IN THE SUPREME COURT OF BELIZE, A.D. 2019

CLAIM NO. 586 OF 2019

AARON BAILEY	**CLAIMANT**
AND	
ATTORNEY GENERAL OF BELIZE	**1st DEFENDANT**
SGT. 577 ISMAEL WESTBY	**2nd DEFENDANT**
BELIZE POLICE DEPARTMENT	**3rd DEFENDANT**

BEFORE the Honourable Madam Justice Sonya Young

Decision
5th November, 2020

Appearances:
Mr. Leeroy Banner, Counsel for the Claimant.

Mr. Kileru Awich, Counsel for the Defendants.

Keywords: Tort - Unlawful Arrest - False Imprisonment - Malicious Prosecution - Murder - No Identification Parade - Sole Eyewitness Dies - Nolle Prosequi - No Reasonable or Cause for Continuing Prosecution - Proof of Malice.

JUDGMENT

1. Aaron Bailey was arrested on the 7th October, 2013. The next day he was charged for murder and arraigned. He remained in custody and was

subsequently committed for trial in the High Court. He was indicted on the 12th January, 2015. His detention continued until the 23rd March, 2018 when he was released on bail. The Crown entered a *nolle prosequi* on the 27th June, 2018 and he was discharged.

2. Aaron Bailey insists that he was arrested and charged by the second Defendant without a proper investigation, any reasonable suspicion or probable cause. He says he had no record, his alibi was never properly investigated and his prosecution continued even after the sole eye witness died in May, 2014. All this, notwithstanding the eyewitness' testimony, was tenuous at best and there was no other evidence against him.

3. He now brings this Claim against the Defendants for unlawful arrest, false imprisonment and malicious prosecution. He says he has been deprived of his liberty for four (4) years and five (5) months, his character and reputation have been greatly injured and he has suffered mental anguish, anxiety and financial loss. He claims special and general damages, including aggravated and exemplary damages with interest and costs.

4. In their Defence, the Defendants plead that the very nature of the offence with which the Claimant had been charged precluded any possibility of bail on arraignment. In any event, his committal to stand trial by the Magistrate was an independent intervening act which broke the chain of causation for any loss and damage sustained. His continued prosecution, even after the death of the sole eye witness, was without malice as there was sufficient evidence to establish a reasonable suspicion and probable cause for his arrest, detention and prosecution.

5. Further, more than one (1) year had passed since his cause of action for false imprisonment accrued so it was, consequently, statute barred. Finally, they urge that the Claimant was never acquitted, so he could bring no Claim for malicious prosecution. They pray that his Claim be dismissed in its entirety with costs to his detriment.

6. The parties seemed to have abandoned some of what had been pleaded (Intervening act of committal, limitation) and agreed on the following issues in their Pretrial Memorandum:

    1. Whether the 2nd Defendant had reasonable and probable cause to arrest the Claimant for murder of Gary Pratt?
    2. Whether the 2nd Defendant had reasonable and probable cause to charge the Claimant for the said murder?
    3. Whether the continued detention of the Claimant after the death of the sole eyewitness can be justified?
    4. Whether the 2nd Defendant commenced the criminal prosecution against the Claimant maliciously and without reasonable and probable cause?
    5. Whether the Claimant is entitled to damages for false imprisonment and malicious prosecution?

7. The Court, however, favors the following statements of the issues:

    1. Whether the Claimant was falsely imprisoned by the 2nd Defendant or was his arrest justified and his detention reasonable in the circumstances?
    2. Whether the Claimant was maliciously prosecuted by the 2nd Defendant, or were the actions of the 2nd Defendant in charging and

prosecuting the Claimant activated without malice and with reasonable and probable cause?

3. Whether the continued detention of the Claimant after the death of the sole eyewitness can be justified?
4. Whether the Claimant is entitled to damages for false imprisonment and/or malicious prosecution and, if he is, in what quantum?

Whether the Claimant was falsely imprisoned by the 2nd Defendant or was his arrest justified and his detention reasonable in the circumstances?

8. The law on false imprisonment needs little recapitulation here. Essentially, it concerns the complete deprivation of the subject's liberty without cause. Neither length of time nor place or mode of detention is important because the detention of a person is prima facie tortious. In this case it, therefore, remains for the arresting officer, Sergeant Westby, to demonstrate that at the time of arrest, he had a reasonable suspicion that Aaron Bailey had committed an arrestable offence. Murder is most definitely an arrestable offence.

9. A reasonable suspicion is formed through the actual existence of and the arresting officer's own belief that there existed, reasonable grounds. There is, therefore, a subjective and objective element. This is not the same as a prima facie case, since inadmissible evidence and even information which may be proven eventually to be untrue can reasonably be taken into consideration. A finding depends on all that was available for the officer's consideration in the particular circumstances.

10. In **Attorney General of Belize v Margaret Bennett et al Civil Appeal No's 48, 49, &50 of 2011** Morrison JA at **paragraph 34** explains what the success of a Claim of this nature requires:

> *"The question of whether or not a reasonable suspicion existed is therefore essentially an objective one, although it will obviously be relevant in any subsequent consideration of the matter in a particular case to know what the arresting officer had in his mind. Thus in* ***Dallison v Caffery****, Diplock LJ said this (at page 619):*
>
> > *'The test whether there was reasonable and probable cause for the arrest or prosecution is an objective one, namely whether a reasonable man, assumed to know the law and possesed of the information which in fact was possessed by the defendant, would believe that there was reasonable and probably cause.""*

The Evidence

11. It is agreed that Mr. Bailey had been arrested and charged for murder. Sergeant Westby, in his witness statement, explained that he had not know Aaron Bailey prior. His decision to arrest and charge Mr. Bailey was *"based on the contents of the statement of Jullian Willoughby and the lack of any confirmation of Aaron Bailey's alibi."* He continued that he would not have arrested him if he had been able to get confirmation of his alibi, but none had been obtained during his investigation.

12. Mr. Willoughby was, admittedly, the only eyewitness who identified Mr. Bailey as the perpetrator. The Court must then turn its attention to the Willoughby statement given two (2) days after the murder. In it he states:

> *"The four feet walked together along the side of the house and when they reached to the right corner of the house and the first person showed up, I saw him lifting his right hand, holding in his fist a black object resembling a gun, he was wearing a Red, black and white striped shirt, a black cap on his head and a blue ¾ jeans pants, I was able*

to see him clearly since he was about 25 feet away from me and a lamppost is on the opposite side of the street across from my house. The lamppost was about 25 feet away from me and that was a lamp which was lighted and gives clear light all in front and to the left side of the yard in front of my mother's house. When the first person showed up at the corner of the house I noticed that he was Aaron Bailey who I have known for the past 12 years, who live on Racoon Street Extension and he hanged with me and used to visit me at my mother's house for about 5 years, but it has been 7 years now that me and he do not hang anymore. When Aaron Bailey showed up and I saw him holding what I believe was a gun I shouted "GUNMAN". I ran from the gate where I was on Antelope Street Extension upwards towards Elston Kerr Street direction, whilst I was running I then heard about five loud bangs like that of gunshots one after the other and I ran about 50 feet away and went into the yard where my sister (Selma Lynch) live which is next yard from my mother's yard and I hide there, at this time I did not knew what happened to Nuri Polanco, Ernest Hinds and Kendal Sanchez. This only took about 10 to 15 second to happened, more or less. When Aaron Bailey showed up at the right corner of my mother's house I watched him to his face for about 5 second and then I ran."

13. The Claimant says that he was hastily charged without a thorough and impartial investigation. He adds that even when taken at its highest this evidence is so weak and tenuous that it ought to have been regarded as non-existent.

14. In his submissions, Counsel for the Claimant concentrated on whether the evidence would have met the **Turnbull** guidelines for identification evidence in a criminal trial **(R v Turnbull [1977] QB 224)**. He, therefore, attempted to demonstrate through the absence of evidence regarding possible obstructions to Mr. Willoughby's ability to properly observe all he said he did (such as the hat he said Mr. Bailey was wearing), what position he was in

when he made his observations and what part of Mr. Bailey's face was actually visible to him. Counsel also drew the Court's attention to the statements provided by three (3) other witnesses at the scene:

> Rosita Polanco said the person she saw had *"something black on his head, I cannot say what was on his head because it happened so fast and my door was only about two inches open."* Later she informed, *"I was able to see the shirt color of the shooter as there is a lamp post light directly across from my yard about 25 feet away and the deceased was standing about 18 feet from me. Where I stood and watched the entire incident…… I did not recognize the shooter as he was wearing something black over his head and I saw him from the back."*
>
> Selma Lynch states that she was some 150 feet away from the person but *"nothing obstructed my view as a lamp post reflected its light towards him from across the street but I was unable to see his face because he had something black blocking his face."*
>
> Alfred Lynch explained that *"when I saw the person I was able to see the color of the shirt because there is a lamp post light right at the corner of Antelope and Iguana about 15 feet away from where he was but I was unable to see his face because he had his head hang down and something black blocking his face. I cannot say what the black object was that was blocking his face because of the distance I was from him."* That distance was stated to be about 150 feet away.

15. Counsel for the Claimant submitted that since all the other witnesses had stated that the shooter had something black over his face, this must render Mr. Willoughby's statement, unreliable. Moreover, the fact that there had been no identification parade to support Mr. Willoughby's statement, served

only to significantly weaken the case against the Claimant to one which could not reasonably have been left to a jury.

16. I agree with the Defendants that any attempt to raise the requirement of reasonable suspicion to that of satisfying the **Turnbull** guidelines would indeed be a demand for *prima facie* evidence. That is certainly not the test and there is no such authority to that effect as was clearly stated in **Shabaan bin Hussein v Chong Fook Kam [1970] AC 942**.

17. Even Counsel for the Claimant seemed to have relented somewhat as he stated at paragraph 11 of his submissions that there may have been sufficient justification for the 2nd Defendant to arrest and question the Claimant. He continued: *"however, because the 2nd Defendant told the Claimant about his whereabouts and that he had several alibi witnesses to support his contention,… it was even extremely important for the 2nd Defendant to get the additional information as mentioned above and if the information was not forthcoming, he was obligated to release the Claimant immediately as the evidence was not sufficient to charge and prosecute the Claimant for murder."*

18. This brings us to a consideration of the alibi. The primary thrust of the Claim now seems to be that the 2nd Defendant's failure to investigate the Claimant's alibi must have completely eroded any suspicion he could have reasonably held.

The Alibi:

19. The Claimant says that under caution he informed Sergeant Willoughby that he was elsewhere at the time the offence was said to have been committed. He was socializing with a number of named persons and he later provided a detailed statement so that it could be thoroughly investigated. That list

comprised the Claimant's uncle Glenford Gill, his brother Devon Bailey and two cousins Jason and Keshawn Deshield.

20. Sergeant Westby in his deposition stated that the Claimant did inform that he had an alibi but it did not say whether the alibi had been investigated or not. His statement of case was altogether silent on the issue of any investigation of the alibi. In his evidence-in-chief before this Court, however, he did state that there was a lack of confirmation of Mr. Bailey's alibi. He revealed for the first time that he had searched for Mr. Bailey's alibi witnesses. He was only able to find one; a Glenford Gill who proved to be uncooperative.

21. Strangely, it was only under cross-examination that the extent of any investigation Sergeant Westby had done, in this regard, was elicited from him. He informed that the policy of the Department was that murders were investigated by persons holding the rank of nothing less than sergeant. He admitted his diligence, experience and knowledge, particularly when it came to the preparation of witness statements. He assured that he would include any information he deemed crucial.

22. He then indicated for the first time that on the 8th October, 2013 (the date on which he charged the Claimant) he, accompanied by a PC Budan, had gone to look for the Claimant's alibi witnesses. He was, however, only able to locate the uncooperative Glenford Gill who gave no statement. He informed, again for the first time, that he had also looked for Devon Bailey without success. He could not recall making any other inquiries about any other alibi witnesses or if he had reported his lack of success to Mr. Bailey. He accepted

that he had failed to make the requisite entries about this part of his investigation and insisted that he had no reason to lie.

23. Counsel for the Claimant made much of the Sergeant's failure to include any of this information in his pleadings, his witness statement or even his deposition in the criminal matter. He asked for some contemporaneous record of the encounter with Mr. Gill or the efforts made to locate the other alibi witnesses. When the Sergeant was unable to provide same, he called it a dereliction of duty. He also called for the officer (PC Budan) who supposedly accompanied the Sergeant when he went to speak with Mr. Gill. He described that officer's absence as a witness in both the criminal matter and the present Claim as *"making matters worse."* He concluded that the alibi had not been satisfactorily investigated.

24. In his submissions, he asked the Court to make a determination of the credibility of the Claimant's witnesses over that of the Defendants'. He highlighted that the Sergeant had deviated from his pleaded case as he had never said that he had sought confirmation of the alibi witnesses. He also referred to Belize Police Force Standing Orders and the need to keep a record of every aspect of the investigation especially for serious crimes.

25. He asked the Court to accept that the lack of any contemporaneous record meant that the evidence given under cross-examination must have been fabricated by Sergeant Westby in an attempt to convince the Court that there had been a proper investigation and he had acted reasonably. He outlined the test in **Wisniewski v Central Manchester Health Authority [1998]**

Lloyd's Rep Med 223 and asked the Court to draw an adverse inference from the Defendant's failure to call PC Budan.

26. While all of this no doubt may have had quite an impact on a jury in the criminal trial, I agree with Counsel for the Defendants that it is not really relevant to the issue of unlawful arrest or false imprisonment now being considered. What is important here is not the probability of a conviction but a case fit to be tried. Counsel for the Defendants drew the Court's attention to **Glinsky v McIver [1962] AC 726** where Viscount Simmons stated at **page 745**:

> *"A question is sometimes raised whether the prosecutor has acted with too great haste or zeal and failed to ascertain by inquiries that he might have **made** facts that would have altered his opinion upon the guilt of the accused. Upon this matter it is not possible to generalise, but I would accept as a guiding principle what Lord Atkin said in Herniman v. Smith, 7 that it is the duty of the prosecutor to find out not whether there is a possible defence but whether there is a reasonable and probable cause for prosecution. Nor can the risk be ignored that in the case of more complicated crimes, and particularly perhaps of conspiracies, inquiries may put one or more of the criminals on the alert."*

27. Counsel supported this observation with that of Diplock LJ (as he then was) in **Dallison v Cafferty [1965] 1 QB 348** where at **page 376** he stated as a matter of principle that *"it is not the prosecutor's duty to resolve a conflict of evidence from apparently credible sources: that is the function of the jury at the trial. The prosecutor's knowledge that there is such a conflict does not of itself constitute lack of reasonable and probable cause for the prosecution, nor is it inconsistent with the prosecutor's honest belief that there is a case against the accused fit to go to a jury."*

Determination:

28. **O'Hara v Chief Constable of the Royal Ulster Constabulary [1997] AC 286** confirmed that the Court must consider what was in the arresting officer's mind at the time and whether that information would be considered by a reasonable man to be sufficient grounds on which to arrest and charge in the given circumstances.

29. In **Jamal Dunbar v The AG of Trinidad and Tobago Claim No. CV2017-02511** Justice Rahim stated at **paragraph 223**:

> *"The Claimant submitted that PC Seekumar failed to conduct reasonable investigations. The learned authors of Clerk and Lindsell on Torts (20th Edition, paragraphs 16-38) state as follows: '... it would be obviously absurd to make a defendant liable because matters of which he was not aware put a different complexion upon the facts which in themselves appeared a good cause of prosecution. But neglect to make reasonable use of the sources of information available before instituting proceedings may be evidence of want of reasonable and probable cause and also malice."*"

30. When this Court considers what Sergeant Westby was aware of before he actually arrested and charged the Claimant, it can reach no other conclusion but that he had a reasonable and probable cause for doing so.

31. There was an eyewitness who gave a statement that he knew, recognized and identified Mr. Bailey by name. This witness placed the Claimant on the scene with an object that resembled a firearm in his hand and named him as the shooter. That the eye witness' testimony may have conflicted with that of other prosecution witnesses was certainly not an issue for Sergeant Bailey to try to determine before he acted as he did.

32. There is absolutely no evidence presented which demonstrates in any way that Sergeant Westby knew that what was said by Mr. Willoughby was untrue or unreliable. What he did know was that the other eyewitnesses had seen the shooter from varying angles and two (2) had only seen him after the incident. He also knew that they all said he had something black in the area of his head. They were all able to see sufficiently well to describe his clothing among other things. It would now be up to a jury having been appropriately cautioned by the judge to assess the identification evidence.

33. This Court could find nothing that would demand or require an identification parade. This was a case of recognition and not identification of a stranger. Even if the Sergeant took into account the fact that the Claimant had informed of an alibi, this was not a compelling factor against the Claimant's arrest and charge, particularly when weighed against Mr. Willoughby's statement.

Sergeant Westby explained that he did not find Mr. Bailey's alibi crucial to the investigation. The Sergeant was certainly not required to ascertain the existence of that possible defence or whether Mr Bailey was telling the truth before he decided to charge.

34. When all this evidence is viewed by a reasonable man, this Court finds that there was sufficient for the Sergeant to conclude that Mr. Bailey ought properly to have been arrested and charged with murder. The Claim for unlawful arrest is dismissed. A decision on the claim of false imprisonment will be made after that of malicious prosecution has been considered.

Whether the Claimant was maliciously prosecuted by the 2nd Defendant, or were the actions of the 2nd Defendant in charging and prosecuting the Claimant activated without malice and with reasonable and probable cause?

35. Counsel for the Defendants relied on the Australian Court of Appeal case **Beckett v New South Wales [2013] HCA 17** for its statement of the elements of this tort. At **paragraph 4** it is stated:

> *"The wrong for which the tort provides redress is the malicious instigation or maintenance of the prosecution of the plaintiff without reasonable and probable cause. The elements of the tort are set out in A v New South Wales. In summary, the plaintiff must prove four things: (1) the prosecution was initiated by the defendant; (2) the prosecution terminated favourably to the plaintiff; (3) the defendant acted with malice in bringing or maintaining the prosecution; and (4) the prosecution was brought or maintained without reasonable and probable cause. A v New South Wales considered the third and fourth of those elements. One aspect of that consideration which assumes importance in this appeal is the discussion of the temporal dimension of the tort: proof of the absence of reasonable and probable cause directs attention to the state of affairs at the time the defendant is alleged to have instigated or maintained the prosecution. Evidence bearing on the existence of reasonable and probable cause is confined to the material available to the defendant at the time the prosecution was commenced or maintained."*

36. Counsel for the Claimant submitted that malice may be proven through the lack of reasonable and probable cause (though not vice versa). But as stated in **Daryl Mahabir v AG of Trinidad and Tobago Claim No. CV2017-00460** at **paragraph 75** which quoted from **Sandra Juman v the Attorney General of Trinidad and Tobago Civil Appeal 22 of 2009**:

"Malice may be inferred from an absence of reasonable and probable cause but this is not so in every case. Even if there is want of reasonable and probable cause, a judge might nevertheless think that the police officer acted honestly and without ill-will, or without any other motive or desire than to do what he bona fide believed to be right in the interests of justice: Hicks v Faulkner [1987] 8 Q.B.D. 167 at page 175."

37. **Alrick Smith et al v Attorney General of Belize Claim 389 of 2015** is also good authority that there must be some malice demonstrated and the burden of proving malice rests solely on the Claimant. This malice could either be actual or inferred and it may not be proper in every circumstance to infer malice simply from a lack of reasonable and probable cause. In that case the learned judge found that the claim for malicious prosecution failed even though there was an absence of a reasonable and probable cause for prosecution as *"there had not been any motive raised on the evidence other than a desire to bring all persons charged to justice."*

38. At paragraph 46 of that judgment, (with her own added emphasis) Justice Griffith quoted from Lord Kerr in **Williamson v The Attorney General for Trinidad and Tobago [2014] UKPC 29, paragraphs 11-14** :

"To constitute malice, the dominant purpose of the prosecutor had to be a purpose other than the proper invocation of the criminal law – an 'illegitimate or oblique motive' – and that improper purpose had to be the sole or dominant purpose actuating the prosecutor. It had to be shown that the prosecutor's motive was for a purpose other than bringing a person to justice and involved an intention to manipulate or abuse the legal system. Proving malice was high a 'high hurdle' for a claimant to pass. Further, the honest belief required of a prosecutor was a belief not that the accused was guilty as a matter of certainty, but that there was a proper case to lay before the court. Where there was absolutely no basis for suspicion, especially

where that was accompanied by an apparent reluctance to proceed with the charge, one might draw such an inference."

39. She then went on to be guided by **Miazga v Kellogg Estates [2010] 2 LRC 418**, a decision out of the Supreme Court of Canada which emphasized the very high threshold actually required in order to prove malicious prosecution. She quoted:

"… tort of malicious prosecution was not an after-the-fact judicial review of a Crown's exercise of prosecutorial discretion;… malicious prosecution was only made out where there was proof of malice in the form of improper purpose or motive involving an abuse of prosecutorial power or the perpetration of a fraud on the system of criminal justice, perverting it for ends it was not designed to serve."

40. Thus, the absence of a reasonable and probable cause may only be one factor to be considered in all of the circumstances. Proof of a reasonable and probable cause must, nonetheless, be based on what was available to the Defendants when the prosecution was commenced and maintained. This Court has already dealt with the initiation of the prosecution through charge by the 2nd Defendant and must now consider the continued prosecution thereafter.

41. The gravamen of the Claim here seems to be that even after the charge there was still no investigation into the Claimant's alibi. More importantly, when the sole eyewitness died, there was absolutely no case against the Claimant. His prosecution was by then, clearly malicious since there was no reasonable and probable cause to maintain same.

The Evidence:

42. After the Claimant was arrested, Sergeant Westby said he did not consider Aaron Bailey's alibi as crucial to the investigation. But he insisted that he did investigate it and it proved fruitless. All that seemed to change from the time of charge to the time of discharge, which touched and concerned the investigation, was that the sole eyewitness died.

43. Mr. Willoughby died on the 2nd May, 2014. Mr. Bailey was committed to stand trial in October of 2014 (the certificate is dated 10th October but states that the preliminary inquiry was held on the 22nd October). He was indicted on the January, 2015. Ms. Sheiniza Smith's testimony gives a history of the matter from the moment committal papers were received by the Office of the Director of Public Prosecutions.

44. It appears that she had initial carriage of the matter. The Claimant was arraigned at the January 2015 sitting of the Criminal Court before Justice Gonzales. He pleaded not guilty, was further remanded and the matter adjourned. She handed over carriage to another Crown Counsel. There is no indication of what happened to this file until June, 2018 when it was set tentatively for trial in September, 2018 before another judge. This is when Ms. Smith regained control of the file; and following its review, she filed a *nolle prosequi* on the 27th June. But she maintains that because of the backlog in the Court and the retirement of Justice Gonzales, it was highly unlikely that the matter would have been tried before the trial date set for September, 2018.

45. Prior to filing the *nolle prosequi*, she says in April, 2018 she had had the benefit of the arguments before the Caribbean Court of Justice in **Japheth Bennett v The Queen [2018] CCJ 29 (AJ)**. Ms. Smith said she understood from the Court's sentiments during that hearing that there was going to be a development in the law as it related to the acceptance of hearsay statements in the form of depositions in a trial.

46. The subsequent judgment of that Court determined that the prosecution must present evidence which supports the correctness of what is stated in that deposition. This, Ms. Smith said, she anticipated and was a primary consideration when she reviewed the Claimant's file.

47. Ms. Smith testified that before this decision the practice was *"to indict persons with offences even where the main witness was deceased or outside the jurisdiction. Depositions were readily admitted and tendered into evidence in the Supreme Court of Belize and relied upon as the sole proof against accused persons under* ***section 123*** *of the* ***Indictable Procedure Act****....."* She continued *"The Claimant's indictment was therefore not unique in that persons had previously been indicted where the main or sole material witness was deceased or living outside the jurisdiction."*

48. Counsel for the Defendants, by way of illustration presented **Emerson Eagan v The Queen Belize Criminal Appeal No. 10 of 2012**. There, the Court of Appeal in a murder case did not consider the prosecution's evidence weak where the only evidence was a statement of a sole eyewitness who had died. A retrial was ordered on other grounds. It is important to note here, however, that the witness's statement was somewhat different in content to what had been provided by Mr. Willoughby.

49. The witness had known the alleged perpetrator for about a year and a half, prior. On the night in question, he had held him in view for three (3) to four (4) minutes. At one point, they were only 10 to 12 feet apart. Moreover, there was no contradictory evidence from the prosecution particularly about any obstruction to the visibility of the perpetrator's face.

Discussion:

50. There is no doubt that the 2nd Defendant initiated the prosecution or that the prosecution continued when the Claimant was indicted and up until the *nolle prosequi* was filed. The issue of whether or not a *nolle prosequi* is a favorable conclusion to the matter in my estimation is without doubt as the Claimant was not convicted. The very case **Beckett v The State of New South Wales (ibid)** on which the Defendants rely, quotes at **paragraph 6** from **Salmond, The Law of Torts, 6th edition (1924)** at 595, *"What the plaintiff requires for this action is not a judicial determination of his innocence, but merely the absence of any judicial determination of his guilt."*

51. The remaining hurdles to surmount, then, are whether there was reasonable or probable cause for maintaining the prosecution and whether there was malice motivating the prosecution.

52. There is no indication that Sergeant Westby did any further investigation relating to the case, whether into the alibi or otherwise. I do agree that it is not the prosecutor's duty to find a defence, but it remains nonetheless a duty to properly and thoroughly investigate the offence. In fact, had Sergeant Westby been faithful to his duty he may or may not have discovered that

there was substance and truth to the alibi. He may or may not have even positioned himself to make a determination on the Claimant's fate well before the nolle prosequi.

53. However, having considered the evidence before the Court, I do not find the failure to investigate or thoroughly investigate the alibi to significantly affect the existence of the reasonable grounds for charging and continuing the prosecution. I agree with Counsel for the Defendants that the information possessed then by the Sergeant would not have included any information possessed by the alibi witnesses themselves and would not have been a consideration for him.

54. While there may have been some negligence on Sergeant Westby's part in the conduct of the investigation, the Court also appreciates that none of the alibi witnesses ever approached the police to indicate what they knew of the Claimant's whereabouts on the night of the murder. Most of them were his own family members and there was more than sufficient time for them to have taken some action between when Mr. Bailey had been charged and his eventual release. Even after he retained Counsel and up to the time the nolle prosequi was entered there was no approach. They were, after all, the foundation of his defence.

Whether the continued detention of the Claimant after the death of the sole eyewitness can be justified?

55. When the sole eye witness died, his evidence could no longer be the subject of scrutiny through cross-examination. What the prosecution was then

confronted with was the evidence of a sole eye witness who had had but a brief viewing of the shooter at night and who had refused to give a further statement when requested by Sergeant Westby to do so.

56. This evidence would be weighed against the testimony of other prosecution witnesses who were unable to see the shooters face because the face was obscured and a Defendant who had claimed, from the moment he was detained and interviewed, to have had an alibi. An alibi which had not been properly investigated, if at all. This would surely have come out in cross-examination. The quality of the evidence in the deceased's statement would more than likely not have met the required standard for a judge to exercise a discretion to allow this case to go to a jury.

57. It was, therefore, crucial for any reasonable prosecutor to act, to reconsider the evidence and the indictment and to make a determination to discontinue. It is at this juncture that the Court finds that there was no longer any reasonable or probable cause to maintain the prosecution against the Claimant because the case had lost its foundation. There was nothing on which the prosecutor could ground a reasonable belief that there could possibly be a conviction, yet Mr. Bailey was subsequently indicted.

58. Now, it is not the contention of the Court that the deposition of a deceased witness is without value. **Emerson Eagan v The Queen (ibid)** surely indicates that in appropriate cases it may be invaluable. Nor does the Court believe, as the Defendants posture, that the decision to act was prompted only by the hearing of (not decision in) **Japheth Bennett v The Queen [2018] CCJ 29 (AJ)**. Ms Smith testified that she anticipated what the

decision would be and it became a primary consideration when she reviewed the Claimant's file.

59. Perhaps, it was one of her considerations but not the primary. This Court would sooner believe that she belatedly realised that with the state of the evidence, there was really no reason to continue the prosecution and decided to do what was appropriate.

60. Now what of malice? In **Alrick Smith etal v The Attorney General Claim No. 389 of 2015 Justice Griffith stated at paragraph 39:**

> *"39. With respect to the fourth element of malice, the Defendants submit firstly and correctly so, that the burden of proving malice rests on the Claimants. Based on the authority of Brown v Hawkes25, malice was explained to mean 'any wrong or indirect motive' and that proof of malice could be established either by showing what the motive actually was or by showing that the prosecution could only be accounted for by imputing some wrong or improper motive to the prosecutor. Additional principles extracted from this authority were submitted to be that hastiness of a conclusion of a plaintiff's guilt whilst leading to a wrong conclusion would not amount to an improper motive and along with the rationale that a prosecutor's honest belief as to guilt should not lead to damages for acting on that belief, except on clear proof of malice."*

61. The Trinidadian High Court case of **Darryl Mahabir v The Attorney General of Trinidad and Tobago (ibid) at paragraph 74** referred to the Privy Council decision of **Sandra Juman v The Attorney General of Trinidad and Tobago [2017] UKPC 3** and its comment on malice:

> *"18. The essence of malice was described in the leading judgment in Willers v Joyce at paragraph 55:"As applied to malicious prosecution, it requires the claimant to prove that the defendant deliberately misused the process of the court. The most obvious case is where the claimant can prove that the defendant brought the proceedings in the knowledge that they were without foundation… but the authorities show that there may be other instances of abuse. A person, for example, may be indifferent whether the allegation is supportable and may bring*

the proceedings, not for the bona fide purpose of trying that issue, but to secure some extraneous benefit to which he has no colour of a right. The critical feature which has to be proved is that the proceedings instituted by the defendant were not a bona fide use of the court's process."

62. The case at bar is not of the type where proceedings were brought without foundation but it did lose its foundation with time. This Court also considers the **Canadian Supreme Court case of Proulx v Quebec [2001] 3 SCR 9** and favours the standard used for a finding of malice as *"evidence that reveals a wilful and intentional effort on the Crown's part to abuse or distort its proper role within the criminal justice system."*[P SEP]

63. In that case, the prosecutor had, some five (5) years earlier, determined that there were insufficient grounds to charge the Appellant with murder as the identification evidence was not reliable. The Appellant, subsequently, launched a defamation Claim against a radio station and a retired police investigator who had investigated the case. The very Defendants in the defamation case then informed the prosecutor of a possible new identification witness. The prosecutor added the said Defendant (the retired police investigator) to the prosecution team, re-opened the file, and proceeded to prosecute the appellant for murder. He was initially found guilty but his conviction was overturned on appeal with very harsh criticism about the lack of credible evidence. The Appellant, thereafter, brought a Claim for malicious prosecution against the Attorney General.

64. The Supreme Court in applying the above stated test explained:

"In addition to an absence of reasonable and probable cause, a suit brought pursuant to an allegedly abusive prosecution may succeed only where malice or an improper purpose is shown. This criterion was discussed by Lamer J. in Nelles, supra. Writing for a majority of this Court, Lamer J. noted that cases of malicious prosecution involve serious allegations, which relate to the misuse and abuse of the

> *criminal process and the office of the Crown Attorney. He stated (at pp. 193-94 and 196-97):*
>
> *'To succeed in an action for malicious prosecution against the Attorney General or Crown Attorney, the plaintiff would have to prove both the absence of reasonable and probable cause in commencing the prosecution, and malice in the form of a deliberate and improper use of the office of the Attorney General or Crown Attorney, a use inconsistent with the status of "minister of justice'.. . .*
>
> *We are not dealing with merely second-guessing a Crown Attorney's judgment in the prosecution of a case but rather with the deliberate and malicious use of the office for ends that are improper and inconsistent with the traditional prosecutorial function. [Emphasis in original.]*
>
> *As such, a suit for malicious prosecution must be based on more than recklessness or gross negligence. Rather, it requires evidence that reveals a willful and intentional effort on the Crown's part to abuse or distort its proper role within the criminal justice system. In the civil law of Quebec, this is captured by the notion of "intentional fault". The key to a malicious prosecution is malice, but the concept of malice in this context includes prosecutorial conduct that is fueled by an "improper purpose" or, in the words of Lamer J. in Nelles, supra, a purpose "inconsistent with the status of 'minister of justice'" (pp. 193-94)."*

65. I am minded to agree. In the case at bar, the Claimants have offered no wrong or indirect motive, no improper purpose. They relied solely on the inference being made. But in order to make this inference, all of the circumstances must be considered. The Claimants have asked the Court to consider the Sergeant's failure to conduct reasonable investigation or an identification parade. My views on those issues have been made clear. In the circumstances of this case, without more, they do not in my estimation amount to any form of ill will or improper motive.

66. The Claimants have also asked that the Court to consider the continued prosecution even after its foundation crumbled. While I am of the view that this speaks to a lack of reasonable and probable cause, even when coupled with the Sergeant's own negligence it does not surmount the very high hurdle

of malice.

67. On the other hand, the Defendants have asked the Court to consider the filing of the nolle prosequi and that it had been done long before the actual trial date, as evidence of a lack of malicious intent. I find this to be acceptable but recognize that there had been serious negligence in not attending to this matter sooner.

68. It must be recalled that the Claimant had been indicted, then subsequently brought before the Court for bail, he had been denied his liberty for a number of years. During most of that time, the evidence was tenuous as best. However, when all the circumstances, even this unnecessary delay are considered, I can not find there to have been anything more than serious negligence, lack of attention or faithfulness to duty or even a strong desire to bring a person to justice. Certainly, it has not been proven to be an intention to manipulate or abuse the legal system (**Williamson v Attorney General of Trinidad and Tobago** (**ibid**)).

Disposition:

69. For these reasons the Court cannot find any of the Defendants liable for either the false imprisonment or malicious prosecution of the Defendant and his case will accordingly be dismissed in its entirety. Issue 4, inevitably, falls away.

70. The Court has also considered the Claimant's circumstances, all that he has endured and what it perceives as the unnecessary length of his incarceration. It will, therefore, make no order as to costs.

IT IS ORDERED AS FOLLOWS:

1. The Claim is dismissed.
2. There is no order as to costs.

SONYA YOUNG
SUPREME COURT JUDGE