JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 10/2009

BEFORE: THE HON. MRS JUSTICE HARRIS, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.
THE HON. MRS JUSTICE MCINTOSH, J.A. (Ag)

BETWEEN	WARRICK LATTIBEAUDIERE	APPELLANT
AND	THE JAMAICA NATIONAL BUILDING SOCIETY LIMITED	1ST RESPONDENT
AND	CATHERINE BROWN	2ND RESPONDENT
AND	JOSCELYN CAMPBELL	3RD RESPONDENT

Rudolph L Francis, instructed by Rudolph L. Francis & Company for the appellant

Garth McBean, instructed by Garth McBean & Company for the respondents

5, 6, May and 2 July 2010

HARRIS, J.A.

[1] This is an appeal in which the appellant challenges the judgment of Brooks, J in which he granted judgment in favour of the respondents.

[2] At all material times, the appellant was employed to the Jamaica National Building Society (the Building Society) as a clerk at its May Pen Branch. The 2nd respondent was the branch manager of the Building Society and the 3rd respondent was the Building Society's compliance manager attached to its head office in Kingston. In 1998, certain irregularities in which the appellant and another employee were implicated were discovered at the branch. Sometime in June 1998, a fixed deposit transaction was irregularly processed and signed by the appellant. On 13 July 1998, the 2nd respondent received certain complaints from customers with respect to two passbooks which impelled her into making internal investigations. Following this, she discovered that there were discrepancies between some withdrawal and lodgment vouchers and the information on the Building Society's computer system. The appellant's signature and Teller Stamp appeared on some of these lodgment and withdrawal vouchers.

[3] The discovery of these irregularities caused the 2nd respondent to make a report to the 3rd respondent. As a result, the 3rd respondent made a further report to a Detective Sergeant Magloria Campbell of the Fraud Squad, as a consequence of which she laid an information against the appellant. Pursuant to the laying of the information, a summons was issued for him to appear before the Resident Magistrate's Court for the

parish of Clarendon to answer charges of conspiracy to defraud. The appellant was tried for the offence but was acquitted of the charge.

[4] On 15 April 2005, the appellant, by way of a claim form brought an action against the respondents claiming damages for malicious prosecution. Paragraphs 5, 6 and 9 of the particulars of claim state:

> "5. On or about the 13th July 1998, the Secondnamed Defendant falsely, maliciously and without reasonable and probable cause made a report to the Thirdnamed Defendant of and concerning the Claimant alledging (sic) that the Claimant conspired with one Suzan Trout to defraud the Firstnamed Defendant and other persons of various sums of money.
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> 6. On the said 13th day of July, 1998, the Thirdnamed Defendant falsely and maliciously and without reasonable and probable cause made a report to Detective Sergeant McGloria Campbell at the Fraud Squad of the Jamaica Constabulary Force in Kingston, as a result of which she laid an Information against the Claimant in the Resident Magistrate's Court for the parish of Clarendon, and thereby secured the issue of a summons directed to the Claimant to appear before the May Pen Resident Magistrate's Court in the said parish of Clarendon, to answer to the charge of Conspiracy to Defraud.
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> ...
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> 9. By reason of the matters aforesaid the Claimant's reputation has been harmed, he has suffered mental anguish, he was prevented from attending to his business, he was prevented from continuing his studies leading to the qualification of a member of the Association of Certified

Corporate Accountants (ACCA), he has been put to the expense of defending himself, and he has suffered loss and damage.

PARTICULARS OF SPECIAL DAMAGE

(1) Loss of business while attending Court
- $100.000.00

(ii) Loss of the sum paid to be registered as a student pursuing the course leading to a member of the qualification of the Association of Certified Corporate Accounts (sic) (ACCA

- $100,000.00

(iii) Legal fees paid to Mrs Scott-Bhoorasingh
- $ 70.000.00

(v) Amount paid for medical expenses
- $ 10,000.00

- $280,000.00"

[5] A defence was filed by the respondents admitting that reports were made by the 2nd respondent to the 3rd respondent and eventually to the police but denying that these reports were made falsely, maliciously or without reasonable and probable cause. Paragraphs 5, 6 and 8 of the defence read:

"

5. In relation to paragraph 5 of the Particulars of Claim the Defendants aver as follows:-

(a) The Defendants admit that on or about the 13th July 1998 the Second named Defendant made a report to the third named Defendant but the Defendants

deny that the Second named Defendant made the said report falsely, maliciously or without reasonable and probable cause,

(b) The Defendants deny that the said report specifically alleged that the Claimant conspired with one Suzan Trout to defraud the First Named Defendant and other persons of various sums of money, and aver that the said report was a general report concerning irregularities which are particularized below.

(c) The second named Defendant made a report which was true with reasonable and probable cause as there were irregularities which showed that monies were missing or not accounted for. Further there was also reasonable and probable cause for the said report for the reasons particularized in paragraph 6 of the defence herein.

6. In relation to paragraph 6 of the Particulars of Claim the Defendant avers as follows:

(a) The Defendants admit that the third named Defendant on or about the 13th July 1998 made a report to Detective Sergeant Magloria Campbell of the Fraud Squad of the Jamaica Constabulary Force and that as a result the said Detective laid an information against the Claimant in the Resident Magistrate's Court and thereby secured the issue of a summons directed to the Claimant to appear in the Resident Magistrate's Court for the parish of Clarendon to answer a charge of Conspiracy to defraud.

(b) The Defendants deny that the said report was made by the Third named Defendant falsely, maliciously and without reasonable and probable cause and say that the Third Defendant had reasonable and probable

cause to make the said report which was true as there were certain irregularities at the May Pen branch of the First named Defendant which showed that certain monies were missing and/or not accounted for.

PARTICULARS

(i) Customers of the first named Defendant reported to the second named Defendant that monies were missing and taken without their consent from their accounts.

(ii) The second named Defendant investigated the said report and discovered that monies were withdrawn from the said customers accounts. The said transactions were initiated by one Susan Trout who was then an employee of the first named Defendant and processed by the Claimant, who was then a Senior Teller, in breach of certain internal control procedures at the said branch of the first named Defendant.

(c) The Defendants say that the third named Defendant made a true report of the said matters particularized above to the said Police Officer who acted on her own initiative in investigating the said report and in arresting and charging the Claimant and further aver that the said Police Officer did not act pursuant to any procurement, incitement, direction or action of any of the Defendants or any agent or servant of theirs.

8. The Defendants make no admission to paragraph 9 of the Particulars of Claim as they have no personal knowledge of the matters contained therein."

[6] The following grounds of appeal were filed:

"(a) The learned trial judge not having any direct evidence as to what influenced the prosecuting officer to come to the conclusion to lay the charge against the Claimant Appellant went on to find that the prosecuting officer could have acted on her own discretion in dong (sic) so. This was highly speculative, and had a prejudicial effect on the Claimant/ Appellant's case, as a result of which he went on, and gave judgment for the Defendants/Respondents.

(b) The learned trial judge's conclusion that no false statement was made to the Police which influenced the prosecuting officer to lay the charge against the Claimant/ Appellant is not supported by the evidence, and is contrary to the evidence on the confrontation between the Thirdnamed Defendant/Respondent and the Claimant/Appellant at the May Pen Office of the Building Society when the Thirdnamed Defendant/Respondent enquired of the Claimant/Appellant "what he had done with the Building Society's money that he had helped or assisted Miss Trout to steal (sic).

(c) The learned trial Judge's acceptance of the submission of Counsel for the Defendants/Respondents that the Thirdnamed Defendant/Respondent's reply to the Claimant/Appellant as to why the Building Society was pursuing the case against him "was after the fact", and could not supply an improper motive, is wrong in law.

[7] Mr Francis submitted that there was no direct evidence before the court on which the learned trial judge could have properly found that the police officer Detective Magloria Campbell was acting on her own in preferring the charges against the appellant. He argued that the learned trial judge accepted the evidence of the appellant that the 3rd respondent hurled accusations at the appellant while they were at the Building Society's office in May Pen. This, he contended, confirmed that the 3rd respondent spearheaded the investigations. The accusations, he argued, were made in the presence of the police and these being false, influenced the police in preferring the charges against the appellant so that although the prosecution was formally brought in the name of Detective Campbell, the 3rd respondent was technically the prosecutor. In support of his submissions, he cited the cases of **Martin v Watson** [1996] 1 AC 74; **Pandit Gaya Parshad Tewari v Sardar Bhagat Singh** (1908) 24 T.L.R. 884; **Commonwealth Life Assurance Society Ltd v Brain** 53 C.L.R. 343 and (1989) 3 NZLR 187 and **Commercial Union Assurance Co of New Zealand Ltd v Lamont** (1989) 3 NZLR 187.

[8] It was Mr McBean's submission that although a civilian complainant may be regarded as the prosecutor in circumstances in which an information was laid by the police, the case of **Martin v Watson** outlines the circumstances under which liability may arise. In the instant case none of the circumstances which would give rise to liability on the part of a

civilian complainant, as laid down in that case, applies, he argued. The information given by the 3rd respondent to the police about the irregularities and shortage of funds at the Building Society was not false as there was sufficient evidence on which the police officer could have acted on her own initiative in preferring the charge, he further argued.

[9] Mr. Francis informed this court that the appeal is not being pursued against the 2nd respondent. This having been stated, I will now proceed to identify the issues which arise in this appeal:

(a) Was the prosecution initiated by the 3rd respondent?

(b) If the answer is in the affirmative, was the institution of the proceedings done maliciously and without reasonable and probable cause?

[10] In dealing with the question as to who was the prosecutor, the learned trial judge said:

> "Mr. Lattibeaudiere testified that it was Mr. Campbell who took the lead in questioning him about the alleged irregularities at the branch.
>
> According to Mr. Lattibeaudiere, Mr. Campbell accused him of having conspired with a Miss Susan Trout, another branch employee, to defraud the Society of several sums of money. The accusations were made, he says, in the presence of Detective Campbell and Miss Brown.
>
> Although Miss Brown denied that this occurred in her presence (Mr. Campbell did not testify), I find that Mr. Lattibeaudiere's testimony on that point is credible and more probable. It is more likely that accusations would have been made by Mr.

> Campbell who was the society's Compliance Manager. The accusations by themselves do not, however, establish that Mr. Campbell is the virtual prosecutor.
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> The law regarding who is the prosecutor, for the purposes of the tort of malicious prosecution, is concisely set out in *Clerk and Lindsell on Torts* 19th Edition. There the learned editors, correctly state that the prosecutor is the person who makes an appeal to the person clothed with judicial authority. Normally, in a case where the accused is charged by the police, the prosecutor is the police officer who lays the charge. The learned editors state at paragraph 16-08:
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> > "...To prosecute is to set the law in motion, and the law is only set 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 ... **If a charge is made to a police constable and he thereupon makes an arrest, the party making the charge, if liable at all, will be liable in an action for false imprisonment** ... But if he goes before a magistrate who thereupon issues his warrant, then his liability, if any, is for malicious prosecution." (Emphasis supplied)

[11] The learned trial judge then made reference to the case of **Martin v Watson** (supra) which deals with the question as to when a complainant may technically be the prosecutor, even where charges are laid by the police officer. He thereafter went on to state:

"In that case, their Lordships outlined the circumstances in which that would occur. They state, at pages 86 G - 87A of the judgment:

> "...**Where an individual falsely and maliciously gives a police officer information indicating that some person is guilty of a criminal offence** and states that he is willing to give evidence in court of the matters in question, it is properly to be inferred that he desires and intends that the person he names should be prosecuted. Where the circumstances are such that the facts relating to the alleged offence can be within the knowledge only of the complainant ... then **it becomes virtually impossible for the police officer to exercise any independent discretion or judgment**, and if prosecution is instituted by the police officer the proper view of the matter is that the prosecution has been procured by the complainant." (Emphasis supplied)

He continued by saying:

> "In the course of the judgment, the House of Lords examined a number of cases on the point. In each case that the complainant was found to be the virtual prosecutor, a salient feature was the fact that a false statement had been made to the police officer who had laid the charge. Their Lordships viewed the judgment of Richardson, J. sitting in the **New Zealand Court of Appeal** in the case of ***Commercial Union Assurance Co. of N.Z. Ltd. v Lamont*** [1989] 3 N.Z.L.R. 187. That learned judge, at page 196, opined that in cases involving the intervention of a police officer, close analysis was required to determine who the virtual prosecutor was. He is quoted as saying:

> **'In the difficult area where the defendant has given false information to the police that in itself is not a sufficient basis in law for treating the defendant as prosecutor. The conduct must at least have influenced the police (sic) decision to prosecute ... The onus properly rests on the plaintiff to establish that it was the false information tendered by a third party which led the police to prosecute before that party may be characterized as having procured the prosecution.'** (Emphasis supplied)

In my view, the criteria stipulated by their Lordships in ***Martin v Watson*** have not been satisfied here. Mr. Lattibueaudiere has not discharged the burden placed on him, as defined by Richardson, J. Although I find that Mr. Campbell made accusations in the presence of Detective Campbell, there is no evidence that he created a situation where Detective Campbell could not have exercised independent discretion or judgment, as to whether to prosecute. There is also no evidence of any false statement having been made.

There is evidence that documents were examined as part of the investigation of the irregularities. These provided objective evidence that the police officer could have examined. There is also evidence that Detective Campbell brought Mr. Lattibeaudiere to a police facility in Kingston where she interviewed him. This was apparently in the absence of any of the Society's officials. It was some time after that interview that Detective Campbell served the summons on Mr. Lattibeaudiere. No further intervention by Mr. Campbell was proved, or even alleged.

In the circumstances I find that Mr Lattibeaudiere has not proved, on a balance of probabilities,

> that Detective Campbell was acting involuntarily when she issued the summons for him to attend court. Instead, I find that she did act on her own initiative. On that finding therefore, it is Detective Campbell who was the prosecutor, and not Mr. Campbell."

[12] The cases cited by Mr. Francis offer useful guidance as to the approach of the court in dealing with the question as to who is a prosecutor. It is perfectly true that, in a case of malicious prosecution, liability may be imposed on a complainant who is a private citizen. However, such liability can only be ascribed to him where it is proved that he falsely made a report against a claimant or created a situation which he, fully knowing to be untrue, caused the claimant to be arrested and charged for an offence .

[13] In **Martin v Watson** a complaint of indecent exposure was made by the defendant against the plaintiff, following which the police laid information before the justices who issued a warrant for his arrest on a charge of indecent exposure. At trial the prosecution offered no evidence and the charge was dismissed. The plaintiff successfully brought a claim for malicious prosecution. On appeal by the defendant, the Court of Appeal, by a majority, held that the defendant was not liable, as she had not participated in the decision to prosecute, the prosecution having been done by the police. The plaintiff appealed to the House of Lords. In allowing the appeal, it was held that:

> "Where a complainant had falsely and maliciously given a police officer information indicating that a person was guilty of an offence and the facts relating to the alleged offence were solely within the complainant's knowledge, so that the officer could not have exercised any independent discretion, the complainant, although not technically the prosecutor could properly be said to have been the person responsible for the prosecution having been brought, by having been actively instrumental in setting the law in motion, and as such could be sued for malicious prosecution by the individual wrongfully charged; and that, accordingly, since the plaintiff had proved that the defendant had been in substance the person responsible for the prosecution having been brought and that she had done so maliciously and without reasonable and probable cause, the defendant was liable in damages for malicious prosecution."

[14] In **Pandit Gaya** the defendant falsely and maliciously made a report to the police that the plaintiff had participated in a riot. Prosecution was instituted by a police officer. The plaintiff was arrested and charged with the offence but was dismissed, it being shown that there was no riot. The plaintiff's claim for malicious prosecution was dismissed. An appeal by the plaintiff to the Judicial Committee of the Privy Council was allowed. Sir Andrew Scobie in giving the advice of the Board, said:

> "If, therefore, a complainant did not go beyond giving what he believed to be correct information to the police and the police, without further interference on his part (except giving such honest assistance as they might require), thought fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But, if the charge was false to

> the knowledge of the complainant, if he misled the police by bringing suborned witnesses to support it, if he influenced the police to assist him in sending an innocent man for trial before the magistrate, it would be equally improper to allow him to escape liability because the prosecution had not technically been conducted by him."

15] In **Commonwealth Life Assurance Society Ltd v Brain** (supra) in an action for malicious prosecution, the plaintiff was charged with the offence of conspiring to defraud. The charge was laid by a police officer as a result of information supplied by the defendant company. The plaintiff was thereafter committed for trial but a trial did not ensue as the Attorney General declined to lay an indictment. At the trial of an action for malicious prosecution, the jury found that the prosecution was instigated by the defendant company and was actuated by malice as the company did not genuinely believe that the prosecution was justified.

[16] On appeal to the High Court of Australia, it was held that there was sufficient evidence before the jury to justify the jury's findings. Dixon J. said, at p. 379:

> "The legal standard of liability for a prosecution which is instituted neither by the defendant nor by his servant is open to criticism on the ground of indefiniteness. It is clear that no responsibility is incurred by one who confines himself to bringing before some proper authority information which he does not disbelieve, even although in the hope that a prosecution will be instituted, if it is actually instituted as the result of an independent discretion on the part of that authority ***(Danby v.***

> ***Beardsley*** (1880) 43 L.T. 603; ***Fanzelow v. Kerr*** (1896) 14 N.Z.L.R. 660). But, if the discretion is misled by false information, or is otherwise practised upon in order to procure the laying of the charge, those who thus brought about the prosecution are responsible ***(Pandit Gaya Parshad Tewari v. Sardar Bhagat Singh; Black v. Mackenzie*** (1917) N.Z.L.R. 729 ... The rule appears to be that those who counsel and persuade the actual prosecutor to institute proceedings or procure him to do so by dishonestly prejudicing his judgment are vicariously responsible for the proceedings. If the actual prosecutor acts maliciously and without reasonable and probable cause, those who aid and abet him in doing so are joint wrongdoers with him."

[17] In **Commercial Union Assurance Co of NZ Ltd v Lamont** (supra) Lamont lit a fire on his property following which a building was destroyed. Lamont reported that certain contents of the building were also destroyed. A fire safety officer, upon inspection of the building, was of the opinion that the fire had been deliberately set. A copy of his report was sent to the police. Lamont, in the meantime, made a claim on the Commercial Union Assurance Co. Prior to the settlement of the claim, the police suggested to the company that the claims were suspicious and should be withheld. Lamont was advised by officers of the company to withdraw the claim. He did not. Investigations were made by the police and the company sent parts of its file to them which were employed in the laying of an information on a charge of attempting to obtain money from the company by false pretense, against Lamont, by the police. At

trial, Lamont was discharged. In an action for malicious prosecution brought by him, the jury found in his favour.

Richardson J at page 196 said:

> "A defendant who has procured the institution of criminal proceedings by the police is regarded as responsible in law for the initiation of the prosecution. Expressions such as 'instigate' 'set in motion' and 'actively instrumental in putting the law in force', while evocative do not provide an immediate touchstone for the decision of individual cases. That requires close analysis of the particular circumstances. In the difficult area where the defendant has given false information to the police, that in itself is not a sufficient basis in law for treating the defendant as prosecutor. That conduct must at least have influenced the police decision to prosecute."

[18] Actions for malicious prosecution are usually grounded upon allegations that a defendant induced the court to act upon false information given by the defendant. The complaint is essentially that criminal proceedings are brought not only without reasonable and probable cause but also with malice. It is therefore incumbent on a claimant to establish that the prosecution was brought with malice and without reasonable and probable cause. In **Martin v Watson** (supra) Lord Keith of Kinkel at page 88 said:

> "It is to be kept in mind also that in actions for malicious prosecution the onus lies on the plaintiff to prove malice and want of reasonable cause. This would not be possible in the case of genuine complaints."

[19] It is clear therefore that where the complaint against a claimant is authentic, a claim for malicious prosecution cannot succeed. This, of course, can be extracted from the principles distilled in **Martin v Watson,** (supra) **Pandit Gaya** (supra), **Commonwealth Life Assurance v Brain** and **Commonwealth Union Assurance Co v Lamont.** The following principles can also be derived from these cases. Where a civilian gives information to the police which he honestly believes to be true and as a consequence, the police, employing their own independent discretion, initiate criminal proceedings, even if the information proves to be false, no liability can be attributed to the citizen. If however, he deliberately supplies the police with information which he knows to be untrue, then, liability as a prosecutor may be ascribed to him. He may also be said to be the prosecutor where he withholds information which if disclosed, the police would not have prosecuted; or where he suborns witnesses; or where, he, by some other dishonest means brings about the prosecution of a claimant. As shown, an essential feature of the tort is that the informant engaged in some act which rendered the prosecution of a claimant an unwarranted exercise.

[20] Where a private citizen gives information to the police which results in charges being brought against a claimant, this does not in itself make the informer a prosecutor. But, if it is proven that he intentionally brought

about the prosecution as a result of his own misdeed, then he cannot escape liability. In determining the question as to who was actively instrumental in commencing the prosecution, it is not sufficient to say that the law was set in motion by the police. Although it is true to say that all criminal offences are initiated and prosecuted by the police, this too is not enough. In assessing liability, the court is required to adopt a close analytical approach to the circumstances of each particular case. The cases show that in so doing, consideration should first be given to all the circumstances surrounding the issuing of the information to the police. Thereafter, the question for the court should be whether in all the circumstances of a particular case, the defendant ought properly to be regarded as being instrumental in setting the law in motion against the claimant. The conduct of a defendant must be such that it is shown to have influenced the police in their decision to prosecute. The test therefore is whether the defendant wrongfully set the law in motion by resorting to the use of the power of the Crown to cause damage to the claimant.

[21] The 3rd respondent, as the compliance manager of the Building Society, would have been under a duty to ensure that the integrity of the accounts of its customers is preserved. He would therefore be obliged to ensure that these accounts remain unviolated. It would not be unreasonable to infer that the 3rd respondent, having received the report

from the 2nd respondent, would have perused the impugned lodgment and withdrawal vouchers as well as the impugned certificate of deposit and would have formed the view that the appellant was involved in fraudulent activities touching transactions in certain accounts.

[22] There is no evidence that the circumstances which led to the arrest of the appellant were peculiarly within the knowledge of the 3rd respondent which would have made it virtually impossible for Detective Campbell to have relied on her own judgment in preferring the charge against the appellant as were the circumstances in **Martin v. Watson** (supra). The appellant asserted that the 3rd respondent, in the presence of Detective Campbell, accused him of stealing the money. This would not have made him the prosecutor, as correctly found by the learned trial judge. There were discrepancies in certain accounts at the Building Society, and indeed the proper course would be for the matter to be reported to the police, as was done by the 3rd respondent. Detective Campbell to whom the report was given, no doubt, would have embarked on her own investigations which obviously would have included an examination of the impugned documents before the preferment of the charge. It is of manifest significance that sometime prior to the service of the summons on the appellant, she interviewed him at the Jamaica Constabulary Force Headquarters. In all the

circumstances, it could not be said that she had not formed her own view in arriving at a decision to prefer the charge against him.

[23] In further support of his contention that the 3rd respondent was the prosecutor, Mr. Francis placed great reliance on an aspect of the evidence of the appellant in which he asserted that during the course of the criminal proceedings, the appellant inquired of the 3rd respondent as to the reason for the case being pursued against him. His response was that "the Society's money was insured and he had to make sure that as custodian of the money, he has to provide strong proof to the insured (sic) that criminal charges were pursued against those who were accused of stealing it". Mr. Francis contended that this statement went to the state of mind of the 3rd respondent in his quest to prosecute the appellant and this, he said, is bolstered by the learned trial judge's finding that those words used by the 3rd respondent could give some hint as to his initial desire to prosecute the appellant.

[24] In my opinion, the words used by the learned trial judge do not rank as a finding. These words were merely an observation which when read in the context in which they were used, could not be construed as meaning that the 3rd respondent's response to the appellant's inquiry was an intimation that the 3rd respondent was the person who initiated the proceedings. I am therefore constrained to disagree with Mr. Francis'

submissions and I say this for two reasons. Firstly, there was evidence that lodgment and withdrawal vouchers and a certificate of deposit were at variance with the information on the Building Society's system. The appellant's signature and Teller Stamp were affixed to the documents which were challenged. Therefore, the statement made by the 3rd respondent would in no way alter the position that there were in fact irregularities at the Building Society and that at the time, the appellant would have been reasonably suspected to be involved in those irregularities. The Building Society would have been under a duty to account to its insurers as to what steps had been taken in the matter and surely prosecution of the appellant would have been an option which was open to it. Secondly, it must be borne in mind that the charges were laid by the police prior to the statement being made by the 3rd respondent and while the trial was in progress. Surely, it could not be said that the statement would have in any way impacted on the preferring of the charge against the appellant.

[25] It cannot be acknowledged, as contended by Mr. Francis, that there was no direct evidence on which the learned trial judge could have found that the prosecutor was Detective Campbell and not the 3rd respondent. Although it would have been desirable to have had evidence from Detective Campbell as to the sequence of events leading up to the charge, the absence of evidence from her would not have in

any way hindered the learned trial judge from properly adjudicating on the matter. There was cogent evidence before him in proof of the allegations of irregularities at the Building Society in which the appellant was involved, which supported the fact that there would have been reasonable and probable cause to initiate proceedings for his prosecution. The learned trial judge was correct in finding that Detective Campbell, was in fact the prosecutor, she having exercised her independent discretion, and acted on her own initiative in bringing the proceedings.

[26] The foregoing is sufficient to dispose of the appellant's claim. As a consequence, the necessity would not arise for me to give consideration to the second issue, which is, whether the prosecution was initiated by malice and without reasonable and probable cause.

[27] I would dismiss the appeal with costs to the 1st and 3rd respondents.

PHILLIPS, J.A

I have read the judgment of my sister Harris J.A. I agree with her reasoning and conclusion and have nothing further add.

McINTOSH, J.A. (Ag)

I too agree with the reasoning and conclusion of Harris, J.A. and have nothing useful to add.

ORDER

HARRIS, J.A.

Appeal dismissed. Costs to the 1st and 3rd respondents to be taxed if not agreed.