

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1988/C087

BETWEEN CLARENCE CAMPBELL PLAINTIFF
AND THE JAMAICA TELEPHONE COMPANY LIMITED DEFENDANT

Burchell Brown for the Plaintiff.

Patrick Foster instructed by Dunn, Cox and Orrett for the defendants.

7th, 8th and 18th October, 1991.

CLARKE, J.

The plaintiff brings this action for malicious prosecution and for negligence in the alternative. He was charged for conspiring on August 22, 1985 "to meddle/interfere, tamper and trespass upon the works of [a] Public Utility to wit: "telephone wires without the express authority of the licensee, the Jamaica Telephone Company Limited, contrary to section 3 of the Public Utilities Protection Act." He appeared on a summons before a Resident Magistrate's Court for St. Andrew to answer to the charge and, ultimately, without any evidence being adduced, he was dismissed from the charge.

Let me say right away that even if the plaintiff were to succeed in the action I would make no award of special damages. The particulars of special damages pleaded are as follows:

"Legal fee to defend action - \$1000.00". Even if that means the legal fee incurred in defending himself on the criminal charge, that claim would fail because no evidence whatsoever was adduced to support it.

As far as the question of general damages is concerned I am prepared to hold that the plaintiff has proved some damage in the light of

He must go on to prove not only that the prosecution was without reasonable and probable cause and that it was malicious, but he must also prove that he was prosecuted by the defendants, that is to say, that they set the law in motion against him on the aforesaid charge.

The pleadings, and the evidence make this last stated requirement an important and live issue in this case. To the plaintiff's averment that the defendants caused him to be prosecuted the defendants plead that "officers of the Jamaica Constabulary Force, acting on their own initiative and not pursuant to any directions given by the defendants' servant and/or agents, proffered charges against the plaintiff." I will, of course resolve that issue by applying the law to the facts I find material and proved. The evidence of the two witnesses in the case, the plaintiff and Peter Williams who testified for the defendants, conflicts in important respects. So the facts will be established largely by the view I take of their reliability.

The plaintiff is a technician employed to the defendants and has been in their employ for the past 41 years. He told me from the witness box that on the morning of August 22, 1985 in keeping with established procedure he went to the defendants' offices to a test clerk of the defendants, one Stafford Thompson, who would, on behalf of the defendants, assign him work to do for that day. He said that the test clerk gave him a number of jobs to do at different addresses in the corporate area.

According to him one of the jobs he was assigned to do that day involved repairing a "drop wire" leading from the road to the front section of premises, 19 Windsor Avenue, St. Andrew. He said that in assigning to him the jobs the test clerk gave him a document. This, the witness describes as a "dispatch paper." The plaintiff gave the clear impression that the test clerk would have noted the various jobs on the dispatch paper. I pause

Continuing his narrative he testified that after he had finished the last assignment for the day he was driving past the said premises when someone called him in. He went in and a policeman approached him. He said that in the presence of Peter Williams, then the defendants' chief security officer, the policeman asked him who had sent him to work at 19 Windsor Avenue. He said he told the policeman it was the Telephone Company. He continued his testimony as follows:

"The policeman said that was a wide statement. I said Stafford Thompson. He asked me the telephone number I was assigned to work on. Told him it was 73672. The policeman then said he can't do me anything because I was assigned to the job. Peter Williams said, 'lock him up and carry him go a jail.' I got vex and didn't want to go to jail. Policeman took me to the Matilda's Corner Police Station. Peter Williams went with me. Police there asked me a lot of questions."

He said that after he left the Station he drove and parked the defendants' vehicle at 47 Half Way Tree Road whereupon Peter Williams came there and told him he was again wanted at the Station. On his return he said Peter Williams asked him to sign some papers and he refused to do so.

The plaintiff further said that a week or two later the police served him with a summons to attend court to answer the aforesaid charge. While he agreed that no employee of the defendant was present when he was served he told me that Williams attended court about three times in

their telephone service number 73672 at their business, Distributors Limited, situate at 19 Windsor Avenue. He stated that the Adairs told him that when they dialled from another telephone number their telephone number 73672 and confirmed the Adairs report. He told me that after checking with the assignment centre of the defendant company he was satisfied that the number 73672 was still assigned to Distributors Limited.

Having made those findings he said that he made a report at the Matilda's Corner Police Station and that later that day Constable Jobson accompanied him to 19 Windsor Avenue. He said that the Adairs took him to one of two buildings on the premises and that in the presence of Constable Jobson he checked the Distributors Limited telephone instrument. No sound was coming from it but he noticed that a new beige telephone instrument was on top of a bar counter some five yards away. He said that the beige telephone rang and a man took up the receiver, put it to his ear and said that Distributors Limited was no longer there. Upon telling the man who he was and that he had heard the man's voice on the telephone earlier that day, the man told him that that telephone was installed about 1½ hours earlier. He said the man indicated that he was expecting the technician who had installed the telephone to return that afternoon.

Williams said that, leaving Constable Jobson and the Adairs at the premises, he went back to the defendants' offices, made a report and returned to 19 Windsor Avenue with Hector Crawford, the superintendent of the installation and repair department. On his return he said one of the defendants' vans was parked on the premises. Telephone workers including the plaintiff were present. The plaintiff was talking with Constable Jobson, Crawford asked the plaintiff what he was doing there. According to Williams the plaintiff said he was

passing and someone "clapped" him and he stopped, and the person asked him

Williams then told me that at this stage he pointed out to Constable Jobson that the Public Utilities Act had been breached. He denied he told Constable Jobson or anyone this: "Lock him up and carry him to jail." He said that it was Constable Jobson who decided that the plaintiff go to the Police Station. He denied he asked the plaintiff to give a statement or sign a document. He said he wrote his own statement and gave it to Inspector Goodhall, one of the officers who had discussions with the plaintiff at the Police Station. He said that after that day he did not discuss the matter with Constable Jobson or any other police officer. He denied that at any time that day the plaintiff told him that he, the plaintiff, was assigned to work at 19 Windsor Avenue or that the plaintiff told him to verify the assignment with the test clerk.

I accept the evidence of the defendants' witness Peter Williams. His evidence conflicts with the plaintiff's as to what occurred when they met at 19 Windsor Avenue and at the Police Station. I accept Peter Williams as a witness of truth in the essential matters in this case. Having noted the demeanour of both witnesses and assessed their credibility I find that the plaintiff, unlike Williams, was prepared to say anything which he thought would assist his case. I reject his evidence where it conflicts in any material way with the evidence of Williams.

The facts, drawn largely from Williams' evidence, fall woefully short of the required proof that the defendants prosecuted the plaintiff. Williams made a report to Constable Jobson who accompanied him to 19 Windsor Avenue. There the constable made observations and questioned the plaintiff. The telephone instrument was checked in the presence of the plaintiff and the constable. He took possession of it. He had the plaintiff go to the Police Station after Williams had pointed out that the Public Authorities

In my opinion the following passage from Clerk and Lindsell 16th Edition at 19-07 accurately states the law as to what is a prosecution:

"To prosecute is to set the law 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 be actively instrumental in so setting the law in motion."

I hold that the police commenced the prosecution by laying an information before a Justice of the Peace who issued the summons a copy of which the police served on the plaintiff. Plainly then, the police set the law in motion by appealing to a Justice of the Peace, a person clothed with judicial authority. Were the defendants through their servants instrumental in so setting the law in motion? In my judgment they were not. To be instrumental in this context means more than being merely a facilitator or *causa sine qua non* of the prosecution commenced by the police. Otherwise, one who after enquiry, relates to the police the commission of an offence, but does not accuse anyone of the offence, would be placed in the position of a prosecutor, once the police commenced the prosecution. As Danby v. Beardsley 43 L.T. 603 shows, that is not the law.

There Beardsley having missed two pairs of horse clippers from his stables sent for a police constable and said "I have had two pairs of clippers stolen from me, and they were last seen in the possession of Danby." The constable then made enquiry and without communicating with the defendant Beardsley arrested Danby who was taken before a magistrate and committed for trial.

Lopes and Lindley JJ. held that there was no evidence that Beardsley was actively instrumental in putting the law in force and therefore he was not the prosecutor. Accordingly, he was not liable in an action for malicious prosecution. The following passage from Lindley J's short judgment at

The defendants in the case before me were not the prosecutors. They neither prosecuted the plaintiff nor directed nor invited the police to arrest or prosecute the plaintiff. Acting on their own initiative, the police proffered the charge against the plaintiff by way of information and summons.

Accordingly, the plaintiff's action for malicious prosecution fails.

Even if I am wrong in holding that the defendants were not the prosecutors the plaintiff has, in any case, failed to satisfy me on a balance of probabilities that the prosecution was launched without reasonable and probable cause and with malice.

The steps Peter Williams said he took (and I find he took them) from the moment the Adairs reported the loss of telephone service, were prudent and reasonable. What is more, although the plaintiff told me that the test clerk handed him a dispatch document when he said he was assigned that day, he said he kept it in his pocket throughout the course of the enquiries at 19 Windsor Avenue and at the Police Station. All he said he did with it was to hand it over to his supervisor the following morning. That evidence strains credulity and I reject it. If that document existed it would have been reasonable to expect that the plaintiff would have shown it to his questioners as it would have gone a far way to show that he had been assigned to work at 19 Windsor Avenue. Nor did he tell the defendants' servants that he had been assigned by a test clerk to work at the premises that day. So, in the circumstances it is plain that the plaintiff has not proved that the defendants failed or neglected to take reasonable care to inform themselves of the true state of the facts.

So far from there being proof of malice on the defendants' part, I find that the defendants' servants evinced only a desire to see that the

themselves of the true state of facts so as not to wrongfully injure the plaintiff. Accordingly, they have not breached in any shape or form their duty of care to the plaintiff.

There will therefore be judgment for the defendants with their costs to be taxed or agreed.