

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. GDAHCV2008/0328

BETWEEN:

DEXTER SMITH

Claimant

and

- 1. THE ATTORNEY GENERAL**
- 2. COMMISSIONER OF POLICE**
- 3. CORPORAL PORTIA NICHOLAS**
- 4. SERGEANT SAMUEL SMART**

Defendants

Appearances:

Mr. Ruggles Ferguson with Ms. Anika Johnson for the Claimant
Mr. Adebayo Olowu for the Defendants

2010: June 6, 9
October 7

JUDGMENT

- [1] **PRICE FINDLAY, J.:** This matter arises out of the arrest of the Claimant on charges of possession of a controlled drug, importation of a controlled drug and trafficking of a controlled drug.
- [2] As a result the Claimant filed a Claim in which he sought the following relief:
- a) Damages for malicious prosecution ... which said prosecution commenced on the 7th December 2004 and ended on the 13th December 2007;
 - b) Legal fees in the amount of EC\$6,000.00 which he incurred as a result of the charges laid against him;
 - c) Interest on both awards of damages and legal fees claimed, \$6,000.00 at the rate of 6 percent per annum from the date of arrest on the 7th December 2004

to judgment and at the said rate of 6 percent per annum from the date of judgment to the date of payment or at such rate and for such period as the Court shall deem fit;

d) Further or other relief;

e) Costs.

[3] The claim for false imprisonment was discontinued pursuant to the Order of Master K. Cenac-Phulgence (Ag.) dated December 12, 2008.

[4] The Claimant in this matter, Dexter Smith, was an employee of LIAT (1974) Ltd. on the 6th October 2004. He is a married man with three small children.

[5] He was at work on the 6th October 2004 when he was approached by a fellow employee, Kyron Nicholas, and informed that he Nicholas had bags to drop off and asked him if he wanted to do the job. Nicholas told the Claimant that the bags belonged to his neighbours.

[6] Sometime later (approximately 2 hours) Nicholas informed the Claimant that he had cleared the bags. The Claimant got his vehicle and Nicholas placed the bags in the Claimant's vehicle. Nicholas also told the Claimant that there was one more bag to be cleared but he would do that after the last flight came in.

[7] After the arrival of the last flight the Claimant was informed by another employee, Andy Greenidge, that he should remove the bags from his vehicle as Nicholas had been caught "trying to clear a bag with drugs".

[8] The Claimant took the three bags out of the jeep and rested them on the ground, and dropped Greenidge to his home at Frequente. He returned to the airport, went looking for Nicholas. He did not speak to him that evening and went home. He decided to take the (3) bags home with him, and as he completed placing the bags in the vehicle, two police officers approached him. He recognized one of the officers as the third Defendant. He did not recognize the other officer.

- [9] He was questioned about the bags. He explained that he received the bags from Nicholas who cleared them and that they were to be dropped off to Nicholas' neighbours at Dixie in Springs.
- [10] He was asked to open the bags. He did so. The bags were searched, nothing illegal was found. He was told he was free to leave.
- [11] He brought the bags back to the airport the following day, and at around 11:00 a.m. he and Rawle Alexander went in Alexander's vehicle to drop the bags for Nicholas at Dixie.
- [12] He had a conversation with Nicholas on the 8th October when Nicholas told him that he was clearing the bags for his cousin who was from abroad.
- [13] On the 7th December, the Claimant reported for work and was told by his supervisor that the police wished to see him. He was seen by the third and fourth Defendants at the LIAT office where he was informed that they had a warrant to search both his vehicle and his home.
- [14] He states that he looked at the warrant it was not signed, but the officers told him that it did not matter, they were going to search his home regardless. Nothing illegal was found in either the vehicle or the home.
- [15] The Claimant then accompanied the officers to the South St. George Police Station where he was questioned. While there Nicholas came in and was questioned in the Claimant's presence. Nicholas indicated that it was the Claimant who had asked him to clear the bag for a friend. The Claimant accused Nicholas of being a "stinking liar". Nicholas replied that he was trying "to save your ass".
- [16] The Claimant was informed after this interview that he was going to be charged with possession of cannabis and for trafficking.
- [17] He appeared at St. George's Magistrate's Court on 9th December 2004 and was granted bail in the sum of EC\$100,000.00 with two sureties. He was suspended from his employment until March 2008 without pay as a result of the charges.

- [18] He went on trial; the trial concluded on 13th December 2007 when a no case submission made by his Attorney was upheld.
- [19] He testified that not only was he suspended from his job but that he suffered injury to his reputation and livelihood. He said that he lost his ability to earn overtime pay; he lost promotions and salary. He also asserts that the charges were filed maliciously and without reasonable and probable cause.
- [20] He testified that he had a life insurance policy which lapsed due to non payment of the monthly premium. He testified that it was due to his suspension that he was unable to meet the \$700.00 per month premiums. The policy lapsed in January 2005. No further particulars were given with respect to the policy.
- [21] He also testified that he paid some EC\$6,000.00 to his Attorneys for his defence in the Magistrate's Court.
- [22] Under cross-examination he denied ever having done any business with Nicholas. He denied knowing where Nicholas lives. He denied giving Nicholas any instructions. He only knew Nicholas as a co-worker. He specifically denied clearing any bags or asking anyone to clear any bags on his behalf. He admitted to dropping bags off for Nicholas, but that was all.
- [23] His position was baggage handler, Nicholas was baggage agent. The baggage handler assisted the baggage agent. If unaccompanied luggage arrived, the baggage handler would put them to one side; the baggage handler would then take inventory of the bags and would call the passenger and arrange to get the bags to them. LIAT would deliver bags to passengers on occasion.
- [24] If the passenger wants LIAT to deliver the baggage, it is for the baggage agent to go to Customs and deals with the Customs Officer. It is up to the Customs Officer to decide whether the bag can be cleared without the passenger being present. He asserted that the baggage handler has no authority to clear bags.

- [25] Leanwall Perrotte testified that on 6th October 2004 Nicholas cleared three bags which had arrived at the then Point Saline International Airport after the passengers to whom they belonged had arrived. She said that the bags had been lying in the Customs area waiting to be cleared.
- [26] Nicholas came and told her he had a bag to clear for his cousin. She said she was present when Nicholas had cleared three bags earlier. She was not the Customs Officer who assisted him.
- [27] She testified that Nicholas did not mention the Claimant's name in relation to any of the bags.
- [28] When Nicholas approached her about the one remaining bag, he did not have the requisite paperwork. She observed that the bag was locked with a padlock. The bag carried the name Paul Jones with St. Vincent, Grenada as the address.
- [29] Nicholas was calm. She provided some keys. Nicholas opened the bag. When the bag was opened she saw several plastic bags. Nicholas commented "What kind of old cheese and old pudding that man have." Previously, according to her testimony, Nicholas had said that the bag had clothes and food.
- [30] She testified that she recognized what was in the bag. It appeared to be compressed cannabis. She asked Immigration to contact the police. Nicholas was asked who his cousin was. He responded it was an old time cousin. The bag and Nicholas were handed over to the police.
- [31] Andy Greenidge testified that on the day in question he was relaxing at the airport with the Claimant when Nicholas approached the Claimant and asked him to deliver some bags for his neighbours. If the Claimant was the mastermind behind this matter, why would Nicholas be asking him to deliver the bags to Nicholas's cousin.
- [32] Nicholas brought the bags to where he and the Claimant were. The Claimant brought the van around and he put the bags into the van.

- [33] Sometime later he told the Claimant to get the bags out of the vehicle and drop him (Greenidge) home.
- [34] Rawle Alexis is also an employee of LIAT. He testified that on 7th October 2004, while at work at about 5:00 a.m., the Claimant asked him if he knew where Nicholas lived as he had three bags for him. The Claimant told him he wanted to drop the bags off for Nicholas. Alexis told the Claimant that he knew where Nicholas lived and when he got a break he would accompany the Claimant to drop off the bags.
- [35] At around 9:00 a.m. both he and the Claimant went to Dixie in Springs to drop the bags for Nicholas. They went in Alexis' car. Alexis called Nicholas, who came and picked up the bags. There was a conversation between Alexis and Nicholas. The Claimant, however, did not come out of the vehicle. Nicholas took the three bags and went into his house.
- [36] The Defendants' case was supported by the evidence of the third Defendant, Corporal Portia Nicholas, who, according to her, is not related to Kyron Nicholas, one of the main protagonists in this matter.
- [37] She was at the date of the incident, 6th October, 2004, a Detective Corporal of the Royal Grenada Police Force. She said she received a report and proceeded to the airport. On her arrival, she went to the Immigration Department.
- [38] When she arrived she observed Immigration Officers around a black suitcase; they were examining a "brown black like package". Nicholas was present and looking on. She spoke with the persons present and then packed the packages back into the suitcase and took both the case and Nicholas into the Immigration Office.
- [39] Nicholas told her that one Paul James, claiming to be his cousin, called him and asked him to clear the bag. She spoke to a superior and was told to have Nicholas go back to the LIAT office, and see who would come to collect the suitcase.

- [40] She observed the Claimant on the sidewalk in front of the departure area. The Claimant called out to Nicholas, walked towards the LIAT counter and entered the LIAT office. She next saw the Claimant when he crossed the road and went to his van. She saw him fixing a black bag in the van. She asked the Claimant to check the bag. She did so and saw foodstuff in the bag. The Claimant told her the bag belonged to Nicholas. She later detained Nicholas for questioning.
- [41] She conducted a Question & Answer interview with Nicholas at the South St. George Police Station. He was then released.
- [42] On Thursday 7th October 2004 she requested that Nicholas report to the police station. He did, and another Question & Answer interview took place. Again, Nicholas was released
- [43] During these interviews Nicholas kept to the story that Paul James (Jones) called him and said that he was his cousin and that he wanted him to clear the bags (4) for him.
- [44] On 11th October 2004, she met Nicholas on her way home and he indicated to her that he wanted to speak to her. Nicholas was in the presence of his girlfriend. He told her he now wanted to tell the truth about the bag. He told her that it was the Claimant who sent him to clear the bag from Customs.
- [45] On 6th December 2004, Cpl. Nicholas again detained Nicholas at the South St. George Police Station for questioning, and yet another Question & Answer interview took place. In this interview Nicholas states that it was the Claimant who asked him to clear the bags and that he lied because the Claimant had threatened him.
- [46] The following day the Claimant was detained by Cpl. Nicholas and taken to the South St. George Police Station. A Question & Answer interview took place. In that interview the Claimant denied any involvement with the bag and the drugs.

- [47] A "confrontation interview" was conducted by Cpl. Nicholas with the Claimant and Nicholas, where the Claimant again denied the allegation of Nicholas. The Claimant said to Nicholas, "The machine grinding slow but grind fine ...". Nicholas responded that he only trying to "cover his ass" and alleged that the Claimant had threatened to harm him and that the Claimant came to work with a gun. Again, the Claimant accused Nicholas of being a liar. The Claimant became very angry with Nicholas to the point that Cpl. Nicholas had to warn the Claimant.
- [48] The Claimant was subsequently charged by Cpl. Nicholas with the offences of possession of a controlled drug, trafficking in a controlled drug and importation of a controlled drug.
- [49] The fourth Defendant did not give a witness statement, and his role in the entire matter appears to be limited to taking a statement from Nicholas.
- [50] In cross-examination, Cpl. Nicholas testified that she has been police officer for 17 years and was in the Drug Squad for 7 years at the time of the incident.
- [51] She testified that she could not say from personal knowledge that the Claimant was in possession of the black bag in which the cannabis was found. She said that she cannot say exactly when the Claimant was in possession of the bag. She said that she formed the conclusion that the Claimant was in possession based on information received by her. What that information was, or from whom it came, she did not say.
- [52] She admitted that the bag which she saw in the possession of the Claimant did not contain any drugs. She also admitted that the other three bags which were searched had no drugs or other illegal substances in them.
- [53] She denied being related to Kyron Nicholas even though their names are spelt the same. She said she was unsure whether they were cousins.

- [54] She reviewed all the statements in the matter and she understood the contents. She also admitted that Nicholas in both interviews of the 6th and 7th October 2004 stated that the bag belonged to his cousin Paul James (Jones).
- [55] Nicholas then changed his story on the 11th October 2004, and at that time said that it was the Claimant who requested that he clear the bag. She said that Nicholas' new story pointed her away from Paul James (Jones) to the Claimant.
- [56] She did not record this version as the conversation took place in the road close to her home, but she wrote down what Nicholas said to her in her pocket book. How she managed to do this when, according to her, it was already dark is open to question.
- [57] She did not have another recorded interview with Nicholas until the 6th and 7th December 2004.
- [58] She only had one Question & Answer interview with the Claimant and in that interview the Claimant denied any involvement with the drugs.
- [59] She also admitted that she did not have a good rapport with the Claimant. She admitted that the rapport had deteriorated more than two years prior to this incident. She maintained a good relationship with the other LIAT staff members.
- [60] She recalled the confrontation between the Claimant and Nicholas at the police station, and she recalled Nicholas accusing the Claimant of having a gun, but does not recall Nicholas saying he felt threatened by the Claimant.
- [61] Nicholas was never charged in the matter. She also admitted that apart from Nicholas, no one else who gave a statement in the matter linked the Claimant to the bag or the drugs.
- [62] She stated that she was not pressured by her superiors to charge the Claimant. She denied that she was advised by a senior officer that Nicholas ought to have been charged. She did not use the Claimant as a scapegoat.

[63] In order for a Claimant to establish a claim of malicious prosecution he must establish four elements, that is,

- (a) That the law was set in motion against him on a criminal charge;
- (b) He was acquitted on the said charge;
- (c) That the prosecutor lacked reasonable and probable cause for instituting the proceedings; and
- (d) That the prosecutor was activated by malice in instituting the proceedings – per Wooding CJ in **Wills v Voisin** [1963] 6 WIR 50.

[64] In this case it has been clearly established that the first two elements exist; the Claimant was arrested and charged with three drug offences arising out of the 6th October 2004 incident.

[65] The Claimant was subsequently acquitted on all charges following a no case submission by Counsel for the Claimant.

[66] What therefore falls for consideration is whether, on the facts before the Court, the two remaining conditions have been established.

[67] The first remaining factor to be considered is whether the Defendants lacked reasonable and probable cause in instituting the proceedings against the Claimant.

[68] Probable cause has been defined by Hawkins J in **Hicks v Faulknes** [1878] 8 Q.B.D 167 at 171 as follows:

“I should define “reasonable and probable cause” to be an honest belief in the guilt of the accused based on a full conviction, founded on reasonable grounds, of the existence of a state of circumstances which, assuming to be true, would reasonably lead an ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was properly guilty of the crime imputed.”

[69] The Claimant in this matter was charged with possession, trafficking and importation of the drug cannabis.

[70] The evidence against him was provided by one party, Kyron Nicholas, the person who was caught clearing the bags at Customs at the Point Saline International Airport and who initially told both the Customs Officer (Leanwall Perrotte) and the police that he was clearing the bag for his cousin, Paul James (Jones).

[71] Was there evidence that the Claimant was in possession of the bag and, therefore, its contents?

[72] The concept of possession in law is set out by Diplock J in **DPP v Brookes** [1975] 21 WIR 411:-

“In the ordinary use of the word ‘possession’, one has in one’s possession whatever is, to one’s one knowledge, physically in one’s custody, or under one’s physical control. This is obviously what was intended to be prohibited in the case of dangerous drugs ...”

[73] In yet another case, **R v Boyesen** [1982] 2 ALL ER 161 Lord Scarman stated:-

“Possession ... denotes a physical control, or custody of a thing, plus knowledge that you have it in your custody or control. You may possess a thing without comprehending its nature, but you do not possess it unless you know you have it.”

[74] Corporal Nicholas is an officer of considerable experience. At the time of the incident she was a Drug Squad Officer for approximately 7 years. She had also given evidence in numerous matters over that period of time.

[75] The sole evidence which tied the Claimant to the drugs was that of Kyron Nicholas, the person who changed his testimony after citing Paul James (Jones), his cousin, as the person who requested that he clear the bags.

[76] The officer was given the information implicating the Claimant on 11th October 2004, but surprisingly, Nicholas was not brought in for a formal statement with respect to this new and important revelation until 6th December 2004.

[77] No one else informed Cpl. Nicholas that the Claimant was in possession of the drugs and the officer had no personal knowledge of the Claimant being in possession of the drugs.

- [78] No evidence was proffered as to what led Cpl. Nicholas to conclude that the Claimant was in possession of these drugs other than the say so of Kyron Nicholas.
- [79] The witness Andy Greenidge was present when Nicholas asked the Claimant to drop the bags off at Springs in St. George's. Apparently, the police never questioned nor interviewed Greenidge, even though the Claimant told the officer that he was asked by Nicholas to drop the bags off at Springs.
- [80] The Defendants depend on what is referred to as the Claimant's behaviour and the fact that the Claimant was present at the airport and was making serious inquiry or concern about the person caught clearing the drugs.
- [81] The Claimant was an employee of LIAT at the time of the incident and on duty on the day in question. He was at the airport, according to the evidence, working. The Court can impute no improper motive for the Claimant's presence at the airport.
- [82] The Claimant's vehicle and a bag in his vehicle were searched by the police and nothing illegal found. Corporal Nicholas also testified that she saw the Claimant standing on the sidewalk in front of the departure area, he called out to Nicholas and walked behind the LIAT counter and entered the office. He did not say anything to Kyron Nicholas.
- [83] Again, the Court finds nothing in this behaviour that is untoward. If a fellow employee is questioned by the police, the Court thinks it would only be natural for other employees to be interested in what is going on. It is in no way an indication of complicity on the part of the interested employee, and I do not find that there was anything untoward in the Claimant's behaviour at the airport on the day in question.
- [84] The Defendant Nicholas admitted that no other evidence but that of Kyron Nicholas implicates the Claimant in the matter.

- [85] What, therefore, was the basis for charging the Claimant with the three offences? Given the evidence before the Court, I find that there was no reasonable or probable cause for the charges which were laid by the Defendants against the Claimant.
- [86] The other matter to be determined in this matter is whether the institution of the proceedings was activated by malice.
- [87] Malice has been defined by Cave J in the case of **Browne v Hawkes** as:-
- “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.”
- [88] 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.
- [89] 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.
- [90] “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.
- [91] 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."

[92] 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.

[93] 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.

[94] I find that there is no liability in the fourth Defendant, Sgt. Samuel Smart, whose sole role in the matter, as stated before, was to record one of the Question & Answer interviews with Kyron Nicholas.

[95] Having concluded that the prosecution of the Claimant was malicious, it is now the duty of the Court to ascertain the damages, if any, to be awarded to the Claimant.

[96] In coming to a decision on the quantum of damages the Court needs to recognize that maliciously putting the law into motion against an individual could result and indeed does result in damage to the individual's character and reputation. He may also suffer damage to his property.

[97] In **Savill v Roberts** per Sholt CJ [1698] 12 Mod. 208:-

"There are three sorts of damages to a plaintiff, any one of which is sufficient to support an action for malicious prosecution: "first, damage to his fame if the matter whereof he is accused is scandalous. Secondly, to his person whereby he is in prison. Thirdly, to his property whereby he is put to charges and expenses."

- [98] In respect of malicious prosecution the Claimant is entitled to recover for injury to reputation as well as injury to feelings, that is, indignity, humiliation and disgrace caused to him by the fact of the charge preferred against him.
- [99] The Claimant here has given evidence of damage to his property, namely the uncontroverted evidence that he has spent EC\$6,000.00 on legal fees in the defence at the Magistrate's Court proceedings.
- [100] In this matter the Claimant alleges that his reputation has suffered as a result of the charges brought against him. His reputation is likely to have suffered as a result of these charges. They were very serious charges, trafficking and importation, as well as possession.
- [101] The Claimant suffered; he was suspended without pay from his job from 9th December 2004 to 8th March 2008. His trial did not conclude in the Magistrate's Court until December 2007. He said that his insurance policy lapsed; he lost his property at Woodlands.
- [102] While no evidence was led as to the value of the policy of life insurance nor of his salary, the Claimant did suffer loss of reputation. These charges hung over the Claimant's head for a considerable period of time and must have caused him severe anxiety and concern.
- [103] In light of the above, I conclude that the Claimant is entitled to the sum of EC\$40,000.00 as general damages, the sum of EC\$6,000.00 as special damages. Costs to the Claimant in the sum of EC\$4,000.00.
- [104] Interest will run on the general damages at the rate of 6 percent per annum from the 13th June 2008 (the date of the claim) to date.
- [105] Interest on the special damages will be at the rate of 6 percent per annum from 13th December 2007 to date.

[106] I was referred to the following cases:

Wells v Voisin [1963] 6 WIR 50

Herniman v Smith [1938] 1 All ER 1

Glinski v Mc Iver [1962] 2 WLR 832

Bradshaw v Waterlow & Sons Ltd. [1915] 3 K.B 527

Weishof v Metropolitan Police Commissioner [1978] 3 All ER 540

Hicks v Faulknes [1878] 8 Q.B.D 167

Ted Alexis v AG of Trinidad & Tobago – High Court Appeal No. S-1555 of 2002 (unreported)

Ortiz (Jose) & Ors v The Police [1993] 45 WIR 118

Trobridge v Hardy [1955] 94 CLR 147

Thaddeus Bernard v Nixie Quashie – Civil Appeal No. 159 of 1992 (Trinidad & Tobago)

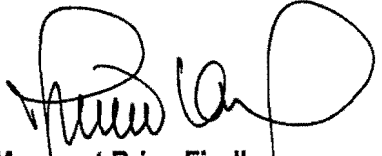
Ted Aqui v AG & Anor – High Court Appeal No. S- 1563 of 2002 (Trinidad & Tobago)

Sorzano & Ors v AG of Trinidad & Tobago – High Court Appeal No. 101 of 2002

Gibbs & Ors v Rea [1998] 5 WIR 102

Romero & Macrado v R [1994] 46 WIR 15

[107] I thank Counsel for their assistance in this matter.


Margaret Price Findlay
High Court Judge