



[2020] JMSC Civ 22

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2012 HCV 01329**

<b>BETWEEN</b>	<b>HILTON ROBINSON</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>AARON KING</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>WOMAN INSPECTOR ANDERSON ROBINSON</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>WOMAN CONSTABLE SOPHIA EDWARDS- BROWN</b>	<b>3<sup>RD</sup> DEFENDANT</b>
<b>AND</b>	<b>ATTORNEY GENERAL OF JAMAICA</b>	<b>4<sup>TH</sup> DEFENDANT</b>

**Georgia Hamilton, Donovan Williams and Dwight Sibbles instructed by Georgia Hamilton and Company for the Claimant**

**Carla Thomas instructed by the Director of State Proceedings appears for the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants**

**HEARD: September 18, 19, 20, 21 & 22, 2017, October 6, 2017 and January 31, 2020**

**CLAIM FOR DAMAGES FOR MALICIOUS PROSECUTION – WHETHER CLAIMANT WAS MALICIOUSLY PROSECUTED – WHO PROSECUTED THE CLAIMANT – WHETHER 2<sup>ND</sup> AND 3<sup>RD</sup> DEFENDANTS CAN PROPERLY BE HELD INDIVIDUALLY LIABLE – WHETHER THE 2<sup>ND</sup> OR THE 3<sup>RD</sup> DEFENDANT PROSECUTED THE CLAIMANT WITHOUT ANY REASONABLE AND/OR PROBABLE CAUSE – PROSECUTOR WHO IS A POLICE OFFICER HAVING ACTED ON INSTRUCTION OF CLERK OF COURT – ASSESSMENT OF DAMAGES FOR MALICIOUS PROSECUTION**

**ANDERSON, K., J.**

**The Background**

- [1] This claim is against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants for general damages, aggravated and exemplary damages, for false imprisonment and malicious prosecution.
- [2] The trial proceeded as between the claimant and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants only, as judgment had earlier been obtained against the 1<sup>st</sup> defendant arising from his default in having defended this claim.
- [3] The burden of proof is on the claimant and this claim must, if it is to be proven, be proven on a balance of probabilities.
- [4] The claimant's claim against those defendants has arisen from that which he had initially alleged, was his false imprisonment and malicious prosecution, with respect to his arrest which occurred on April 9, 2011, when he was criminally charged for the offences of illegal possession of a firearm and assault and which charges were terminated in his favour, on June 22, 2011.
- [5] Upon the commencement of the trial of this claim, which was presided over by me, lead counsel for the claimant informed this court that the claim for damages for false imprisonment is no longer being pursued against either of the defendants then before the court.
- [6] The claimant has alleged, in his amended particulars of claim, that the 2<sup>nd</sup> defendant was, at all material times, a woman inspector of the Jamaica Constabulary Force (JCF) and the sub-officer in charge of the Junction Police Station and a servant and/or agent of the Crown.
- [7] He has also therein alleged that the 3<sup>rd</sup> defendant was, at all material times, a woman constable of the JCF and a servant and/or agent of the Crown assigned to

the Junction Police Station and who was under the direction and control of the 2<sup>nd</sup> defendant, in the performance of her duties.

- [8] The 4<sup>th</sup> defendant has therefore been sued, pursuant to the provisions of the **Crown Proceedings Act**.
- [9] Furthermore, it is therein alleged that on or about April 2, 2011, the 1<sup>st</sup> defendant wrongfully assaulted and beat the claimant in the vicinity of the 1<sup>st</sup> defendant's barbershop, in Junction, St. Elizabeth.
- [10] The claimant had reported that, to the police and on April 2, 2011, which was the day that the claimant made that report. The 1<sup>st</sup> defendant was arrested, as a consequence of that report.
- [11] It has also therein, been alleged that, following reports made by the 1<sup>st</sup> defendant at the Junction Police Station, the 2<sup>nd</sup> defendant directed the 3<sup>rd</sup> defendant and/or the 3<sup>rd</sup> defendant, proceeded to charge and arrest the claimant for assault at common law and illegal possession of a firearm. Evidence was given at trial, which is undisputed, that the claimant was also charged with the offence of malicious destruction of property. The relevance of that last-mentioned charge to this claim though, will be addressed in some detail, at a later stage of these reasons.
- [12] Accordingly, it is the claimant's allegation as specifically adumbrated in his amended particulars of claim, that he was wrongfully arrested, without any reasonable or probable cause and thereby, falsely imprisoned. The claimant was arrested at the Junction Police Station and was detained there, until he was released on bail, after approximately one hour. It is, in the circumstances, alleged by him, that he was falsely imprisoned for a time period of approximately one hour. He is though, no longer pursuing any claim against the relevant defendants, for present purposes, in that regard.
- [13] The claimant has also alleged that, following upon his arrest, he made three (3) appearances at the High Court division of the Gun Court for Jamaica, at Black

River and that it was on the last of those three (3) occasions, which was on June 22, 2011, that the claimant was discharged, as the Crown offered no evidence against him, on either charge.

**[14]** It is also therefore, the claimant's allegation, that he was maliciously prosecuted for the two (2) offences which he had been charged with and which had been unsuccessfully prosecuted against him.

**[15]** The particulars of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' alleged malice and absence of reasonable and probable cause, as alleged by the claimant, are as follows:

- 'a. The 2<sup>nd</sup> and 3<sup>rd</sup> defendant failed and/or refused to make enquiries of divers witnesses whose names and contact details were provided by the claimant; and*
- b. The 2<sup>nd</sup> and 3<sup>rd</sup> defendant failed and/or refused to make enquiries of the witness who was identified in the statement of the 1<sup>st</sup> defendant; and*
- c. The 2<sup>nd</sup> defendant flatly refused to make enquiries of divers witnesses telling the claimant words to the effect that, 'I don't need to ask anyone anything, as I know how you business people in Junction stay, unuh quick to draw gun on people.'*

**[16]** In response to this claim, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants have averred that the claimant was actually, not arrested by either the 2<sup>nd</sup> or the 3<sup>rd</sup> defendant, but rather, that, based upon a report which was made at the Junction Police Station, on April 8, 2011, by the 1<sup>st</sup> defendant, to the effect that the claimant had pulled his firearm on the 1<sup>st</sup> defendant, the 2<sup>nd</sup> and 3<sup>rd</sup> defendant asked the claimant to come to the Junction Police Station, which the claimant did, on April 8, 2011.

**[17]** After he came to the police station, the claimant was allegedly then informed of the report which had been made against him, by the 1<sup>st</sup> defendant and he was asked to hand over his firearm, as the matter was being investigated, which the claimant did. The claimant thereafter, left the police station.

**[18]** The claimant was though, according to the defence of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, summoned for the two (2) offences that were brought against him –

those having been the said offences as earlier referred to. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants have denied that they prosecuted the claimant maliciously and/or without any reasonable or probable cause and moreover, have denied that the claimant was prosecuted at all, by the 2<sup>nd</sup>, or the 3<sup>rd</sup> defendant.

**[19]** It has been accepted by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants (hereafter referred to, as, 'the defendants'), that those charges were dismissed after the Crown offered no evidence against the claimant with respect to either of same and that the same were dismissed, on the date as alleged by the claimant.

**[20]** The defendants alleged further though, that the claimant only attended court on two (2) occasions and not three (3), as has been alleged by the claimant.

**[21]** Whilst therefore, there is agreement between the pertinent parties as to the last date when the claimant attended court in relation to the two (2) charges that had been brought against him, neither of the pertinent parties made any averment in their respective statements of case, as to exactly when was the first date when the claimant attended court to answer to the two (2) charges which had been brought against him.

**[22]** Based upon the defendants' statement of case, the second date when the claimant attended court, was the last of the two (2) dates when he attended court, pertaining to the criminal charges which had been brought against him. It is to be recalled, that that date is June 22, 2011.

**[23]** In the claimant's statement of case though, he has only averred, as to the dates when he was at court, pertaining to those two (2) charges, the last date of that which he has alleged, were the three (3) dates when he attended court, with respect to the relevant charges.

**[24]** That lack of detail will be of relevance, if this court concludes that the defendants are liable for malicious prosecution, since, in that circumstance, this court will then have to proceed to assess damages for same. One of the key considerations in

that regard, will be, not only the number of appearances made at court, but also, the period of time during which the relevant charge(s) remained pending, against the claimant.

### **Malicious Prosecution – The issues**

- [25] In the case at hand, there is no dispute between the parties, that the claimant was criminally prosecuted. Equally, there is no dispute that those criminal charges were both unsuccessfully brought against him.
- [26] The claimant was put, by the defendants, to prove his alleged losses/damage. To my mind, on the evidence which he gave to this court at trial, the claimant has proven that he suffered loss and/or damage, as a consequence of that criminal prosecution which was unsuccessfully pursued against him.
- [27] In that regard, it was the claimant's unchallenged evidence, that in relation to the relevant criminal charges, he had hired Mr. Cecil July, as his attorney, to represent him and that he had paid Mr. July, in total, the sum of \$654,000.00, with respect to same. The claimant produced at trial and there were accepted as exhibits, receipts for \$154,000.00 which the claimant testified that he had paid to Mr. July, in cash. The claimant's testimony was also that he paid Mr. July, an additional aggregate sum of \$500,000.00 using two (2) cheques which were drawn on his restaurant's chequing account, but that, despite having made repeated requests of Mr. July, for receipts pertaining to same, to be provided to him, none such was ever provided.
- [28] I accept that aspect of the claimant's evidence, entirely. In the circumstances, the claimant has proven that he has suffered loss and damage, as a consequence of the unsuccessful pursuit of the criminal charges against him.
- [29] There are two (2) issues, as regards the claimant's claim for damages for malicious prosecution, which, to my mind, merit significant and careful attention. They are as follows: i) Who prosecuted the claimant? and ii) Was the claimant maliciously prosecuted? I will address these issues, next.

## Who prosecuted the claimant?

- [30] In answer to the question: Who prosecuted the claimant, I am satisfied, firstly, that it was not the 1<sup>st</sup> defendant. That is so because, even though it is undisputed that he was the person who made the report to the police, which ultimately resulted in the criminal charges having been pursued against the claimant, it is not the first defendant who ought properly to be considered as having set the law in motion against the claimant as far as those criminal charges are concerned.
- [31] As stated in the Clerk and Lindsell on the Law of Torts text, 20<sup>th</sup> ed. (2010) at paragraph 16-11, *'to prosecute is to set the law in motion and the law is only set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question, and to be liable for malicious prosecution a person must at least be actively instrumental in so setting the law in motion. This involves 'active steps' to ensure that a prosecution results.'* See: **Evans v London Hospital Medical College (University of London)** [1981] 1 WLR 184, at 188-189; and **H v AB** [2009] EWCA Civ 1092, at [69], per Moore-Bick, LJ.
- [32] The following, is extracted from the said text (*op. cit*): *'The decision of the House of Lords in **Martin v Watson** [1996] 1 AC 74, and some important subsequent decisions of the Court of Appeal, address the complex question of who should be held responsible for initiating a prosecution when police and public prosecutors act on information offered or charges preferred by a private person. The judgment in **Martin v Watson** clearly establishes that the claimant must demonstrate that the defendant acted in such a manner as to be responsible directly for the initiation of proceedings. The responsibility for initiating the prosecution must be his or hers, not the result of a truly independent judgment to prosecute on the part of the police, or other third parties.'*
- [33] In that context, I am satisfied, on a balance of probabilities, based upon the evidence which was presented at trial, that it was the 2<sup>nd</sup> and 3<sup>rd</sup> defendants that

prosecuted the claimant for the two (2) offences which were unsuccessfully pursued against him.

- [34] Whilst the 2<sup>nd</sup> defendant did not personally, issue the summons which led to the claimant having been prosecuted for the relevant offences, she was, nonetheless, actively involved in the investigation of the criminal complaint which had been made against the claimant, by the 1<sup>st</sup> defendant. I have not accepted the 2<sup>nd</sup> defendant's evidence, which she gave when she was being cross-examined, that she was not doing an investigation in relation to Mr. Robinson.
- [35] In paragraphs 4 to 36 of the witness statement of the 2<sup>nd</sup> defendant, the 2<sup>nd</sup> defendant has outlined various steps which she took, which pertain to the investigation of the complaints which had been made, both by the 1<sup>st</sup> defendant against the claimant and by the claimant against the 1<sup>st</sup> defendant. Those paragraphs of that statement of hers, formed part of her evidence-in-chief. It is not necessary for present purposes, to quote those paragraphs.
- [36] Suffice it to state that those paragraphs make it clear that the 2<sup>nd</sup> defendant communicated with the 3<sup>rd</sup> defendant about the investigation into the criminal complaint which had been made by the claimant against the 1<sup>st</sup> defendant and vice versa and gave advice and even directives, to the assigned investigating officer, as regards same, in addition to assistance, in having, at the request of the 3<sup>rd</sup> defendant, invited the claimant to attend upon her office at the Junction Police Station, whereupon, she requested the claimant to hand over his firearm to her, which he did. That step was taken because, as she stated in paragraph 35 of her witness statement, *'I called Mr. Robinson and he came in on the same day and I explained to him that since Mr. King made a report against him pulling the firearm on him, **and it is being investigated** then we would have to take the firearm from him and he gave it to me.'* (portion highlighted for emphasis)
- [37] The 2<sup>nd</sup> defendant even gave evidence that she had made enquiries of one DSP Daley, who was of course, then superior in rank as a police officer, to her, as to



what, *'we should do,'* as regards a matter concerning the investigation into the complaint which had been made by the 1<sup>st</sup> defendant against the claimant. There is no doubt in my mind, that in the context in which the word *'we'* was used there in paragraph 32 of the 2<sup>nd</sup> defendant's witness statement, the persons being referred to, by the 2<sup>nd</sup> defendant, are herself and the 3<sup>rd</sup> defendant. Of course too, throughout her evidence, the 2<sup>nd</sup> defendant made reference to the 3<sup>rd</sup> defendant as having been the investigating officer. The 3<sup>rd</sup> defendant did not deny that, in her evidence.

- [38] Thus, even if it was that, as the 2<sup>nd</sup> defendant testified, she did not direct the 3<sup>rd</sup> defendant to charge and arrest the claimant for assault at common law and illegal possession of firearm, that does not mean that she did not actively play an instrumental role, in the law having been set in motion against the claimant with respect to those criminal charges. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants took active steps to ensure that the claimant would have been prosecuted for the offences which he was prosecuted for. See: **H v AB** [2009] EWCA Civ 1092 at 1096.
- [39] The 2<sup>nd</sup> defendant stated in her witness statement, that in her mind, since there were contradicting accounts, it was a matter for the court to decide. She also stated that, in essence, she had received similar advice from DSP Daley, after she had enquired of him, as to what she should do, as regards the investigation into the allegations made by the 2<sup>nd</sup> defendant against the claimant. Furthermore, it was the 3<sup>rd</sup> defendant's unchallenged evidence, that she was the one who had summoned the claimant to court to answer to each of the charges which had been brought against him.
- [40] Finally on this particular issue, it must be stated that even though the defendants were permitted by me, as presiding judge, to amend their defence by adding as (e) to paragraph 8 thereof, that, *'In any event the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were not the prosecutors,'* the defendants' counsel, to my mind, wisely resiled from that assertion as made via that amendment, in part. She resiled from same, to the extent that during her oral closing submissions, she specifically asserted that the

3<sup>rd</sup> defendant was responsible for the prosecution having been brought, in so far as, *'she prepared the summonses, laid the information and received/recorded the statement from Mr. King. She also conducted further investigations.'*

**[41]** For reasons already given, I have concluded that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were jointly, as a matter of substance, responsible for the initiation of the prosecution against the claimant. I have not accepted the defence counsel's submission that only one person can be a prosecutor of a criminal charge, since only one person can lay an information.

**[42]** I have not accepted that submission because, whilst it is correct to state that only one person can lay an information, it is incorrect to conclude that only that person who actually lays the charge before the court, is properly to be deemed as being, 'a prosecutor,' for present contextual purposes. It is to be recalled that a 'prosecutor' is anyone who takes active steps to ensure that a prosecution results. To my mind therefore, there can be more than one prosecutor of a single charge which is brought before a court of law for adjudication.

**[43]** The Attorney General is taken as the legal representative of the Crown, who must bear the legal burden of accepting responsibility for the actions of its Crown servants and/or agents, provided that such actions were carried out within the course of those servants' and/or agents' employment as such.

**[44]** The defendants have not disputed that at all material times, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were servants and/or agents of the Crown. As such, if any party is to be held liable in respect of this claim, it will have to be the 4<sup>th</sup> defendant, only. That is so because, at the material time, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were not acting of their own accord and thus, independently of the Crown. The claimant specifically alleged the contrary and the defendants have specifically accepted that allegation. In the circumstances, this claim fails entirely, as against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, but that is not because they did not prosecute the claimant, but rather, because, although they did prosecute the claimant, they did so, in their capacity as servants

and/or agents of the Crown. See: **The Attorney General of Jamaica and Gladstone Miller** – Supr. Ct. Civil Appeal No. 95 of 1997, on this point.

[45] I then will turn now to the next issue, which will assist in determining whether the 4<sup>th</sup> defendant is liable to the claimant, or not. That is the issue as to whether the claimant was maliciously prosecuted, this as distinct from his having been prosecuted, without, ‘malice.’

[46] In determining whether the claimant was maliciously prosecuted, it must be understood, what constitutes malice in this context. It also must be specified, what are the elements of the tort of malicious prosecution, since that will better aid the understanding of the elements of same, which are in dispute and which are yet to be resolved by this court. I will address the latter aspect, first.

[47] There are, in Jamaica, four (4) elements of the tort of malicious prosecution. One of those elements is comprised of two (2) factors though, which can be proven in the alternative and as such, will suffice to meet the requirements of the tort.

[48] Those elements are as follows:

- i) The claimant must show that the law was set in motion against him, by the defendant, on a criminal charge, or in other words, that he was ‘prosecuted’ by the defendant, on a criminal charge; and
- ii) That the prosecution was determined in his favour; and
- iii) That the prosecution was initiated out of malice, or without any reasonable and probable cause; and
- iv) That as a consequence, the claimant suffered loss and damage.

[49] Element number (iv) is required, since the tort of malicious prosecution is not a trespass to the person and therefore, is not actionable per se.

[50] **Section 33 of the Constabulary Force Act** has modified the common law, such that element number (iii) consists of two (2) factors which may be proven, in the alternative. At common law, those factors are each, separate elements to be

proven. See: **Juman v The Attorney General of Jamaica and anor** – [2017] 2 LRC 610; and **Peter Flemming v Cpl. Myers and The Attorney General of Jamaica** [1989] 26 JLR 525; and **Keith Nelson and Sergeant Gayle and The Attorney General of Jamaica** Claim No. C.L. 1999/N-120.

[51] I have already addressed elements number (i), (ii) and (iv) and determined that the claimant has duly proven those elements and thus, I will not address those elements, any further.

[52] It is fair to state that the 4<sup>th</sup> defendant's defence relied most heavily, on that defendant's contention, that the claimant was neither prosecuted maliciously, nor without reasonable or probable cause. I will therefore, address those factors in turn, beginning with the issue of malice.

#### **Whether the claimant was prosecuted due to malice**

[53] What is malice, in the context of a claim for damages for malicious prosecution? This question has been comprehensively answered in the text: Clerk and Lindsell on Torts, 20<sup>th</sup> ed. (2010), at paragraph 16-52. It will suffice, for present purposes, to extract the following quotation from that paragraph, in order to answer the question: *'Malice in this context has the special meaning common to other torts and covers not only spite or ill-will but also improper motive.'* **Gibbs v. Rea** [1998] AC 786, at 797. The proper motive for a prosecution, is, of course, a desire to secure the ends of justice. If a claimant 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.

[54] In proof of malice, the claimant personally gave evidence that on April 9, 2011, the 2<sup>nd</sup> defendant had told him, after he had gone to the police station upon the request which was made by the 3<sup>rd</sup> defendant, for him to do so and when he was speaking with her, while there, that she had received a report that he had pulled his firearm on Aaron King, during the incident on April 2, 2011. According to the claimant, he

instantly denied that and gave her the names/aliases of all of the witnesses who were, according to him, there and asked her to speak with them. His evidence also was that all of those witnesses could be found in, 'Junction' – St. Elizabeth and that, 'they could all speak to the fact that the only time when his firearm was exposed, was when he fell to the ground, after Aaron had punched him, causing his firearm to fall from his waistband. According to him, *'Mrs. Anderson-Robinson would not hear me out and responded in words to the effect that, **'I don't need to ask anyone anything, as I know how you business people in Junction stay, unuh quick to draw gun on people.'** At this stage I started feeling very troubled, especially when I remembered that Mrs. Edwards-Brown told me only days before that Aaron King was a family friend of hers.'* (Highlighted for emphasis)

[55] According to the claimant's counsel, as was set out in paragraphs 22 and 23 of their written submissions , '22. *Should the court find that the 2<sup>nd</sup> defendant did make such a statement, it is respectfully submitted that this attitude would tend to suggest that the 2<sup>nd</sup> defendant did not pursue the claimant in hopes of bringing him to justice but because of some preconceived notion that she had about 'business people in Junction.'* Of course, the statement which is being referred to, in that quotation, is the statement highlighted in bold, in the prior paragraph. '23. *Likewise, should the court find that the 1<sup>st</sup> defendant was a friend of the 3<sup>rd</sup> defendant and her husband, as alleged by the claimant, and that she told the claimant that she could not handle any case against him then the court would be entitled to draw the inference that this was the reason and not a genuine desire to pursue the claimant to the ends of justice.'*

[56] In response to those allegations of the claimant, which underpin the claimant's specific allegation of malice, as distinct from the absence of reasonable and probable cause, for the initiation of the relevant prosecution, the defence has firstly, through the 2<sup>nd</sup> defendant, specifically denied having told the claimant any such thing as quoted in paragraph 54 above.

- [57]** Secondly, the 3<sup>rd</sup> defendant expressly denied having made the statement which it has been alleged that she made, to the claimant – this being that she could not handle any case against Aaron (that being a reference to the said Aaron King, who is the person that the claimant had made his report to the police, against), as he was a friend of hers and her husband.
- [58]** I am of the view, based on the relevant evidence presented at trial, as regards the allegations that those statements were respectively made by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, that, on the one hand, the statement allegedly made by the 3<sup>rd</sup> defendant, was in fact made by her, but on the other hand, the statement attributed to the 2<sup>nd</sup> defendant, was not made by her.
- [59]** As regards the latter-mentioned, there is no other evidence supportive of same. This is unlike as regards the former-mentioned, because, as regards that alleged statement of the 3<sup>rd</sup> defendant, it is supported by the fact that the 3<sup>rd</sup> defendant gave evidence that it was reported to her, at the Junction Police Station, on April 4, 2011, by the claimant, that he was told the very same thing which he alleged in court, during the trial of this claim, that he had been told by the 2<sup>nd</sup> defendant.
- [60]** That is set out in paragraphs 9 and 15 of the 3<sup>rd</sup> defendant's witness statement and those paragraphs of that statement, were admitted into evidence, as part and parcel of her evidence-in-chief, at trial.
- [61]** Furthermore, it was also, part of the 2<sup>nd</sup> defendant's evidence-in-chief, that it was because the claimant had told her that he (the claimant), was uncomfortable with the 3<sup>rd</sup> defendant handling his matter, because she (the 3<sup>rd</sup> defendant), had told him (the claimant) that her husband and Mr. King were friends, that she had re-assigned the matter, to Woman Constable Cole.
- [62]** Interestingly enough though, the 3<sup>rd</sup> defendant only specified in her evidence-in-chief, as per paragraph 20 of her witness statement, that on April 5, 2011 she was informed by the 3<sup>rd</sup> defendant, that the case of assault occasioning bodily harm,

re: Hilton Robinson would be re-assigned to another officer, that being: Woman Constable Patrice Cole, of the Junction Police Station.

- [63] At that stage of her evidence, the 3<sup>rd</sup> defendant did not proffer to the trial court, any reason that that she may have been told by the 2<sup>nd</sup> defendant, as to why the investigation into the complaint which had been made by the claimant against Mr. King, was re-assigned.
- [64] When she was asked, during her cross-examination evidence, as to what she was told by the 2<sup>nd</sup> defendant, as to the reasons for the re-assignment, the 3<sup>rd</sup> defendant's answer was: *'For transparency purposes, being that I was also investigating a case against Mr. Hilton Robinson, a case and a cross-case.'*
- [65] It is apparent that the evidence given by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are not in accord as to the reason for the re-assignment, at least in terms of what the 2<sup>nd</sup> defendant gave in evidence, as having been the reason for the re-assignment and what the 3<sup>rd</sup> defendant gave in evidence, as having been the reason given to her, by the 2<sup>nd</sup> defendant, for the re-assignment.
- [66] I am satisfied that the divergence of the evidence in that respect, arose because of the fact that the 3<sup>rd</sup> defendant did not wish this court to know of the actual reason for the re-assignment - which was because the claimant had reported to the 2<sup>nd</sup> defendant, what he had earlier been told, by the 3<sup>rd</sup> defendant, which was that she cannot investigate any complaint against Mr. King, because he and her and her husband, 'are friends.'
- [67] I do not though, from that evidence, infer malice, on the part of the 3<sup>rd</sup> defendant. In fact, it likely suggests an absence of malice, because, there was no need for the claimant to actually have been told that, by the 3<sup>rd</sup> defendant. She could have kept to herself, the information that she and her husband and Mr. King, 'are friends.'

[68] In any event though, that was not the reason why the 3<sup>rd</sup> defendant did not investigate the complaint which had been made by the claimant against Mr. King, any further, but rather, because a senior officer had re-assigned the matter.

[69] In the circumstances, I am not of the view that the claimant has proven malice, on the part of the prosecutors of the charges which were unsuccessfully pursued against him. I will next go on to consider whether or not the claimant has proven that there was the absence of reasonable and probable cause for the prosecution of said charges.

### **Was there reasonable and probable cause for the prosecution?**

[70] If there was no reasonable and probable cause for the prosecution of the claimant in respect of the criminal charges which were unsuccessfully pursued against him, then, based on this court's earlier conclusion that each of the other elements of a claim for damages for malicious prosecution, have been duly proven, save and except for malice, which is an alternative element to this one; it would mean that the claimant's claim has been duly proven. The converse is also true.

[71] In **Herniman v Smith** [1938] AC 305, the House of Lords approved the definition of 'reasonable and probable cause' in this context, as explained by Hawkins J in **Hicks v. Faulkner** [1878] 8 QBD 167, at 171, which is: *'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 reasonable 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.'*

[72] A person is not bound before instituting proceedings to see that he has such evidence as will be legally sufficient to secure a conviction. Neither is it necessary that the defendant should act only on legal evidence and enquire into everything, at first hand. It will be and is sufficient, if he proceeds on such information as a



prudent and cautious person may reasonably accept in the ordinary affairs of life and it is for the claimant to satisfy the jury that there was a want of proper care in testing that information. See: **Glinski v Mciver** [1962] AC 726; **Lister v Perryman** [1870] LR 4 HL 521; and **Brown v Hawkes** [1891] 2 QB 718.

- [73] Thus there is no general and inflexible rule, that a prosecutor acts without reasonable and probable cause in prosecuting a crime on the basis of only the uncorroborated statements of the person alleged to be the victim of the accused's conduct.

*'... The objective sufficiency of the material considered by the prosecutor must be assessed in light of all of the facts of the particular case.'* See: **A v New South Wales** [2007] 81 ALJR 763 at (86 and 87).

- [74] It is not justifiable to commence a prosecution on mere suspicion. See: **Meering v Grahame White Aviation Co.** [1919] 122 LT 44, at 56; and **Tims v John Lewis and Co. Ltd.** [1951] KB 459, at 474.

- [75] It may sometimes be contended that a prosecution is unreasonable, not on the ground that the prosecutor has no substantial information before him, pointing to the guilt of the claimant, but because he was also aware of countervailing evidence which afforded a good answer to the charge. A prosecutor has no right to pick and choose among the evidence before him, and act only upon such portions of it as show that he has good cause for proceeding; nor is he bound to assume that the theory put forward for the defence is sound (although, as explained below, he should take likely defences into account). In **Herniman v Smith** (*op. cit.*), at 319. Ld. Atkin said: *'No doubt circumstances may exist in which it is right before charging a man with misconduct to ask him for an explanation. But certainly there can be no general rule laid down, and where a man is satisfied, or has apparently sufficient evidence, that in fact he has cheated, there is no obligation to call on the cheat and ask for an explanation which may only have the effect of causing material evidence to disappear or be manufactured. 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 a reasonable and probable cause for a prosecution.'*

**The application of the law as to what is reasonable and probable cause for the prosecution to the factual scenario underlying this case**

[76] All of those legal principles as earlier summarized, are directly relevant to the matter at hand. I will therefore now embark on the task, of applying same, for the purpose of enabling this court to make its determination as to whether the claimant's claim for damages for malicious prosecution has, or has not, been duly proven.

[77] Firstly, it is important to note that the 2<sup>nd</sup> defendant testified, during cross-examination, that she did not know whether there was any reasonable and probable cause for Mr. Robinson being prosecuted for the firearm offences. She maintained throughout her testimony, that she did not prosecute the claimant. I have though, for the reasons earlier specified, rejected that latter-mentioned aspect of her evidence.

[78] That evidence of hers is important though, because it shows that the 2<sup>nd</sup> defendant did not 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.

[79] The 2<sup>nd</sup> defendant testified further to that effect, in response to the suggestion which was made to her, as now set out, along with her answer, to that suggestion.

**Sug.** *'You did not have an honest belief that Mr. Robinson committed the firearm offences.'*

A. *'I am not sure what happened there, so I allow Woman Constable Edwards-Brown, to do her investigation and in my mind, it's a matter for the court to decide.'*

**[80]** In the circumstances, since there exists evidence of the lack of honest belief in the guilt of the accused, on the part of the 2<sup>nd</sup> defendant, who was, to my mind, one of the prosecutors of the claimant, it follows that, it is my view that the claimant's claim against the 4<sup>th</sup> defendant, for damages for malicious prosecution, has been duly proven.

**[81]** In the event though, that I may be considered as being wrong in having reached the conclusion that the 2<sup>nd</sup> defendant prosecuted the claimant, jointly, along with the 3<sup>rd</sup> defendant, I will next go on to consider whether the 3<sup>rd</sup> defendant had reasonable and probable cause, for her prosecution of the claimant.

**[82]** In that respect, there is no doubt that the 3<sup>rd</sup> defendant had reasonable cause to suspect that the claimant may have been guilty of the crimes, which he was charged for, as referred to, in this claim, those being the charges of assault at common law and illegal possession of a firearm. That though, is not enough, to enable this claim to be successfully rebutted, by the 4<sup>th</sup> defendant.

**[83]** The 3<sup>rd</sup> defendant had taken a statement from Aaron King, which had alleged that the claimant had pointed a gun at him, while he was in his barber shop, and said: *'Bwoy weh mi light bill? You want mi shoot yuh bwoy!'* It is also alleged in that statement, that the claimant caused damage to Mr. King's property, being equipment that he used, in order to perform his duties as a barber. That statement was recorded on April 8, 2011 and in that statement, Mr. King alleged that the said incident had occurred on April 2, 2011. That statement, to my mind, provided to the 3<sup>rd</sup> defendant, reasonable and probable cause to suspect that the claimant may have committed the offences of assault at common law and illegal possession of a firearm. The latter offence would be suspected because, once any firearm is, in Jamaica, used to commit a criminal offence, the use thereof, is deemed to be such,

that the person in possession of that firearm, at that time, is treated, as a matter of law, as being in illegal possession of that firearm, because that person would have then, been in possession of that firearm contrary to the terms of any licence pertaining to the usage of same, by that person.

**[84]** It was in the context of that reasonable suspicion which the 3<sup>rd</sup> defendant then had, that she then approached her senior officer at the Junction Police Station and asked her to require the claimant to hand over his licensed firearm, to the 2<sup>nd</sup> defendant. That was done by the claimant.

**[85]** The 2<sup>nd</sup> and 3<sup>rd</sup> defendants made further enquiries and, whether separately or collectively, carried out further investigative work. One person named, 'Billy' was spoken with, by the 3<sup>rd</sup> defendant, in that regard, but he was unable to assist as regards providing any information as to what had occurred inside of Mr. King's barber shop, on the relevant occasion. Billy did report, though orally, that on April 2, 2011, he had witnessed a fight occur between the claimant and Mr. Aaron King and that during the fight he had seen Mr. King throw Mr. Robinson to the ground and then, the claimant's firearm fell from his waistband, to the ground. Billy then assisted in parting the fight. Billy though, refused to provide a written statement.

**[86]** At that stage, the 3<sup>rd</sup> defendant made, what she has testified, was her independent decision to summon the claimant for the offences of assault at common law and malicious destruction of property. That was when the prosecution for those offences, was commenced. The evidence has disclosed that the claimant was served with those summons, on April 9, 2011, when he (the claimant), was at the police station.

**[87]** There was no evidence provided to this court, by the claimant, that he (the claimant), had ever made it known to the 3<sup>rd</sup> defendant that he knew of witnesses, namely: Raymond Myers, Cleve Simpson or Clinton Powell or even the said 'Billy.' There was instead, evidence provided to this court by the claimant, that he had provided to the 2<sup>nd</sup> defendant, the names of all of those persons, as witnesses to

the relevant incident which had occurred on April 2, 2011, as between himself and Aaron King.

**[88]** In the circumstances, it is my conclusion that, at the material time, which is when the claimant was summoned for the offence of assault at common law, that having been on April 9, 2011, the 3<sup>rd</sup> defendant had reasonable and probable cause for the initiation of the prosecution against the claimant for that offence.

**[89]** The malicious destruction of property charge is not relevant for present purposes, because the claimant did not, in his amended particulars of claim, specify same as being one of the charges that was brought against him, which he is alleging that he was maliciously prosecuted for. In the circumstances, no further consideration needs to be given to that charge. In the event though, that I am wrong in having reached that conclusion, I will state that, in any event, it would also have been my conclusion as regards same, that the 3<sup>rd</sup> defendant would also have had reasonable and probable cause for the prosecution of the claimant, with respect to that offence.

**[90]** I am also of the view that the 3<sup>rd</sup> defendant had reasonable and probable cause for the initiation of the prosecution against the claimant for the offence of illegal possession of a firearm.

**[91]** Whilst it was her evidence that she was instructed by Mrs. Hilton – Clerk of Court for St. Elizabeth, to lay another information and serve another summons, for illegal possession of firearm, on the claimant and I have accepted that evidence as being truthful, that evidence does not provide any useful assistance to the Crown, in its defence. That is so, because no evidence was given, as regards what information was provided to the Clerk of Court – Ms. Hilton, which would have resulted in Ms. Hilton having so directed the 3<sup>rd</sup> defendant. I agree with the claimant's counsel's submission, that positive evidence needed to have been brought before this court, to show this court, what were the instructions given to the Clerk of Court, by the

3<sup>rd</sup> defendant. On this point, see: **Glinski v Mclver** (*op. cit.*), esp. at 708 F, per Ld Radcliffe.

[92] Accordingly, it was stated in the case: **Abbott v Refuse Insurance Co. Ltd.** [1962] 1 All ER 1074, by the UK Court of Appeal, that the taking of legal advice is evidence of reasonable and probable cause, but is not conclusive. I would, for my part, add to that, that it can only properly constitute evidence of there being reasonable and probable cause for the prosecution which follows, based upon the taking of that legal advice, if it is shown to the court's satisfaction, upon a claim for damages for malicious prosecution, that said legal advice was based on sufficient information having been provided to the legal adviser. Thus, it was important for the defendant to have led positive evidence, as to what was that information which was provided to that legal advisor.

[93] In any event though, it is clear to me, that the 3<sup>rd</sup> defendant had reasonable and probable cause for the prosecution of the claimant on the offence of illegal possession of a firearm, based upon the statement which she had taken from Mr. Aaron King.

[94] I am also, it must be stated, not of the view that even though it is my view that the 3<sup>rd</sup> defendant did tell the claimant that she could not investigate any complaint against Aaron King, because he (Mr. King) is a friend of her husband and her, that as a result of that having been so, it is to be taken as a given, that the 3<sup>rd</sup> defendant did not have any reasonable and probable cause for the prosecution of the claimant. Not only is that not a given, but furthermore, I have been unable to draw any inference as to there having been no reasonable and probable cause for the prosecution of the claimant, arising from what I do believe was the 3<sup>rd</sup> defendant's view, that she could not pursue any complaint against Mr. King.

[95] Whilst therefore, I have not concluded that the 3<sup>rd</sup> defendant maliciously prosecuted the claimant, I have concluded that the 2<sup>nd</sup> defendant did maliciously prosecute the claimant and that consequentially, it is the 4<sup>th</sup> defendant who is

liable. I will next turn therefor, to the assessment of damages, arising from the malicious prosecution of the claimant, upon the charges of assault at common law and illegal possession of a firearm.

### **Assessment of damages**

- [96]** The special damages claimed for, which pertains to the sum which was paid to Attorney Cecil July as legal fees for his representation in court, as regards those criminal charges, has been duly proven. That sum is \$654,000.00.
- [97]** There is no proper basis for any award to be made to the claimant for either aggravated, or exemplary damages and accordingly, no award will be made for either of same.
- [98]** The claimant was faced with one very serious charge, which in fact, could not properly be tried in the Magistrate's Court, because of the sentence which could have been imposed on the claimant, if he had been convicted of that offence. That very serious charge is the offence of illegal possession of a firearm. The offence of assault at common law is moderately serious.
- [99]** Whilst there existed dispute between the parties as to how many times the claimant had attended court for those charges, documentary evidence was placed before the court, which showed that the claimant attended court on four (4) separate occasions, before the prosecutor informed the court that no evidence was being offered against the claimant, whereupon, the claimant was then acquitted.
- [100]** In respect of the claimant, he was before the court, charged with those offences, between April 9 and June 22, 2011, which is approximately two and a half months. There is no evidence to suggest that the claimant was in custody during that period of time. If he had been in custody, the onus was on the claimant to have led such evidence, as it is relevant to an assessment of damages for malicious prosecution. The claimant though, gave unchallenged evidence at trial, as to the emotional

distress which he experienced, as a consequence of his having been criminally charged and having had to be before the court, as a consequence.

[101] All of those factors mentioned, are relevant for present purposes. In that regard, see: **Roderick Cunningham v Attorney General and ors.** [2014] JMSC Civ 30. The claimant's counsel has submitted that the claimant should be awarded the sum of \$2,000,000.00 as damages for malicious prosecution and has placed reliance on the case: **John Crossfield v The Attorney General of Jamaica and Corporal Ethel Halliman** SCCA No. 132/2009.

[102] For their part, the defence counsel has submitted, on the Crown's behalf, that the **Crossfield** case bears little, if any similarity, to this case. The Crown has submitted that the maximum sum which should be awarded to the claimant as damages for malicious prosecution, is \$350,000.00.

[103] I agree, with the defence counsel's submissions as to the maximum sum which should be awarded to the claimant as damages for malicious prosecution, save and except in one respect, which is that I am not of the view that the sum of \$350,000.00, if it were to be awarded to the claimant, ought to be viewed by this court, as being the maximum sum, which can properly be awarded to the claimant as damages for malicious prosecution. I am instead, of the view that said sum would be a reasonable one to be awarded, based on the proven facts of this particular case.

[104] The Judgment Orders will therefore be as follows:

1. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants are awarded judgment in their favour, as regards the claimant's claim for damages for false imprisonment and the costs of that claim are awarded in favour of those defendants, with such costs to be taxed, if not sooner agreed.
2. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants are awarded judgment in their favour, as regards the claimant's claim for damages for malicious prosecution and the costs of the claim against those defendants, for damages for malicious prosecution,



are awarded in favour of the 4<sup>th</sup> defendant, with such costs to be taxed, if not sooner agreed.

3. The claimant is awarded judgment in his favour, with respect to his claim against the 4<sup>th</sup> defendant, for damages for malicious prosecution and the costs of that claim, against that defendant, are awarded in the claimant's favour, with such costs to be taxed, if not sooner agreed.
4. With respect to the claimant's claim for damages for malicious prosecution, as against the 4<sup>th</sup> defendant, the claimant is awarded general damages, in the sum of \$350,000.00, with interest at the rate of 3%, with effect from March 15, 2012 to date of judgment and special damages in the sum of \$654,000.00, with interest at the rate of 3% with effect from June 22, 2011 to date of judgment.
5. The Registrar of this court shall schedule a hearing and make the necessary case management orders, in respect of the assessment of damages, as against the 1<sup>st</sup> defendant.
6. The claimant shall file and serve this order.

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**Hon. K. Anderson, J.**