresting officer to put the Claimant before an appropriate tribunal for bail to be considered within a reasonable time after his arrest. The 6 day period was far too long.

[8] There was an attempt made to settle the sum for False Imprisonment. The Court was advised by Crown Counsel and does verily believe that an attempt was made to get approval for the settlement before the Court handed down judgment at 2:00 pm on May 3, 2023. Unfortunately, despite him communicating the 2:00 pm deadline, the Chambers did not officially communicate approval of the settlement

and the Court therefore had to assess damages, award interest and costs as a normal finding.

[9] Ultimately, for the false imprisonment, on the authorities submitted by both the Claimant and the Crown, I found that the sum of $950,000.00 to be appropriate. For the first day, given the initial shock, counsel for the Claimant submitted that a sum of $303,000.00 was appropriate and thereafter, $222,000.00 per day thereafter. Counsel for the Crown submitted that this was a reasonable figure. In the circumstances, I found that $950,000.00 was reasonable.

[10] The key contest is now on the question of the Malicious Prosecution and whether or not the officer had reasonable and/or probable cause to prosecute the Claimant.

The Law on Malicious Prosecution

[11] The law on Malicious Prosecution is not new and the principles are fairly well settled.

[12] I can do no better than quote Lord Keith of Kinkel in ***Martin v Watson***[1] on the enunciation of the law in this area:

> *"It is common ground that the ingredients of the tort of malicious prosecution are correctly stated in* Clerk & Lindsell on Torts*, 16th ed. (1989), p. 1042, para. 19-05:*
>
> *"In action of malicious prosecution the plaintiff must show* first *that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge;* secondly*, that the prosecution was determined in his favour;* thirdly*, that it was without reasonable and probable cause;* fourthly*, that it was malicious. The onus of proving every one of these is on the plaintiff."*

[1] [1996] AC 74 at p. 80

[13] There is no dispute that the prosecution was determined in favour of the Claimant. He was acquitted by the circuit court following the recanting by the complainant in the criminal case. That pleading was never challenged by the Defendants.

[14] There is also no issue raised as to whether or not the prosecution was instituted by the 2nd Defendant on behalf of the Crown. The question therefore is whether or not the 2nd Defendant acted without reasonable and/or probable cause in instituting the criminal prosecution against the Claimant.

[15] So what is meant by "reasonable and/or probable cause"? In the case of ***Herniman v Smith***[2], the following definition was approved by the House of Lords (which definition was taken from the case of ***Hicks v Faulkner***[3]),

> *"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"*

[16] So what are we looking for to say that a person has reasonable and/or probable cause? We are looking for:

(i) An honest belief that the accused is guilty;
(ii) This belief is based on a full conviction found on reasonable grounds
(iii) The grounds are a state of circumstances which, if true, would lead an ordinarily prudent and cautious man to believe that the accused is probably guilty (not guilty beyond reasonable doubt).
(iv) The belief is that of the ordinarily prudent and cautious man.

[17] So the crux of the case is whether or not the 2nd Defendant had met these criteria before she decided to set the law in motion against the Claimant.

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[2] [1938] AC 305
[3] (1878) 8 QBD 167 at 171

An Honest Belief in the Guilt

[18] It cannot be seriously disputed that the 2nd Defendant honestly believed that the Claimant was guilty of the offences with which she charged him at the time she did charge him. It was her evidence in chief that she had this belief. She denied a suggestion that she had no reasonable and/or probable cause to arrest and charge the Claimant.

[19] I do accept the evidence of the Claimant that she spoke to him after he was eventually discharged and that she told him had her doubts. It was never put to the Claimant in cross-examination that the 2nd Defendant never said those words to him.

[20] When put to her by Mrs. Rose-Green for the Claimant, the 2nd Defendant denied that she had any such conversation with him.

[21] But it is important to recall that all the 2nd Defendant needs to have is an honest belief that the Claimant was probably guilty. She did not to have an honest belief that the Claimant was guilty beyond reasonable doubt. So that it is my view, and I so find, that whilst the 2nd Defendant said she had her doubts, it did not affect the fact that she had an honest belief that the Defendant was more than likely guilty. That is all the standard she had to meet to initiate the prosecution against him. I agreed with the submissions of Mr. Miller that the belief in guilt is no more than a belief in the prosecutor that he had a prima facie against the accused.

[22] It would have then been for the tribunal of fact to make a final determination of his guilt beyond reasonable doubt. The standard of belief for arrest and charge is lower than the standard of *proof* for conviction at trial.

A Full Conviction Founded Upon Reasonable Grounds

[23] We cannot judge the 2nd Defendant in light of the fact that we now know that the Complainant told a lie on the Claimant. But what we can do is to scrutinize the

facts that presented themselves to the 2nd Defendant, at the time she formed this honest belief in the probable guilt of the Claimant, to determine whether or not her belief was reasonably held, though honest.

[24] For a belief that is founded upon grounds that are not reasonable, cannot be a belief that is rational. Remember, we are to judge the 2nd Defendant from the standard of the ordinarily prudent officer. The prosecution must also be based on the true facts of the case in so far as the prosecutor can reasonably ascertain them. In other words, an ordinarily prudent prosecutor is to take reasonable steps to get all of the facts before them before deciding whether or not to prosecute.

[25] In the case of ***Abrath v North Eastern Railway Company***[4], the House of Lords upheld a decision of the Court of Appeal approving the direction of the trial judge to the jury on the question of the facts giving rise to the honest belief of the prosecutor. The case involved an action against a railway company for malicious prosecution. At the trial, the judge directed the jury that it was for the plaintiff to establish a want of reasonable and probable cause, and malice, and that it lay on him to show that the defendants had not taken reasonable care to inform themselves of the true facts of the case. The judge asked the jury whether they were satisfied that the defendants did take reasonable care to inform themselves of the true facts, and that they honestly believed in the case which they laid before the magistrates. The jury answered both questions in the affirmative, and the judge entered judgment for the defendants.

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[4] (1886) 11 QBD 247

Did the 2nd Defendant Take the Time to Get the True Facts?

[26] The submission from Mrs. Lannaman is that the 2nd Defendant did not take the time to properly investigate the case so as to ascertain the true facts of the case before her before making her decision to prosecute the Claimant.

[27] Mrs. Lannaman points to several bits of evidence elicited on cross-examination to support her argument.

[28] Firstly, the 2nd Defendant did not, on her own evidence on cross-examination, interview the Complainants siblings that she said were with her in the room at the time when she said the Claimant had assaulted her on the several nights she was at his house.

[29] It is my finding that the 2nd Defendant did not do this, nor did she provide a credible explanation as to why this was not done. After all, on the Complainant's own statement, the Claimant is said to have performed these acts of buggery and carnal abuse in some instances right next to the sleeping siblings. It would have been important to hear from them as to whether or not they heard or saw anything at all.

[30] When pressed on this, the 2nd Defendant simply said that the complainant said at the time that the siblings were sleeping and so she did not press them. In addition, she thought they were all younger and discounted their potential evidence. But it was pointed out to her that one of them, Anthony, was older, yet he was not questioned.

[31] To my mind this was not ideal. But it does not, by itself, point to the failure to take reasonable care to appreciate all the relevant facts. Mrs. Lannaman is essentially asking me to speculate on what the children may or may not have said. In the absence of any evidence from the children themselves as to what they saw or heard, I am unable to say that whatever they may have seen or heard was relevant.

[32] Secondly there was also a failure to take a statement from the Complainant's aunt. But it is my finding that the same thing can be said of the failure of the officer to take a statement from the complainant's aunt to whom she first made the complaint about what she claimed the Claimant did.

[33] But in the global view, these omissions cannot be said to be a catastrophic failure of the 2nd Defendant to appreciate the relevant facts before deciding to prosecute that would be sufficient for me to say she had no reasonable grounds on which to base her honest belief. The 2nd Defendant was made aware of the issue from a report from the hospital; she responded and took a statement from the Complainant, the Complainant's mother, and she received the medical report from the doctor. The facts relevant to the case would have come from those actions.

[34] I do understand Mrs. Lannaman's point that with the Complainant being a minor, her evidence should be more heavily scrutinized and perhaps better supported by other evidence. But in my view, the officer had done sufficient to ascertain the salient facts of the case to inform her honest belief that the Claimant was probably guilty. She need not have ascertained all relevant facts.

[35] Let us compare this case to the facts of another case from Jamaica arising out of a similar situation. That case is ***Neville Williams v Janine Fender et al***[5]*.* In that case, the Claimant was arrested and charged by the 3rd Defendant for rape and other sexual offences allegedly committed by him against the 1st Defendant (who was the victim). He was tried and found guilty, but his conviction was overturned on appeal to the Court of Appeal.

[36] Following this, he instituted proceedings against the 1st Defendant, as the complainant and the investigating officers as well as the Attorney-General of Jamaica for (among other things) malicious prosecution. His claim did not succeed

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[5] (Unreported) Supreme Court, Jamaica, Claim No. 2005 HCV 00126, judgment delivered July 1, 2009.

against the 1st Defendant as Sinclair-Haynes J (as she then was) did not find that she was the true prosecutor. However, Sinclair-Haynes J did find that although the investigating officer could have had reasonable and/or probable cause to institute the prosecution, based on the material discrepancies in the statements of all the witnesses that he had collected and his failure to get objective DNA evidence that potentially exonerated the Claimant, he had no reasonable and/or probable cause to *maintain* the prosecution.

[37] Among her key findings of fact was that at the time of the arrest, all that the 3rd Defendant had was the statement of the complainant. She deemed that what it contained was sufficient to inform the honest belief on reasonable grounds that the Claimant was probably guilty. But as his investigation continued and the significant discrepancies in the statements from eye witnesses to the incident mounted, the investigator was on more and more shaky ground and he should not have continued the prosecution.

[38] Sinclair-Haynes J found that the setting of the law in motion by the officer on the statement of the complainant as it was would have been correct based on information he had at the time of the arrest and charge **provided he had not known the complainant before**. However, in my view, when the additional material became available, the matter was before the Court and its continued prosecution was in the sole purview of the prosecuting authorities; the Clerk of Court and the Office of the Director of Public Prosecutions. The investigating officer, after arrest and charge and placing before the Court, had no more authority to determine the course of the prosecution.

[39] Looking at the key finding the learned trial judge made concerning the additional material from the witness statements collected, it is clear that that officer and the Crown Counsel failed to consider quite material discrepancies. These were:

a) His failure to take a statement or even contact Blacks, the eye witness, before the arrest was made where Blacks' statement (which he eventually collected)

revealed material discrepancies between the complainant's account and Black's account that undermined the credit of the Complainant;

b) His failure to take a statement from "Gracie" a potential recent complainant.

c) His admitted failure to properly treat with the available forensic evidence in the case that could exculpate the Claimant;

d) There was conflict between the statement of the complainant's mother and the complainant as to how the incident unfolded as reported by the complainant to the mother vs what the complainant said in her statement.

[40] But these discoveries were all after the fact of arrest and charge which the learned trial judge found that he was well within bounds to have done **provided he had not known the complainant before**.

[41] So the findings of the judge was not that he did not properly arrest and charge, but that in light of what he later knew or could have discovered, he should not have continued the charge. However, for the reasons I earlier indicated, I would part company with the finding that the investigator was liable for continuing the prosecution.

[42] In my view, that case of ***Neville Williams*** is quite distinguishable from the facts of this case. We have no evidence from the other children. So, unlike ***Neville Williams*** where we knew what Blacks said from a statement, I would be speculating on what the children in the room may or may not have seen or heard to determine if it was relevant. So I cannot form the view, in the absence of evidence, that those missing statements were impactful on the decision to prosecute or no.

[43] There was no DNA or forensic evidence taken from the child for comparison with the Defendant and there is no evidence from him that he offered to give any but was declined.

[44] The 2nd Defendant took all the material statements from before the arrest and, I find, the material she had was sufficient to give her reasonable grounds for her

honest belief that the Claimant was probably guilty despite the discrepancies in the statements.

[45] The medical report was supportive of the fact that something had happened to the complainant. Based on the statements, the timelines fit and the statement provided by the complainant, if believed, would address the gap in time between the last day of the alleged incident and when she reported the bleeding to her aunt.

[46] Unlike in ***Williams*** there is no evidence that the 2nd Defendant knew the Complainant and her mother or the Claimant from before the incident. In the ***Neville Williams*** case there was clear evidence that the investigator knew the complainant from before the incident and the argument was made that they were in a relationship with each other and this had a bearing on how the case was investigated by the investigator pointing to actual malice.

[47] The Claimant did not suggest any alibi evidence and his statements to the 2nd Defendant at the time of his apprehension was simply a denial of the incident. He did not offer any other version of the events (and none were pleaded) that the 2nd Defendant could have explored, but did not, before prosecuting him. So outside of the speculation, there really isn't any other relevant facts that I can say the 2nd Defendant failed to appreciate before deciding to prosecute.

[48] Mrs. Rose-Green made heavy weather of a number of discrepancies between the evidence of the Claimant and her mother that were present in their statements. Her submissions are that the officer should have realised that these discrepancies were so significant that it should have caused the officer to reconsider prosecuting the Claimant.

[49] I do not agree with this. It is not for the investigating officer to decide whether or not an accused is guilty of an offence. The investigating officer is merely called upon to have sufficient facts to form an honest belief based on reasonable grounds that the accused is probably guilty. The resolution of the factual dispute is for the tribunal of fact.

[50] The upshot is that even if there are discrepancies, unless they are significantly material, then the prosecutor is on good ground to lay the charges.

[51] Some of the areas pointed to by Mrs. Rose-Green were:

a) **The statement of the complainant that the Claimant put his penis in her bottom but she did not feel any pain (despite him doing this for a period of time).**
b) **The variance in accounts between the Complainant and her mother about what happened at the incident between the Complainant's mother and the Claimant.**
c) **The difference in accounts between how the Complainant described how she identified the Claimant in her statement to the officer and how she identified him as recounted in the Complainant's mother's statement on what the complainant said to her (one was visual and the other voice).**

[52] All of these are important points that go to the credibility of the Complainant. But it does not mean that the officer could not have formed the honest belief that he was probably guilty. Recall that probably guilty means 50.01% to 49.99%.

[53] What is more, the 2nd Defendant had evidence of the bleeding from the vagina from the complainant and her statement that she had been bleeding from the night she was last with the Claimant; there was the statement that she gave identifying the Claimant (whether by voice or otherwise) positively as the person who assaulted her; the relative recency of the complaint; an explanation capable of belief as to why she took 3 days to report the incident; the length of time the complainant knew the Claimant; the absence of any prior knowledge of the parties by the 2nd Defendant hence no malicious motive to prosecute; the absence of any suppression of evidence by the 2nd Defendant or the failure to get material forensic evidence.

The Statement of the Complainant, if True, Could Lead the Prudent Prosecutor to Believe the Claimant Guilty.

[54] In my view, what the 2nd Defendant had was more than sufficient to conclude that the Claimant was probably guilty. Indeed, the Claimant went through a preliminary

enquiry where a Parish Court Judge (a Resident Magistrate at the time), would have found that the Claimant had a case to answer in the Circuit Court and committed him for trial. What this means is that the Complainant gave sworn evidence and was found credible by the Resident Magistrate in order for her to commit the Claimant for trial.

[55] So all told, I am of the view that the case presented to the 2nd Defendant was sufficient to arrest and charge.

CONCLUSION

[56] In the circumstances, I am not satisfied, on the balance of probabilities, that the Claimant has made out his case for malicious prosecution. It is for him, the Claimant, to satisfy me, on the balance of probabilities, that the officer did not have an honest belief that he was probably guilty founded upon reasonable grounds. He has failed so to do on my view of the material that was before the 2nd Defendant at the time she instituted the prosecution against him.

[57] It is true that the complainant was a minor, and she suffered a terrible wrong. The reality is that as much as she was a minor, the complainant deliberately lied to the police, the then Resident Magistrate, and a Judge and Jury about who did what to her.

[58] What she did caused very serious harm to the Claimant and, whatever her motive or explanation for so doing, she should have been held accountable in some way. Indeed, her action of deliberately misidentifying her true assailant had the potential effect of allowing the real perpetrator to go unscathed whilst another person took the rap for the heinous acts done to her.

[59] In this case though, I can find no fault with the actions of the investigator or the crown in the arrest, charge and prosecution of the Claimant.

DISPOSITION

1 Judgment for the Claimant on the Claim for False Imprisonment in the sum of $950,000.00 with interest at 6% from the 14th April 2014 to the 3rd May 2023.

2 No award for Special Damages.

3 Judgment for the Defendants on the claim for Malicious Prosecution.

4 Costs to the Claimant to be taxed if not agreed. The Claimant to recover 50% of his costs.

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Dale Staple
Puisne Judge (Ag)