APPELLATE CIVIL.

Before Mr. Justice Mya Bu, and Mr. Justice Mosely.

DAW YON *v.* U MIN SIN.*

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Mar. 13.

Malicious prosecution, suit for damages—Launching prosecution on untrue statements—Inference of malice—Lawyer's advice—Facts fairly and correctly laid—Bona fide action on advice—Statements known to prosecutor to be untrue—Legal advice no excuse.

When a prosecutor launches a prosecution based upon a statement which he knows to be untrue, and for which there is no reasonable and probable cause, that very circumstance would raise the inference that there was malice in his instituting the prosecution.

If a person has laid all the facts of his case fairly before his lawyer and has launched a criminal prosecution acting *bona fide* upon the advice of the lawyer, he would not be liable to an action for damages for malicious prosecution. But where he launches the prosecution upon certain facts which he knows or must have known to be untrue, he cannot take shelter under his lawyer's advice.

Albert Bonnan v. *Imperial Tobacco Co.*, A.I.R. (1929) P.C. 222 ; *Nurse* v. *Rustomji*, 46 M.L.J. 353 ; *Ravenga* v. *Mackintosh*, 107 E.R. 541, referred to.

Anklesaria for the appellant.

Clark for the respondent.

MYA BU and MOSELY, JJ.—This is an appeal from a decree awarding damages for malicious prosecution. The prosecution in question was that launched in Criminal Regular No. 61 of 1937 of the Court of the Subdivisional Magistrate of Pyinmana on a complaint filed in the name of Maung Tun, styling himself as agent of Daw Yon, the defendant, against the plaintiff U Min Sin, who was described as banker and landowner. The complaint was filed on the 22nd April 1937. At that time as well as during the progress of that case Maung Tun was admittedly an agent of Daw Yon, acting under a power-of-attorney which generally authorized Maung Tun to act as Daw Yon's agent in all legal proceedings, civil, criminal and miscellaneous (not "criminal miscellaneous " as the translation of this

* Civil First Appeal No. 148 of 1939 from the judgment of the District Court of Pyinmana in Civil Regular Suit No. 1 of 1938.

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Court has it.) The prosecution was for an offence punishable under section 465 of the Penal Code, and was based upon the allegation that U Min Sin had produced an award in Civil Regular No. 9 of 1935 of the District Court of Pyinmana purporting to be one written and signed on the 12th November 1935, for which the stamp-paper, however, was purchased only on the 26th November 1935.

The antecedent facts are these : Daw Yon is one of the three widows of U Min Din, who died on the 17th October 1935, U Min Din being a brother of U Min Sin. U Min Din made a will a few days before his death, whereby he appointed U Min Sin and a sister named Daw Shin executors to distribute his estate amongst his heirs. On the 22nd October 1935 Daw Yon and other heirs of U Min Din signed an agreement to abide by the distribution to be made by U Min Sin, as an arbitrator, of all the properties of U Min Din. One of the children of U Min Din was a man named Maung Kha. That agreement was subsequently amplified by an agreement dated the 9th November, which was signed by all the heirs except Maung Kha. Then, pursuant to these agreements and after enquiry, U Min Sin drew up his award which, it is common ground, he delivered on the 20th November 1935 after due notice to the heirs concerned. When the notices of the intended delivery of the award were issued to the heirs U Min Sin received a notice from one Mr. Mitra, an advocate acting on behalf of Maung Kha, objecting to the making of the award. In spite of this objection the award was delivered on the 20th November, but subsequently U Min Sin discovered that this award should be stamped, and, therefore, purchased stamp-papers to the value of the requisite stamp and attached them to the award. Thereafter Daw Yon filed a petition in the District Court of

Pyinmana for the filing of the award, but it was dismissed for default, and as a result of a suit for partition of the estate of U Min Din the several heirs received various portions, Daw Yon herself receiving about 300 acres of paddy land. At that time Daw Yon was on friendly terms with U Min Sin and therefore she had her lands leased by U Min Sin on her behalf to various tenants. Later on, however, the friendly relations between Daw Yon and U Min Sin became strained, and Daw Yon was unable to recover the title-deeds of the lands or the lease bonds from U Min Sin, which gave rise to many legal proceedings,—charges of criminal trespass against U Min Sin and others and a civil action for delivery of those documents. In the civil action Daw Yon succeeded ultimately in getting a decree as she prayed for. Out of the three cases for criminal trespass two were withdrawn and one of the accused in one of the cases was convicted, but U Min Sin was not. Then came the institution of the proceedings in Criminal Regular No. 61 of 1937 simultaneously with the institution of the proceedings in Criminal Regular No. 62 of 1937 in the Court of the Subdivisional Magistrate, Pyinmana. Criminal Regular No. 62 of 1937 was also initiated on a complaint in which Maung Tun, styled in the same way as he was in the complaint in Criminal Regular No. 61 of 1937, prosecuted U Min Sin for an offence under section 468 of the Penal Code. These two proceedings were disposed of on the same day, when the prosecution withdrew the charge in Criminal Regular No. 62, and the Court heard arguments of advocates for the prosecution and for the defence as to why a charge should not be framed or a discharge should not be ordered in Criminal Regular No. 61. After hearing argument the learned Magistrate passed an order discharging U Min Sin and classifying the case as " false." In these circumstances, the plaintiff

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U Min Sin charges that the defendant Daw Yon prosecuted him in Criminal Regular No. 61 of 1937 maliciously and without reasonable and probable cause and claims damages in the sum of Rs. 30,000 as a solatium and Rs. 2,335, special damages.

One of the main defences to the action is that neither was the defendant the prosecutor in Criminal Regular No. 61 of 1937 of the Court of the Subdivisional Magistrate, Pyinmana, nor was the prosecution instituted at her instance. On this point the learned District Judge has found on the evidence and circumstances of the case that the prosecution was launched at her instance and she was therefore virtually the prosecutor. This conclusion is based upon very substantial grounds, for, in the first place, it is not disputed that Criminal Regular No. 62 of 1937 of the Court of the Subdivisional Magistrate, Pyinmana, was instituted at her instance and on her behalf by Maung Tun, her agent.

[Discussing the evidence their Lordships held that the learned District Judge was right in stating that the prosecution was launched by Maung Tun on behalf of Daw Yon and at her instance. The circumstances showed the absence of reasonable and probable cause for the prosecution. Defendant's own statements showed that the award was made on the 12th November 1935 and that the award was made known to all the parties concerned on the 20th November 1935. She knew all along that the award was not written either on the 26th November or subsequently but that it was written on the date on which it purported to be.]

Knowing quite well that the award was written on the 12th and was delivered on the 20th, the fact that the date of the purchase of the stamp-papers was the 26th November 1935 could not have given defendant any

ground for believing that it was written only on the 26th and was antedated the 12th November 1935. Upon this point the learned Advocate for the appellant urges that the prosecution was launched by Maung Tun after receiving advice from the lawyer Mr. Mitra. Maung Tun's evidence on this point is to the effect that he consulted the lawyer whether or not the case was good before he filed it and that the lawyer said that the case was good.

Another point which the learned Advocate for the appellant places before us for consideration is the wording of paragraph 3 of the complaint filed in the case wherein it is stated to the effect that the award was alleged to have been written and signed on the 12th November 1935 but the stamp-paper was purchased only on the 26th November 1935, and that in those circumstances the award could not have been written and signed on the 12th November 1935. It is contended that this statement is merely a simple statement of facts as appearing on the documents themselves, and that as regards the statement that the award could not have been written and signed on the 12th November 1935 it was a mere statement of the complainant's own inferences drawn from those circumstances. Maung Tun was not cross examined on behalf of the defendant as to whether the facts he laid before Mr. Mitra were true or not and consisted of all the relevant circumstances which would have enabled the lawyer to take a correct view of those facts. But whatever might have been the case, even if the defendant was advised through Maung Tun that upon the facts stated in paragraph 3 of the complaint a reasonable conclusion to be drawn was that the award could not have been written and signed on the 12th November 1935, yet, so far as the complainant is concerned she must be deemed to have been well appraised of the fact that that conclusion was

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erroneous, because she knew quite well before the matter was ever placed before the lawyer that the award was written and signed on the 12th November as she alleged in her petition for the filing of the award ; therefore, the charge that the award could not have been written and signed on the 12th November must have been known to Daw Yon to be absolutely contrary to the facts within her own knowledge. In such circumstances it cannot be doubted that so far as she was concerned she knew that that allegation was false and that there was no reasonable or probable cause for the prosecution.

When a prosecutor launches a prosecution based upon a statement which he knows to be untrue, and for which there is no reasonable and probable cause, that very circumstance would raise the inference that there was malice in his instituting the prosecution. In this case, however, there are other circumstances which show that at the time that the complaint was made the defendant was on very unfriendly terms with the plaintiff and was making use of all available opportunities for bringing the plaintiff into a criminal Court. That the charges of trespass did not materialize except in one of the cases and as against only one of the other persons accused and that the prosecution in Criminal Regular No. 62 of 1937 had to be withdrawn are circumstances which go to show that the prosecution launched in Criminal Regular No. 61 of 1937 based upon allegations of facts which were known to her to be untrue was malicious.

In the Privy Council case of *Albert Bonnan* v. *Imperial Tobacco Company of India, Limited* (1), their Lordships observed :

" Their Lordships have no doubt that it was in reliance upon the expert advice so received from London that the proceedings were instituted, and that though, as the event proved, that advice

(1) A.I.R. (1929) P.C. 222, 223.

was wrong it would be impossible rightly to hold that the respondents in acting upon it had no reasonable or probable cause for the course they took."

The case there was one in which there was no dispute as to the truth of the facts placed before the lawyer by the litigant, and it was upon those facts that the conclusion of the lawyer was arrived at as to their legal effect, and not like in this case where it is not known whether or not there had been an honest disclosure of all the facts either by Daw Yon or by her agent Maung Tun, and where a *bona fide* belief in the lawyer's advice, even if the lawyer stated that a charge could be maintained, could not have existed in the mind of Daw Yon. Only if Daw Yon, defendant, had all the facts of the case laid fairly before the lawyer and acted *bona fide* upon the opinion of that lawyer in having the prosecution in Criminal Regular No. 61 of 1937 launched against the plaintiff would she not be liable to the action for damages in this case. This is in accordance with the principles enunciated by Bayley J. in *Ravenga* v. *Mackintosh* (1), which has been followed in *W. H. Nurse* v. *Rustomji Dorabji* (2). But where the prosecutor has as in this case launched the prosecution upon certain facts which he or she knew or must have known to be untrue, or upon the conclusion drawn by the lawyer which he or she could not believe to be correct, the prosecutor is not entitled to take shelter under the lawyer's advice in a suit for damages for malicious prosecution against him.

[Their Lordships agreed with the District Judge in his assessment of general damages to be awarded to the plaintiff at Rs. 3,000 but increased the amount of special damages to Rs. 1,125 for legal expenses and dismissed the appeal with costs.]

(1) 107 E.R. 541 ; (1824) 2 B. & C. 693. (2) 46 M.L.J. 353.