

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2015/0001

BETWEEN:

ERASTUS LAVILLE

Claimant

And

AVALON ANTHONY (Police Constable)

1st Defendant

**COMMISSIONER OF POLICE OF THE
ROYAL ST. CHRISTOPHER AND NEVIS POLICE FORCE**

2nd Defendant

DIRECTOR OF PUBLIC PROSECUTIONS

3rd Defendant

THE ATTORNEY GENERAL OF ST. KITTS AND NEVIS

4th Defendant

Appearances:-

Mr. Chesley Hamilton of Counsel for the Claimant.

Ms. Violet Williams of Counsel for the Defendants.

2017: November 10th

JUDGMENT

[1] On 11th July, 2011 the claimant, who was then 18 years old, was arrested on suspicion of murder of one Wendell Wilkinson. He was detained in police custody for six days then released. He was re-arrested on 16th October, 2011 and charged with murder.

- [2] A preliminary inquiry was subsequently held, at the conclusion of which the claimant was committed to stand trial at the September, 2012 Assizes.
- [3] The claimant's trial commenced on 23rd May, 2013 but ended in a mistrial on 20th June, 2013. His retrial commenced on 24th June, 2014 and resulted in an acquittal on 7th July, 2014.
- [4] The main witness for the prosecution was one Kadeem Carty who had given a statement to the police in which he claimed to have seen the claimant, whom he had known from primary and high school, running after the deceased and that he saw the deceased fall to the ground whereupon the claimant shot him with a gun.
- [5] On 07th January, 2015, the claimant commenced an action against the defendants seeking a declaration that his arrest, charge, detention and prosecution were wrongful, unconstitutional and illegal and seeking damages for, inter alia, wrongful arrest, false imprisonment, malicious prosecution. By consent, the claim was amended so that the claim is now simply one for general damages for wrongful arrest, false imprisonment, malicious prosecution, malicious process and misfeasance in public office and special damages in the sum of \$75,000.00.
- [6] The basis on which the claimant asserts malicious prosecution is set out at paragraph 21 of his amended statement of claim. In short the claimant avers that the 1st defendant knew at all times that there was no basis for arresting, charging or instituting proceedings against the claimant because the 1st defendant was aware of evidence in the form of a sworn and notarized statement from one Jason Liddie dated 2nd September, 2011 in which it is said he had implicated two other persons in the murder but made no mention of the claimant. This fact was only disclosed to the claimant just prior to the commencement of the second trial.
- [7] It is further contended that during the preliminary inquiry, the claimant disclosed a compact disc to the prosecution which revealed a conversation purportedly

between Carty and his brother, Jamie Huggins, which the claimant says demonstrates that Carty gave untruthful evidence. Notwithstanding the contents of the tape recording, the 3rd defendant continued the prosecution.

[8] The claimant also wishes to adduce an undated statement purportedly signed by one Gavin Whyte, deceased, and a copy of the transcript of his evidence given at the claimant's second trial. The claimant contends that this evidence contradicts the evidence given by the prosecution's main witness.

[9] In view of the foregoing, the claimant asserts that the 1st, 2nd and 3rd defendants allowed Carty to give false evidence against the claimant.

[10] In reply, the defendants aver that at the time the police received the statement of Liddie he was a serving prisoner at HMP. His statement indicated that he did not see the shooting, that he saw two unmasked men running away, one with a gun in his hand; the other with his hand in his waist and that someone had told him that two masked men shot the deceased.

[11] As it relates to the tape recording, the defendants further aver that the tape recording does not indicate when the conversation took place, does not identify any of the speakers by name and that several parts of the recording are inaudible.

[12] As it relates to the evidence of Gavin Whyte, the defendants object to its admissibility on the basis that it is irrelevant and unreliable.

[13] The defendants' preliminary application is to exclude this tape recording and to strike out all references in relation to the evidence of Gavyn Whyte on the ground that they are inadmissible and irrelevant to the determination of the issues in this case.

[14] The defendants contend that it is beyond dispute that the tape was not in the possession of the police or the claimant at the time of his arrest and charge; was not available at the preliminary inquiry and was excluded by the judge at the first

trial when an attempt was made to tender it.

[15] In short, the defendants contend that its authenticity, reliability and relevance have not been established.

[16] For his part, the claimant submits that the tape recording is relevant because it is proof that the prosecution did maliciously and without reasonable and probable cause prosecute the claimant. Its purpose is therefore to challenge the credibility of the prosecution's main witness. Given that the 3rd defendant was aware of the contents of the tape but proceeded with the prosecution nonetheless, this, says the claimant, affords clear evidence of the intention of the defendants to maliciously prosecute the claimant.

[17] Further, it is said that given the nature of the contents of the tape, it can rationally affect, whether directly or indirectly, the assessment of the probability of the existence of wrongful and malicious prosecution which is a fact in issue.

[18] As to Gavyn Whyte's evidence, the claimant submits that it is relied upon to attack the credibility of Carty's evidence as it directly contradicts it. The claimant reasons that the jury's not guilty verdict must mean that they rejected Carty's evidence and accepted Whyte's.

Issues:

[19] The issues for resolution fall within a narrow compass: (i) whether the tape recording and the undated statement and transcript of evidence of Gavin Whyte are admissible.

[20] The court keeps at the forefront of its mind that the exercise on which it is embarked is not the trial of the action. Thus, in seeking to make a determination on the question of admissibility of evidence I am concerned with whether it is relevant to and probative of some fact in issue in the case.

[21] In this case, the disputed material is centrally geared towards feeding the allegation of malicious prosecution. It is perhaps worth stating the essential elements that need to be established in order for an action for malicious prosecution to succeed, for these provide the framework within which to form a proper evaluative judgment as to the admissibility of the disputed material.

[22] The essentials of the tort of malicious prosecution are succinctly stated by the learned authors of **Clerk and Lindsell of Torts** (21st edition) page 1182, paragraph 16-09:

“In an action for malicious prosecution the claimant must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him by the defendant on a criminal charge; secondly, that the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause; fourthly, that it was malicious. The onus of proving every one of these is on the claimant. Evidence of malice of whatever degree cannot be invoked to dispense with or diminish the need to establish separately each of the first three elements of the tort.”

[23] The concept of reasonable and probable cause requires that the police officer must have an honest belief in the accused's guilt, founded on facts which could reasonably lead any ordinary prudent man to conclude that the accused was guilty of the offence with which he is charged. The test has both a subjective and objective element in that reasonable cause must appear from the facts and the officer must in his own mind apprehend that there is a proper basis for the charge. See **Manzano v The Attorney General of Trinidad & Tobago**¹.

[24] It is a heavy burden to establish that the prosecutor lacked reasonable and probable cause for the prosecution and that he was actuated by malice. Lord Kerr put the matter thus in **Williamson v The Attorney General of Trinidad and Tobago**²:

¹ Civil Appeal No. 151 of 2011

² [2014] UKPC 29; (2014) 85 WIR 452

“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 the proof of a negative proposition, normally among the most difficult of evidential requirements.”

[25] From the foregoing principles, it follows that the critical issue on this application is whether the existence of a tape recording which came to light after the institution of proceedings, and on which the main witness for the prosecution is alleged to admit that he was not being truthful when he claimed to have witnessed the claimant commit the murder, is relevant in establishing whether the defendants had reasonable and probable cause to institute and/or continue the prosecution of the claimant?

[26] The test for relevance is statutorily established by section 63 of the Evidence Act, 2011. It provides:

“Evidence that is relevant in proceedings is evidence that, if it were accepted could rationally affect, whether directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceedings.”

[27] It is further provided in section 64:

“Evidence that is relevant to proceedings is admissible, and shall be admitted in the proceeding, and evidence that is not relevant to the proceedings is not admissible.”

[28] It is accepted by both sides that this tape recording only surfaced during the course of the preliminary inquiry. This means that this information could not have operated on the mind of the 1st defendant at the time when he laid the charge against the claimant.

[29] However, given that it was disclosed to the prosecution during the preliminary inquiry, in my view, if the contents of the tape recording were accepted, and if the defendants had knowledge of the contents of the tape recording during the course

of the prosecution, then this could rationally affect an assessment of the probability that the defendants had no reasonable and probable cause to continue the prosecution.

[30] Having determined its relevance, I must be satisfied that the tape recording can be properly authenticated. The tape recording is electronic evidence within the meaning of section 144 of the Evidence Act, 2011. Section 146 provides for the manner of authentication of such evidence:

“The person seeking to introduce an electronic record in any legal proceeding has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be.”

[31] The common law position regarding the admissibility of tape recordings is summarized in **R v Maqsood Ali**³. The facts, as taken from the headnote are as follows. The police detained two suspects, A and M, to assist them in a murder enquiry. They were taken into a room in which was hidden a microphone secretly connected with a tape recorder in another room. None but the police knew of the presence of the microphone. The tape recorder was switched on for approximately an hour during which time it recorded a conversation between the two men in a Punjabi dialect. The tape recording was imperfect in that the microphone did not always pick up what was being said and the recording was overlaid from time to time by extraneous noises. A. and M. were charged on June 13th and 15th, respectively, with the murder of A.'s wife. In the course of the trial it became apparent that, apart from the tape recording, there was no direct evidence of an incriminating nature implicating the defendants. The defence strongly objected to the admissibility of the tape recording, the transcripts and the translations.

[32] It was held that a tape recording is admissible provided that:

- (i) Its accuracy could be proved;
- (ii) the voices properly identified; and,

³ [1965] 3 W.L.R. 229

(iii) that the evidence was relevant and otherwise admissible.

[33] While the recording in question was covertly obtained by the police in a police station the principle appears to be of general application and not confined to tape-recordings obtained *by the police*.

[34] In **R v Senat**⁴, tape-recordings obtained by private individuals were held to be admissible evidence.

[35] In the instant case, the claimants assert that they are in a position to identify the voice of the speaker as the Crown's main witness through his brother, Jamie Huggins, who is the maker of the tape and who has given a witness statement in which he states that he made the recording of the conversation with his brother, Kadeem Carty, at Camp Springfield and that a true and accurate transcription was made of the recording.

[36] Additionally, the claimant has stated in his witness statement that during his second trial Carty admitted that it was his voice on the tape recording.

[37] It is well to bear in mind at this stage the important distinction between the question of admissibility and the weight to be attached to the evidence. The degree of weight to be attached to the material, if admitted, is for the trier of fact. Thus I need not delve into the reasons why the prosecution may not have attributed any credibility to the tape recording.

[38] I am therefore satisfied that the admissibility threshold is crossed in relation to the tape recording.

[39] In so far as the evidence of Gavin Whyte is concerned, the claimant relies on it to attack the credibility of Carty. The claimant asserts that the jury's verdict of not guilty means that they accepted Whyte's evidence and rejected Carty's. This

⁴ (1968) 52 Cr. App. R. 282

argument is fundamentally flawed. One cannot speculate about the reason for a jury's verdict. The most that can be said with any certainty is that the prosecution did not persuade the jury beyond a reasonable doubt of the claimant's guilt. This does not logically or necessarily translate into a conclusion that they must have accepted one witness and rejected the other. It is equally possible that they may have rejected Whyte's evidence but still entertained reasonable doubts about the prosecution's case. But that is precisely the type of conjecture that is discouraged.

[40] In any event, and more importantly, the credibility of Carty is not in issue in these proceedings. He is not a witness in these proceedings. His credibility was a matter for the jury. Whyte's evidence, coming as it did well into the trial as part of the case for the defence, cannot rationally affect an assessment of the probability that the defendants had no reasonable and probable cause to continue the prosecution of the claimant.

[41] I am therefore satisfied that the undated statement of Whyte and whatever evidence he gave during the course of the trial are totally irrelevant to the issues in this case.

[42] Accordingly, I make the following orders:

- (i) The tape recording is admissible in these proceedings.
- (ii) The undated statement of Gavin Whyte and the transcript of his evidence at the second trial are inadmissible. All references thereto appearing in the witness statement of the claimant or elsewhere are struck out.

[43] I make no order as to costs.

Trevor M. Ward, QC
Resident Judge

By the Court

Registrar