DHARAM BIR SINGH

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v

COMMISSIONER OF POLICE &
THE ATTORNEY-GENERAL

B [HIGH COURT, 1990 (Palmer J) 30 April]

Civil Jurisdiction

Practice (Civil) - application to strike out Defence - whether Defence to action for damages for malicious prosecution sufficiently pleaded - whether Plaintiff's
C *acquittal in related criminal proceedings gives rise to an estoppel against the Defendant.*

The Plaintiff who had been acquitted of a charge of murder began an action for damages for malicious prosecution. The Defendants simply denied acting with malice. The Plaintiff sought to strike out the Defence arguing want of particular-
D ity and estoppel. Dismissing the application, the High Court HELD: (i) that the Defence was sufficiently pleaded and (ii) that the circumstances of the Plaintiff's acquittal did not give rise to an estoppel against the Defendants.

Cases cited:

E *Critchell v. London and South Western Railway Company* [1907] 1 KB 860
Hunter v. Chief Constable of West Midlands [1981] 3 All ER 727
Kemsley v Foot [1951] 2 KB 34
Nagle v. Fellden, [1966] 2 QB 633.
Remmington v. Scoles (1897) 2 Ch. 1
Weinberger v. Inglis (1918), 1 Ch. 133

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V. Maharaj for the Plaintiff
Mrs C. Manuel for the Defendants

Interlocutory application in the High Court

G **Palmer J**:

This action is one brought by the Plaintiff for damages for malicious prosecution. It is being defended by both Defendants. The present application is one under Order 18 Rule 18 of the High Court Rules 1988 to strike out the Defence of the Defendants under that rule and under the inherent jurisdiction of the Court on the

grounds:

(1) That it discloses no reasonable Defence.

(2) That it is frivolous and vexatious.

(3) That it is an abuse of the process of the Court.

The essential facts constituting the history of this matter are not in dispute and are as follows:

In the evening of the 30th August 1987 the Plaintiff was taken by a police party to the Valelevu Police Station. He remained in police custody throughout the night, in the course of which he was interviewed and subsequently he was charged with the murder of his sister Vijay Kumari, daughter of Ham Raj Singh. On the 31st August 1987 he was taken before the Suva Magistrates Court where he was remanded in custody. He remained in custody until the 7th of March 1989 when his trial upon that charge in the High Court terminated in his favour and he was released from custody. The termination of the trial before Fatiaki J. happened in this way:

At the close of the prosecution's case Counsel For the Plaintiff made a submission of no case and sought reconsideration of an earlier ruling in a trial within a trial. In due course the learned Judge ruled that a confession and charge statement allegedly made by the Plaintiff and tendered by the prosecution were inadmissible. State Counsel conceded that if that material were to be ruled inadmissible there would be no evidence that the accused committed the offence, and accordingly in accordance with the provisions of Section 293 of the Criminal Procedure Code Cap.21 the learned Trial Judge recorded a finding of Not Guilty and ordered the Plaintiff's immediate release from custody.

Turning to the pleadings in the action the Defendants admit that they are respectively the appropriate representative Defendants for the purpose of the action. The critical allegation in the Statement of Claim for the purposes of the present application, is in paragraph 14 which reads as follows:

> "14. The Plaintiff charges that the Police Officers for whom the first and second defendants are vicariously liable did by their investigations and the conduct of the committal proceedings and the trial in the course of their evidence against the Plaintiff made false and malicious representations thereby procuring the Magistrate to commit the Plaintiff to prison to await his trial at the

Criminal Sittings of the High Court at Suva."

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The Defence to that allegation is as follows:

> "14. That the Defendants deny paragraph 14 of the statement of claim as to the allegations made therein and put the Plaintiff to proof thereof."

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The applicant is putting his case as follows:

> "1. That the Defendants' general denial in paragraph 14 of the Defence is not an admissible plea.
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> 2. That the Defendants are estopped from denying facts already found in another jurisdiction namely in the criminal trial.
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> 3. That the Defendants are seeking to relitigate the same question as one which has already been litigated in the
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> Criminal Trial and that that is not a permissible procedure."

I approach this matter on the well established basis that the jurisdiction to strike out pleadings given to the Court by Order 18 is a summary procedure which should only be employed and the jurisdiction only exercised in plain and obvious cases. Ample authority for that proposition is cited in the Supreme Court Practice 1985 (the White Book") under Order 18 and especially under paragraphs 18/19/ 3, 18/19/7, and 18/19/17. Somervell, L.J. in the Court of Appeal in England in Kemsley v Foot [1951] 2 KB 34 at page 39 remarked that "the effect of the cases is accurately summarised in the Annual Practice" and that the appropriate Orders "should be applied only in plain and obvious cases." The Court of Appeal again made the position plain in Nagle v. Fellden, [1966] 2 QB 633. Danckwerts L.J. on page 648 said:

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> "The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the Court."

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And on page 651 Salmon L.J. said:

> "It is well settled that a statement of claim should not be struck out and the Plaintiff driven from the judgment seat unless the

case is unarguable."

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Although most of the authorities appear to concern Defendant's applications to strike out statements of claim the principle under Order 18 can equally be applied to Plaintiff's applications to strike out a Defence such as is sought in the present

case; examples where defences were struck out may be found in Critchell v. London and SouthWestern Railway Company [1907] 1 KB 860 and Remmington v. Scoles [1897] 2Ch. 1. I am accordingly approaching this application in the light of the law just referred to. B

The first, and as will be seen, critical point to note is that in an action for malicious prosecution the Plaintiff carries the onus *inter alia* of proving that the Defendant acted without reasonable and probable cause and maliciously. C

Turning now to the first submission on behalf of the Plaintiff, the learned authors of Bullen and Leake and Jacobs on *Precedents of Pleadings*, 12th Edition have this to say on page 1203:

> "As the onus of proving that tile Defendant acted without reasonable and probable cause and maliciously is on the Plaintiff, the proper form of defence is to deny the Plaintiff's allegations, and not to plead affirmatively that the Defendant had reasonable and probable cause ." D

In my view the authorities there cited support that statement, see for example Weinberger v. Inglis [1918], 1 Ch 133 at 140. E

Indeed a look at Bullen and Leake and Jacobs shows that the Plaintiff in an action for malicious prosecution should plead not only that the Defendant's action was taken maliciously, but also that it was taken without reasonable and probable cause, and the appropriate defence to that is a denial by the Defendant that he had no reasonable or probable cause. In the present instance neither paragraph 14 nor any other part of the Statement of Claim contains that particular allegation and I therefore hold that the Defence as pleaded in paragraph 14 is a proper one and meets the allegations in the Statement of Claim. F

Accordingly I hold that the Plaintiff's first ground has not been made out. G

Grounds 2 and 3 can be taken together. In my view it has not been shown that there is an estoppel operating against the Defendant in this case. The mere fact of the Plaintiff's acquittal of course does not preclude the Defendants from defending the present action. It is only one, albeit an essential element of the action that the previous criminal proceedings have terminated in the Plaintiff's favour. The

Plaintiff's Counsel submits that the Defendants, are estopped from denying a

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fact already found in another jurisdiction. And he points to what he says is a finding on page 11 of Justice Fatiaki's ruling to the effect that the Plaintiff was assaulted by the Police. I am not entirely certain that the reference to that in Justice Fatiaki's ruling was intended to constitute a finding of fact or whether it is rather a recital of the evidence on the point of the assault. But accepting it for
B the present purposes as a finding that the Plaintiff was assaulted it is to be noted that no assault is alleged in the statement of claim except by a reference in the particulars, which of course need not be pleaded to and therefore there was no cause for the Defence to plead to it. Certainly there is no denial of the assault on the part of the Defence and in fact it concedes it. Plaintiff's Counsel places some reliance on the case of Hunter v. Chief Constable of West Midlands [1981] 3 All
C ER 727, a case in the House of Lords. That case too concerned a confession in a criminal matter which it was alleged had been obtained by force. However, in that case the action was brought by the convicted person and it was held that he could not by such an action re-litigate an issue which had already been determined against him, namely the voluntariness or otherwise of his confession which involved the occurrence or otherwise of assaults upon him. That is the converse of the
D present case. In this case the claim that the confession had been obtained by force was upheld and resulted, in the absence of other evidence, in the Plaintiff's acquittal.

But the issue sought to be litigated in the present case is a different one from that which was being litigated in the criminal trial. The alleged assaults upon the Plaintiff in the present case have not been made any cause of the present action.
E They may become relevant, firstly as to damages, and secondly as providing an element for consideration of the alleged malice of the Defendants. But they are not directly an issue in the present case. A critical issue, as already mentioned, and one upon which the Plaintiff carries the onus of proof, is whether the Defendant acted maliciously and without reasonable and probable cause. That issue has not been determined in the criminal proceedings which merely terminated in the
F Plaintiff's favour for lack of evidence. It is not therefore an issue which, is being relitigated in the present proceedings, nor have all the facts relevant to that issue been determined in the previous proceedings.

In my view this is not a plain and obvious case such as would attract the operation of the Court's power to Strike out the defence. But in any case, I would hold as
G to the first submission as already indicated, that the defence is a proper one as pleaded, secondly that the defence is not estopped from pleading its denials and is not frivolous or vexatious, and thirdly that there is no abuse or the process of the Court in that the issue being litigated now is not the same issue that was being litigated in the criminal proceedings.

For the foregoing reasons the application fails and is dismissed with costs to the Defence.

(Application dismissed).