

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)
A.D. 2021**

CLAIM NO. AXAHCV 2016/0025

BETWEEN:

HASANI HERBERT

Claimant

and

THE ATTORNEY GENERAL OF ANGUILLA

Defendant

Appearances:

Ms. Navine Fleming, Libran Chambers of Counsel for the Claimant
Mr. Dwight Horsford, Honourable Attorney General, with him Mrs. Sherma Blaize-Sylvester, Crown Counsel, Attorney General's Chambers of Counsel for the Defendant

2019: November 20, 21;
December 13;
2021: January 21.

Tort – False imprisonment – Malicious prosecution – Claimant arrested on suspicion of murder – Claimant subsequently charged and remanded in prison – Matter subsequently withdrawn by prosecution at preliminary inquiry subsequent to no case submission by claimant's counsel and prior to presiding magistrate ruling on no case submission – Whether reasonable and probable cause for claimant's arrest and detention – Malicious prosecution – Whether reasonable and probable cause to charge and proceed with prosecution of claimant for the offence of murder – Whether prosecution actuated by malice – Whether malice to be imputed from conduct of prosecution – Whether proceedings concluded in claimant's favour – Burden of proof – Damages – Appropriate measure of damages – Whether claimant can recover legal fees paid in defending charge at the preliminary inquiry

JUDGMENT

- [1] **INNOCENT, J.:** This is a claim for damages for malicious prosecution and false imprisonment brought by the claimant, Mr. Hasani Herbert ('Mr. Herbert') against the Honourable Attorney General of Anguilla ('Attorney General').
- [2] Mr. Herbert was arrested by officers of the Royal Anguilla Police Force ('RAPF') on 17th June 2012 on suspicion of having committed the offence of murder. He was subsequently charged with the offence of murder on 19th June 2012 in connection with the murder of Mr. Jordel Gumbs ('Mr. Gumbs') which occurred at West End, Anguilla on the night of 11th June 2012.
- [3] Mr. Herbert was taken before the Magistrate's Court and remanded to custody at Her Majesty's Prison ('HMP') on 20th June 2012.
- [4] At the conclusion of the preliminary inquiry, counsel appearing for Mr. Herbert made a no case submission. The presiding magistrate adjourned the preliminary inquiry to allow counsel appearing for Mr. Herbert to reduce the no case submission into writing. On 15th October 2015, when the preliminary inquiry resumed, and prior to the presiding magistrate's ruling on the no case submission, the prosecution discontinued the prosecution against Mr. Herbert.
- [5] By the time that the prosecution had withdrawn the charge, Mr. Herbert had spent a period of 1217 days on remand, according to his pleaded case. The Attorney General disputes this period of 1217 days and pleaded that according to the records of HMP Mr. Herbert had spent a period of 1,184 days on remand.
- [6] In support of his claim that his arrest and subsequent detention was unlawful, and therefore, amounted to false imprisonment, Mr. Herbert alleged that he had been arrested and detained without any reasonable and probable cause.
- [7] Mr. Herbert in his pleaded case, claimed that the police investigators relied on evidence of cell tower records and cellular phone records to support their case that he, and another suspect, were in the vicinity of the area where the murder

occurred. It appears that Mr. Herbert's contention in relation to this evidence was that, ipso facto, it was by itself insufficient and unreliable evidence. In the course of the trial, Mr. Herbert's argument in relation to this evidence was that this evidence was unlawfully obtained and was not admitted into evidence by the presiding magistrate at the preliminary inquiry.

- [8] In his pleaded case, Mr. Herbert asserted that the police sought to rely on evidence of gunshot residue ('GSR') that was obtained from swabs taken from his hands on 17th June 2012, some two days after he had been arrested and seven days after the murder. Mr. Herbert's contention appears to be that the evidence of the GSR, without more, was unreliable and did not point inexorably to the conclusion that he was either the perpetrator of the offence or that he was in some way connected therewith.
- [9] Mr. Herbert, in his pleaded case, also complained that intimate samples were unlawfully taken from a cup which had been handed to him by the principal investigator who had offered him a drink of water. The cup was subsequently submitted for DNA analysis. Evidence of the results of the DNA analysis was withdrawn by the prosecution at the preliminary inquiry on the basis of its inadmissibility.
- [10] Mr. Herbert's case for wrongful arrest is premised on the argument that at the time of his arrest and charge, there was no admissible material evidence in the possession of the police that amounted to reasonable grounds for suspecting that he had committed the offence in question or tending to connect him to it.
- [11] With respect to his claim for malicious prosecution, Mr. Herbert relied on the following contentions, which may be summarized as follows. First, Mr. Herbert alleged that the officers of the RAPF fabricated, manipulated and/or otherwise obtained by unlawful means, the evidence upon which they relied to commence and continue the criminal proceedings against him. In a nutshell, Mr. Herbert

appears to be suggesting that the evidence relied on was obtained unlawfully and/or unfairly. Therefore, Mr. Herbert's case appears to be that the prosecution acted maliciously by having commenced, continued and sustained a prosecution against him on the basis of evidence that was not only palpably unreliable and inadmissible, but also unlawfully obtained. Essentially, the court understands Mr. Herbert's case against the Attorney General to be that, in all the circumstances of the case, there was no evidence available to the prosecution to justify the commencement and continuation of the prosecution against him; and that no reasonable prosecutor would have instituted and continued the criminal prosecution on the basis of the evidence that was available.

[12] Therefore, Mr. Herbert contended, that for all of the above reasons, his incarceration on remand amounted to false imprisonment. The Attorney General denied the claim and Mr. Herbert's entitlement to the relief sought in its entirety.

[13] The Attorney General asserted that there was reasonable cause and/or suspicion for Mr. Herbert's arrest. According to the Attorney General, there was evidence available to the police to justify Mr. Herbert's arrest insofar as it implicated him in the commission of the offence. This evidence, the Attorney General pleaded, consisted of evidence from one witness who heard what sounded like gunshots and shortly thereafter saw two men running along the road in the vicinity of where the gunfire was heard. That witness also described having seen a motor vehicle bearing a certain registration number driving slowly along the same road. The vehicle stopped and two men who had been hiding in the nearby undergrowth emerged and entered the vehicle.

[14] In addition, it appears from the Attorney General's assertions that police investigators had in their possession a witness statement from the driver of the motor vehicle wherein he stated, that he had picked up Mr. Herbert and another man in the vicinity of where the offence had been committed and drove them both to Blowing Point.

- [15] The Attorney General asserted that police investigators were also in possession of evidence that consisted of intercepted electronic communication between one man and another, whose identity will remain anonymous, that referred to a contract killing of Mr. Gumbs. It appears from this intercepted communication that Mr. Gumbs frequented a particular establishment where his girlfriend worked and from where he would pick her up after work.
- [16] It appeared that the evidence in the possession of the police investigators also revealed that intercepted cellular phone logs from a registered service provider proved that one of the mobile telephones used in the intercepted electronic communications belonged to Mr. Herbert. The intercepted call logs and cellular tower records also showed that Mr. Herbert made calls from his mobile device from his home at Blowing Point to an employee of the establishment where Mr. Gumbs' girlfriend was employed.
- [17] The cellular tower records and call logs also revealed that several calls were made from Mr. Herbert's mobile device about the time that Mr. Gumbs was shot. There were also several calls exchanged between Mr. Herbert's mobile device and the mobile devices of two other men, whose identities shall remain anonymous, within a relatively short period of time, both before and after the shooting incident.
- [18] It appeared from the defence filed by the Attorney General, that the Attorney General inadvertently made an admission as to what was canvassed at paragraph 8 of the statement of claim; that is, in relation to the intercepted electronic communications. In an Amended Defence the Attorney General denied the averments contained at paragraph 8 of Mr. Herbert's statement of claim. The Attorney General asserted in his Amended Defence that, the telecommunication records that the police had in their possession was supported by a witness statement of an employee of the registered service provider; but however, the presiding magistrate at the preliminary inquiry ruled the evidence inadmissible. The Attorney General claimed, that thereafter, the prosecution was unable to

secure the attendance of another employee of the service provider to testify at the preliminary inquiry.

[19] The Attorney General pleaded, that by the time that the preliminary inquiry had commenced, one of the prosecution's material witnesses had left Anguilla and did not return to testify at the preliminary inquiry.

[20] The Attorney General admitted Mr. Herbert's allegation regarding the unreliability of the GSR evidence and the inadmissibility of the evidence of the DNA analysis; and in particular the methods employed to obtain the same.

[21] Notwithstanding the aforementioned concessions made by the Attorney General, the Attorney General vehemently contested Mr. Herbert's claim that at the time of his arrest the police did not have reasonable grounds for suspecting that he had committed the alleged offence.

[22] In addition, notwithstanding any concessions made regarding the admissibility and reliability of the evidence led at the preliminary inquiry, the Attorney General also vehemently opposed Mr. Herbert's claim that the commencement and continuation of the criminal proceedings against him was malicious insofar as it was either based on fabricated evidence, unlawfully obtained evidence or was obtained unfairly or in breach of his constitutional rights.

[23] More importantly, the Attorney General denied that the continuation of the criminal prosecution against Mr. Herbert was unreasonable or an unreasonable exercise of the Attorney General's prosecutorial discretion to the extent that the likelihood of obtaining a committal for the offence charged was at best hopeless.

[24] At this stage, it is worthy of note that Mr. Herbert's claim was not based explicitly on any allegation of 'abuse of process' on either the part of the police investigators or the Attorney General. In particular, Mr. Herbert made no averment in his pleaded case that there had been any undue or inordinate delay by the

prosecution in the conduct of the preliminary inquiry or by failing to bring him before the magistrate within a reasonable time after his initial arrest and charge.

[25] The following issues arise for determination:

- (1) Whether the police had reasonable suspicion and probable cause to arrest and detain Mr. Herbert;
- (2) Whether the police had reasonable and probable cause to charge, commence and continue the criminal prosecution against Mr. Herbert;
- (3) Whether in so doing the prosecution was actuated by malice; and,
- (4) Whether the proceedings were concluded in Mr. Herbert's favour.

[26] Ms. Fleming, argued on Mr. Herbert's behalf, that his arrest was unlawful to the extent that it infringed his constitutional rights under section 3(1)(f) of the Anguilla Constitution insofar as the provision emphasizes "reasonable suspicion of having committed an offence. Mr. Herbert also relied on the remedy provided for by section 3(4) which is the right to compensation for the deprivation of his rights under section 3(1)(f) of the Constitution.

[27] The court is of the considered view that Mr. Herbert cannot rely on the abovementioned constitutional provisions in furtherance of the present claim. The relief contemplated by section 3(4) of the Constitution exists in the realm of public law. Mr. Herbert is seeking a private law remedy and did not come by way of constitutional motion which involves wholly different legal and procedural considerations. Therefore, this approach is misguided.¹

[28] However, the main thrust of Mr. Herbert's argument was, that at the time of his arrest, the police had no reasonable suspicion and probable cause for his arrest and detention. In support of this contention he relied on the decision of Ramdhani J. (Ag.) in **Everette Davis v Attorney General of St. Christopher and Nevis**.²

¹ Jaroo v The Attorney General of Trinidad and Tobago [2002] 2 WLR 705

² at paragraphs [12] [13] and [15]

- [29] Ms. Fleming contended, that ultimately, the question to which the court must address its mind, is whether the police had reasonable suspicion and probable cause to arrest, detain and charge Mr. Herbert for the offence of murder.
- [30] Ms. Fleming's argument was that, the evidence that the police had in their possession at the time of Mr. Herbert's arrest, fell woefully short of what amounted to reasonable suspicion and probable cause.
- [31] She further contended, that Mr. Herbert was arrested solely on the evidence of an individual who claimed to have picked up Mr. Herbert in an area located near the vicinity where the offence was committed; and, that this evidence was deficient and could not have provided any justification for Mr. Herbert's arrest. The court understands Ms. Fleming's argument to be, that at the time of Mr. Herbert's arrest the evidence in the possession of the police was not sufficient to amount to reasonable suspicion and probable cause for his arrest and detention on the charge of murder. In support of this contention, she appeared to be relying on the dicta of Ramdhani J. in the case of **Everette Davis v The Attorney General of St. Christopher and Nevis**.³
- [32] The Attorney General, also relying on the decision in **Everette Davis v The Attorney General of St. Christopher and Nevis**, submitted that the law confers upon the police the right to detain and arrest upon reasonable suspicion and probable cause that a person had committed an offence.
- [33] According to the Attorney General, the perceived facts must be such as to permit the reasonable third person, and actually cause the police officer in question to suspect that the person has committed a crime. The Attorney General argued, that it matters not whether the information available to the police officer supports the view that the person may be innocent; once it leads to the conclusion that he may

³ at para. [28]

have committed or is about to commit the offence, this is sufficient to justify the arrest.

- [34] In support of his claim for false imprisonment, Mr. Herbert relied on the decision of **Alexander Jules and Another v The Attorney General**⁴ in support of his contention that at the material time, and in light of evidence available to the police, there was no lawful authority, in the absence of what was needed to constitute reasonable suspicion and probable cause, to justify his detention prior to being charged.
- [35] Mr. Herbert also contended that it was incumbent on the Attorney General to prove that his imprisonment was justified and that the police had acted reasonably.
- [36] On the foregoing premises, Mr. Herbert contended that there was no admissible evidence that would have amounted to reasonable suspicion and justifiable grounds for his continued detention, charge and prosecution.
- [37] Mr. Herbert relied on the decision of Belle J. in **James Junior Frederick v The Attorney General**⁵ wherein the reasons for preferring a charge were examined. He also relied on the dicta of Cenac-Phulgence J. in **Alexander Jules and Another v The Attorney General**.⁶
- [38] To counter Mr. Herbert's arguments in relation to the issue of false imprisonment, the Attorney General relied on the decision in **Flemming v Myers Another**⁷ which he held out as being the embodiment of the classic statement of the principles involved in the tort of false imprisonment. The Attorney General also relied on the decision in **Ramsingh v The Attorney General**.⁸

⁴ Supra

⁵ [2017] ECSCJ No. 351

⁶ At para 27

⁷ [1990] LRC (Crim) 575

⁸ [2002] UKPC 16 per Lord Clarke at para [8]

- [39] Ms. Fleming argued that Mr. Herbert's prosecution was without reasonable and probable cause and or lawful justification. In support of this submission, Ms. Fleming relied on what she described as the inadmissibility and unreliability of the evidence in the possession of the police, upon the strength of which, they pursued the prosecution against Mr. Herbert.
- [40] Ms. Fleming contended, that all that the foregoing evidence merely proved was that Mr. Herbert was in the area at the time of the offence, and did not, in any way, implicate Mr. Herbert in the commission of the offence.
- [41] In addition, Ms. Fleming contended that, in sum, none of the foregoing matters and evidence could reasonably have amounted to evidence upon which police or any reasonable person could have concluded that a successful prosecution could have been pursued against Mr. Herbert; and, by implication, there was no justification to sustain the charge of murder against him.
- [42] Ms. Fleming also argued, that some of the evidence relied on by the prosecution was obtained illegally or by caprice, and for the present purposes, reliance upon them by the prosecution with the knowledge that they were illegally or unlawfully obtained and or manifestly unreliable, amounted to malicious prosecution.
- [43] In her closing submissions, Ms. Fleming relied on the dicta of *Cenac-Phulgence J.* in **Jules v The Attorney General**. Essentially, Mr. Herbert's position was that the case, having been withdrawn by the prosecution after his no case submission had been made, resulted in the proceeding being determined in his favour.
- [44] The Attorney General contended, that Mr. Herbert could not succeed on his claim for malicious prosecution as he had not presented any evidence to satisfy all the constituent elements of malicious prosecution. The Attorney General submitted, that Mr. Herbert had failed to establish that his prosecution for the offence of murder amounted to an abuse of the court's process by wrongfully setting the law in motion on a criminal charge. It was argued, that in order to succeed, Mr. Herbert

would have had to establish that he was prosecuted by the defendant; that the prosecution was determined in his favour; that it was without reasonable and probable cause and was malicious.

[45] The Attorney General argued, that reasonable and probable cause depended on the information and belief of the defendant; which is entirely a question of fact and law. It also depended on the relevant facts known to the police and/or the prosecutor before the laying of the charge, including the inferences to be drawn from them.

[46] The Attorney General argued, that the test to be applied is both an objective and a subjective one. Reasonable cause must appear from the facts, and the prosecutor must in his own mind apprehend that there is a proper basis for the charge. The Attorney General relied on the observations of Ward J. in **Erastus Laville v Avalon Anthony and Others**⁹ and the dicta of Gordon JA in **Margaret Joseph v The Attorney General**¹⁰ where Gordon JA referred to the case of **Glinski v McIver**¹¹.

[47] The Attorney General submitted, that in the present case, the prosecution was not actuated by improper and indirect motives. In order for the claimant to succeed, the court must be satisfied that the proper motive or objective of the prosecution was not to fulfill the ends of justice. Mere absence of proper motive is generally evidenced by an absence of reasonable and probable cause. The court is not bound to infer malice from unreasonableness.

[48] The Attorney General also submitted, that absence of belief in a defendant's mind as to the merits of the case will afford strong evidence of malice, so will lack of good faith in the proceedings. Therefore, any indication of a desire to concoct evidence or to procure a conviction at any cost are all evidence of malice.

⁹ [2017] ECSCJ No. 279

¹⁰ [2004] ECSCJ No. 57

¹¹ [1967] 1 All ER 696

According to the Attorney General, none of those features were present in the instant case. The court understood the Attorney General's position on the point to be that the admissibility of the evidence relied on by the prosecution was the subject of decision by the presiding magistrate at the preliminary inquiry. That ultimately, the reliance on that evidence by the prosecutor, which he may have subjectively thought to be admissible, did not point ineluctably to evidence of malice.

[49] In relation to the issue of whether the proceedings were terminated in Mr. Herbert's favour, the Attorney General conceded that this was indeed the case. This, he says, was because the matter had been withdrawn shortly after it became clear that critical witnesses would not be forthcoming and would not testify at the preliminary inquiry. This was particularly the case, especially in light of the presiding magistrate's exclusion of evidence critical to the prosecution's case. According to the Attorney General, the continued prosecution of the matter thereby became frustrated, and once it became apparent that the prosecution could not proceed further, in light of the available evidence, a decision was therefore taken by the prosecution to withdraw the proceedings against Mr. Herbert.

[50] Therefore, the Attorney General submitted, that as a result, although the prosecution can be held to have been terminated in Mr. Herbert's favour, it does not support the position that Mr. Herbert can succeed on his claim for malicious prosecution in the absence of malice. In fact, he said, the matter had been withdrawn "at the most reasonable time", after the prosecution had determined that the matter could not effectively proceed without certain critical witnesses and evidential material.

[51] The Attorney General relied on what has been described as the locus classicus on the tort of malicious prosecution in West Indian jurisprudence, notably, the case of

Wills v Voisin¹². The Attorney General also sought refuge in the case of **Glinski v McIver** for the proposition that, whether the prosecutor or person who set the law in motion honestly believed that the accused was guilty does not necessarily arise in every case; it would arise where there is affirmative evidence of want of such honest belief or some contested evidence bearing directly on honest belief. The duty of the prosecutor, before bringing the criminal charge which is the subject of the action, was to have found out whether there is reasonable and probable cause for the prosecution, rather than whether there was a possible defence or whether the proposed accused was guilty.

[52] The resolution of the several issues raised in this proceeding depends almost entirely on the view which the court is likely to take of the testimony of retired Detective Inspector Mr. Rogers. Mr. Rogers retired from the RAPF after thirty two years of service. At the time of his retirement he was the Inspector in charge of the Criminal Investigations Department ('CID') of the RAPF. Mr. Rogers was also the lead investigator in the case involving Mr. Herbert. Mr. Rogers' testimony, which the court finds critical, is contained in his witness statement filed 30th June 2017. He was also cross-examined. It will be sufficient to recite only what is of particular relevance to the current issues to be resolved.

[53] Mr. Rogers testified that the intercepted telecommunication records were important to the RAPF's case against Mr. Herbert. He testified that the intercepted mobile device communications were obtained by the CID and consisted of a chat log that contained text messages between persons pertaining to a "contract killing" of an individual who frequented a certain restaurant. According to Mr. Rogers, Mr. Gumbs was killed in the parking lot of that very same restaurant. He also testified that the intercepted mobile device communications were obtained somewhere between three to four months prior to the homicide.

¹² (1968) 6 WIR 50 per Wooding CJ at p. 57 C-D

- [54] He testified that as a result of intelligence received by the RAPF, an application was made to the mobile service provider requesting information pertaining to the mobile devices belonging to Mr. Herbert, another man and a female. It appears that the female individual, when interviewed by the police, informed that she had purchased one of the mobile devices for Mr. Herbert.
- [55] In addition, it appears from Mr. Rogers' testimony that an assessment of the intercepted communication from the mobile service provider showed the time and the location of the cell site from which the communications were routed, which coincidentally was at approximately the same time and from the same location that Mr. Gumbs was murdered.
- [56] Mr. Rogers testified essentially, that the intercepted communications showed that Mr. Herbert's mobile device was used in West End prior to Mr. Gumbs' murder. At or about the same time, according to Mr. Rogers' testimony, Mr. Herbert made a call from his location in West End to another man in Blowing Point. Within less than a minute after that call, the recipient of Mr. Herbert's call in Blowing Point made a call to a man whose mobile device registered off the cell site located in West End. Within minutes of that latter call, the mobile device located in Blowing Point made a call to Mr. Herbert's mobile device which registered off the cell site located at West End. In addition, Mr. Rogers testified that the intercepted mobile call logs also showed communications exchanged between Mr. Herbert's mobile device and a cell site location to a mobile device used at the restaurant where Mr. Gumbs was shot.
- [57] It also appears from Mr. Rogers' testimony that the call log evidence was supported by a statement taken by the police from one of the individuals who participated in the mobile device communications with the other parties. In particular, this individual confirmed that he had picked up Mr. Herbert and the other man at West End shortly after the murder. Mr. Rogers' testimony was to the

effect that the abovementioned evidence formed part of the basis for arresting Mr. Herbert.

- [58] In cross-examination, Mr. Rogers testified that the evidence of the intercepted mobile telecommunications was obtained and retrieved by the police without a warrant. The court understood the substance of this aspect of the testimony given in cross-examination to mean that at the time that the intercepted communications were obtained, the police did not follow the proper and necessary procedure for obtaining the same. Mr. Rogers expressed the view that the intercepted mobile telecommunications was one of the matters of evidence that triggered his decision to charge Mr. Herbert. Mr. Rogers testified that:

“We did not have a warrant, we had something from the Governor... It was not me personally... I did not know if it was submitted.”

- [59] Mr. Rogers also sought to give an explanation as to why the presiding magistrate at the preliminary inquiry declined to allow the evidence of the intercepted telecommunications being admitted in evidence. He said:

“We could not get anyone from Digicel to give the evidence out of fear... We had to get someone out of Antigua... To my knowledge the person from Antigua was not permitted to give the evidence.”

- [60] Mr. Rogers agreed in cross-examination that at the time of Mr. Herbert’s arrest the police had no evidence in their possession that placed Mr. Herbert in the parking lot where Mr. Gumbs was murdered.

- [61] In addition, Ms. Fleming cross-examined Mr. Rogers in relation to the reliability and credibility of the evidence of the purported eyewitness. This evidence was essentially challenged by Ms. Fleming on the basis that no proper identification had been made by this eyewitness of the two men whom he said he saw run into nearby bushes and later alighted therefrom and entered the motor vehicle belonging to the other witness upon whose statement the police relied on as the basis for charging Mr. Herbert.

- [62] It appears that Mr. Rogers was adamant that the testimony of the driver of the motor vehicle somehow supported the evidence of the intercepted communications. It was on this basis and within this evidential context that Mr. Herbert argued, that this evidence amounted to unreliable circumstantial evidence, which Mr. Rogers testified was the basis for charging him with the offence of murder on 19th June 2012. It appears from Mr. Rogers' testimony that this was the only evidence which the police had in their possession at the time. According to Mr. Rogers' testimony, this was sufficient evidence, notwithstanding its inability to establish Mr. Herbert's presence at the scene of the crime, which gave him reasonable and probable cause for arresting, detaining and charging Mr. Herbert with the murder of Mr. Gumbs.
- [63] In a nutshell, what has been previously described, was the only available evidence that the police had in their possession at the time that Mr. Herbert was charged. In the circumstances, the issue that arises is whether this was sufficient evidence, at the material time, amounting to reasonable suspicion and probable cause to have arrested, detained and charged Mr. Herbert.
- [64] The court has considered the evidence that came into the possession of the police after Mr. Herbert's arrest and charge for the subject offence. This evidence comprised mainly of evidence of GSR and DNA. Again, the resolution of the issues with respect to malicious prosecution and false imprisonment arise directly from the testimony of Mr. Rogers.
- [65] Mr. Rogers testified, that at the time Mr. Herbert was charged, the results of the GSR and DNA analysis were unavailable.
- [66] Essentially, the tenor of Ms. Fleming's cross-examination of Mr. Rogers suggested that she intended to establish two matters in relation to the evidence obtained subsequent to Mr. Herbert's arrest. Firstly, that the evidence available to the police at the time that Mr. Herbert was charged was insufficient to have amounted to

reasonable and probable cause; and secondly, that the evidential material subsequently obtained was insufficient to have justified the criminal prosecution against Mr. Herbert.

[67] In a nutshell, Ms. Fleming sought to illicit from this witness that the evidence obtained prior to Mr. Herbert being charged, apart from establishing his presence in the vicinity of the location where the murder occurred, fell woefully short, without more, from establishing that Mr. Herbert was in the parking lot when Mr. Gumbs was shot, or that Mr. Herbert shot Mr. Gumbs or participated in the shooting of Mr. Gumbs.

[68] It must be recalled that Mr. Herbert's contention is that this evidence, apart from failing to point inexorably to the conclusion that he murdered Mr. Gumbs, was also perforated with inconsistencies and had a significant element of unreliability. The apparent unreliability of this evidence was manifested in poor quality of the evidence coming from the "eyewitness" who saw three men entering bushes and emerging therefrom and subsequently entering a motorcar. In addition, it appears that this witness gave no formal or informal identification evidence of the men that he saw.

[69] In the circumstances, Ms. Fleming sought to establish by her cross-examination of Mr. Rogers, that given his experience and length of service as a police officer, he ought to have apprehended that this evidence was not only manifestly weak and unreliable, without more, but was also incapable, by itself, of implicating Mr. Herbert in the commission of the offence. Therefore, it was on this basis that Ms. Fleming sought to argue, that at the time of Mr. Herbert's arrest there was no evidence in the possession of the police that amounted to reasonable suspicion and probable cause for Mr. Herbert's arrest and charge for the offence in question.

- [70] Ms. Fleming also sought, by virtue of her cross-examination of Mr. Rogers, to impugn the evidence obtained subsequent to Mr. Herbert's arrest and charge and his subsequent remand. In particular, Mr. Rogers was cross-examined by Ms. Fleming on the basis that the evidence of the DNA and the intercepted telecommunications were obtained both unlawfully and unfairly in addition to being manifestly unreliable and inadmissible.
- [71] It appears, in the court's respectful view, that the essence of Mr. Herbert's case is simply, that the decision to commence and continue the criminal prosecution against him, in light of the state of the evidence in the possession of the police, was unreasonable; and in fact, no reasonable prosecutor would have commenced and continued such a prosecution in light of the state of the evidence. Therefore, Mr. Herbert has called into question the conduct of the prosecution in the exercise of its prosecutorial discretion, which he said resulted in him being falsely imprisoned.
- [72] The court understood Ms. Fleming's argument to be, that the prosecution, given the state of the available evidence, ought to have been alerted to the fact that it was either impossible or unlikely to have obtained a conviction on a charge of murder, far less a committal for trial, but nevertheless proceeded with a criminal prosecution that was doomed to fail.
- [73] It can also be gleaned from the posture adopted by Ms. Fleming in relation to the conduct of the prosecution in proceeding with the criminal prosecution against Mr. Herbert, that it ought to have been patently obvious to any reasonably minded prosecutor, from the very start of the proceedings, that a criminal prosecution premised on evidence that was palpably and manifestly unreliable and/or inadmissible was bound to fail. Ms. Fleming's contention appeared to be, that the prosecution ought not to have, in these circumstances, decided to commence and maintain the criminal prosecution against Mr. Herbert.

[74] The question which comes to the fore is, whether the criticisms leveled at the prosecution are sufficient to ground a case for malicious prosecution and false imprisonment.

[75] However, despite the concessions made by the Attorney General with respect to the evidence discussed in this judgment, it appears that the Attorney General's position is that, Mr. Herbert has mistakenly characterised the conduct of the criminal prosecution against him as "malicious prosecution". Notwithstanding the likelihood that the position adopted by the Attorney General may very well be correct, the court is of the view that, in the present case, it may very well have been a misapprehension by the prosecution of the ethical considerations that it ought to have observed in arriving at the decision to commence, maintain and continue the criminal prosecution against Mr. Herbert; the result of all of which, Mr. Herbert contended, was that he was made to endure prolonged and unnecessary incarceration for which he is entitled to be compensated for by an award of damages .

[76] In **Margaret Joseph v The Attorney General and Another** it was held that:

"Once there is the finding that the arrest was not wrongful, then it logically follows that the action for false imprisonment must also fail. There is no allegation that the Appellant was held by the police, prior to bail being granted, beyond the time permitted by law. The allegations regarding the conditions in which the Appellant was held are a different issue, and not one that can be adjudicated by this Court based upon the pleadings in this case."¹³

[77] Having considered the evidence of Mr. Rogers at the trial, the court has formed the view that at the time of his arrest there was reasonable suspicion and probable cause for Mr. Herbert's arrest and detention. The court has taken the view that the evidence in the possession of the police at the time of Mr. Herbert's apprehension, though circumstantial in nature, was sufficient to amount to reasonable grounds for

¹³ Per Gordon JA (Ag.) at para. 11

suspecting that he was in some way involved in the events giving rise to Mr. Gumbs' murder.

[78] The evidence available at the time of Mr. Herbert's arrest placed him at or near the vicinity of where the murder was committed. The cell tower records and the mobile phone logs, and the contents of the intercepted mobile text messages, raised more than a mere suspicion that Mr. Herbert was in some way complicit in Mr. Gumbs' murder. The court has formed the view, that all the various pieces of evidence available to the police at the time of Mr. Herbert's arrest, when juxtaposed and looked at in the round, were sufficient to establish reasonable suspicion and probable cause for Mr. Herbert's arrest. This is clearly the case when one applies the appropriate test of what amounts to reasonable suspicion and probable cause.

[79] Mr. Herbert's contention is that, having made the decision to arrest him on suspicion of having committed the offence of murder, the police had no reasonable or probable grounds for detaining him and subsequently charging him with the offence of murder. Therefore, Mr. Herbert contends that his detention on remand was unlawful. However, once reasonable suspicion and probable cause for Mr. Herbert's arrest had been established, he clearly would be unable to succeed in a claim for wrongful imprisonment.

[80] Therefore, having established reasonable suspicion and probable cause for arresting Mr. Herbert, the court is of the view, that the police were entitled to detain him pending further investigations into the commission of the suspected offence. This was a case of a murder involving the use of a firearm. Clearly, during the course of Mr. Herbert's detention the police would have continued their investigations by obtaining witness statements and conducting various forensic examinations, in order to establish the necessity for charging Mr. Herbert with the offence. There may have been other reasons associated with the conduct of the police investigation that would have warranted Mr. Herbert's continued detention.

[81] Ms. Fleming relied on the decision in **Everette Davis v The Attorney General of St. Christopher and Nevis**¹⁴ as providing a substantial basis for Mr. Herbert to succeed on his claim for malicious prosecution.

[82] In **Everette Davis**, the claimant was detained twice by the police who were investigating first, a missing person's report, which later became a murder investigation. On the first occasion, the police detained him for nearly 48 hours doing no more than questioning him about the missing person, and the fact that he had had a previous altercation with the then missing man. He answered all their questions, and near to the end of the 48 hours period he was released. Several days later, after the dead body of the missing man was found, the investigating officer again detained the claimant. At this stage there was no more evidence except a tee shirt with the initials 'KOD' which had been found near the crime scene. It was apparently believed by the police that this tee shirt belonged to an acquaintance of the claimant. Again he was questioned, and being asked for DNA samples volunteered hair and blood samples. Two days later the police charged him and two other persons jointly for the murder of the deceased. The preliminary inquiry began on the 22nd June 2012, at which time the claimant was remanded to Her Majesty's prison. There he was held for the next eight months and some days being brought on numerous occasions to the magistrate where the prosecuting officer continuously requested and was granted adjournments on the basis that he did not have the investigating file. Eventually when the matter was called up on the 4th February 2013, the prosecuting officer informed the court that he had finally gotten the file and that he was withdrawing the matter against the claimant. The claimant who had by then spent 230 days in the custody of the State was released. The claimant then filed this matter against the Attorney General in his capacity as representative of the State, seeking declarations that his constitutional right to liberty had been infringed and for orders for compensation and exemplary or vindictory damages be made. The Attorney General defended the matter

¹⁴ [2014] ECSCJ No. 142

arguing that there had been reasonable grounds to arrest and charge the applicant and as such, there was no breach of any constitutional right.

[83] Ramdhani J., allowing the claimant's claim, held:

"The law gives the police the right to detain and or arrest anyone upon reasonable and probable cause that that person has or is about to commit an offence. The test as to whether there is reasonable and probable cause is both subjective and objective. The perceived facts must be such as to allow the reasonable third person and actually cause the officer in question to suspect that the person has committed or is about to commit a crime. It does not matter if the information available to the police leads equally or more to a view that the person may be innocent of the offence, once it leads reasonably to a conclusion that he may have committed, or is about to commit the offence, that is sufficient to ground the arrest. The reasonable police officer is assumed to know the law and possessed of the information in the possession of the arresting officer would have believed that the claimant was guilty of the offence for which he was arrested. The term 'reasonable suspicion' relates to the existence of facts at the time. It does not relate to a perception on the state of the law.

It is significant to note that there is no need for the officer to have admissible evidence amounting to a *prima facie* case to ground reasonable suspicion when it comes to mere detention without charge. A lower standard is permissible and can be founded on inadmissible evidence. Of course reasonable suspicion can also be founded on admissible evidence. Such reliance on either admissible or inadmissible evidence must be shown to have actually existed and was reasonable in the circumstances.

Reasonable suspicion may arise from the overt acts of the person who becomes the suspect. It may also arise from statements made by that person. Statements from known third persons may also provide such grounds. Thus information from an informer or a tip off from a member of the public may provide such reasonable grounds. It is debatable whether information from an anonymous telephone caller can provide grounds for reasonable suspicion. Much would ultimately depend on the type of information being conveyed. A statement by one officer to a second officer that X is a suspect is not sufficient to ground suspicion in that second officer. However, a police briefing outlining the reasons for the suspicion, might provide reasonable grounds for suspicion, and so too might a police bulletin providing sufficient information.

When it comes to the basis for the preferment of a criminal charge, it must be made clear that no criminal charge can be laid against anyone unless the police ground their suspicion that the person has committed that offence on admissible evidence.”

[84] The case of **Everette Davis** is distinguishable from the present case in the following respects. First of all, the court found that the claimant’s constitutional rights had been infringed. In the present case there is no allegation of any breach of Mr. Herbert’s constitutional rights. In addition, it must be recalled that Mr. Herbert grounded his claim, not in public law but instead a private law remedy. Nevertheless, the case of **Everette Davis** is also distinguishable from the present case on its facts. In **Everette Davis**, Ramdhani J found that:

“When the investigating officers first arrested the claimant, all they had was information that he had had a previous altercation with the deceased. When the claimant admitted this to them, it became admissible evidence against him. But it was evidence which was woefully short of any threshold in grounding any reasonable or probable cause that the claimant had committed murder. Having a previous altercation with a person who is months later murdered is no basis to ground any lawful inference that the person committed murder. There must have been something more, perhaps even hearsay information (for the detention) or evidence (for the charge) that this claimant might have threatened the deceased with future harm, or that he was seen in the location and time of the crime. There was nothing more.”¹⁵

[85] It appears that the case of **Everette Davis** was decided on its own peculiar facts. The circumstances of the present case differ significantly. In the present case, it cannot be said that the evidence available to the police at the time of Mr. Herbert’s arrest fell woefully short of the threshold for grounding reasonable suspicion and probable cause. The circumstances in **Everette Davis** were indeed exceptional. The strength of the circumstantial evidence available to the police at the time of Mr. Herbert’s arrest for the offence of murder was greater than in the case of **Everette Davis**.

¹⁵ Infra per Ramdhani J. at para. 28

[86] In **Ramsingh v The Attorney General of Trinidad and Tobago**,¹⁶ where on 25th February 2002 the appellant was detained in a police station in Trinidad and Tobago on suspicion of assault. She remained in detention for over five hours while the police waited for a medical report on the condition of the victim. In the event the report showed no serious injury to the victim and the appellant was released without being questioned or charged. The appellant brought civil proceedings against the Attorney General in which she claimed damages for false imprisonment. Her claim was dismissed by Shah J (“the judge”) on 12th July 2007 after a trial which lasted three hours. He gave his reasons in an *extempore* judgment, although they were subsequently encapsulated in a written document dated 5th December 2007. The appellant appealed to the Court of Appeal (Bereaux, Stollmeyer and Smith JJA) but her appeal was dismissed on 18th December 2009. The Court of Appeal gave short reasons in an *extempore* judgment, although they said that, if the matter were to go further, they would amplify their reasons. They said, *inter alia*, that there was reasonable and probable cause to arrest and detain the appellant. The appellant subsequently sought leave to appeal to the Privy Council; final leave was obtained on 12th August 2010 and the Court of Appeal gave further detailed reasons in a written judgment delivered on 12th October 2010.

[87] On appeal to the Privy Council, it was held, dismissing the appeal and upholding the decision of the Court of Appeal and the Court Below, that the detention of the Appellant at the police station pending the arrival of medical information as to the condition of the alleged victim was not unlawful and that the judge and the Court of Appeal were correct to hold that the Respondent is not liable to the Appellant for false imprisonment; nor was there any infringement of her constitutional rights.

¹⁶ [2012] UKPC 16

[88] The issue which the Privy Council had to determine, which in large measure mirrors the arguments advanced by Mr. Herbert, was whether the Appellant's detention was lawful or whether it was unlawful and amounted to the tort of false imprisonment.

[89] The Privy Council's reasoning is contained in the judgment of Lord Clarke where he said:

"The answer to this question depends upon all the circumstances of the case. As explained above, the respondent must show that the whole period of detention was justified. However, while it would be wrong in principle to hold that, because the initial arrest was justified, it follows that the subsequent detention was also justified, it is important to consider the subsequent detention in the light of the arrest.

Both at the trial and in the Court of Appeal much of the focus was on the arrest, which was at that time said to be unlawful. It follows from the fact that the arrest is now accepted as lawful that it is accepted that the police had shown reasonable and probable cause to arrest the appellant. This must be on the basis that the arresting officer, Police Sergeant de Gannes, had reasonable grounds for suspicion that she had committed an arrestable offence. Assault by beating is not an arrestable offence. It follows that it is accepted on behalf of the appellant that PS de Gannes reasonably suspected the appellant of having committed a serious assault on Mrs. Heeralal. Although he did not see blood he formed the view that she was in a semi-conscious state as a result of an assault which the evidence suggested had been carried out by the appellant.

It was in these circumstances that it was decided, not only to arrest the appellant, which it is accepted was lawful, but to detain her until it was ascertained what, if any, injuries Mrs. Heeralal had suffered. It is submitted that that was an unreasonable decision because the ascertainment of her injuries was not a relevant consideration in resolving the question whether or not to detain the appellant. The Board is, however, unable to accept that submission. The appellant was reasonably suspected of having carried out a serious, perhaps very serious assault. She could not sensibly be interrogated until the police knew what the nature of the assault was. Equally, in practical terms she could not have been charged until they knew what the nature of any injuries was. Had the assault caused actual bodily harm or grievous bodily harm? Would a charge of attempted murder be justified?

It is submitted on behalf of the respondent that, given the reasonable suspicion that the assault was serious, perhaps very serious, it was prudent for the police to detain the appellant until the position was clear. If it had been a serious assault, the appellant would have known that and it is far from clear what she might have done if released. Equally, if it had been a serious assault, it would no doubt have been appropriate to charge her accordingly and perhaps to oppose an application for bail. The police did not of course know how long it would take to obtain information from the hospital. In the event it took over five hours. It might have taken less. The Board accepts those submissions.”¹⁷

[90] In determining whether Mr. Herbert has a viable claim for malicious prosecution, the court has sought guidance from the decision of the Privy Council in **Trevor Williamson v The Attorney General of Trinidad and Tobago**,¹⁸ where Lord Kerr delivering the judgment of the Court said:

“In order to make out a claim for malicious prosecution, it must be shown, among other things, that the prosecutor lacked reasonable and probable cause for the prosecution and that he was actuated by malice. These particular elements constitute significant challenge by way of proof. It has to be shown that there was no reasonable or probable cause for the launch of the proceedings. This requires proof of a negative proposition, normally among the most difficult of evidential requirements. Secondly malice must be established. A good working definition of what is required for proof of malice in the criminal context is to be found in *A v NSW* [2007] HCA 10; 230 CLR 500 at para 91:

“What is clear is that, to constitute malice, the dominant purpose of the prosecutor must be a purpose other than the proper invocation of the criminal law – an ‘illegitimate or oblique’. That improper purpose must be the sole or dominant purpose actuating the prosecutor”¹⁹

[91] His Lordship continued:

“An improper and wrongful motive lies at the heart of the tort, therefore. It must be the driving force behind the prosecution. In other words, it has to be shown that the prosecutor’s motives is for a purpose other than bringing a person to justice ... The wrongful motive involves an intention to manipulate or abuse the legal system.....Proving malice is a high hurdle for the claimant to pass...”²⁰

¹⁷ At paras [16] – [19]

¹⁸ [2014] UKPC 29

¹⁹ *Infra* at para. 11

²⁰ *Infra* at para. 12

[92] In the words of Justice Kerr in **Williamson v The Attorney General**:

“Malice can be inferred from a lack of reasonable and probable cause ... But a finding of malice is always dependent on the facts of the individual case. It is for the tribunal of fact to make the finding according to its assessment of the evidence.”²¹

[93] In **Margaret Joseph v The Attorney General and Another** it was held that:

“In *Glinski v McIver* the House of Lords held that in order for a plaintiff to succeed in an action for malicious prosecution he must prove one or other of the following: either that the defendant did not believe the plaintiff was probably guilty of the offence; or that a person of ordinary prudence and caution would not have concluded, in the light of the facts he honestly believed, that the plaintiff was probably guilty. Additionally, the plaintiff must prove malice on the part of the defendant, that is, any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice - *Wershof v Metropolitan Police Commissioner*.”

[94] The principle is that a prosecutor must have an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. The honest belief required of the prosecutor is a belief not that the accused is guilty as a matter of certainty, but that there is a proper case to lay before the court.²²

[95] Wooding CJ gave an eloquent exposition of the law related to malicious prosecution in the case of **Wills v Voisin**²³, where he said:

“Now, as to the law relating to the claim for malicious prosecution. It is in the public interest, and it is a public duty, that offenders should be brought to justice. It is the obligation, as well as the right, of every individual to set the courts in motion whenever infringements of the law occur. The burden of so doing lies especially upon police officers who are paid appointed guardians of the public peace. Nonetheless, it is entirely wrong that anyone should be subjected to legal process without reasonable and

²¹ *Infra* at para 13

²² *Glinski v McIver* [1962] AC 726, 758 per Lord Denning

²³ (1963) 6 WIR 50 at p. 57

probable cause. Thus, the duty to prosecute and the right to be protected against unwarranted prosecution may often be so balanced as to make it difficult to resolve which ought to prevail. Hence, in the public interest, the law will stand by him who essays to discharge the duty against him who seeks to enforce the right, provided that in essaying to discharge the duty the prosecutor has not been actuated by malice. Accordingly, in an action for the vindication of the right to be protected against unwarranted prosecution, which is the action for malicious prosecution, a plaintiff must show (a) that the law was set in motion against him on a charge for a criminal offence; (b) that he was acquitted of the charge or that otherwise it was determined in his favour; (c) that the prosecutor set the law in motion without reasonable and probable cause; and (d) that in so setting the law in motion the prosecutor was actuated by malice. It was not disputed in this case that the appellant arrested and charged the respondent Voisin with larceny of a number of items alleged to be of the aggregate value of \$8,000. Nor was it disputed that he was committed to stand his trial at the Assizes in Port of Spain or that upon his trial thereat he was acquitted by a jury and duly discharged. Two issues, nevertheless, remained in contest between the parties. Both were of essential importance since the respondent Voisin needed to succeed on both in order to sustain his claim. Moreover, on him lay the onus of proof with regard to both."

[96] In **Alexander Jules and Another v The Attorney General**,²⁴ Cenac-Phulgence J., relied on the decision in **Sandra Juman v The Attorney General of Trinidad and Tobago**²⁵, where the Privy Council referred to the decision in **Willers v Joyce and Another**²⁶ for the proposition that:

"As applied to malicious prosecution, it requires the claimant to prove that the defendant deliberately misused the process of the court. The most obvious case is where the claimant can prove that the defendant brought the proceedings in the knowledge that they were without foundation...But the authorities show that there may be other instances of abuse....The critical feature which has to be proved is that the proceedings instituted by the defendant were not a bona fide use of the court's process."

A failure to take steps which it would be elementary for any reasonable person to take before instituting proceedings might in some circumstances serve evidentially as a pointer towards deliberate misuse of the court's process, but sloppiness of itself is very different from malice. In the

²⁴ SLUHCV 2016/0595 (19th June 2018)

²⁵ [2017] UKPC 3

²⁶ [2016] 3 WLR 477

present case there was no cause to doubt that the first respondent believed, rightly or wrongly, that there were sufficient grounds to prosecute, or that the object of charging the appellant was to place the matter before the magistrate for the court to decide the question of her guilt; and there was no suggestion that he had any ulterior improper motive. Even if the court had decided that objectively the first respondent lacked reasonable and probable cause to prosecute the appellant, there was no basis to hold that he acted with malice.”²⁷

[97] In respect of Mr. Herbert’s argument that there was insufficient evidence available to the police at the time of his being charged for murder, and that the evidence available to the prosecution at the time of the preliminary inquiry, which ultimately proved to be insufficient to warrant his committal for trial, amounted to a lack of reasonable and probable cause which entitled him to succeed on his claim for false imprisonment and malicious prosecution, the court examined the decision in **James Junior Frederick v The Attorney General**,²⁸ cited by Ms. Fleming in argument.

[98] In **Frederick v The Attorney General**, the central issue was whether the initial evidence provided to the police which instigated the Claimant’s arrest was sufficient to sustain a prosecution for the offence(s) charged and whether the evidence was known to be false. Belle J. said:

“It is my view that the reason for preferring the charge can be gleaned from the totality of the evidence collected. Not all of the evidence was of the same quality. The evidence of Police Corporal 43 Matthew Charles who intercepted the Claimant and found Mervin Charles in his car would have been of some importance. The only difficulty with this evidence is that Mervin Charles never described the offence of being forcefully taken away against his will but instead reported that he had been sexually assaulted.

In my view based on the facts before the court the investigating officer could form the suspicion and conclude that there was sufficient evidence available to charge the Claimant with the cited offence. All of the evidence appeared to point to the "force" being used in the sense of, "mental or

²⁷ *Infra* at paras. [43] and [44]

²⁸ [2017] ECSCJ No. 351

moral power; or influence with a person or thing exerting this": according to the Oxford English Dictionary.

Clearly the case against the Claimant was not perfect but there would reasonably appear to be evidence upon which the investigating officer could conclude that a successful prosecution could be pursued against the Claimant.

It is with this background in mind that the arguments of the parties can be analysed to arrive at a conclusion on the elements of the alleged tortious acts which must be proved if the Claimant is to successfully prosecute his claim against the defendant.

Applying the case of *Barbour v AG* of the Court of Appeal of Trinidad and Tobago all of the evidence taken together amounted to reasonable and probable cause for prosecuting the Claimant. In that case Hyatali CJ reviewed relevant authorities including *Dallison v Caffery*.

In *Dallison v Caffery* Diplock LJ set out the test to be applied to ascertain whether there was reasonable and probable cause for a prosecution in the following terms:

"A person, whether or not he is a police officer, acts reasonably in prosecuting a suspected felon if the credible evidence of which he knows raises a case fit to go to the jury that the suspect is guilty of the felony charged. This is what in law constitutes reasonable and probable cause for the prosecution."

The test whether there was reasonable and probable cause for the arrest or prosecution is an objective one, namely, whether a reasonable man assumed to know the law and possessed of information which in fact was possessed by the defendant, would believe that there was reasonable and probable cause. Where the test is satisfied, the *onus* lies on the person who has been arrested or prosecuted to establish that his arrestor or prosecutor did not in fact believe what *ex hypothesi* he would have believed had he been reasonable."

Counsel for the Defendant concluded that a reasonable and cautious man having the information that Sergeant Francis had would have arrived at the conclusion that a crime had been committed and the end result would have been charge(s) being brought against the Claimant.

I must say that I prefer the Defendant's argument which addresses the evidence that was available to the Sergeant at the time of arrest and beyond. Such evidence could not have been ignored even if there was doubt about some aspects of it."

[99] The Attorney General has registered no disagreement with the notion that the proceedings were concluded in the claimant's favour. In fact the Attorney General conceded on the authority of **Khan v Singh**²⁹ that the discontinuance of proceedings at the preliminary inquiry was a sufficient termination of proceedings in the claimant's favour upon which to base an action for malicious prosecution. In **Jules and Another v The Attorney General**, where the prosecution had withdrawn the charges against the defendants because the charges had been brought pursuant to repealed legislation, Cenac-Phulgence J. held:

"The claimants must show that the prosecution ended in their favour, and so long as it did it is of no moment how this came about. Withdrawal of a charge, even without prejudice to the right to recommence has been held in Canada to be sufficient."³⁰

[100] In arriving at this conclusion, Cenac-Phulgence J. appeared to have relied on the Canadian authorities of **Casey v Automobiles Renault Canada Ltd.**³¹ and **Romegialli v Marceau**.³²

[101] In **Casey v Automobiles Renault**, a claim for malicious prosecution, the defendant laid an information against the claimant and withdrew it at a later date. During the intervening period, nothing was done by the magistrate before whom the information was sworn. The court held in favour of the claimant and adopted the learning set out in Salmond on Torts 13th ed., p726:

"If the prosecution has actually determined in any manner in favour of the plaintiff it matters nothing in what way this has taken place. There need not have been any acquittal on the merits. What the plaintiff requires for his action is not judicial determination of his innocence but merely the absence of any judicial determination of his guilt. Thus it is enough if the prosecution has been discontinued or if the accused has been acquitted by reason of some formal defect in the indictment or if conviction has been quashed even if for some technical defect in the proceedings"

²⁹ (1960) 2 W.I.R 159

³⁰ At para. 27

³¹ [1965] S.C.R. 607

³² [1964] 1 O.R. 407 - 409

[102] Therefore, notwithstanding that at a preliminary inquiry the presiding magistrate is not concerned with a determination of the guilt or innocence of the claimant, the simple point is that the prosecution had commenced, and the court's process set in motion, and the claimant had suffered damage as a result.

[103] In **Romegialli v Marceau**, the defendant, who had preferred a charge of theft against the plaintiff and caused a warrant to issue for his arrest, was sued for malicious prosecution when such charge was withdrawn at the request of the prosecution, without prejudice to the right of the prosecution to proceed later if it so desired. Although finding that the defendant had acted maliciously and without reasonable and probable cause the trial Judge dismissed the action on the grounds that no criminal proceedings had actually been instituted by the defendant, because the information was a nullity, and that the proceedings had not terminated in favour of the plaintiff because of the reservation attached to the withdrawal of such proceedings. On appeal, it was held, that the plaintiff was entitled to succeed in his action. The gist of an action for damages for malicious prosecution is that it is an abuse of the process of the Court by wrongfully setting the law in motion on a criminal charge and so long as the prosecution does not result in a judicial determination of guilt, for whatever reason, a plaintiff is entitled to recover on showing that the defendant acted maliciously and without reasonable and probable cause.

[104] Based on the abovementioned authorities, the court does not hesitate to find that the proceedings were determined in Mr. Herbert's favour.

Conclusions

[105] It appears that what is germane to the claim of malicious prosecution brought by Mr. Herbert is the question of reasonable and probable cause. It has been suggested, that once it is found that there was reasonable and probable cause, there is no need to proceed further, presumably because, the claimant, must prove all four elements of the tort to be successful.

- [106] The court has arrived at the conclusion, that in the present case, the mere fact that most of the substantial evidence relied on by the prosecution to prove Mr. Herbert's guilt was held to be inadmissible by the magistrate, does not point inexorably to the conclusion that the prosecution was actuated by malice. Mr. Herbert's complaint regarding the manner in which some of the evidence was obtained does not support the contention that the prosecution was actuated by some malicious or improper motive.
- [107] It appears that the substance of Mr. Herbert's claim seemed to have interrogated the exercise of prosecutorial discretion, which based on the nature of Mr. Herbert's complaints, amounted to an abuse of process. This raised the question of whether a claimant can succeed on a claim for malicious prosecution on the ground of abuse of process, that is, in private law, as opposed to seeking a public law remedy. It may be that in seeking a public law remedy, a claimant could rely on unreasonableness in the *Wednesbury* sense, whereas in the realm of private law, the claim would rest on the concept of reasonable and probable cause. Clearly, the kind of abuse of process complained of in the present case cannot by itself give rise to a claim for malicious prosecution.
- [108] Ineptitude on the part of the prosecutor or sheer sloppiness on the part of police investigators, cannot in and of themselves ground a claim for malicious prosecution. The court has observed that the conduct of the police investigators in the present case fell woefully short of the standard of skill expected from police investigators, particularly in the course of investigating a serious offence of murder. The present case is emblematic of conduct by the police investigators that is not in keeping with proper codes of practice related to the obtaining and collection of evidence. The present case also highlighted the absence of adequate trial preparation and the proper deployment of evidence. It also appears that due diligence was not observed in ensuring that the rules for the admissibility of evidence were observed. This negligent conduct, bordering dangerously close to

misconduct, has resulted in a botched prosecution that resulted in Mr. Herbert being incarcerated for a period in excess of three years.

[109] The court makes the following observations in respect of Mr. Herbert's claim for wrongful imprisonment. Mr. Herbert's contention with respect to the claim for false imprisonment was that, having been arrested on reasonable suspicion of having committed the offence of murder, the police proceeded to charge him for the offence on the basis of evidence that was insufficient to justify the charge and the subsequent prosecution. Ms. Fleming's contention on the point was that, at the time that the police arrived at the decision to charge Mr. Herbert, the reasonable and probable cause that he had committed the offence of murder was not grounded on admissible evidence or sufficient evidence.

[110] In support of this argument Ms. Fleming relied extensively on the decision in **Everette Davis v The Attorney General** for the above proposition. In particular Ms. Fleming relied on the dicta of Ramdhani J. (Ag) where he said:

“When it comes to the basis for the preferment of a charge, it must be made clear that no criminal charge can be laid against anyone unless the police ground their suspicion that the person has committed that offence on admissible evidence.”³³

[111] In deciding as he did, in **Everette Davis**, Ramdhani J. (Ag) applied the decision in **Shaaban Bin Hussien and Others v Chong Fook Kam and Another**³⁴ in making a distinction between reasonable suspicion and prima facie evidence. In **Hussien v Chong Fook Kam** Their Lordships held:

“that reasonable suspicion could not be equated with prima facie proof; that suspicion could take into account matters that could not be put in evidence at all whereas prima facie proof consisted of admissible evidence; and that the police were not called before acting to have anything like a prima facie case for conviction but only to be satisfied that there did in fact exist reasonable grounds for suspicion of guilt.”

³³ Per Ramdhani J (Ag) at para 15

³⁴ [1970] A.C. 942

[112] Their Lordships went on further to find that:

“Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: “I suspect but I cannot prove.” Suspicion arises at or near the starting-point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police inquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar. There is no serious danger in a large measure of executive discretion in the first instance because in countries where common law principles prevail the discretion is subject indirectly to judicial control.”

[113] Therefore, it appears that Mr. Herbert cannot rely on this distinction between reasonable suspicion and prima facie evidence in support of his claim for false imprisonment. However, the issue specifically raised by Mr. Herbert is whether there was any legal basis for the charge of murder and Mr. Herbert’s continued incarceration on remand. In the case of **Everette Davis v The Attorney General**, the court had to grapple with a similar issue. If this question is answered in Mr. Herbert’s favour, then clearly, he is entitled to succeed on this limb with respect to his claim for malicious prosecution.

[114] The court is of the view that the distinction between reasonable suspicion and prima facie evidence does not assist Mr. Herbert in respect of his claim for false imprisonment. The distinction made by their Lordships between the two concepts in the case of **Hussein** was merely to amplify the threshold that was required to be met in establishing reasonable suspicion. However, what can be distilled from the judgment of Ramdhani J. (Ag) in **Everette Davis**, was that in arriving at the decision to prefer a charge, the police investigator is called to observe a higher

standard with regard to reasonable suspicion than when he exercises his power of arrest.

[115] The court has examined Ms. Fleming's arguments on this point in light of the decision of **Dexter Smith v The Attorney General and others**³⁵, not cited by counsel in argument. In **Dexter Smith v The Attorney General and others**, the claimant was charged with the offences of possession of controlled drugs, importation of controlled drugs and trafficking of controlled drugs. At his trial, a no case submission was upheld. The investigating officer testified that she could not say from her personal knowledge that the claimant was in possession of the bag in which the cannabis was found. She also testified that she could not say when the claimant was in possession of the bag. In her testimony she said that she arrived at the conclusion that the claimant was in possession of the bag containing cannabis on the basis of information received by her. The source of that information was not disclosed. She admitted that the bag that she saw in the claimant's possession did not contain any prohibited substance. The investigating officer admitted that there was no other evidence tending to implicate the claimant in the commission of the offences except that of one witness who subsequently changed his story, that the claimant had the bags containing the drugs in his possession.

[116] The court in **Dexter Smith v The Attorney General and others** had to resolve the issues of whether the defendants had reasonable and probable cause to justify the prosecution against the claimant and whether they acted maliciously. The court found that there was no proper basis for charging the claimant and based on the available evidence, there was no reasonable and probable cause for the charges laid against the claimant.

³⁵ [2010] ECSCJ No. 256

[117] In delivering the judgment of the court, Price-Findlay J. relied on the definition of malice in **Brown v Hawkes**³⁶, that:

"Malice, in its widest and vaguest sense, has been said to mean any wrong or indirect motive; and malice can be proved either by showing what the motive was and that it was wrong, or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor."

[118] Price-Findlay J. held that:

"It is well settled that the absence of reasonable and probable cause may allow the Court to draw the adverse inferences and impute malice to the prosecutor where the prosecution cannot be reasonably explained otherwise."³⁷

[119] The learned trial judge in **Dexter Smith v The Attorney General and others**, reasoned that:

"In *Glinski v Mc Iver* [1962] AC 726 Lord Denning stated that the want of reasonable and probable cause depended on the state of mind of the prosecutor. He further said of the cases where the inference may be drawn from the conduct of the prosecutor that the question was whether it might reasonably be inferred that he was conscious that he had no reasonable and probable cause for the prosecution.

The position is entirely different at the prosecution stage, when the prosecutor can be expected to have gathered in all the evidence and applied his mind, with the benefit of such legal advice as may be appropriate, to the question whether the prosecution can be justified." - Per Gault J in *Gibbs & Others v Rea* [1998] 52 WIR 102 at 121.

Further, on review of the evidence in this matter, I agree with the reasoning of Wooding CJ in *Wells v Voisin* when he stated:-

"I think I ought to say very briefly that in such a case as this where absence of reasonable and probable cause, if it had been proved, would have depended upon a finding that the appellant did not honestly believe in the charge he laid against the respondent, *Voisin*, it would be open to the court to infer that the appellant brought the prosecution maliciously, that is to say, without an honest motive."

³⁶ [1891-94] All ER Rep Ext 1887; [1891] 2 QB 718

³⁷ At para 88

I find that, given the totality of the evidence, that the third Defendant instituted the proceedings in this matter without an honest motive. In other words, the third Defendant acted with malice.

There was no credible evidence that the Claimant was even in possession of the bag or the drug contained in the bag. Further, there was no evidence that the Claimant was involved with the importation or the trafficking of the drug in question. I also find that the failure to charge Kyron Nicholas, the person who was found attempting to clear the drugs through Customs highlights, to my mind, the absence of an honest motive on the part of the third Defendant.”³⁸

[120] The kernel of Mr. Herbert’s complaint involves the manner in which the police investigation and the subsequent prosecution were conducted; albeit by the reliance upon evidence that was tainted by illegality and in all the circumstances of the case could properly have been regarded as both inadmissible and at other instances unreliable. However, the court is of the view that the decision in Dexter Smith does not advance Mr. Herbert’s case. The case of Dexter Smith involved circumstances where there simply was no evidence to establish the most substantial ingredient of the subject offence which was possession; a fact which ought to have been patently obvious to the police investigator. This is unlike the circumstances of Mr. Hebert’s case where there was indeed some evidence to substantiate reasonable and probable cause. In the present case the absence of an honest motive for the prosecution has not been shown.

[121] It is without doubt that the prosecution’s case imploded during the course of the preliminary inquiry and ultimately collapsed at the close of the prosecution’s case, prompting them to discontinue the prosecution at that stage. The question that arises is whether that fact by itself is sufficient to make out a case for malicious prosecution to the extent that it is capable of proving malice?

³⁸ At paras 89 - 93

- [122] The court is of the view that the answer to this question lies in the consideration of at what stage of the proceedings did the prosecution come to the realization that the case against Mr. Herbert was likely to fall apart. Alternatively, whether a reasonably minded prosecutor would have recognized the evidential shortcomings of the case, and whether having recognized the same, persisted in the prosecution thereof with the knowledge or alive to the fact that the prosecution was likely to fail.
- [123] Also of importance is the question of the ethical considerations that a reasonable prosecutor ought to have addressed his mind to in deciding to commence and continue the prosecution against Mr. Herbert in light of the available evidence up to the stage at which the prosecution was withdrawn. Unlike the United Kingdom there are no Codes of Practice in statutory form to guide prosecutors in Anguilla. Therefore, this begs the question of the yardstick by which the court ought to measure the decision to commence and continue a criminal prosecution. Ultimately, in the court's view, it is a question of whether a prosecutor had reasonable and probable cause to commence and continue the prosecution.
- [124] In resolving the issue of whether the police had reasonable and probable cause to justify the charge and prosecution of Herbert for the offence of murder, it will be necessary for the court to make an assessment of the evidence available to the police at the time of preferring the charge of murder.
- [125] The court has already found that at the time of Mr. Herbert's initial arrest there was sufficient evidence to ground reasonable suspicion of his having been some way involved in the commission of the offence. However, was this sufficient evidence to ground reasonable and probable cause for the charge of murder? The court has formed the view that the evidence available to the police at the time that Mr. Herbert was charged with the offence of murder was capable of amounting to reasonable and probable cause to justify the charge.

- [126] The call logs and cell tower evidence placed Mr. Herbert in the vicinity of where the murder occurred. The evidence relative to the motor vehicle coming from Raashan Richardson and Mr. Bryan although it did not point to the conclusion that Mr. Herbert had shot anyone was sufficient to place Mr. Herbert somewhere in the vicinity of the scene of the murder. In fact, Mr. Bryan's evidence identified Raashan Richardson as the person whom he knew was the driver of that particular motor car.
- [127] In addition, the intercepted telecommunications in the possession of the police prior to the commission of the offence, again was sufficient to amount to reasonable and probable cause for charging Mr. Herbert. Both the intercepted mobile telecommunications and cell tower evidence were viable links in the chain of circumstantial evidence that the police had in their possession at the time that Mr. Herbert was charged. In the circumstances, the court adopts the view that the evidence available to the police at the time Mr. Herbert was charged amounted to sufficient evidence to ground reasonable and probable cause to charge Mr. Herbert.
- [128] The defendant, by its own admission, accepted that the intercepted mobile telecommunication in the form of Blackberry text messages were obtained without a warrant, prior to the commission of the subject offence and in relation to another unrelated police investigation. In fact, the defendant accepted that this evidence was inadmissible and was not admitted into evidence at the preliminary inquiry. However, knowledge that this evidence was inadmissible from the very start cannot clearly be imputed to the police investigators prior to and subsequent to preferring the charge of murder against Mr. Herbert.
- [129] It has not been shown to the court conclusively that the cell tower evidence and the intercepted mobile telecommunication evidence were obtained unlawfully. Knowledge of their unlawfulness cannot simply be imputed to the police investigators. It ought to have been shown that the police investigators must have

known both prior to and subsequent to preferring the charge of murder against Mr. Herbert, that the evidence was illegally or unlawfully obtained. In any event it appears that this was not necessarily the basis upon which the magistrate having conduct of the preliminary inquiry refused to admit the evidence. From what has been canvassed before the court, it appears that this evidence was not admitted because of the unavailability of a witness competent to give evidence in relation to the same. It cannot be said that this eventuality would have been apparent to the prosecution as the vagaries of the preliminary inquiry unfolded.

[130] The intercepted mobile telecommunications could only have been obtained in conformity with the provisions of the Telecommunications Act³⁹ and the Telecommunications (Special Provisions) Act.⁴⁰ Section 40 (1) (e) and (f) of the Telecommunications Act makes it a criminal offence to intercept any communication transmitted over a telecommunications network without authorization of the provider or user, or a court order.⁴¹

[131] In addition section 40 (3) (b) and (c) of the Telecommunications Act provides that:

“(3) Notwithstanding paragraph (1) (e), any person operating a telecommunications network or providing a telecommunications service may intercept any communication that is transmitted over its network or service—

(b) after having been authorised to intercept such communication by the Court; or

(c) in obedience to an Order issued by the Governor.”

³⁹ R.S.A. c. T6

⁴⁰ R.S.A. c. T8

⁴¹ (1) A person who knowingly—

(e) intercepts, attempts to intercept or procures another person to intercept, without the authorisation of the provider or user, or a court order, or otherwise obtains, attempts to obtain, or procures another to obtain, unlawful access to, any communication transmitted over a telecommunications network;

(f) uses, or attempts to use, the content of any communication, knowing or having reason to believe that such content was obtained through interception or access in contravention of paragraph (e);

is guilty of an offence and liable to a fine of \$50,000 or to imprisonment for a term of 2 years or to both and, in the case of a continuing offence, to a further fine of \$5,000 dollars for each day that the offence continues after conviction.

When cross-examined by Ms. Fleming, Mr. Rogers, the lead investigator on the case, and a veteran police officer of thirty two years standing, simply could not account for whether or not the necessary authorization had been obtained to intercept the mobile telecommunications. However, Mr. Rogers did allude to what he termed “something from the Governor”. However, there was no evidence presented to support the assertion that the evidence was obtained otherwise than in conformity with the relevant statutes.

[132] The defendants have sought to rely on the fact that they were unable to lead the evidence at the preliminary inquiry because of the unavailability of a witness from the telecommunications provider to testify at the trial. The court does not find any reason to reject this explanation. It is apparent that this was the basis upon which the magistrate declined to admit this evidence.

[133] The conduct of the police investigators as reprehensible as it was made to appear at times, does not compel the court to infer that the police investigators lacked reasonable and probable cause to charge Mr. Herbert and commence the prosecution against him, and that the prosecution was malicious or that the prosecution lacked the proper motive for commencing and continuing the prosecution against Mr. Herbert.

[134] It appears seemingly odd, that having formed the view that there was reasonable and probable cause for charging Mr. Hebert, one of the police officers concerned in the investigation would have sought to obtain a sample of DNA from Mr. Herbert by means not prescribed by law or otherwise than in accordance with the provisions of section 27 of the Anguilla Police Act⁴². This fact has not been denied by the defendant but in fact conceded by them.

⁴² R.S.A. c. A70

[135] Prior to 2016, there was no statute that authorized the taking of a sample of saliva for DNA analysis. Section 27 of the Anguilla Police Act only authorized the taking of non-intimate samples. Section 27(4) of the Anguilla Police Act at the material time provided that:

“For the purposes of this section “non-intimate sample” means—

- (a) a sample of hair other than a pubic hair;
- (b) a sample taken from a nail or from under a nail;
- (c) a swab taken from any part of a person’s body other than a body orifice;
- (d) a footprint or a similar impression of any part of a person’s body other than a part of his hand.”

It was not until the year 2016, by virtue of section 2 of the Anguilla Police (Amendment) Act, 2016 which amended the provisions of section 1 of the Anguilla Police Act that the meaning of non-intimate sample was extended to include saliva. Therefore, when police constable Mr. Vanroy Herbert attempted to extract a DNA sample from Mr. Herbert’s saliva, not only did he do so without Mr. Herbert’s consent, but also without any lawful authority. It is therefore not surprising that the magistrate presiding over the preliminary inquiry deemed this evidence inadmissible.

[136] At the time that Mr. Herbert was charged with the offence of murder, the results of neither the GSR analysis nor the DNA analysis were available to the police. Therefore, the only evidence available to the police at the time that Mr. Herbert was charged with the offence of murder was the intercepted communications, the witness statement from Raashan Richardson, wherein he stated that he had picked up Mr. Herbert and another man in the vicinity of where the murder occurred, the witness statement of Mr. Bryan who claimed to have seen unidentified individuals entering a vehicle habitually driven by Raashan Richardson after he hears what he described as an explosion, the witness statement of an individual who claimed to have purchased a mobile device for Mr. Herbert which was included in the intercepted communications. Therefore, given the state of the evidence available to the police at the time that Mr. Herbert was

charged, it cannot be said that such evidence, by themselves, could not have amounted to reasonable grounds for suspecting that Mr. Herbert had committed the offence charged or was in any way complicit therein.

[137] The results of the GSR analysis were obtained on or about 18th July 2014. It appears that the swabs taken from Mr. Herbert for GSR testing were taken approximately seven days after the commission of the offence and approximately two days after his arrest. Although the prosecution's expert testified that Mr. Herbert's clothing and his hands contained elevated levels of GSR, the presiding magistrate deemed this evidence inadmissible on account of what he found to be its unreliability. In any event, although the results of the GSR analysis, could not without more, point inexorably to the fact that Mr. Herbert had been complicit in Mr. Gumbs' murder, it nevertheless formed a suitable basis for reasonable and probable cause to warrant the continuation of the criminal prosecution against Mr. Herbert. The court in saying this is mindful of the fact that many a successful criminal prosecution have been obtained on the basis of purely circumstantial evidence.

[138] The court is constrained to find the defendant's argument that they immediately discontinued the criminal prosecution against Mr. Herbert once it became apparent that a successful prosecution could not be sustained on the strength of the available admissible evidence reasonable.

[139] It cannot be said that it would have been readily apparent to the prosecution that a successful prosecution could not have been sustained on the strength of the available evidence. Although it can be discerned from the conduct of the police investigators that they must have had knowledge that a portion of the evidence relied on was unfairly or illegally obtained, it cannot be readily inferred that the prosecution was actuated by malice or any indirect motive other than bringing the perpetrators to justice. There simply is not sufficient evidence from which malice can be inferred.

[140] In the court's view, it cannot be said that the prosecution's decision to proceed with the prosecution whether armed with unfairly and or illegally obtained evidence, which in and of themselves were wholly unreliable and incapable of substantiating the charge of murder without more, amounted to an abuse of process of the court by being tainted by malice. The court finds this to be particularly the case in light of the evidence of the taking of the DNA sample from Mr. Herbert, a fact which was not denied by the defendant. The court is of the considered view that this abuse of process may lend itself to the inference that the prosecution was somehow actuated by the oblique motive of bringing the actual perpetrator to justice. The conduct of the police investigators went above and beyond conduct which can merely be seen as "reckless" or "sloppy". Their conduct reeked of deliberate acts to secure Mr. Herbert being charged and prosecuted for the offence at all costs including the collection of evidence which evidently was contrary to law. In short, the conduct of the police investigation fell nothing short of reprehensible. Nevertheless, that is not to say that there was not some other evidence capable of amounting to reasonable and probable cause for the prosecution, the presence of which would have very well negated any inference of malice.

[141] In the circumstances, the court is not inclined to draw the adverse inference that in the absence of reasonable and probable cause, malice can be imputed to the prosecution where the decision to charge and prosecute cannot be reasonably explained otherwise. The prosecution would have been expected to have assimilated all the available admissible evidence and thereafter apply their mind to the question of whether, the charge and the prosecution could be justified. Assuming that this was done in the present case, then there would be no difficulty in arriving at the conclusion that there could have been and that there was reasonable and probable cause for arriving at the decision to charge and prosecute Mr. Herbert in light of the available evidence that was truly admissible.

- [142] Therefore, the court has formed the view that the prosecution did have an honest believe in the charge laid against Mr. Herbert. In the circumstances, it is not left open to the court to find that the prosecution was brought against Mr. Herbert maliciously, or that it was devoid of proper motive.
- [143] The court holds, that there existed reasonable and probable cause to justify charging Mr. Herbert and that the commencement and continuation of the prosecution against him was not malicious. Therefore, Mr. Herbert cannot succeed in his claim for malicious prosecution.
- [144] The court has given consideration to Mr. Herbert's claim for false imprisonment in so far as it relates to his period of detention before being charged. The tort of false imprisonment has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it. It is not necessary to prove either bad faith or lack of care to establish liability. The claimant bears the burden of proving the fact of imprisonment. If proved, it is then for the defendant to show that he had lawful authority for acting as he did. If there is no lawful authority, then the person responsible for the imprisonment is liable even if he acted in accordance with the view of the law which at the time, was accepted by the courts as being correct. The defendant must show that there was reasonable and probable cause for the detention which does not shift the burden of proof.
- [145] The court having held that at the time of Mr. Herbert's arrest there was reasonable suspicion of his having committed the offence, it follows that his claim for false imprisonment cannot succeed. There is no allegation that after being arrested Mr. Herbert was not taken before the magistrate within a reasonable time of his initial detention. In fact, Mr. Herbert was arrested on 17th June 2012 and charged on 19th June 2012. He was taken before the magistrate on 20th June 2012 and remanded in custody. Clearly the magistrate had no authority to grant him bail. Therefore, Mr.

Herbert was remanded in custody at HMP by lawful authority deriving from the remand warrant issued by the magistrate.⁴³

- [146] Given the findings that the court has made herein regarding the liability of the defendant, the court makes the following orders.

Order

- [147] Having regard to the court's findings herein, the court is of the view that Mr. Herbert has failed to prove his claim for wrongful arrest and false imprisonment. Neither does Mr. Herbert succeed on his claim for malicious prosecution on a balance of probabilities. Accordingly, Mr. Herbert's claim stands dismissed.

- [148] Given some of the observations that the court has made in the present case regarding the conduct of the police in the criminal investigation, the court does not find this to be an appropriate case to award costs against Mr. Herbert. Accordingly, the court makes no order as to costs.

Shawn Innocent
High Court Judge

By the Court

Registrar

⁴³ Fleming v Myers and Another [1990] LRC (Crim) 575

