SAMUELA TUILOLE (farmer of Waitabu, Lakeba, Lau) v ATTORNEY-GENERAL OF FIJI

HIGH COURT — CIVIL JURISDICTION

JITOKO J

22 January 2003

[2003] FJHC 321

Criminal law — prosecution — Plaintiff filed statement of claim — Defendant filed application to struck out any proceedings — whether prosecution exercised due care and attention — whether there was malicious prosecution — whether Defendant has reasonable grounds to charge the Plaintiff — Magistrates Court Act s 65(1).

The Plaintiff was charged with offences under the Prevention of Fire Act (Cap 145). The Plaintiff was found guilty and sentenced to do 2 hours per day community work for 2 months. The Plaintiff subsequently filed an appeal. The High Court allowed the appeal and quashed the conviction on the ground that the Prevention of Fire Act had been repealed by the Forests Decree 1992. The Plaintiff filed claims against the State for negligence resulting in depravation of his liberty and loss of face, reputation and humiliation among his own people on the ground that the Defendant, its servants or agents had not been aware that the Act which he was charged had been repealed in 1992. The Defendant filed an application to strike out any proceedings if it disclosed no reasonable cause of action.

Held — (1) The court is of the view that the prosecution honestly believed that the Plaintiff had committed an offence under the Prevention of Fire Act. It was a reasonable belief by the prosecutor based on facts known to him at the time of the charge. The Plaintiff must prove that at the time the prosecution made the charge, it was aware that the Act had been repealed to show malicious prosecution. This was not the case. The mistake by the prosecution is an understandable one.

(2) 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 reasonable and probable cause for a prosecution. Under all the circumstances, the court is satisfied that there exists no reasonable cause of action disclosed in the Plaintiff's statement of claim.

Plaintiff's statement of claim dismissed. Defendant's application allowed.

Cases referred to

Cox v English, Scottish & Australian Bank Ltd [1905] AC 168, cited.

Herniman v Smith [1938] AC 305; *Hicks v Faulkner* (1878) 8 QBD 167, considered.

N. Vere for the Plaintiff.

D. Buresova and *Y. Singh* for the Defendant.

Jitoko J. The Plaintiff is a farmer of Waitabu Village on the island of Lakeba. He is, according to the statement of claim, a Chief of the Yavusa with the title "Tuira, Vatuligiligi".

On 4 February 2002, the Plaintiff was charged at the Lakeba Magistrates Court with offences under the Prevention of Fire Act (Cap 145), and specifically ss 4 and 8. The Plaintiff was found guilty and sentenced to do 2 hours per day community work for 2 months.

The Plaintiff subsequently filed an appeal against his conviction and on 24 May 2002. The High Court allowed the appeal and quashed the conviction on the ground that the Prevention of Fire Act had been repealed by the Forests Decree 1992.

On 6 June 2002, the Plaintiff filed claims against the state for negligence resulting in deprivation of his liberty and loss of face, reputation and humiliation among his own people. The negligence, the Plaintiff alleges, arose out of the Defendant its servants or agents not been aware that the Act under which he was charged had been repealed in 1992.

The law

Section 4 of the Prevention of Fires Act relates to the giving of notice to owners of adjoining lands of the intention to set fire to one's land. The section states:

> Space to be cleared round land before fire is made.
> 4. Before fire shall be set to any land the owner shall cause an open space of not less than 4 metres in width to be cleared round the land and all inflammable matter to be removed from such space and shall, not more than 2 clear days before fire shall be set to such land, give notice to the owners of the adjoining lands of the hour at which it is intended to set fire to such land.

Section 8 is the penal provision for noncompliance which states:

> Penalty for non-compliance with provisions of the Act.
> 8. Every person who without complying with the provisions of this Act wilfully or negligently sets fire to any land shall be liable to a fine not exceeding $100 or to improvement for a term not exceeding 6 months.

As stated in the outline of the facts, the Plaintiff having been found guilty of an offence under s 4, was sentenced to 2 hours per day community work for 2 months in accordance with s 8.

The Forest Decree 1992 was an attempt to streamline the administration, protection and utilisation of Fiji's forest resources and consolidate the various legislations dealing with forests generally, under one enactment. In the process, the Forest Act (Cap 150), The Prevention of Fires Act (Cap 145) and the Land Conservation and Improvement (Fire Hazard Period) Order of 1969 were repealed and revoked.

The prosecution was not aware of the repeal of Cap 145 and consequently the court proceeded on the basis that the offence as indeed the legislation still existed. As Shameem J observed on appeal:

> The mistake in this case in laying the charge under the wrong law was an understandable one, particularly in Lakeba where neither police nor magistrate have easy access to law books. Indeed neither Counsel this morning realised that the Act has been repealed.

As was often the case during the periods of the interim administration and regimes following the coup de état of 1987, amendments to Fiji's laws were done on ad hoc basis with little reports or publicity surrounding the more mundane. Revisions of Acts and/or regulations on statute books were not always followed up even in the principal seat of power, Suva, and it is hardly surprising that the repeal of the Prevention of Fires Act, was not reflected on the Laws of Fiji volumes that are kept at the Lakeba Magistrates Court.

Plaintiff's claim

The Plaintiff alleges that the Defendant, in the capacity as the police prosecution, "maliciously and without reasonable and probable course preferred a charge against the Plaintiff". In the alternative, the Plaintiff claims that the Defendant, through its servants and/or agents, had acted negligently in proceeding with the prosecution of the Plaintiff without verifying the correctness or otherwise of the offence. It had not in addition, the Plaintiff argues, provided proper safeguards and guidelines which ensured that the amendments or laws of Fiji are updated and thus avoiding situations where a party is charged for offences that no longer existed.

The Defendant's prosecution of the Plaintiff under a non-existent Act, had resulted in material losses and damages as well as emotional suffering to the Plaintiff. These are particularised at paras 12–14 of the claim.

In respect of loss of reputation and dignity, the Plaintiff contends that the fact that he had been made to do his community service back among his own people and to be supervised by someone from his own village, represented gross disrespect to the Fijian culture and to his own standing and status as a chief of the village.

Defendant's application to strike out action

The Defendant's application is made under O 18 r 18(1)(a) of the High Court Rules, which allows the court to strike out any proceedings if it disclosed no reasonable cause of action.

The Defendant does not deny the facts as outlined by the Plaintiff. However, the Plaintiff, according to the Defendant's counsel, had erred in naming the Commissioner of Police and represented by the Attorney-General in his capacity as the prosecuting official of the state, as the Defendant in the proceedings. Counsel argued that while the Police were responsible for the laying of the charges, it was the magistrate and the court which ultimately were responsible for the imposition of the penalty on the Plaintiff. It was therefore against the magistrate that the action should have been brought. But to bring this action against the magistrate and be successful, Defendant argues, the Plaintiff has to overcome the protection afforded the magistrate and other judicial officers under s 65(1) of the Magistrates Court Act (Cap 14).

The section states as follows:

> Protection of judicial officers
>
> 65.-(1) No magistrate, justice of the peace or other person acting judicially shall be liable to be sued in any civil Court for any act done or ordered to be done by him in the discharge of his judicial duty whether or not within the limits of his jurisdiction provided that he at that time, in good faith, believed himself to have jurisdiction to do or order the act complained of.

Notwithstanding the counsel for the Defendant's argument, the court is of the view that the Plaintiff has the right to bring proceedings against the Commissioner of Police and the prosecution service, which remains distinct and separate from any action which one may contemplate against the court and/or its officers.

Malicious prosecution

Counsel for the Plaintiff concedes that he is well aware of the legislative protection afforded the judicial officers as provided for under s 65(1) of the Magistrates Court Act. The Plaintiff in summary is claiming that the prosecution

had not exercised due care and attention in ascertaining whether the offence he had been charged with, still remains on the statute books and therefore valid. The Defendant's actions in proceeding with the charge, without first ascertaining the status of the Act, according to the Plaintiff, amounted to gross negligence. Under the circumstances, the Defendant was guilty of malicious prosecution.

For the Plaintiff to succeed in his allegation of malicious prosecution he has to establish four essential elements namely:

(1) Institution of Criminal proceedings by the Defendant.
(2) Termination of the proceedings, in favour of the Plaintiff.
(3) Absence of reasonable and probably cause.
(4) Malice, or a primary purpose other than that of carrying the law into effect.

The court believes that the Plaintiff is well able to establish both 1 and 2 above. However, in respect of 3 the burden of proving absence of reasonable and probable cause, rests on the Plaintiff, with a very high standard of proof to avoid a nonsuit or direct verdict: see *Cox v English, Scottish & Australian Bank Ltd* [1905] AC 168. The court had earlier defined "reasonable and probable cause" in *Hicks v Faulkner* (1878) 8 QBD 167 per Hawkins J at 171 as:

> … an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonbly lead an ordinary prudent and cautious man, placed in the position of the accuses, to the conclusion that the person charged was probably guilty of the crime imputed.

In the end, the question must always be whether the Defendant has reasonable grounds for believing the Plaintiff guilty of the charge preferred against him. As Lord Atkin stated in *Herniman v Smith* [1938] AC 305 at 319:

> 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 reasonable and probable cause for a prosecution.

In this case, the court is of the view that the prosecution honestly believed that the Plaintiff had committed an offence under the Prevention of Fire Act. It was a reasonable belief held by the prosecutor at Lakeba based on the facts known to him at the time the charge was preferred. For the Plaintiff to prove malicious prosecution and specifically the absence of reasonable and probable cause, he has to show that at the time the prosecution laid the charge, it was aware that the Act had been repealed. This was not the case. Indeed the High Court observed during the Plaintiff's appeal that the mistake made by both the police prosecution and the court, was an understandable one, given the circumstances. It would be extremely difficult if not impossible for the Plaintiff to prove the absence of reasonable and probable cause on the part of the Defendant. In fact any efforts to do so is bound to fail.

On the fourth element of malice, the Plaintiff having failed to establish the absence of reasonable and probable cause, the question becomes irrelevant.

Under all the circumstances, the court is satisfied that there exists no reasonable cause of action disclosed in the Plaintiff's statement of claim.

Having ruled in favour of the Defendant's summons, the court wishes nevertheless to make the following observation. The Plaintiff is the chief of a "Yavusa" which constitutes the most important core unit in the Fijian traditional hierarchy. It is from this unit that the leadership of the Fijian people in their respective villages are to be found. Within its framework exists an elaborate

system of relationships between groupings and individuals that at the same time define their roles and obligations within the community. It is of paramount importance therefore that non-indigenous organisations including the government and its agencies observe and respect the sanctity of such institution when dealing with it. In this case, it would seem unfortunate, given the Plaintiff's status, to sentence him to do community work on the island of Lakeba. But having to do so in and among his very own people in the "yavusa", and reporting as it were, to one of the members of his own, is foolhardy to say the least and amounts to total insensitivity on the part of the police and/or government officials on the island. For not only by such action have they lowered the Plaintiff's status and dignity in the eyes of his people, but even more important is the damage it would have had on an already fragile system of Fijian governance and relationship within the village level, in this instance, on the "yavusa" of Waitabu.

While the court is not in a position to grant any relief, bound as it does by the laws of the land, it nevertheless considers it not inappropriate under the special circumstances of this case, to suggest that government looks at the Plaintiff's cause with some sympathy and with a view perhaps of favourably considering some other form of restitution.

The Defendant's application is granted. The Plaintiff's statement of claim is hereby struck out.

I make no order as to costs.

Plaintiff's statement of claim dismissed. Defendant's application allowed.