SYDNEY PICKLES (PLAINTIFF) ..... APPELLANT;

AND

JAMES BARR AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

1948
*Oct. 25, 26, 27
1949
*Feb. 1

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Malicious prosecution—Malice—Reasonable and probable cause—Evidence—Judge's charge—Misdirection—Criminal Code s. 542—British Columbia Supreme Court Act R.S.C. 1936, c. 56, s. 60.

In an action for malicious prosecution, the judge's charge amounted to misdirection, when, after properly saying that a want of reasonable and probable cause was a circumstance from which the jury might infer malice, he concluded that if malice was to be found at all in this case it was not because of lack of reasonable and probable cause, although, in addition to some evidence from which the jury might have inferred malice, there was also evidence upon which the jury might have found want of reasonable and probable cause.

Brown v. *Hawkes* (1891) 2 Q.B. 718 referred to.

APPEAL from the decision of the Court of Appeal for British Columbia (2) dismissing (Smith J.A. dissenting) appellant's appeal from the decision of Macfarlane J. dismissing an action for malicious prosecution.

Sydney Pickles in person for the appellant.

R. D. Harvey K.C. for the respondent.

(1) [1949] S.C.R. 215. (2) (1948) 1 W.W.R. 1097.

*PRESENT: Rinfret C.J. and Taschereau, Rand, Estey and Locke JJ.

1949
PICKLES
v.
BARR
Locke J.

The judgment of the Court was delivered by

LOCKE J.:—This is an appeal by the plaintiff in an action for malicious prosecution from a judgment of the Court of Appeal for British Columbia (1) dismissing his appeal from a judgment of Macfarlane, J. by which, after findings made by a jury, the action was dismissed. In the Court of Appeal Sydney Smith, J.A. dissented and would have directed a new trial.

The defendants, with the exception of the defendant Weeks, are the executive officers of the Victoria Branch of the Society for the Prevention of Cruelty to Animals. Weeks is employed by the Victoria Branch of the Society as an inspector and on February 19, 1947, laid an information charging the plaintiff and his employee, one Longdon, with having wantonly neglected to provide proper care to a sheep, thereby causing unnecessary suffering. The charge was laid under sec. 542 of the *Criminal Code* and the magistrate issued a summons. On March 6, 1947, the appellant appeared, represented by counsel, and counsel instructed by the Victoria Branch of the Society appeared for the prosecution and obtained leave from the magistrate to withdraw this charge and to substitute the following charge against the appellant alone:—

> That Sydney Pickles, between the 27th day of January, 1947, and the 4th day of February, 1947, in the Municipality of the District of Saanich, in the County of Victoria, being the owner of four sheep, namely, one sheep destroyed on or about the 3rd day of February, 1947, at Sunstead Farm by Inspector Weeks of the Society for the Prevention of Cruelty to Animals and three others found dead there by the said Weeks on the same day, did unlawfully cause unnecessary suffering by unreasonably omitting to care for such animals contrary to the Criminal Code.

At the conclusion of the evidence for the prosecution this charge was dismissed. The evidence taken at this hearing was made part of the record in the action and it is quite clear that no other disposition of the matter could properly have been made.

As, in my opinion, there should be a new trial, it is inadvisable that there should be any extended comment on the evidence adduced at the hearing. Briefly stated, the facts were that following an anonymous report received on February 3, 1947, by the defendant Florence G. Barr, the corresponding secretary of the Victoria Branch, that the

(1) (1948) 1 W.W.R. 1097.

sheep on the farm of the appellant in the Municipality of Saanich were in bad shape, Weeks in company with an assistant inspector named Hamer was sent to the farm to investigate. They found, according to their evidence, a flock of about a hundred sheep of which, according to Hamer, all but ten or twelve were in good shape. In addition, they found two dead sheep and a dead lamb in or near the barn and in the field nearby a sheep lying on its side struggling and evidently in an extremity. The appellant who lived in Victoria was not present but, with Longdon's consent, the inspectors shot the sheep and a post-mortem performed by a veterinary surgeon on the following day disclosed that the animal was suffering from an infestation of worms in its stomach and small intestines and fatty degeneration of the liver. Certain further inquiries were made by the inspectors and written reports submitted to a meeting of the members of the Executive on February 4, on which date a resolution was passed instructing that the opinion of one McIntyre, described in the resolution as a sheep expert, and that of Mr. C. L. Harrison, the city prosecutor for Victoria, be obtained. A further report of the veterinary surgeon made to the appellant on the day following the visit of the inspectors to the farm, and a copy of which was made available to them, recommended that the worming of the flock was necessary but, because of the inclement weather, it would not be advisable to do so at the time and in the meantime advised giving the animals free access to phenotiazine mixed with salt. On February 12, following a further report from the defendant Weeks, the minutes disclose that "it was decided to lay a charge against Mr. Pickles in regard to one sheep found in a suffering and dying condition." It was not, however, until the 17th of February that the defendant Weeks and Florence G. Barr laid the matter before Mr. Harrison who gave evidence that, after considering the facts and particularly noting that there was nothing to indicate that the appellant knew anything about the sheep being ill which had been found lying in the field and had been destroyed and that the veterinarian had said it would not be apparent to the farmer that the sheep was sick until it laid down to die, he advised them not to lay a charge without consulting their solicitor and

1949

PICKLES v. BARR

Locke J.

getting advice on it and told them that he (Harrison) would not lay the charge or recommend that it be laid. On the day following, however, Weeks saw Harrison and showed him an information which had been prepared charging the appellant with wantonly neglecting to provide proper care to a sheep, thereby causing unnecessary suffering. On being asked by Mr. Harrison whether he had got the advice of their lawyer Weeks replied in the negative and was then advised not to swear the information. The charge was, however, laid by Weeks on February 20 and the matter thereafter dealt with as above stated.

It should be said that there was a conflict as to what had actually transpired between Mr. Harrison and these two defendants on February 17th and in his discussion with Weeks on the day following. According to Mrs. Barr, Mr. Harrison had told them to go ahead and prosecute and to have Mr. Harvey, K.C. handle the prosecution. According to the defendant Weeks, Mr. Harrison had told them to go ahead and that when he had shown the latter the information which had been drafted he had approved of it. Upon this evidence the jury found that Mr. Harrison's evidence was true and that the statements which the defendant Weeks and Florence G. Barr claimed to have been made to them by him were not made. To these findings, however, a rider was added to which further reference will be made.

In charging the jury the learned trial judge informed them that he proposed to ask them to make certain findings of fact and that, dependent upon the nature of their findings, he would decide the question as to whether there was a want of reasonable and probable cause. After reviewing the evidence the learned judge said in part:—

> I think those, gentlemen, are the things to which I will direct your attention when you come to consider the questions I will put to you, and upon which I will direct you as to my finding, as to reasonable and probable cause. If you find that Mr. Harrison warned him not to take this prosecution without getting the advice of Counsel, and that he did so without getting it, that evidence goes to show that they had not reasonable cause.
>
> On the other hand, you have the evidence of Mr. McIntyre. Did Mr. McIntyre advise him that there was evidence of neglect, or just what was the nature of his comments in connection with that? Were they conditional only, or were they such as a reasonable person would act upon in coming to the decision that the charge should be laid? Was it

evidence of neglect, the evidence of the existence of a state of circumstances which would reasonably lead any ordinarily prudent and cautious man placed in the position of Weeks, to come to the conclusion that the person charged was probably guilty of the crime accused?

That is the extent of the obligation, and I am asking you questions so I can find out whether or not that is true. I am going to ask you a question with regard to Dr. Bruce, as to what he told them, and with regard to Colonel Evans. When I have put before you those questions and you have answered them, if you answer that Dr. Bruce's evidence is the evidence to be accepted, that Mr. Harrison's evidence is the evidence to be accepted, that Colonel Evans' is the evidence to be accepted then I would instruct you that my verdict would be that the plaintiff has established that there was want of reasonable and probable cause.

If, on the other hand, you think that Mr. Weeks' evidence where it is contradicted by those other men, is the evidence to be accepted, and that Mrs. Barr's evidence is the evidence to be accepted; and that Mr. McIntyre gave them a firm opinion that there was neglect under the circumstances, and in your opinion the circumstances were properly described to him, then I would advise you that the plaintiff has not satisfied the onus that was on him.

Upon the jury retiring a discussion ensued between the learned trial judge and counsel as to certain aspects of the charge and the jury was recalled. In the further charge then delivered the following passage appears:—

Now I mentioned malice in my charge this morning. There is a provision in law that you may infer malice from want of reasonable and probable cause, but you are by no means bound to do so. In determining the question of malice, the jury may, but are not bound to, find malice in the absence of reasonable and probable cause. You are not obliged to find malice, although both must be found in order that the plaintiff may succeed; unless he proves both lack of reasonable and probable cause and malice, he fails in the action. You may infer malice from some lack of reasonable and probable cause, but there is evidence here directed to the question of malice, which I have referred to in my charge, and I do not think that question needs to arise here. If you find malice at all, you will find it, not because of lack of reasonable and probable cause in this case, but because of the fact that the prosecution was undertaken from motives other than those I have described as proper.

and it was with this final instruction that the jury retired and arrived at their verdict.

The questions asked and the answers made were as follows:

Question 1: "Were the statements which Mr. Harrison says he made to Inspector Weeks and Mrs Barr in fact made to them?" Answer: "Yes."

Question 2: "Were the statements which Inspector Weeks and Mrs. Barr say that Mr. Harrison made to them in fact made to them?" Answer: "No." Rider: "We feel that there was a misunderstanding in the interpretation of Mr. Harrison's instructions."

Question 3: "Did Mr. Bruce make the statements which Weeks attributed to him on February 7th?" Answer: "Yes."

1949

PICKLES v. BARR

Locke J.

Question 4: "Were the statements attributed to Colonel Evans by Mrs. Barr and Inspector Weeks made to them respectively by him?" Answer: "Yes."

Question 5: "Did Mr. McIntyre give his opinion that there was neglect as a final opinion on the facts stated by Weeks?" Answer: "No."

Question 6: "Did Mr. McIntyre express the opinion subject to confirmation after he had seen the sheep?" Answer: "Yes."

Question 7: "Was the evidence on which Weeks acted reasonably apparent to him to be unreliable or incomplete?" Answer: "No."

Question 8: "Did Weeks honestly believe, taking into consideration all the statements as you find them made on the evidence in this case, that Pickles was probably guilty of the offence charged?" Answer: "Yes."

Question 9: "Did Weeks lay the Information or either of them maliciously, that is, from any motive other than an honest desire to bring a person (that is the plaintiff) whom he believed to be a guilty person to justice?" Answer: "No."

Question 10: "Did any of the remaining defendants authorize the prosecution of the plaintiff maliciously?" Answer: "No."

Question 11: "If so, which defendant?" No answer.

Question 12: "Regardless to your answers to the above questions, give total damages suffered by the plaintiff: (*a*) 'for Special damages.'" Answer: "$403.94." (*b*) "for General damages." Answer: "Nil."

As to the rider attached to the answer to the second question it must, in my opinion, be rejected. It had not been suggested either by the defendant Florence G. Barr or by the defendant Weeks that they had misunderstood the advice given to them by Mr. Harrison on February 17th; rather had they both attributed to him statements which the jury found as a fact had not been made. There was in truth no possibility of misunderstanding the advice given by Mr. Harrison to these two defendants or that given by him to Weeks on the following day. The suggestion made in the rider that there was a misunderstanding contradicts the jury's findings in Question 1, that the statements which Mr. Harrison said he had made were in truth made, since those statements were incapable of misinterpretation. The jury had also found that the statements of Weeks and Mrs. Barr that Mr. Harrison had told them "to go ahead" were untrue. As these findings were made in response to direct questions, the rider which is inconsistent with the answers should be rejected.

As to Questions 3 to 6 inclusive, the learned trial judge had informed the jury that if they accepted the evidence of Doctor Bruce, Colonel Evans and Mr. Harrison he would instruct them that he would decide that the plaintiff had established that there was want of reasonable and probable

cause. He had said further that if they believed the evidence of Weeks and Mrs. Barr in preference to that of Bruce, Evans and Harrison, and if they found that McIntyre gave them a firm opinion that there was neglect under the circumstances, he would advise them that the plaintiff had not proven a want of reasonable and probable cause. The jury, however, as has been pointed out, accepted the evidence of Mr. Harrison and found that McIntyre had only expressed his opinion subject to confirmation after he had seen the sheep, while accepting the evidence of Weeks and Mrs. Barr where it contradicted that of Evans and Bruce. This contingency was not provided for in the charge so that if in fact the jury interpreted the concluding portion of the judge's charge as a direction that they were to consider whether there was a want of reasonable and probable cause in answering Questions 9 and 10 which were directed to malice, they were without any instructions as to whether a want of reasonable and probable cause had been shown. That question was one for the trial judge to determine and in the situation created by the answers made to Questions 1 and 6 inclusive the jury acted without instructions. In *Brown* v. *Hawkes* (1), Cave, J. said in part:—

> There may be such plain want of reasonable and probable cause that the jury may come to the conclusion that the prosecutor could not honestly have believed in the charge he made and in that case want of reasonable and probable cause is evidence of malice.

It is impossible in the present case to know whether this aspect of the matter was even considered by the jury or, if it was, upon what basis they proceeded. This, I think, is a fatal objection to the verdict and the judgment entered.

If it is wrong to assume that the jury understood from the concluding portion of the charge that a want of reasonable and probable cause was a circumstance from which they might infer malice and accepted the concluding part of the direction that, if malice was to be found at all, it was not because of lack of reasonable and probable cause, there was misdirection. The plaintiff had, it is true, adduced some other evidence from which the jury might have inferred that the prosecution had been initiated

(1) (1891) 2 Q.B. 718 at 723.

1949

PICKLES v. BARR

Locke J.

maliciously but, in addition to this, there was evidence upon which the plaintiff might properly contend that there was a plain want of reasonable and probable cause.

The appeal should be allowed with costs and a new trial directed. No objection was made to that portion of the judge's charge which, in my view, was misdirection, though counsel for the plaintiff had in the earlier discussion made it clear that he contended that from a want of reasonable and probable cause malice could be inferred. Having in mind the provisions of sec. 60 of the *Supreme Court Act,* cap. 56, R.S.B.C. 1936, and in the exercise of the powers vested in this Court there should be no costs to either party in the Court of Appeal. The costs of the first trial should be in the discretion of the presiding judge at the new trial.

Appeal allowed with costs; new trial directed.

Solicitors for the appellant: *Crease, Davey, Lawson, Davis, Gordon and Baker.*

Solicitor for the respondents: *R. D. Harvey.*