

IN THE TUNBRIDGE WELLS COUNTY COURT

Claim No: 9TN91919

Merevale House,
42-46 London Road,
Tunbridge Wells,
Kent, TN1 1DP

Date: 07/12/2010

Before:

DISTRICT JUDGE LETHEM

Between:

(1) MR. ANTHONY BRANSON
(2) MRS. CORRINNE BRANSON
(3) MS. ANNA HELENA RUMMEY

Claimants

- and -

(1) MR. PEDRO FRANCISCO MARRERO
(2) MRS. MAVIS MARY JULIA MARRERO
(3) MR. GEOFFREY FRANKLIN
(4) MR. PETER MICHAEL MALONE

Defendants

MR. RUSSELL STONE (instructed by Messrs. Blake Laphorn) for the
Claimants/Respondents.
MR. PRITESH RATHOD (instructed by Messrs. Warners) for the Fourth
Defendant/Applicant.

APPROVED JUDGMENT

Tape Transcription of Marten Walsh Cherer Ltd.,
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JUDGE LETHEM:

1. This judgment relates to an application for summary judgment made by the fourth defendant, Peter Malone, on 6th July 2010 whereby he seeks that the case against him in this action is struck out pursuant to Part 24.
2. The background is that the fourth defendant is one of four defendants connected with a boundary dispute between the claimants, the Bransons and Ms. Rummey and Mr. and Mrs. Marrero, the first and second defendants. That is purely contextual because the case against the fourth defendant is a discrete case and confined to one incident which occurred on 3rd July 2009 whereby it is asserted that the defendant was guilty of malicious prosecution in relation to the first claimant.
3. At paragraph 19 of the amended Particulars of Claim the claimants plead that a fight occurred on 3rd July 2009. It is right that I go into the circumstances of what happened because it is germane to the way in which Mr. Stone, on behalf of the claimants, has approached this matter.
4. It is asserted that the third defendant was involved in an altercation with the first claimant for which the third defendant was responsible. The police were called to that incident and the officers examined the scene, being the garden where the fight had taken place, and found an indentation in the flower bed which was consistent with the first claimant's version of events.
5. The third defendant made a statement in which he alleged that the first claimant was the assailant. The first claimant was interviewed and denied the third defendant's account, casting him as the assailant.
6. It is a remarkable feature of the incident that it was recorded on a handheld Dictaphone by the second claimant and there is in existence a tape of what occurred; indeed, transcripts of those tapes appear in the bundle for today's application.
7. It is plain from the police logs that they were told of the existence of this tape and that, at one stage, they sought the tape. But it would seem (and I assume for today's purposes) that they never heard the tape until it was played at a subsequent magistrates' court trial.
8. Having investigated the matter, by 22nd June 2009 the police had decided not to proffer charges. This much is made very clear by the statement of Police Constable Jewitt at paragraph 11 of his statement. But paragraph 11 goes further because it makes it plain that significant in the police's thinking were two difficulties with the third defendant's case. The first one was a lack of corroboration, that essentially it was the first claimant's word against the third claimant's word and, secondly, that there was no evidence of a stick said to have been used in the course of the attack. So, on or about 22nd June, PC Jewitt informed the third defendant that the prosecution would not take place and there would be no charges.
9. Within four days, by 26th June 2009, the first defendant had been in touch with the third defendant and they had been in touch with the police suggesting that Mr. Malone had witnessed the incident and that he was able to provide independent evidence of what occurred.

10. With commendable alacrity, the police then went and saw Mr. Malone who made a statement. The relevant part of it reads as follows. He relates that he intended to go and see Mr. Marrero about some business, that he got out of his van and that he was walking towards Mr. Marrero's property, and he says this:

"I heard a commotion coming from my right. I looked to my right where there was a hedge and I raised my head up to look over it. I saw what appeared to be quite a tall, white, balding man of stocky build who was facing towards Pedro's house. As I noticed him I saw him bring one of his hands down upon a male in front of him. He seemed to be holding a thinnish stick which struck the guy in front of him. The guy who got hit was white, medium build with either a heavy stubble or a light beard. He was standing so I could see his right profile. The male with the stick brought it down upon the other male's head area looking perhaps to hit the front of his head. That male staggered and fell backwards and the other male seemed to jump on top of him and I presume that he was punching the other male on the floor. I couldn't tell how many times the male was punched, perhaps once or twice. I couldn't see what happened to the stick. At that point I thought a domestic was taking place and I didn't want to become involved. I went on to ring Pedro's doorbell."

That is, essentially, the end of the relevant aspects of the fourth defendant's statement.

11. As a result of this statement, the first claimant was further interviewed on 27th July, maintained his denial of the incident and, again, maintained that the third defendant was the assailant.
12. PC Jewitt was not finished with his investigations because his witness statement tells me that on Friday, 7th August, he went to the scene of the alleged incident with a Crimes Scene Investigator, one Mark Horton. At paragraph 17 of his statement he says that Mr. Horton took a series of photographs of the area of the alleged assault and that Mr. Horton was asked to concentrate on the angle of the hedge and whether a witness could see events from behind the hedge in the location of the incident. He goes on to tell me that he had already clarified that it was possible, if standing in Mr. Marrero's garden, to look over the hedge and see the persons or objects on the other side of the hedge and on either side of Mr. Branson's gate. So, as Mr. Rathod for the fourth defendant says, there was an element of the police checking the fourth defendant's version of events at that stage.
13. Having conducted these investigations, on 12th August a file was sent to the Crown Prosecution Service and I am told, by paragraph 19 of the witness statement of PC Jewitt, that on Tuesday, 18th August 2009, there was a 45 minute conference between the Crown Prosecutor and the police officer. Subsequently, on 24th August, the Crown Prosecution conveyed to PC Jewitt that the first claimant should be charged with a single offence of assault occasioning actual bodily harm. That occurred and the first

claimant stood trial in the magistrates' court on 19th December 2009, when he was acquitted.

14. It is said, at paragraph 24K of the amended Particulars of Claim that the magistrates made findings that the fourth defendant's evidence had not been credible and that a stick had not been used in the assault. Subsequent correspondence from the court shows that the recorded version of the magistrates' finding, suggesting that the fourth defendant was not credible, should have read (and possibly did read) that his evidence was not "reliable" as opposed to "credible".
15. The essence of the first claimant's case against the fourth defendant is found at paragraph 24K of the amended Particulars of Claim. Summarising the case, it amounts to this: The evidence that the fourth defendant gave to the police and which he supported by giving evidence in the magistrates' court was false; that it departed so much from the weight of the other evidence that the fourth defendant could not reasonably have held the view that it was accurate; that the reality is that the third defendant and the fourth defendant conspired together to produce evidence they both knew was false and that the purpose of producing that evidence was to ensure a prosecution of the first claimant occurred.
16. Mr. Stone, on behalf of the first claimant, says that at trial evidence will be called to show remarkable contextual similarities between the errors made in the evidence of the third and the fourth defendant, e.g. they both indicate the incident occurred at four o'clock when in fact we know that the incident happened over 40 minutes later, at about 4.42, certainly according to the police logs.
17. Mr. Stone says that that will be sufficient, taken as a whole or taken as part of the overall evidence, to lead to the conclusion that the third and the fourth defendants colluded together in order to provide that evidence and that, while he cannot produce direct evidence of the collusion, the inescapable inference from that contextual analysis and from a consideration of the evidence given will be enough to ensure the case proceeds beyond today and constitutes a real prospect of success at trial.
18. In supporting that approach, the chronology is key for Mr. Stone: that on 22nd June the police had committed themselves to a course of action that there would be no prosecution, that they had identified the weaknesses in the third defendant's case — the lack of corroboration and the difficulties with the stick, that within four days the fourth defendant had come forward and that the police had, by making the comments they made on 22nd June, committed themselves to a course of action which meant that once the corroborative evidence was in place with its reference to a stick, they had no option but to prosecute. In short, the holes in the prosecution case had been plugged and that they had no independent discretion to exercise. They had to go ahead.
19. The fourth defendant's case is a much more forensic approach, asking me to look at the evidence in relation to each and every one of the aspects and, because I am going to adopt that approach, I will return to that in greater detail later in this judgment.
20. In terms of the test that I have to apply, there is no dispute whatsoever between Mr. Rathod and Mr. Stone that the test is that set out in the case of *Swain v. Hillman* [2001] 1 All ER 91 and I draw from Mr. Rathod's skeleton that the words "no real prospect of succeeding" do not need any amplification. They speak for themselves.

"The word 'real' distinguishes fanciful prospects of success or, as Mr. Bidder QC submits, they direct the court to see whether there is a realistic, as opposed to fanciful, prospect of success.

21. Mr. Stone, in his skeleton, takes the matter slightly further and refers me to the well-known decision in *Three Rivers District Council v. Bank of England (No. 3)* [2001] 2 All ER 513, that the test is based not on probability but an absence of reality. I accept those propositions of law.
22. I add this point, not, perhaps, as a gloss but as a commentary. It is important in this judgment that I recognise it is not my job to try this case. It is only those cases that have no real prospect of success that should be weeded out at this early stage. I bear that distinction in mind.
23. It is accepted by both counsel that the tort has four elements: first, that the fourth defendant must be the prosecutor, secondly, that the issue must have been determined in the claimant's favour, thirdly, that the prosecution had to be without reasonable and probable cause and, fourthly, that the defendant acted maliciously.
24. As I have already indicated, I adopt Mr. Rathod's approach and consider each of those points in turn. I ask myself whether there is a real prospect that the first claimant will be able to show that the fourth defendant was a prosecutor. In this respect Mr. Rathod says that a mere witness is not a prosecutor; that the claimant will be unable to show that the fourth defendant desired a prosecution; that even if it could be shown that the fourth defendant acted maliciously that would not make him a prosecutor and that the police were not robbed of their discretion. And he draws my attention to broader considerations concerning deterrents.
25. In terms of my approach to the law, I have been referred to a number of cases which time prevents me from setting out in their full detail. Suffice it to say, the test which I apply is that found in the House of Lords' decision *Martin v. Watson* at page 86G and I pick up that extract at this point:

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

26. It seems to me a number of propositions emerge from that extract. First, and uncontroversially, Mr. Rathod is right that a mere witness is not a prosecutor, secondly, that to become a prosecutor within the meaning of this test the witness must falsely and maliciously give information, and finally that the information has to be

provided in circumstances where the police officer or the prosecutor is unable or it is virtually impossible for them to exercise any independent discretion or judgment.

27. The fact that we now have a modern prosecuting system, where private prosecutions are the exception as opposed to the rule, means the law accepts that one looks at substance as opposed to form. It matters not whether a police officer or whether the Crown Prosecution Service is the prosecutor if it is a third party, either a complainant or a witness, who has left the prosecution with no independent decision to make.
28. A similar passage appears in the decision *Mahon v. Rahn (No. 2)* [2000] 1 WLR 2150 at paragraph 269 where Brooke LJ said this:

“In a simple case it may be possible to determine the issue quite easily by asking these questions: (1) Did A desire and intend that B should be prosecuted? (2) If so, were the facts so peculiarly within A’s knowledge that it was virtually impossible for the professional prosecutor to exercise any independent discretion or judgment? (3) Has A procured the institution of proceedings by the professional prosecutor, either by furnishing information which he knew to be false, or by withholding information which he knew to be true, or both?”

It seems to me that that perhaps develops the test that I have

already drawn from the *Martin* decision by adding the third element.

29. That passage goes on: “In the more complex case it is likely to be more difficult to apply these tests” but I would adopt the approach suggested by Richardson J in *Commercial Union Assurance Co. of New Zealand Ltd. v. Lamont* [1989] 3 NZLR 187 when he said that the tests should be same when the police had conducted an investigation and decided to prosecute but they should be cautiously applied. The reason, of course, is, as he also took into account, that “prosecuting authorities are trained and accustomed to consider the evidence placed before them with an appropriately critical eye. Crown prosecutors, for example, have to be satisfied that there is enough evidence to provide a realistic prospect of conviction and paragraph 5 of the Current Code for Crime Prosecutors describes in clear terms the tests they have to apply before they can allow themselves to be so satisfied.”
30. The third extract on this area which I have borne in mind is paragraph 35 of the decision in *AH v. AB* [2009] EWCA Civ 1092 where the court said this:

“The two sentences constituting this passage must be incremental. Deliberate falsehood evidences an intent that there should be a prosecution, and sole knowledge means that the police have no independent check on it. This might suggest that the two things together, malicious intent and malign effect, will make the complainant a prosecutor. But that is in apparent tension with the principles adopted from well established sources by Judge Goodman and approved by the House. The

third of those principles distinguishes, though it does not decisively segregate, both malice and sole knowledge from the question of who is the prosecutor, whereas Lord Keith's formulation at first instance appears to conflate them. But a manifest corollary of his dual proposition is that where police do have independent verification and decide to prosecute, even a malicious key witness will not, or may not, be regarded in law as the prosecutor. If so, it would appear that the intervention of a public prosecutor may preserve a witness, even a malicious one, from liability in tort."

31. The very focus of that passage is whether or not the police have an independent check on the evidence or whether they have been robbed of that and further robbed of the ability to properly apply their minds in accordance with the prosecution code.
32. Mr. Stone says, as I have already indicated, that he will get home on this limb. In particular he focuses on the fact that the police would not have prosecuted without the fourth defendant's statement. That much is clear from what PC Jewitt told the first claimant on or about 22nd June. He focuses again on the fact that the police had committed themselves to two problems with the third defendant's case, the absence of corroboration and the absence of the stick. He points out that these were the very areas which were plugged by the fourth defendant's statement. He says that the police, having committed themselves to the position that they did on 22nd June, were essentially robbed of any independent ability to review the matter once an independent witness had come forward. In those circumstances, there is at least enough to go to trial to decide whether or not the fourth defendant was a prosecutor.
33. I should say, in this respect, that I accept Mr. Stone's proposition that the independent prosecutor, or the prosecutor, may be a witness other than the victim of the offence. In that respect, it seems to me, *Moon v. Kent County Council* [15 February 1996] is based on a very similar set of facts to this particular case. So I focus my mind on whether the police were robbed of that ability to review or to form an independent view.
34. Mr. Rathod says that there is no real prospect the claimant will succeed in that respect and it is worth considering the evidence that was available to the prosecution at the time they were considering the matter in August 2009 with the police officer.
35. There was the third defendant's account. There was the first claimant's account as set out in a number of interviews. Potentially there was the second claimant's account and certainly the police knew of the existence of a tape recording. Further, there would have been the statement or the notebook of the officers who attended the scene on the first occasion and noticed the indentation in the flower bed consistent with the first claimant's account and inconsistent with the third defendant's version.
36. There was, of course, the fourth defendant's statement which I have already referred to. On top of that, there were the observations of PC Jewitt when he went to check on the fourth defendant's version and see if he could have seen what he is meant to have seen, and, of course, there is the further evidence of the Scenes of Crime Officer who took the photographs and examined the scene with PC Jewitt. So that is what the prosecution had available to them.

37. What did they do with that? After they had the fourth defendant's version they re-interviewed the first claimant. They felt under a duty to put that to the first claimant. They then reviewed the case. It seems clear to me that this was not a peremptory review. It was a 45 minute review, according to the evidence of PC Jewitt. They then decided to charge.
38. I return to the wording of the test. It is put variously. Naturally, the overriding and binding authority on me is *Martin v. Watson* in the House of Lords where it said this: "Where the circumstances are such that the facts relating to the alleged offence can be within the knowledge only of the complainant, as was the position here, it becomes virtually impossible for a police officer to exercise any independent discretion."
39. Mr. Stone might quite properly cavil at that, saying that there have to be other situations where the discretion is removed but where the information is not simply in the knowledge of the witness, and he would be right to do that. So it seems to me that I have to expand that view and ask myself the question whether the police had an opportunity to independently check the fourth defendant's version of events and whether they could, in all the circumstances, exercise an independent judgment. In this respect the issue is not an issue of the way in which the Crown Prosecution exercised any discretion that they had. It is whether they had a discretion to exercise.
40. It seems to me that if I take the claimant's case at its highest what it actually proves is, first, that the fourth defendant's evidence was part of a jigsaw of evidence and, secondly, that the police reviewed and exercised an independent judgment in relation to that evidence on more than one occasion when they went back to the scene of the incident after taking the fourth defendant's statement, when they interviewed the first claimant again and when they had the 45 minute conversation between PC Jewitt and the Crown Prosecution Service.
41. Taking the claimant's case at its very highest, it demonstrates the police exercising a discretion and independent judgment. They may not have called for some of the evidence, for instance not calling for the tape (and I know not the circumstances in which that came about), but anybody standing back and looking at the situation would have realised that that evidence was available. I remind myself that, of course, it is the case that if no prosecution had ensued from the fourth defendant's statement, then there would never have been any question of the tort being made out. It would be strange in the extreme if I was called upon to investigate the Crown Prosecution Service's exercise of discretion and find that they should, perhaps, not have prosecuted but decided that they did and the fourth defendant's fate were to turn on that erroneous decision. That would be the wrong approach.
42. The right approach is simply to ask *whether* they could exercise the discretion, not *how* they exercised it. They could. They did. On that basis the claimant's case against the fourth defendant has no real prospect of success and I will strike it out.
43. It is right, however, that I should go on and make one or two very short observations about the balance of the case and what my approach would have been had I been called upon to consider that. Certain of Mr. Rathod's points have already been wrapped up in the comments that I have made. Plainly a witness does not become a prosecutor. But, equally, a witness who gives false evidence can become a prosecutor if the test in *Martin v. Watson* is made out.

44. I would hold, and would have held for the purposes of this application, that the juxtaposition of the timing of the fourth defendant coming forward, the nature of the evidence that he produced, the possibility of the contextual analysis revealing similarities between the evidence of the third and the fourth defendant, showing that they had both made similar mistakes, might be enough to show that there was a degree of collusion between the third and fourth defendant, that the object of that collusion was to ensure that a prosecution took place, that because it was collusive it was not honestly held and there was no belief in a reasonable or probable cause and that it would have been possible to infer malice.
45. I say that on the basis that it is not my job to try cases, that there was that evidence there and that might have been enough to get the first claimant home at trial; certainly enough to get the claimant home on this application. I say, in parenthesis, it must have been plain to everybody that although that case may have got to trial it was not the strongest of cases and, as Mr. Stone was forced to concede in his submissions to me, a lot of it is based on implication and on certain parts of the case holding together. But, I remind myself, it is not my job to try the cases. So, on that basis, I would have dismissed the application.
46. However, as I have made clear, Mr. Rathod has satisfied me on the first limb that there is no real prospect of it being shown that Mr. Malone was the prosecutor.
47. Accordingly, my order is that the claim as against the fourth defendant, Peter Malone, be struck out pursuant to Part 24 of the Civil Procedure Rules as having no real prospect of success.

JUDGE LETHEM: Mr. Rathod, yes.

MR. RATHOD: Sir, before I go on to my applications, two points of fact —

JUDGE LETHEM: It is the date, the 26th June date.

MR. STONE: You mentioned June and they were all July.

JUDGE LETHEM: I realised I was doing it as I said it.

MR. RATHOD: But a little more fundamental than that, when you mentioned the four day gap and the police not having possession of the tape —

JUDGE LETHEM: I said they had a right to call for it.

MR. RATHOD: It is just that one page says: "I have consulted with Peter George, Investigative Adviser. Going on freely available evidence there are no independent witnesses and audio from both the (unclear) handler and digital recording device fail to provide sufficient information to what occurred".

JUDGE LETHEM: I see. So they possibly did have that at that time.

MR. RATHOD: In respect of the four day gap — I am only bringing this to your attention because I have —

JUDGE LETHEM: No. It is right. You must.

MR. RATHOD: 22nd July. “Therefore, in light of no substantial evidence, the suspect will be released”. That is at 15:37 hours. At 21:07, on the same day, “Updated the IPS to the lack of independent witnesses and he informed me that his neighbour informed him yesterday that a friend who was visiting may have witnessed something.”

JUDGE LETHEM: I am grateful for that. I think the first part would have fortified my decision that there was yet another item of evidence that was potentially available to the police and could have been considered by the police. That fortifies my decision. Thank you very much for that, Mr. Rathod.

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EXTRACT FROM DISCUSSION AFTER JUDGMENT

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(Discussion on costs)

JUDGE LETHEM: The order will be that the First Claimant do pay the costs of the Fourth Defendant summarily assessed in the sum of £9,857.58.

MR. STONE: Sir, the only other application that I have to make is permission to appeal. I have not got Volume II here but I was considering, as you were giving the final stages of your judgment, whether it is a suitable case for a leapfrog appeal. Given the issues involved, I will leave that for your discretion.

But I do seek permission to appeal on the basis that the independent discretion in these particular circumstances was wholly tainted by material facts that were only in the knowledge of the two defendants and no independent investigation could have altered that fact in the circumstances, whatever else there was. Hence, it falls within the test on the basis, arguably — and it is not a case that should be struck out at this stage summarily — that, effectively, you erred in law in reaching the conclusion on the application of the facts to the law in this case that there is no arguable case on the law that there was no ability to independently assess the situation. There was ability to independently assess the situation. Having got the information and assessed it, it really came down, as they notified and as the police recognised when they were not going to prosecute, it is one person's word against another. The only additional element to that, which came after the tape and knowledge of the tape, was the imposition of the statement of the fourth defendant you have gone through in circumstances where there is at least an argument on all the other elements of the tort and that this was effectively an erroneous decision on your part in reaching that conclusion.

MR. RATHOD: It is not really appropriate for me to —

JUDGE LETHEM: I know it is not.

MR. RATHOD: It is a matter between my learned friend and the court.

JUDGE LETHEM: But I always give you an opportunity.

I am going to refuse permission to appeal. I carefully analysed the situation and came to a decision that was within the breadth of my discretion. Permission to appeal is refused.

Now we get to the good bit. Is this the final hearing?

MR. STONE: No. Summary judgments are not, in my understanding, a final hearing.

JUDGE LETHEM: All right. This is an interim order and appeal lies to the Circuit Judge.

MR. STONE: That led to my first point to you.

JUDGE LETHEM: I understand that but I am going to send it to the CJ, if it ever gets that far.