

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 112 of 2016

BETWEEN : RAJENDRA SINGH

PLAINTIFF

AND : THE COMMISSIONER OF FIJI POLICE FORCE

FIRST DEFENDANT

AND : THE DIRECTOR OF PUBLIC PROSECUTIONS

SECOND DEFENDANT

AND : ATTORNEY GENERAL OF FIJI

THIRD DEFENDANT

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr A. Nand for the Plaintiff
Mr A. Prakash for the First, Second and Third Defendants.

Date of Hearing : 13 November 2018

Date of Judgment : 16 November 2018

JUDGMENT

Introduction

The matter was fixed for hearing on 12 and 13 November 2018.

On 12 November, at the outset of the proceedings, both Counsel asked the Court to act under the provisions of Order 33 rule 3 of the High Court Rules which states "The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial or the cause or matter, and may give directions as to the manner in which the question or issue shall be stated".

1. The Court ordered that the issue of whether a person who has been discharged in the criminal court can successfully pursue a civil action for malicious prosecution be tried by oral submissions by Counsel.
2. Subsequently at the close of proceedings on 13 November, at the request of both Counsel, the Court ordered that it would now adjourn to consider whether the Plaintiff can bring this claim or not. If he can, then both the Plaintiff and the Defendants will give evidence and call witnesses and then both Counsel would submit on the damages to be awarded for malicious prosecution, false imprisonment and the loss of items. If he cannot, then the claim will be dismissed. The above was confirmed by both Counsel as correct. At their further request the Court adjourned the hearing to the next day.
3. The Plaintiff in his Statement of Claim contends as follows:
 - (1) On 26 June 2007, the First Defendant (Commissioner) secured the issue by a Magistrates' Court of a warrant authorizing a search of the Plaintiff's former residence and caused the same to be entered and searched.
 - (2) The search was for the discovery of items relating to the charges for pornographic activities involving "juvenile" but no such articles were made.

- (3) On 15 December 2008, the Plaintiff's solicitors, Messrs Patel Sharma Lawyers wrote to the Commissioner demanding the return of the confiscated items.
- (4) On 20 September 2007 the Plaintiff went to the Crimes (sic, Criminal) Investigation Department Headquarters (CID HQ) "to pick his item" confiscated on 26 June 2007. He was arrested, interviewed and charged with 3 counts of rape and 1 count of an unnatural offence.
- (5) He was detained in police custody for 48 hours and was produced at the Suva Magistrates' Court where he was remanded in custody by the Magistrate for 336 hours (14 days).
- (6) Later the Director of Public Prosecutions (DPP) withdrew the charge of rape and laid a new charge of pornographic activity involving "Juvenile" in the Suva Magistrates' Court.
- (7) In the premises the Plaintiff was falsely imprisoned for 14 days.
- (8) The proceedings were terminated in the Plaintiff's favour when he was granted "Nolle Prosequi" (sic, prosequi) by the DPP on 12 August 2011.
- (9) The allegations of malice/absence of reasonable and probable cause included:
 - (i) Charging the Plaintiff for rape and unnatural offence without probable and correct evidence.
 - (ii) Charging the Plaintiff for pornographic activity involving juveniles without the birth certificates being disclosed to the Plaintiff or his solicitors, and in the knowledge it was untrue.
- (10) The Particulars alleged:
 - (i) Loss of Liberty – 14 hours at Totogo Police Station and 14 days on remand in Korovou Prison.
 - (ii) Fear and anxiety of a groundless prosecution.
 - (iii) Suffering a severe psychiatric reaction

(11) Loss of items belonging to the Plaintiff:		
(i)	Damaged & Corroded Computer and accessories	\$20,000.00
(ii)	Missing 10 software programmes	\$ 3,000.00
(iii)	Samsung camera with battery pack	\$ 2,000.00
(iv)	UPS, external storage Device etc	\$10,000.00
(v)	Motivational tapes & computer/software	\$15,000.00
(vi)	90 original audio CDS	\$10,000.00
(vii)	90 original audio DVDS	\$ 8,000.00
(viii)	90 original musical audio CDS	\$ 4,000.00
(ix)	5 stud diamond ring	<u>\$20,000.00</u>
	TOTAL	<u>\$92,000.00</u>

(12) The Plaintiff claims:

- (i) Damages for false imprisonment and malicious prosecution
- (ii) Damages for loss of items in the sum of \$92,000
- (iii) General Damages

4. The Defendants in their Statement of Defence state as follows:

- (1) A search warrant dated 25 June 2007 was issued to the Commissioner authorizing the search of the Plaintiff's former residence and a search was conducted.
- (2) The Commissioner had full authority to search and seize items necessary to the investigations and to bring them before the Court to be dealt with according to law.
- (3) The Plaintiff was initially investigated for rape, defilement and trafficking in obscene publications in 2007.
- (4) The Plaintiff was interviewed at the C.I.D. H.Q. and charged with 3 counts of rape and 1 count of an unnatural offence.
- (5) On 1 October 2009, the DPP amended the charges to 2 counts of pornographic activities involving a juvenile.

- (6) The DPP filed a nolle prosequi and the criminal proceedings against the Plaintiff were terminated on 12 August 2011.
- (7) The allegations against the Plaintiff were serious in nature and thorough investigations from 2007 to 2009 were conducted.
5. The Plaintiff in his Reply to Defence said there was no evidence to support the charges against the Plaintiff.
6. The Minutes of the Pre-trial Conference dated 9 November 2017 which are a model of prolixity do not deserve to be recorded in this Judgment as they are an otiose repetition of the pleadings.
7. Mr Prakash confirmed that all the items in the Common Bundle of Documents (CBD) are agreed and Mr Nand confirmed that all the items on pages 1 to 247 of the Defendants' Bundle of Documents (DBD) were agreed.
8. The hearing commenced with Mr Nand submitting. He said the case was stayed and the DPP can charge the Plaintiff for a different offence on the same facts. The Plaintiff does not need to be acquitted and if not convicted can bring an action. The nolle prosequi means the Plaintiff is innocent. The Court has to decide whether the Plaintiff is guilty or innocent.
9. Mr Prakash then submitted. He said in Fiji there were 5 elements for malicious prosecution and the burden was on the Plaintiff to prove all 5. The Plaintiff also had to plead all 5. This Court is not required to determine the guilt or innocence of the Plaintiff. It only has to determine if the prosecutor had reasonable or probable cause to initiate the prosecution. The Plaintiff has to prove malice on the part of the prosecutor, that she prosecuted for an improper purpose. The Plaintiff failed to plead the elements. He failed to plead malice in the prosecution or the prosecutor prosecuted with an

improper purpose or with malice. Recklessness, negligence or poor judgment on the part of the prosecutor do not constitute malice.

10. Mr Nand in his reply agreed the 5 elements need to be proved.
11. At the conclusion of the arguments I informed I would take time for consideration. Having done so I will now deliver my decision.
12. I shall start with the pivotal issue which is the nolle prosequi issued by the DPP. In Latin it means to be unwilling to prosecute. The Oxford Dictionary of Law, 9th edn, defines it as "A procedure by which the Attorney General may terminate criminal proceedings. The Attorney General's decision to enter a nolle prosequi is not subject to control by the courts. The procedure is most commonly employed when the accused cannot be produced in court to plead or stand trial owing to some physical or mental incapacity that is expected to be permanent. A nolle prosequi does not bar a further prosecution".
13. The Criminal Procedure Act 2009, section 49 provides
 - (1) In any criminal case and at any stage of the case before conviction or judgment, the Director of Public Prosecutionsmay enter a nolle prosequi either by counsel instructed by him or her stating in court or by informing the court in writing that the State intends that the proceedings shall not continue.
 - (2) Upon the entry of a nolle prosequi under sub-section (1) the accused person shall be
 - (a) at once discharged in respect of the charge for which the nolle prosequi is entered; and
 - (b)
 - (c)
 - (3) The discharge of an accused person in accordance with this section shall not operate as a bar to any subsequent proceedings against the accused person on the basis of the same facts".

14. Archbold Criminal Pleading, Evidence And Practice 2017 states at para 1-401 that proceedings upon an indictment pending in any court may be stayed by the entry of a nolle prosequi after indictment but before judgment. It can be entered only on the direction of the Attorney-General. A nolle prosequi is now usually directed to be entered where the accused cannot be produced in court to plead or stand his trial owing to physical or mental incapacity which is expected to be permanent. A nolle prosequi puts an end to the prosecution but does not operate as a bar or discharge or an acquittal on the merits and the person remains liable to be re-indicted.
15. The Constitution of Fiji by section 117(8) provides that the DPP may (a) institute and conduct criminal proceedings; (b)....., (c) discontinue, at any stage before judgment is delivered, criminal proceedings instituted or conducted by the Director of Public Prosecutions.....”.
16. I shall now turn to the authorities cited by Counsel. The first is the decision of the High Court of Australia in : Commonwealth Life Assurance Society Limited.....Appellant/Defendant AND Smith.....Respondent/Plaintiff [1937 – 1938. 59 C.L.R.] cited by Mr Nand. I am unable to consider this decision because at page 543 it is stated “The present case is not one where the proceedings were terminated by the entry of a nolle prosequi. They ended by the refusal of the Attorney-General to file an indictment”.
17. I turn to Bullen & Leake & Jacob’s Precedents of Pleadings, 18th edn, volume 1, 2016 (Bullen). At page 88, para 5-12 it is stated “To establish a claim for malicious prosecution the claimant must plead and establish that “:-
 - (a) He was prosecuted by the defendant i.e proceedings on a criminal charge were instituted by the defendant against him.
 - (b) The proceedings were terminated in the claimant’s favour.
 - (c) The proceedings were instituted without reasonable and probable cause.

- (d) The defendant instituted the proceedings maliciously; and
- (e) The claimant suffered loss and damage as a result.

18. Looking at the ingredients of malicious prosecution the following are obvious, and I am now looking at the Agreed Bundle of Documents (ABD). The item on page 22 is described as a Nolle Prosequi dated 12 August 2011 and signed by the DPP. It states the DPP informs the (High) Court that the State does not intend to continue the proceedings against the (Plaintiff) "On one count of : Pornographic Activity Involving Juvenile....."
19. On page 23 of the ABD is the Order of the judge that "Proceedings terminated. Accused is discharged....."
20. To my mind it is significant to note the Accused/Plaintiff was not acquitted. He was not even granted, as in some jurisdictions, a discharge amounting to an acquittal. The significance can be seen from the case of Clifford v the Chief Constable of Hertfordshire (2008) EWHC 3154 where Clifford had been charged with making and possessing indecent photographs on his computer but was acquitted after the CPS offered no evidence at trial.
21. In the instant case the only charge that remained against the Plaintiff was that of taking indecent photographs of a juvenile girl, Selai Vosa. Was there reasonable and probable cause for the DPP to have instituted the criminal proceedings? One needs to go no further than the Defendant's Bundle of Documents (DBD) to pages 120 and 122 to observe the obscene photographs of naked girls [This is part of the DBD accepted by Mr Nand as agreed documents]. Surely these show the presence of reasonable and probable cause and the absence of malice.
22. It is instructive for the Court to consider the position in England of the DPP who is the head of the Crown Prosecution Service (CPS) since the Prosecution of Offences Act 1985. Bullen at para 5-15 on page 91 says "It would be theoretically possible, although

factually unlikely, for the CPS to be liable to a claimant for malicious prosecution. See *Thacker v Crown Prosecution Service*, *The Times*, December 29, 1997, CA". I accept and adopt the writers' statement that there are "strong policy factors which would militate against a claim against the CPS....."

23. I need finally to consider the role of the DPP in the legal framework of Fiji. The supreme law, the Constitution states in section 117(10) "In the exercise of the powers conferred under this section, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority, except by a court of law or as otherwise prescribed by this Constitution or a written law".
24. According to the Concise Oxford English Dictionary, 12th edn, "directions" means "instructions.....about how to do something" while "control" means the restriction of an activity, tendency, or phenomenon."
25. So paraphrasing sub-s 10 above, I read the intention of the draftsmen of the Constitution to be that the DPP's power e.g. to discontinue any criminal prosecution under sub-s 8(c) is under the instruction or restriction of the Court. To my mind the draftsmen in their prescience did not intend the DPP to have *carte blanche* in issuing any *nolle prosequi* in say a case where the accused can be produced in court to stand his trial because he has no physical or mental incapacity which is expected to be permanent. The Plaintiff appeared in the Civil High Court in November 2018 some 7 years and 3 months after the *nolle prosequi* was issued by the DPP. It would therefore have appeared more correct to amend the charge as it did not involve a juvenile rather than be unwilling to prosecute. Thus the wisdom of the draftsmen to place the DPP Fiji in a different legal position to that of the A.G. in England is evinced. A cavalier attitude to the entry of a *nolle prosequi* can weaken if not crack the morale of those entrusted to keep the populace safe. This would be what the draftsmen clearly desired prosecutors to eschew. They would have been aware of the maxim of public policy expressed in Latin as "interest

reipublicae ne malaficia remaneant impunita” and in English as “It is a matter of public concern that wrongdoings are not left unpunished”.

26. Further the draftsmen did not intend that any power bestowed on the holder of a public office should not have its concomitant checks and balances. They were aware of the decision of the Judicial Committee of the Privy Council in *Attorney-General of Fiji AND Director of Public Prosecutions* that the Attorney-General did not have ascendancy over the D.P.P. (see the advice of the Board to Her Majesty the Queen of Fiji [1983] 2 A.C. at page 683. So, the draftsmen vested the direction or control of the D.P.P.’s exercise of the powers conferred on him, in a court of Law.
27. Before I pronounce my decision, I shall refer to the decision in the District Court of New South Wales in *R v RP* [2016] NSWDC 10, 15 February 2016. Toner DCJ at para 19 alluded to the DPP’s power to enter a *nolle prosequi* as not being an absolute power and that the exercise of that power is subject to the power of this Court to control its processes.
28. At the end of the day I find that the Plaintiff has failed to establish that there was no reasonable or probable cause for his prosecution for pornographic activity and he has also failed to prove the prosecution was terminated in his favour since the Judge discharged the Plaintiff, not acquitted him, and the discharge would thus not be a bar to subsequent proceedings against the Plaintiff on the basis of the same facts, and finally he failed to prove the DPP was actuated by malice in instituting the prosecution.
29. Consequently, the issue is resolved against the Plaintiff. The absence of a malicious prosecution is tantamount to there being no false imprisonment as all detention stemmed from a prosecution which was initiated for reasonable and probable cause based on available evidence.

30. In the result:

- (1) The Plaintiff's claims against the First, Second and Third Defendants for damages including aggravated and exemplary damages for false imprisonment and malicious prosecution, for damages for loss of items in the sum of \$92,000 and for general damages are hereby dismissed.
- (2) The Plaintiff shall pay the First and Third Defendants the costs of this action summarily assessed at \$1,000.

Delivered at Suva this 16th day of November 2018.



David Alfred

JUDGE

High Court of Fiji