



Summary of Judicial Decision

Lam Wai Ip v The Secretary for Justice

HCA 2827/2016; [2020] HKCFI 1773

Decision : Plaintiff's claim dismissed
Date of Hearing : 6-8 & 23 July 2020
Date of Judgment/Decision : 30 July 2020

Background

1. On 15 May 2014, the Plaintiff was arrested for and subsequently charged with an offence of trafficking in a dangerous drug. According to the Prosecution's case, the police found 3 packets of dangerous drug, commonly known as "ICE", in the right front pocket of the long sport trousers that the Plaintiff was wearing ("Trousers A"), and found dangerous-drug-related paraphernalia in the Plaintiff's room. During the trial with jury before the Court of First Instance ("CFI"), a pair of trousers without pockets (with pouches cut off and all openings sewn up) was produced as evidence. The Plaintiff (i.e. as the defendant in the criminal trial)'s case was that Trousers A did not have any pocket, and hence the dangerous drug could not have been found in the pocket of Trousers A. At the end of the trial, on 25 August 2015, the Plaintiff was acquitted of the offence.
2. Upon acquittal, the Plaintiff commenced this civil claim for malicious prosecution on the ground that the police officers had fabricated evidence and framed him up. The Plaintiff alleged that the trousers that he was wearing at the time of arrest did not have any pocket as the pockets had been torn and repaired by having the pockets cut away. Hence it would not have been possible for the police officers to find anything inside the right front pocket. He claimed damages, including general and aggravated damages and exemplary damages.

Issues in dispute

3. The question was whether the Plaintiff had proved the 4 elements of malicious prosecution, which are as follows:-
 - (1) he was prosecuted by the defendant;
 - (2) the prosecution was determined in his favour;
 - (3) the prosecution was without reasonable and probable cause; and
 - (4) the prosecution was malicious.
4. It was common ground that the criminal proceedings had been determined in the Plaintiff's favour, and thus the 2nd element was not in issue. The main



issues in dispute were therefore whether the remaining 3 elements in malicious prosecution had been established.

Department of Justice's Summary of the Court's rulings

(full text of the CFI's judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=129821&QS=%2B&TP=JU)

5. The CFI dismissed the Plaintiff's claim for malicious prosecution. In particular, it was held that the Plaintiff failed to establish the 3rd and 4th elements, i.e. that the decision to prosecute him was a decision without reasonable and probable cause and with malice.
6. In respect of the 1st element, since the Secretary for Justice ("**SJ**") has the authority to control all the criminal prosecutions in the HKSAR, the CFI found that the Plaintiff had correctly and properly named SJ as the defendant in his claim founded on malicious prosecution. (paragraph 14)
7. In relation to the 3rd and 4th elements, the CFI cited the judgment in *Chin Kam Chiu v FTI Consulting Inc and Others* [2020] HKLRD 878. In order to establish that the prosecution was a decision without reasonable and probable cause and with malice, the claimant must establish that the prosecutor did not have an honest belief in the guilt of the accused, and that the dominant purpose of the prosecutor must be a purpose other than the proper invocation of the criminal law, in other words, an illegitimate or oblique motive. (paragraph 15)
8. As to the evidence given by witnesses in this connection, the CFI found guidance from some authorities on the evaluation of evidence. In determining a witness' credibility, contemporaneous documents, inherent likelihood or unlikelihood of an event having happened, consistency of the witness' evidence with undisputed or indisputable evidence, and the internal consistency of the witness' evidence are important. Further, the Court would approach self-serving statements made by a witness with circumspection, but would give considerable weight to statements made by a witness which were against his interest. (paragraphs 21-24)
9. Applying the aforementioned legal principles, the CFI found the Plaintiff's evidence untruthful on various material aspects. For instance, there was no satisfactory explanation as to why the Plaintiff did not make any complaints regarding the alleged fabrication of evidence at his first 4 appearances in the criminal proceedings. (paragraphs 5-6 and 26-27)
10. Further, the Plaintiff made two significant admissions against his interest:- (1) the pair of trousers worn by him when he left his room on the day of arrest was not Trousers A but was another pair of trousers ("**The New Trousers Episode**"); and (2) the green bottle and the plastic bags found by the police in his room were his, and that the green bottle was used for consuming "ICE". (paragraph



28)

11. Since the Plaintiff's evidence was untruthful on various material aspects, save and except the aforementioned two significant admissions against his interest, the CFI refused to accept the Plaintiff's evidence. Full weight was attached to the two admissions. (paragraph 29)
12. On the other hand, the CFI accepted and found truthful the evidence given by the 4 police officers who were witnesses on behalf of SJ. The CFI also accepted the evidence given by an officer of the Correctional Services Department, which was not challenged by the Plaintiff. (paragraphs 30-45)
13. The CFI therefore found that the Plaintiff's claim on malicious prosecution could not succeed given that the alleged fabrication was untrue in view of the New Trousers Episode. (paragraph 49)
14. Even putting aside the New Trousers Episode, the CFI was of the view that the decision to prosecute could not be said as having no reasonable and probable cause and could not be said as a decision with malice as it could not be said that the evidence gathered by the prosecution before the criminal trial did not show a *prima facie* case against the Plaintiff. (paragraphs 50-52)
15. The CFI found that the Plaintiff failed to establish malicious prosecution and dismissed his claim. (paragraph 74)

Civil Division

Department of Justice

7 August 2020