IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0018 of 2017
[High Court Civil Case No. HBC 278B of 2012)

BETWEEN	:	**1. RUPENI NAISORO** **2. SAINIVALATI RAMUWAI**
		Appellants
AND	:	**THE COMMISSIONER OF POLICE** **THE ATTORNEY-GENERAL OF FIJI**
		Respondents
Coram	:	**Basnayake, JA** **Lecamwasam, JA** **Dayaratne, JA**
Counsel	:	**Mr M Naivalu for the Appellant** **Ms S Ali with Ms N Ali for the Respondent**
Date of Hearing	:	**23 May, 2019**
Date of Judgment	:	**7 June, 2019**

JUDGMENT

Basnayake, JA

[1] I agree with the reasons and conclusion of Dayaratne, JA.

Lecamwasam, JA

[2] I agree with the reasons given and the conclusion of Dayaratne, JA.

Dayaratne, JA

The Appeal before this court

[3] This appeal has been preferred against the judgment of the High Court of Suva dated 27 October 2016. At the very out set I wish to advert to the progression of this case in this court until the date of hearing on 23 May 2019.

[4] The case first came up for hearing on 16 November 2018. On that date Mr. Valenitabua who appeared for the Appellants had made an application to withdraw from the case since his clients no longer wished to have his services and Ms. Ali who appeared for the Respondents had not objected to the said application. Accordingly court had permitted Mr. Valenitabua to withdraw. The Appellants had thereafter moved for time to retain a new counsel and Ms. Ali had objected to that application and the court reserved its order on that application. By its order dated 30 November 2018, the application for postponement was allowed subject to costs of $1000. Each Appellant was directed to pay $500 as costs to the Respondents within a period of 28 days and failure to pay costs within the stipulated period of time was to result in the dismissal of the appeal.

[5] Costs have since been paid by the Appellants and at the next call over which was 8 April 2019, the President of the Court of Appeal (President) has fixed the case for hearing on 23 May 2019 and directed the Appellants to file their written submissions within 21 days and in default, the appeal was to be considered as abandoned. The written submissions have been filed on 30 April 2009. This was one day after the deadline of 21 days. The registry has accepted the written submissions and the President had made a minute that the late filing is to be considered by court at its sittings on 23 May 2019.

[6] In the meantime, by Notice of Motion dated 23 April 2019, Counsel for the Appellants sought certain orders. They were;

"(a) That the 1st Respondent within 21 days provide to counsel on record for the Applicants the first statement of Moape Kadavu to Police given on 2 May 2005 pursuant to their investigations,

(b) That leave be granted to the Applicants to adduce further evidence of the first statement of Moape Kadavu to Police given on 2 May 2005 pursuant to their investigation,

(c) That upon issuance of the first statement of Moape Kadavu to Police given on 2 May 2005 pursuant to their investigation that they be given leave to amend their Statement of Claim, if necessary with leave to the Respondent to file amended defence thereafter,

(d) That leave be granted to file additional grounds of appeal,

(e) That this appeal be heard in the third quarter Court of Appeal session,

(f) That the costs of this application be in the cause".

[7] When this matter was taken up before us on 23 May 2019, learned Counsel for the appellant supported his motion and moved that the matter be re-fixed for hearing and sought directions as contained in his Motion.

[8] Learned Counsel for the Respondents objected to the application and stated that the appeal should be considered to have been abandoned since the Appellants have failed to comply with the directions given by the President on 8 April 2009 and have filed their written submissions after the given deadline.

[9] We considered the directions sought by the Appellants in their Motion dated 23 April 2019 and informed the learned counsel for the Appellants that it was not possible for us to permit the amendment of pleadings at the stage of the appeal and also that there was no merit in the rest of the directions that had been sought. We therefore refused his application for a postponement of the hearing and inquired from him as to whether he was ready to make oral submissions. Since he indicated that he was not ready, we granted a short adjournment for him to get ready. When court resumed sittings, he informed us that he was not making any oral submissions but would rely on the written submissions he had filed on 30 April 2019.

[10] Learned counsel for the Respondents objected to his written submissions being accepted since they had been filed out of time and renewed her submission that the matter should be considered to have been abandoned. Court having indicated that her application will be duly considered, asked if she wished to make any oral submissions on the substantive matter and she did make very brief submissions and stated that she will be relying on the written submissions that she had already filed.

[11] We have considered the application made by the learned counsel for the Respondents that the appeal be considered as abandoned for non-compliance of the order made by the President on 8 April 2019. It is clear that the written submissions have been filed a day after the given deadline. Having taken into consideration the fact that it is out of time by just one day, court was not inclined to completely shut out the appeal on that account. Therefore, we have decided to consider the case on its merits. However we will not consider the written submissions filed by the counsel for the appellant on 30 April 2019 and will take into consideration the written submissions that have been filed on behalf of the Appellants in this court previously, namely the written submissions dated 12 October 2018. In any event, no prejudice will be caused to the Appellants since we find that the written submissions that have been filed on 30 April 2019 are not of any substance and appear to have been filed simply to comply with the order of court.

Case in the High Court

[12] The Appellants instituted proceedings in the High Court against the Respondents and their Statement of Claim contained three causes of action. They were:

(a) torture by assault and battery,

(b) malicious prosecution and

(c) false imprisonment.

[13] They alleged that they were arrested in connection with the murder of a 17 year old youth by the name of Navneet Kumar (Navneet) and that officers of the 1st Respondent assaulted them and forced them to sign a confession that they had committed the murder

of Navneet. They alleged that they suffered multiple injuries as a result of the police assault and had listed the nature of the injuries.

[14] They stated further that they were indicted for the murder of Navneet in the High Court by the Director of Public Prosecutions (DPP) and were convicted. The High Court imposed a sentence of life imprisonment and they commenced serving the jail term. They appealed against their convictions and whilst the appeals were pending, a person by the name of Timoci came forward and confessed that he had committed the murder of Navneet. He was indicted by the DPP for the said murder and upon his plea he was convicted by the High Court. The Appellants were granted bail pending appeal and thereafter the Court of Appeal after hearing their appeals, acquitted them of the murder charges. On the basis of their acquittal by the Court of Appeal, they claim that they were wrongly accused, wrongly prosecuted and wrongly convicted and thus claim that it amounts to malicious prosecution.

[15] They further claim that consequent to their being maliciously prosecuted, they were falsely imprisoned for a period of seven years. They sought damages under the three different causes of action.

[16] In their Statement of Defence, the Respondents categorically denied the accusation of torture and took up the position that the said allegation was gone in to by the High Court in the trial within a trial (*voir dire*) and determined that the confessions were voluntarily made. With regard to malicious prosecution, the Respondents took up the position that they were appropriately charged based on the available evidence and that the DPP had prosecuted the Appellants considering the serious nature of the crime. They also contended that the Appellants had been convicted by the High Court judge after a trial within a trial being conducted and having also considered the unanimous opinion of the assessors. With regard to the complaint of false imprisonment, they stated that the imprisonment was consequent to the conviction by the High Court and that the Appellants cannot have any cause of action against the Respondents since imprisonment was consequent to judicial orders.

The Appeal to this court

[17] The grounds of appeal, as stated in the Notice of Appeal are;

> 1. *The learned judge erred in law and fact in dismissing the Plaintiffs' respective claims for battery, assault, false imprisonment and malicious prosecution and as a result refused to award damages to the appellants*
>
> 2. *The learned judge erred in law and in fact in holding that the Appellants failed to prove all elements of battery, assault, false imprisonment and malicious prosecution on the balance of probabilities*
>
> 3. *The learned Judge erred in law and in fact in refusing to award any costs in favour of the Appellants*

[18] The first ground of appeal is too vague. The third ground raises the issue of costs. When an action is dismissed, there cannot be any costs in favour of the Plaintiffs and therefore this ground of appeal is without any merit and has to be rejected at the very outset. The second ground raises the question as to whether the learned judge was wrong in holding that the elements necessary to prove the three causes of action had not been established on a balance of probabilities. This is an aspect that this court can go into and hence I will consider the merits of that ground in my judgment.

The first cause of action - torture by assault and battery

[19] The Plaintiffs had alleged in their Statement of Claim that they were arrested by the Police on suspicion of having committed murder and that they were severely beaten up whilst in police custody. Since they could not bear the pain of torture any further, they had reluctantly admitted to being a party to a murder that they never committed. They had signed certain written statements which were to be considered as confessions. They had named some of the officers who are alleged to have assaulted them and had described the injuries they are said to have suffered. They also claim to have been examined by doctors and that they were receiving treatment even at the time of the trial.

[20] The Respondents in their Statement of Defence denied that the Appellants had been assaulted by police officers and also took up the position that the issue of assault and the voluntariness of the confessions had already been determined in the Trial within a Trial

(*voir dire*) by the High Court during the murder trial and that the learned High Court judge had determined that there was no assault. They also pleaded that it would amount to res judicata if that issue were to be gone in to in the civil proceedings.

[21] In order to succeed under this cause of action, the Appellants had to prove on a balance of probabilities that they were assaulted whilst in police custody and that they suffered the injuries that had been described. It was also incumbent on them to produce medical evidence in order to establish the nature of the injuries and the manner in which they could have been inflicted.

[22] Both Appellants testified at the trial and the Respondents led the evidence of Vijay Nand, an investigating officer of the Nausori Police Station. According to the Appellants, they had been severely assaulted whilst in police custody and had suffered multiple injuries including fracture of the ribs. They have explained the manner in which they were assaulted. In cross examination they were questioned as to how they could have managed to walk if they had infact sustained injuries of that nature. It was also put to them that the doctor and the magistrate would have certainly noticed such injuries if they were in that condition. Although the Appellants had claimed that they were receiving treatment even at the time they gave evidence, no medical reports were produced to substantiate such position. They did not lead evidence of a doctor who was treating or had treated them. It is imperative to produce medical evidence to establish a tort of this nature. The importance of medical evidence to support the extent of injuries was highlighted in the case of **Commissioner of Police v Wehrenberg** [2013] ABU 0019 of 2007 (1 November 2013).

[23] The allegations being assault whilst in police custody, it was incumbent on the Appellants to explain the steps they had taken to bring such conduct to the attention of relevant authorities. The first Appellant had deposed to the fact that he was represented by a lawyer from the time of his arrest until the end of the High Court case (page 31 of the High Court proceedings). Neither he nor his lawyer ever complained of assault to the Magistrate who would have been the first person to be informed of such matter. It is in evidence that the Appellants were produced before a doctor and that they were afforded an opportunity to speak to a Justice of Peace at the time they were taken to the Magistrate

(page 103 & 104 of the High Court proceedings). They neither complained to the doctor nor the Justice of Peace.

[24] The learned High Court judge has out lined the evidence given by the witnesses and analyzed the evidence. From paragraph 5 – 16 of his judgment, he has set out the evidence of the two Appellants and the police officer who was called by the Respondents. The evidence has been properly evaluated to determine their creditworthiness and adequacy in relation to matters that had to be established in order to succeed under the relevant cause of action. He has pointed out the infirmities in the Appellants' case

[25] The trial judge was in the best position to consider matters of fact. He was able to observe their demeanor and was ideally suited to determine whether the evidence was plausible. At paragraph 16 of his judgment, the learned High Court judge concluded that *"On a review of the evidence as a whole, I do not accept that the first and second plaintiffs were tortured and assaulted. There was no evidence produced in the form of a medical report nor a complaint made to the Justice of Peace nor by their lawyers to the Magistrate's Court or the High Court".* Considering the manner in which the learned judge has evaluated the evidence placed before him, I see no reason to interfere with his finding that the Appellants had failed to prove the first cause of action on a balance of probabilities.

The second cause of action – malicious prosecution

[26] The Appellants allege that they were charged in the High Court for murder solely based on the confessions extracted from them pursuant to being assaulted and that their acquittal by the Court of Appeal (CA) would establish that they were maliciously prosecuted. Infact it is pertinent to reproduce here, paragraph 34 of their Statement of Claim. It reads as follows - *"That once the Fiji Court of Appeal and everyone accepts that Timoci Ravurabota acting alone committed the crime by murdering Navneet Narayan the actions, motives, the facts put forward as true and the evidence at trial of the 1st Defendants investigators are exposed as false which tantamount to malicious prosecution".* This statement and the tenor of the submissions made by the learned counsel for the Appellants in the High Court (as well as in the written submissions filed

in this court) make it clear that the Appellants relied entirely on the fact of the Appellants' acquittal by the CA and certain observations made by the CA to prove the tort of malicious prosecution.

[27] In their Statement of Defence, the Respondents took up the position that the Trial within a Trial (*voir dire*) had gone in to the issue of the confession and that the High Court had arrived at a determination that the confessions had been voluntarily made. They also stated that the Appellants were properly accused, prosecuted and convicted and that these issues were properly dealt with in the summing up of the murder criminal trial against them (paragraph 29) and that they were properly charged based on the evidence that was available with the 1st Respondent, that the charges were properly analyzed by the DPP and that they were remanded due to the seriousness of the crime (paragraph 24).

Constituent elements in an action for malicious prosecution

[28] I consider it appropriate to firstly identify the essential elements that a Plaintiff must prove in order to succeed in an action for malicious prosecution. The Appellants in their written submissions have referred to the case of **A v New South Wales**, [2007] HCA 10. The High Court of Australia in this case has traced in great detail the history and development of the tort of malicious prosecution. They have re-iterated the oft relied upon four elements a Plaintiff must establish in order to succeed in an action for malicious prosecution. They are;

> *"(1) that proceedings of the kind to which the tort applies (generally, as in this case, criminal proceedings) were initiated against the Plaintiff by the defendant;*
>
> *(2) that the proceedings terminated in favour of the plaintiff;*
>
> *(3) that the defendant, in initiating or maintaining proceedings acted maliciously; and*
>
> *(4) that the defendant acted without reasonable and probable cause"*

[29] Halsburys Laws of England (4th Edn), Vol 45, para 1368, stipulates that the Plaintiff should expressly plead these four essential elements. Therefore, it is prudent to examine if the Appellants have pleaded these four elements in their Statement of Claim and also

whether they have proved them at the trial. Significantly, the Appellants have acknowledged this requirement and in paragraph 35 of their written submissions state that *"Since malicious prosecution is an action on the case, the Plaintiff has the substantive burden of proof to establish all the elements of the case and must show damage"*.

[30] It is admitted that the investigations were conducted by officers of the 1st Respondent and that the criminal charges were forwarded and the prosecution was conducted by the DPP. It is also admitted that the Appellants were acquitted in appeal. Therefore, the first two elements can be considered as having been satisfied in this case.

[31] What remains therefore, is to consider as to whether the latter two elements have been pleaded and proved. A perusal of the Statement of Claim reveals that the Appellants have failed to plead them. What has been pleaded is - *"That once the Fiji Court of Appeal and everyone accepts that Timoci Ravurabota acting alone committed the crime by murdering Navneet Narayan the actions, motives, the facts put forward as true and the evidence at trial of the 1st Defendants investigators are exposed as false which tantamount to malicious prosecution"* (para 34). This clearly does not satisfy the requirement that all elements must be pleaded.

[32] Next, it has to be ascertained if these two elements have been proven at the trial. It must be emphasized here that as stated earlier, the Appellants based their case on certain remarks made by the CA in the appeal filed by them against their conviction and sentence. They seem to have placed great reliance on the said remarks and believed that to be sufficient to prove malicious prosecution. Needless to say, it was the duty of the Appellants as Plaintiffs, to prove their case on a balance of probabilities by placing evidence in the High Court. They could not have ceded that burden and sought refuge solely on remarks made by the CA. The tort of malicious prosecution had to be decided by the trial court and not the CA.

[33] By the time the CA considered the appeal, Timoci had come forward and confessed to the murder. The CA heard his evidence and the evidence of the appellants once again. The approach of the CA in considering the issue of 'why the appeals should be allowed' was as follows - *"As stated in paragraph 21 above the correct approach of the appeal court*

when new evidence is considered is to ask whether ***if the tribunal of fact had heard the new evidence*** *at the high court trial would they have had a reasonable doubt and acquitted the defendants"* (emphasis added) (para 61 of the judgment).

[34] The CA thus had to consider the new evidence that had emerged, which was not available at the time the charges were brought against the Appellants or during the murder trial in the High Court. The CA in their judgment states that- *"The supporting evidence, discussed at length above, leads to the conclusion, on which I am sure, that Timoci Ravurabota acted alone and that Senivalai Ramuwai and Rupeni Naisoro are completely innocent of the murder of Navneet Kumar who was killed on … … … In my opinion it is a case where this court should conclude not on the basis that with the new evidence there might have been a reasonable doubt in the tribunal of fact as to the guilt of Senivalai Ramuwai and Rupeni Naisoro, but beyond any reasonable doubt these two appellants are innocent and the victims of a miscarriage of justice.* ***I believe this would be the view of the learned High Court Judge and the Assessors who heard the case in 2007 if they had heard the new evidence as well as the evidence then adduced before them****"* (emphasis added) (para 69).

[35] I consider it apt to quote the following observation made in **A v New South Wales** *(supra)* to emphasize the rationale of insisting on the two elements of 'malice' and 'absence of reasonable and probable cause' - *"Much of the development of the law concerning malicious prosecution reflects the attempts to balance the provision of a remedy where criminal processes have been wrongly set in train with the need not to deter the proper invocation of those processes. The two requirements of absence of reasonable and probable cause, and malice, represent the particular balance that it struck".*

[36] It is sometimes thought that proving either of these two elements would suffice. However, this is not so and proving malice would not by itself establish the absence of reasonable or probable cause or vice versa. It was pointed out in the above case that *".... the positive requirement of malice, and the negative requirement of absence of reasonable and probable cause, each have a role to play in the tort. A conclusion about malice does not render irrelevant the inquiries about what the prosecutor did make, and should have*

made, of the material available when deciding whether to initiate or maintain the prosecution".

[37] The ordinary dictionary meaning of 'malice' alone may not be appropriate to define malice in this context. As stated in **A v New South Wales** *(supra),* malice would mean *"... acting for purposes other than a proper purpose of instituting criminal proceedings. Purposes other than a proper purpose include, but are not limited to, purposes of personal animus of the kind encompassed in ordinary parlance by the word 'malice' ".* It would be necessary that *'the defendant must have had malicious intent in the sense of improper purpose'.* Accordingly, 'malice' would constitute *"... an element that focuses upon the dominant purpose of the prosecutor and requires the identification of a purpose other than the proper invocation of the criminal law".*

[38] I consider it pertinent to mention another important view expressed in that case. It was stated that - *"Two further observations should be made about the element of malice. First,* ***its proof will often be a matter of inference. But it is proof that is required, not conjecture or suspicion****. Secondly, the reference to "purposes other than a proper purpose" might be thought to bring into this realm of discourse principles applied in the law of defamation or in judicial review of administrative action. No doubt some parallels could be drawn with principles applied in those areas. But drawing those parallels should not be permitted to obscure the distinctive character of the element of malice in this tort. It is an element that focuses upon the dominant purpose of the prosecutor and requires the identification of a purpose other than the proper invocation of the criminal law"* (emphasis added).

[39] The element of 'absence of reasonable and probable cause' cannot be adjudged by a single yardstick and has to be determined on the facts and circumstances of each case. I am once again inclined to rely on **A v New South Wales** *(supra),* where it was said that an action for malicious prosecution will not lie *"where the material before the prosecutor at the time of initiating or maintaining the charge both persuaded the prosecutor that laying a charge was proper, and would have been objectively assessed as warranting the laying of a charge".*

[40] I will now consider as to whether the facts of this case satisfied these two constituent elements by applying the principles set out above. It is best to begin by adverting to some of the 'agreed facts' in the High Court. They are;

> *"The 1st Defendant was reliably informed by Moape Kadavu that he met the 1st Plaintiff on 29th April 2005 at 11pm. Moape also stated that he and the 2nd Plaintiff had stabbed Navneet Narayan. This had caused the 1st Defendant to locate and interview the 1st Plaintiff in order to substantiate such information.*
>
> *The 2nd Plaintiff's arrest was due to the reliable information provided to the 1st Defendant by Moape Kadavu that he met the 1st Plaintiff, and that the 1st Plaintiff told him that he and the 2nd Plaintiff had stabbed Navneet Kumar. This had caused the 1st Defendant to locate and interview the 2nd Plaintiff in order to substantiate such information.*
>
> ***The Police's suspicion against the Plaintiffs, their respective arrest, detention, caution interview, charge, prosecution and conviction were solely based on information provided to the 1st Defendant's officers by one Moape Kadavu that the Plaintiffs had stabbed Navneet Kumar".*** (emphasis added)

[41] The above 'agreed facts' together with the evidence given by the witness for the Respondent and other matters referred to by me herein before, explains the circumstances under which the Appellants were arrested and charged. The officers of the 1st Respondent and the DPP acted on the material available at that time and the issue is as to whether they can be said to have acted maliciously or without reasonable or probable cause when they initiated criminal proceedings against the Appellants.

[42] In this case, the police conducted investigations and the criminal charges were forwarded and the prosecution in the High Court was conducted by the DPP. It was not a sole decision taken by the local police. Witness Nand who testified on behalf of the Respondents has said that the Director CID, Divisional Crime Officer and several other senior officers had been involved in the investigations (pages 83 – 85 of the High Court proceedings). During cross examination he has specifically stated that the police in charging the Appellants acted on the evidence available at the time (pages 90 – 92 of the High Court proceedings). The High Court accepted the confessions to have been voluntarily made and upon the summing up, the assessors expressed the opinion that the Appellants were guilty (two of the three assessors found the 1st Appellant guilty while all

three assessors found the 2nd Appellant guilty). The learned High Court judge convicted both of them.

[43] In **A v New South Wales** *(supra),* Court enunciated that *"Thirdly, the action for malicious prosecution has a temporal dimension. To ask whether a prosecution was commenced or maintained without reasonable and probable cause directs attention to* ***the state of affairs when the prosecution was commenced****, or when the prosecutor (the defendant in the subsequent civil claim) is alleged to have maintained the prosecution.* ***Moreover, it necessarily directs attention to what material the prosecutor had available for consideration when deciding whether to commence or maintain the prosecution, not whatever material may later have come to light".*** (emphasis added)

[44] Considering the facts of this case, it will also be relevant to quote the words of Russel LJ in the unreported case of **Wenlock v Shimwell**, which was adopted by Davies LJ in the case of **Riches v DPP**, [1973] 2 All ER 935 at page 938. He said - *"I may perhaps add this, that I cannot see how an allegation of prosecution without reasonable and probable cause and with malice really can stand any chance of success when you find that the view that the Director of Public Prosecutions presumably had of the evidence seems to have been shared by the committing magistrate, by the judge who allowed the matter to go to the jury and by the 12 jurymen".*

[45] I find that the learned High Court judge who heard the case has identified the elements that had to be proved in a case of malicious prosecution and has analyzed the evidence in relation to those elements. He has paid attention to the numerous cases that had been cited in the written submissions of the parties and has relied on the relevant dicta. He has given his mind to the observations made by the CA in its judgment in the criminal appeal. He concludes that the Appellants have failed to plead or establish absence of reasonable or probable cause or malice on the part of the Respondents. Having considered all matters, I see no reason to disagree with the conclusions of the learned judge.

The third cause of action – false imprisonment

[46] The third cause of action contained in the Statement of Claim is that the Appellants were falsely imprisoned from 3 May 2005 to 23 May 2012. This is from the date they were

arrested until they were acquitted by the CA. On the basis that they were falsely imprisoned, the Appellants sought damages.

[47] The Respondents took up the position that although officers of the 1st Respondent had conducted investigations, the DPP had analyzed the evidence and forwarded charges. They took up the position that placing the Appellants in custody was upon judicial orders (both prior to trial and after conviction) and on that ground stated that there can be no cause of action for false imprisonment.

[48] During the course of the trial it had been admitted by the Appellants that they had not been incarcerated for a period of seven years as averred in the Statement of Claim since they had been on bail pending the trial as well as on bail pending appeal.

[49] Although the Appellants had been arrested by officers of the 1st Respondent, they were remanded by the Magistrate. Thereafter, they started serving their sentence of life imprisonment following conviction by the High Court. As such it is clear that the imprisonment was on account of judicial orders.

[50] A person whose conviction is overturned in appeal cannot sue the police or the prosecutor for the time spent in prison. I do not consider it necessary to engage in a long discussion on this issue. The statement of Lord Diplock in the case of **Maharaj v Attorney General of Trinidad and Tobago** (No. 2), [1978] All ER 670 at 679 is authority for this proposition. He said *" ..... no human right or fundamental freedom..... is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to, then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair".* This cause of action therefore has to fail.

[52] For the reasons as discussed by me, I hold that the learned High Court judge was correct in declining the action filed by the Appellants. Accordingly, I affirm the judgment of the High Court and dismiss the appeal. In all the circumstances, I do not award costs.

Orders

Appeal dismissed. No costs.

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Hon. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Justice V. Dayaratne
JUSTICE OF APPEAL