KERALA HIGH COURT

Justice V. R. Krishna Iyer

Chatnu v. Valayanat Tharayil Chirutha

Citation: 1970 KHC 345 : 1970 KLJ 1023

JUDGMENT

1. Although the law relating to the tort of malicious prosecution is well settled, peripheral questions baffling easy solution sometimes vex the court and the present case has spawned some such problems. The defendant who gave information about an offence alleged to have been committed on his person by the plaintiff was sued in damages for malicious prosecution after the criminal case, charge sheeted by the police as C. C. 45 of 1960 on the file of the Sub Magistrate's Court, Tirur, ended in an acquittal (Ext. A1). The Trial Court dismissed the suit holding that the essential ingredients had not been made out, but the appellate court differed and decreed damages in a sum of Rs. 300/-. The defendant has carried the litigation to this court in the present second appeal and has turned the focus on points of law which deserve investigation.

2. The facts are few and may be stated right now. The plaintiff, a woman who lived alone, her husband being employed away in Calicut, is alleged to have chopped the defendant at about 8 p.m. on 27-12-1959 as he was returning home from the railway station along with 2 other friends one of whom is D. W. 2 and strangely enough none of them prevented the cut or seized the female assailant. The defendants' house, though but a little distance away from the plaintiff's was accessible by a shorter route than the one along which he is stated to have walked that night back home. The accused cut D.W. 1 (the defendant) on the head causing an incised wound and some other injury on the fingers stated to have been caused while warding off the cut. Water was poured on the wound, the

defendant was carried to the I hospital and at his instance information was conveyed by one of his companions to the village munsif who, in turn, duty bound, informed the police. The police, duly visited the scene, questioned witnesses, completed the investigation and charge sheeted the case against the plaintiff. It is also in evidence that the defendant, who was an inpatient in the hospital for a week, had, during this period, come out to the place of occurrence with the police presumably to point out the spot where he was attacked. There is no admissible evidence in this case as to whether the police found the place wet, and the reliance by the courts below on Ext. A6, the scene mahazar, is not permissible because a mahazar by itself is not substantive evidence and may be used only to corroborate the testimony of the police officer who prepared it. The investigating officer has not been examined in the suit, an omission which should ordinarily be avoided in such actions. I may mention here another circumstance also which will become relevant as the discussion proceeds. The victim had worn a shirt when he was cut the bloodstained clothing was produced neither before the police nor before the criminal court. The motive alleged by the defendant for this savage attack is that he D.W. 2 and others had signed a mass petition complaining about the harlotry of the plaintiff and the consequent menace to public morals in the locality. Although the petition itself had not been produced before the criminal court, it has been exhibited in the suit as Ex.B1,and what is more, the cross examination of the D.Ws. also proceeds on the assumption that such a petition had been filed. The plaintiff's case is and that was her defence in the criminal court that she is a married woman although her husband has been frequently away on account of his job elsewhere. Taking advantage of his absence, the defendant, she alleges, was making advances to her which she resisted. On the alleged day of occurrence as she was taking her bath from near the well the randy defendant made towards her, the outraged plaintiff resisted the overture and then ensued an encounter between man and woman and the woman overpowered the man who fell down hitting his head on an old vessel kept there, injuring his head. The plaintiff also sustained some minor injury. The medical certificate issued for the defendant's injuries is Ext. A5 and for the plaintiff's, Ext. A2, the medical officer who examined both being P.W. 2. The doctor has sworn that he found on the person of the defendant a vertical injury which was unlikely to have been caused by a fall on a drum (apparently the case of the accused was that the wound was caused by a fall on a drum or other like vessel). He also

swears to the injury being an incised one as distinguished from an incised looking one. According to him, the head injury is likely to have been caused by a sharp weapon and those on the finger of D.W. 1 could have been caused by "accidental contact of the hand while warding off a weapon". The same doctor had examined the plaintiff and in the witness box had sworn to the "injuries as recorded in Ext. A2" I may mention here that it is the obligation of the court to elicit from the medical officer and record the particulars of the injuries he noticed on the person of the victim. It might be convenient to avoid this tedious process and merely state that the injuries have been correctly stated in the wound certificate. It is elementary that the wound certificate as such is not substantive evidence and. as a contemporaneous record, may only corroborate what the medical officer may depose to in the witness box. S.157 of the Evidence Act should not be lost sight of by courts, merely to avoid the trouble of writing down the details of the wounds noticed by the doctor. Taking a technical view, one might go to the extent of saying that there is no evidence regarding the nature of the injuries on the person of the plaintiff, but taking a practical view one may recognise the likelihood of the plaintiff having sustained some injury.

3. The criminal court framed charges against the accused and after consideration of the entire evidence acquitted her. The relevance of the criminal court judgment in a suit for malicious prosecution is restricted although precedents have been brought to my notice which have taken liberties with these limitations. I will advert to these rulings a little later.

4. The sub Magistrate, in the present case, in acquitting the accused concluded thus: "*For the above reasons, I consider it unsafe to rely on the prosecution evidence. I hold that the case against her is not proved beyond reasonable doubt, find the accused not guilty as charged and acquit her under S.251A(11) Crl. P.C.*" The sequel was the suit notice, Ext. A3, duly refuted by Ext. A4, and the claim for damages in a sum of Rs, 1000/- in the present suit.

5. The principles governing actions for malicious prosecution are as familiar as they are free from obscurity.

"*It is a tort maliciously and without reasonable and probable cause to initiate against another criminal proceedings which terminate in his favour and which result in damage to his reputation, person, freedom or properly. ..... It is a remedy for misuse of legal procedure. ..... It is intended to discourage the use of the machinery of justice for improper purposes. The law relating to it has evolved from a compromise of 2 rules of law both of which are equally important. One is that all men have the freedom to bring criminals to justice. In that is involved the liberty of the citizen. The other is that in public good it is necessary that false accusations against innocent persons have to be prevented. In the harmonious blending of these 2 principles some restrictions have been made in making a successful claim for malicious prosecution*." (1969 KLJ 641).

When dealing with this tort, the need for reconciliation of two highly important social interests has been emphasised in the Restatement of the Law (Vol. III) thus:
"The first is the interest of society in the efficient enforcement of the criminal law, which requires that private persons who aid in the enforcement of the law should be given an effective protection against the prejudice which is likely to arise from the termination of the prosecution in favour of the accused. The second is the interest which the individual citizen has in being protected against unjustifiable and oppressive litigation of criminal charges, which not only involve pecuniary loss but also distress and loss of reputation."

In short, it is really a balance of desirabilities. The Privy Council as early as ILR 30 Allahabad 525 has observed:
"In the opinion of their Lordships, it would be a scandal if the remedy provided by this form of action were not available to innocent persons aggrieved by such unfounded charges.
In a country like India, the two considerations adverted to by me are both important. If the citizen could be scared away by threat of a suit for damages from giving information of the commission of an offence, every time a case ends in acquittal (and the rule of benefit of doubt results in many real culprits getting away with it) the administration of justice by court and the enforcement of the criminal law by the police will seriously suffer. At the same time, a blanket protection even for vindictive and false information or complaint

might be an invitation for harassing proceedings, on private initiative, being taken before the police and the courts. Having regard to the higher principle of promoting fearless resort to the authorities the court must look strictly at the restrictive ingredients of the tort of malicious prosecution. A just latitude is allowed by the law to those who as citizens and / or aggrieved persons inform or complain about crime of their action or falls short or misuse of the process of the law, inspired by oblique motives and without the vestige of a reasonable and probable cause.

6. Some argument was addressed as to the absence of malice in launching the prosecution by the defendant. Even here, it is right to mention that the adjective "malicious" in this tort is slightly misleading for, in this jurisdiction, the wrong consists not so much in the presence of the actual malice but in the perversion of the legal process to secure an object other than the vindication of justice. The word 'malice' is customarily used in two senses, the one factual and the other, artificial or legal. In the first sense, it means, plainly, ill will or a desire to do harm, and in the second, it merely denotes some motive other than desire to bring to justice a person whom the accuser believes to be guilty. In short, legal malice is an odd and unnatural expressions and, if I may adapt Bramwell L. J. in Weir v. Bell (1878) 3 Ex. D. at p. 243, "has no more meaning than legal heat, or legal cold, legal light or legal shade". It snot malevolence but oblique motivation. That is why in the American Restatement of the Law, this species of tort is described as wrongful prosecution (of criminal proceedings).

7. It is trite law that the plaintiff in an action for malicious prosecution has cumulatively to make out:

(a) that he was prosecuted by the defendant

(b) that the prosecution ended in the plaintiff's favour

(c) that the prosecution lacked reasonable and probable cause and (d) that the defendant acted 'maliciously'.

(I have already stated that this last word has to be understood in a legal sense and may perhaps be a misnomer if understood literally). In the present case, counsel have addressed me at length on the question as to whether the defendant is a prosecutor and also on the

absence of reasonable and probable cause. Ext. A1 is proof of the prosecution having ended in the plaintiff's favour; but who prosecuted the plaintiff?
"*The defendant must have been 'actively instrumental' in instigating the proceedings. If he merely states the facts as he believes them to a policeman or a magistrate, he is not responsible for any proceedings which might ensue as a result of action taken on his own initiative by such policeman or magistrate." (Street on law of Torts (1955 Edition) p. 411). (Similarly, the absence of reasonable and probable cause is an essential ingredient, the onus of proving which lies on the plaintiff even though it is the assertion of a negative. "If the assertion of a negative is an essential part of the plaintiff's case, the proof of assertion still rests upon the plaintiff.*"

8. The civil court can, and has a duty to, decide the issues independently of the judgment of the criminal court while recording its findings on the four elements already adverted to. In the present case, the courts below have put the judgment of the criminal court, Ext. A1, to use in a manner not permitted by the law by relying upon or referring to the arguments and conclusions which weighed with the magistrate, properly speaking, the judgment of the criminal court is evidence merely to show that the person prosecuted is out of the criminal woods, if I may say so. It is conclusive as to the prosecution having terminated in favour of the plaintiff. But this is the only use to which the judgment of the criminal court can be put. As regards the findings and the reasoning it is impertinent, being opinion evidence and the civil court has to reach its findings on the evidence produced before itself, resisting the "temptation of drawing inference from the criminal court's conclusions. In this context, reference may be made to the ruling reported in AIR 1933 Mad. 429. A Division Bench of that court, after referring to AIR 1929 Allahabad 265, observed:

"*The learned judge would appear to think that some presumption arises from the mere fact that the plaintiff has been acquitted by the criminal court in cases where there is no scope for surmise and where evidence was given by the defendant of what he actually saw. I think that this case goes a good deal further than the usually accepted position which is not effected by the Privy Council judgement, that it lies upon the civil court itself to undertake an entirely independent enquiry before satisfying itself of the absence of reasonable and*

probable cause. Indeed, I am unable to agree that our Evidence Act justifies an examination of the judgment of the criminal court in order to ascertain the grounds upon which the acquittal proceeded and the views taken by the trying magistrate of the evidence. Under S.43, Evidence Act, it appears to me that the judgment can be used only to establish the fact that an acquittal has taken place as a fact in the civil suit. I know of no provision in the Act which will justify the civil court in taking into consideration the grounds upon which that acquittal was based and upon this point I am in agreement with 9 Bom. Law Reporter 1934 and AIR 1928 Allahabad 337 in the view that there is no such provision."

Their Lordships proceeded further to hold that:

"*The clear and straight issue in the present case, which must be decided before we can find absence of reasonable and probable cause, is whether the respondent was deliberately making a complaint which was in substance false when he alleged that the appellant took part in the disturbance and fired the shot which injured D.W. 3. And the appellant must establish the falsity of this complaint by disproving it before he can be entitled to damage*." Mr. Justice Ramaswami of the Madras High Court has dealt with this aspect in a judgement characteristically informed by scholarship and laden with case law: "*Turning to the extent of the use which could be made of the criminal court's judgement and the deposition in the suit it is now well settled law that so far as the judgement of the criminal Court is concerned, the only use to which it can be put to is to prove that the prosecution had terminated in favour of the plaintiff: Venkatapathi v. Balappa, AIR 1933 Mad. 429 (Z26). The findings of the criminal Court or the reasoning thereof on which the judgement is based, is no evidence at all in a civil case between the parties and is not admissible excepting in those exceptional cases where the circumstances which resulted in the acquittal of the plaintiff became relevant, ie: the corruption of the Magistrate. That is so even with the judgement of the appellate court or the revisional court which reverses the order of the lower Court. The civil court in a suit for malicious prosecution has to base its findings on the evidence produced before itself as the whole question of malicious prosecution is opened anew and the absence of reasonable and probable cause and malice become points at issue before it and these issues have to be decided on the evidence*

produced before it: Kutumba Rao v. Venkataramayya, 63 Mad. LW 821: (1950) 2 Mad. LJ 336: (AIR 1951 Mad. 344). In regard to the depositions recorded in the criminal Court, they can be made use of as substantive evidence in the suit if the parties agree to treat those depositions as evidence in the suit or they are admissible under S.33 of the Evidence Act. Otherwise those depositions can be made use of only under the provisions of S.157 and 158 of the Evidence Act." (AIR 1957 Mad. 646).

In a recent ruling of this court, dealing with the effect of an acquittal in a criminal court upon disciplinary proceeding against a government servant, Mathew J. observed
"*A judgement of acquittal by a criminal court is inadmissible in a civil suit based on the same cause of action except for the very limited purpose mentioned in S.43 of the Evidence Act. Just as a civil court must independently of the decision of the criminal court investigate facts and come to its own findings, so also, I think, a tribunal conducting a disciplinary proceeding must investigate the facts and come to its own finding*. ....." (1969 KLJ 760).
A contrary view has been taken in some rulings such, for instance as the one reported in AIR 1960 Orissa 29. After referring to the Madras decision above cited and certain passages in AIR 1944 PC 1 Barman J. observed:

"*In my opinion, the Madras view as expressed in the decision cited above seems to be extreme. It is not that the judgment of the Criminal Court has to be ignored altogether but it should not be relied upon as conclusive for deciding the civil suit for malicious prosecution. A civil court has to go into the matter on the evidence adduced before it in the civil suit independently of the view expressed by the Criminal Court*."

I am not able to follow clearly how the civil court can decide independently of the view of the criminal court if its judgement can be referred to as presumptive evidence to reach the conclusion in the civil suit. If the materials considered by the criminal court are not separately placed before the civil court as evidence; the judgment is an extraneous factor to be ignored, for, to be influenced by what is extraneous is to allow intrusion into the obligation to act independently. It may, however, be noticed that a Division Bench of the Orissa High Court as late as AIR 1970 Orissa 91 has had occasion to touch upon this matter

contrarily. After repeating the duty of the civil court to decide for itself independently whether or not the prosecution was not without reasonable and probable cause or malicious, the court observed:

"No doubt the judgement of a criminal court is admissible to show certain facts and circumstances, such as, the names of witnesses examined, the documents exhibited or that the acquittal was on some technical grounds without going into the evidence or on the merits of the evidence, but in our opinion, the reasonings and conclusions in the judgement of a criminal Court cannot be gone into to determine whether the acquittal resulted on account of the prosecution evidence being weak, insufficient or doubtful".

Nevertheless the learned Judges took the view that:

"*Though normally the onus of proving the absence of reasonable and probable cause rests on the plaintiff it is subject to an exception that where the accusation against the plaintiff was in respect of an offence which the defendant claimed to have seen him commit and the trial had ended in acquittal on merits the presumption will be not only that the plaintiff was innocent but also that there was no reasonable and probable cause for the accusation. Then it is for the defendant to prove affirmatively the presence of such cause*", (head note).

The Bench then examined the further refinement between "acquittal on grounds of extreme weakness of the prosecution evidence and the acquittal by giving benefit of doubt" accepted in AIR 1960 Orissa 29. In the 1960 Orissa case it was stated that if the acquittal was on grounds of extreme weakness of the prosecution evidence, it could be treated as one on merits, but if it was after giving the benefit of the doubt it could not be so treated. Anyway, in AIR 1970 Orissa 91, their Lordships took the view that acquittal on the merits must mean any acquittal after trial on a consideration of the evidence as distinguished from, and in contradistinction to, acquittals resulting from or due to technical deficiencies. The learned judges discountenanced the distinction between acquittals bred by weakness of prosecution evidence and those flowing from the benefit of doubt.

"*Embarking on making such a distinction will necessary mean utilisation of reasonings and conclusions in the criminal court judgement by the civil court in the trial of the suit which is not permissible*."

A learned judge of the Kerala High Court, in a recent ruling reported in 1967 KLJ 967, although without discussing the limits of S.43 of the Evidence Act, has more or less veered to the view taken in AIR 1960 Orissa 29, The learned judge examined the judgement of the criminal court in that case and discovered that the acquittal was based on the benefit of doubt and, therefore, could not be described as "*an unstained termination of the prosecution in the accused's favour".* Indeed, his Lordship made a fairly close study of the evidence in the criminal case as disclosed in the judgement. "*The judgement in the criminal case shows that the two independent witnesses. for prosecution have spoken of the incident and have not been discredited in cross examination. One defence witness also spoke of the incident and all that the other defence witness had stated was that he could not say whether the incident actually took place or not. Anyhow, on account of the defendant's pretension of ignorance of his relationship with the plaintiff and the longstanding civil litigation between them the magistrate had chosen to give the benefit of the doubt to the plaintiffs and to acquit the plaintiffs*". According to his lordship, if the acquittal is based on "*benefit of doubt*" "it is a strong evidence, if not rebutted, against want of reasonable and probable cause for the prosecution". I respectfully demur if it is meant as a general proposition. It is basic to the trial of cases in, India that the Evidence Act must be applied without judicial exceptions and erosions' May be that this statute contains rules both dated and exotic and it may, perhaps be that in current conditions the law needs considerable revision but the court has merely to apply its provisions as they are. I have already explained that the Evidence Act does not admit of using the criminal court judgement for purposes other than are sanctioned by S.43 and I am unable to find nor have counsel helped me to spot any provision of law by which the contents of a criminal court judgment may become relevant to ascertain whether the acquittal is on the merits or not, and, further, whether it is after giving the benefit of the doubt or on account of the weakness of the prosecution evidence or on account of the overpowering effect of the defence evidence and so on. It appears to

me that the Madras view outlined in AIR 1933 Mad. 429 sets out the correct law and Ext. A1 may be looked into for establishing the termination of the criminal proceeding in favour of the plaintiff and for other formal purposes such as to ascertain the names of the witnessess examined, but not for any other substantive purpose, however tempting such use might be. The bearing of this divagation on the permissible uses of criminal court judgements will presently become clearer when I proceed to consider whether the defendant is the prosecutor and whether there is absence of reasonable and probable cause for the prosecution.

9. If the contents of the judgement regarding the manner in which the acquittal is rendered and the degree of weakness of the prosecution in making out its case are available for the civil court's consideration, counsel for the appellant is on good ground because he argues that in this case the acquittal results from the rule of benefit of doubt which, therefore, leaves room for doubt as to whether the plaintiff accused was guilty or not. He is reinforced by the implicit reasoning in 1967 KLJ 967. I am afraid that, for reasons I have already given, criminal court judgements are unavailable for this purpose nor is there any specific pronouncement in the 1967 KLJ case about the relevancy of such a judgment in an action for malicious prosecution for enquiring into a graduated scale of guilt or non guilt. The learned judge, on the facts of the case, came to the conclusion that malice and want of reasonable and probable cause for the prosecution had not been made out and reinforced that conclusion by reference to the discussion in the magistrate's judgement. I do not think it is authority for the broad proposition contended for by counsel for the appellant that whenever a case ends in acquittal and the magistrate gives the benefit of the doubt, a suit for malicious prosecution stands self condemned. That would be rewriting the law and if I may say so with great deference, could not have been meant by Madhavan Nair J. So much for the reliance on Ext. A1 by the appellant.

10. This is a proper stage for dealing with the reliance on Ext. A1 by the respondent. If a person alleges in a complaint or "first information" that a certain offence has been committed by another to his personal knowledge, runs the argument, and the criminal case flowing therefrom fails eventually, a presumption of absence of reasonable and probable

cause arises and, further, of malice in the prosecutor. The learned Subordinate judge has proceeded on this footing relying upon the rulings reported in AIR 1960 Orissa 29 and 1965 KLT 1054. There are quite a number of other decisions which take this view and I may mention that this is of pivotal significance in an action for malicious prosecution because some High Courts have gone further to hold that if a person gives information to the police which to his knowledge is false and gives evidence for the prosecution later he may be taken to be the real prosecutor even though he has not taken any other steps in the course of the investigation or in the conduct of the case. Naturally, the impact of an acquittal on the ingredients making up the tort in that species of the information or complaint which alleges personal knowledge of the accuser deserves serious consideration. The logic is that when a person is acquitted in a criminal case his innocence of the charge is established and, if he is innocent, the allegations in the complaint or information making him guilty are untrue. And where those allegations purport to be made by an accuser as within his personal knowledge, the complaint is false. If it is false, obviously it is bereft of reasonable and probable cause and inspired by improper motive. The cornerstone of this edifice is that an acquittal in a criminal court is axiomatically a certificate of innocence. A first rate fallacy! A conviction follows upon that degree of proof of guilt, which is free from reasonable doubt. If evidence falling short of this exacting standard is all that has been adduced in court, the accused has to be acquitted, be he guilty. In other words, on a mere preponderance of probabilities a criminal court could not even if it would, while a civil court could, even if it would not, hold the charge proved. For, "It is undoubted law that in civil proceedings a finding can and may be rested on the probabilities of the case". (Vide 1960 Kerala 195) but a criminal court, under our jurisprudence, is bound to acquit the accused not merely when he is innocent but in every case where the guilt has not been brought home beyond reasonable doubt. This is part of the public policy of our penal law referred to as the bedrock of criminal law or the golden thread that runs right through our criminal jurisprudence. Better that a hundred guilty person escape rather than one innocent person be convicted: It follows from this policy that courts perforce allow guilty persons to escape because the proof of guilt is not sufficiently rigorous and so an acquittal is not necessarily a judicial negation of guilt. In this context, one may read Glanville Williams

on the Proof of Guilt (The Hallwin Lectures, p. 130-131). The learned author asks what degree of proof is needed and expands on it.

"Is it mere likelihood, or certainty, or something in between these two extremes? This question in turn raises a fundamental issue of penal policy: how far is it permissible, for the purpose of securing the conviction of the guilty, to run the risk of innocent persons being convicted?

The Romans had the maxim that it is better for a guilty person to go unpunished than for an innocent one to be condemned; and Fortescue turned it into the sentiment that twenty guilty men should escape death through mercy rather than one just man be unjustly condemned. The next recorded instance of this is in the mouth of Sir Edward Seymour, who, speaking for Fenwick upon a Bill of Attainder in 1696, said: "*l am of the same opinion with the Romn, who in the case of Catiline, declared, he had rather ten guilty persons should escape, than one innocent should suffer."* Hale took the ratio as five to one; Blackstone reverted to ten to one, and in that form it became established.

The maxim did not go altogether without challenge. Its most celebrated opponent was Paley, who in his Principles of Moral and philosophy, took issue with it because of the paramount social importance of convicting the guilty. "When certain rules of adjudication must be pursued, when certain degrees of credibility must be accepted, in order to reach the crimes with which the public are infested courts of justice should not be deterred from the application of these rules by every suspicion of danger, or by the mere possibility of confounding the innocent with the guilty. They ought rather to reflect, that he who falls by a mistaken sentence may be considered as falling for his country."

Thus, the acquittal in a criminal court depends largely on the line the law drawn between the risk to the innocent individual and the danger to society which needs protection. The learned author's exposition is instructive. Supposing the proposition is that

"It is better that a thousand, or even a million, guilty persons should escape than that one innocent person should suffer; but no responsible and practical person would accept such view; for, it is obvious that if pur ratio is extended indefinitely, there comes a point when a the whole system of justice has broken down and society is in a state of chaos".

11. My point is that an acquittal is not a sure index of innocence but the expression of a reasonable apprehension that by convicting, the court runs the risk of punishing the innocent. This is precisely why the Indian courts have refused to treat acquittals in criminal courts as conclusive of the innocence of the accused when the same person on the same facts is proceeded against by way of disciplinary action before an administrative tribunal. In 1969 KLJ 760, Mathew J. has explained how his acquittal notwithstanding, the delinquent officer may be punished. The following excerpts are illustrative of my point:
"I do not think that judgement of a criminal court acquitting an accused on the merits of a case would bar disciplinary proceeding against him on the basis of the same facts; or that the judgement would operate as conclusive evidence in the disciplinary proceedings. The reason for it is not far to seek. A criminal court requires a high standard of proof for convicting an accused. The case must be proved beyond reasonable doubt. The acquittal of an accused by a criminal court only means that the case has not been proved against him beyond reasonable doubt. Such a standard of proof is not required for finding a person guilty in a disciplinary proceeding. It would be enough if there is a preponderance of probability of his guilt."
If this thinking were correct, Ext. A1 cannot ipso facto establish the innocence of the plaintiff or form the foundation for the presumption of malice and absence of reasonable and probable cause. Nevertheless, it must be stated that a large number of decisions have taken the contrary view. AIR 1929 Allahabad 265 and AIR 1938 Patna 529 are two of the old cases taking this view. AIR 1940 Patna 167, AIR 1958 Patna 329, AIR 1960 Orissa 29, 1965 KLT 1054 and AIR 1970 Orissa 91 strike a similar note:

'Where therefore, the charge is of such a nature as must be true or false to the knowledge of the defendant, then no question of reasonable and probable cause can arise. Falsity of the evidence by the prosecutor himself would go to show want of reasonable and probable cause and further go to show malice on the part of the prosecutor". (AIR 1958 pat. 329).

Anyway, assuming that an acquittal generates a rebut table presumption its scope is confined to two ingredients only viz., the absence of reasonable and probable cause and

malice. Even so, it still is necessary to establish that the defendant was the prosecutor. Let me assume these two elements in favour of the plaintiff and proceed to the enquiry as to whether the defendant is the real prosecutor.

12. Counsel for the respondent has urged on the strength of yet other decisions, particularly the one reported in AIR 1960 Kerala 264 that where the complainant had laid a charge against the plaintiff on facts allegedly within his personal knowledge he must be deemed to be the prosecutor if it be shown that the allegations were false to his knowledge. It is not necessary for me to refer to all the rulings on the point since Vaidialingam J., (as he then was) has exhaustively dealt with the question in the 1960 Kerala case. His Lordship referred to the leading Privy Council decision reported in ILR 30 Allahabad 525 and observed: "It is also clear that their Lordships are of the view that 'if the charge is false to the knowledge of the complainant' he will certainly be liable for the consequences of this false complaint and it will be no defence for such a person to merely say that the actual prosecution was instituted and conducted by the police. No doubt, in the case of a person who merely gives some information to the police on the basis of which the police starts investigation and ultimately lay a charge against the persons, who, according to them, may be involved in a particular occurrence, it cannot be stated that such a person who merely laid information to the police, without anything more can be considered to be a prosecutor unless he misleads the police by bringing suborned witnesses to support it and influences the police to assist him to sending an innocent man for trial before the Magistrate."
It is now well established that in this branch of the law it must be shown that the defendant has been actively promoting the 'Operation Prosecution' during the investigatory and or forensic phases of the criminal proceedings. It is not necessary that he should figure as the complainant in the court and indeed, in India, the private sector operates in the matter of criminal prosecutions often by igniting police investigation. Bearing this aspect in mind the Judicial Committee observed in AIR 1926 PC 46:

"*In any country where, as in India, prosecution is not private, an action for malicious prosecution in the most literal sense of the word could not be raised against any private*

individual. But giving information to authorities which naturally leads to prosecution is must the same thing. And if that is done and trouble is caused, an action will lie."

Of course, in that decision, their lordships have observed that the approach should be to find out whether the plaintiff has proved that the defendant' invented & instigated the whole proceedings. I am not too sure whether a party who gives false information to the police but thereafter takes no interest and renders no assistance in the course of the investigation or in the conduct of the case can be said to be a prosecutor. (True it is that even one who is screened off from view by the formal presence on the record of the State as prosecutor may be the real prosecutor provided the organisers, sub rosa, the criminal action or rather, he ropes in the accused by information and assistance. They also serve as prosecutors who only pull strings and operate from behind, if the project is the outcome of their active contribution. But something more than merely laying information, be it true or false, is necessary to make him an active instrument and it is only if he is actively instrumental in setting the law in motion can he be designated the prosecutor. In a ruling reported in AIR 1953 Orissa 56, the learned Judge, Mohapatra J., observed that the mere giving of information "*even though it was false, to the police cannot give cause of action to the plaintiff in a suit for malicious prosecution if he (the defendant) is not proved to be the real prosecutor by establishing that he was taking active interest in the prosecution and that he was primarily and directly responsible for the prosecution*" Vaidialingam J. observed, with reference to this decision, that the proposition so stated was too broadly expressed. In AIR 1966 Andhra Pradesh 292 Manoher Pershad J. took the view:

"*I am not prepared to agree with the contention of the learned counsel that merely if it is shown that the complainant had made a false complaint he would be made liable for damage. In order to make him liable apart from that fact, the further facts namely that he assisted the police in sending an innocent man for trial and that he misled the police by bringing suborned witnesses have to be proved*."

While I am inclined to agree with the latter view, I do not wish to pronounce definitely on the conflict as, perhaps, it is not necessary for an effective disposal of this case.

13. The simple question is whether the defendant is the prosecutor. The facts relied upon by the respondent to substantiate this part of the case are that the first information was laid at the instance of the defendant, that the story was intrinsically improbable and had ended in an acquittal. Further, he had gone to the spot with the police and later sworn in support of his version. Counsel argued that the allegation was that the complainant had cut the defendant with a chopper at about 8 p.m. while he was on his way home in the company of two other persons. A female aggression, in such circumstances, was incredible. (By way of aside, a word. A single woman, waiting at night weapon in hand. and charging on a lascivious molester may be, improbable but not incredible; for there are women and women and some tough viragos may be ferocious and many others desperately violent like bears at. bay). Again D.W. 1 was going through a longer route then was natural. He had worn a shirt, which must have been bloodstained had he sustained the wounds as alleged, but it was not produced before the police or the court. The presence of blood stains in the courtyard of the plaintiff's house was held up as circumstantial evidence of [he rival version. The learned District Judge squeezed out of Ext. A6 (not even admissible as already pointed out) the defendant's desire to mislead the police! The motive put forward by the prosecution was also commented upon. Counsel insisted that the acquittal by itself, was potent enough to prove the defendant the real prosecutor. May be, the prosecution case was improbable. From here counsel jumped to the facile conclusion that it was false, forgetting for a moment that the accused's version was also stricken with improbablities. She did not even mention to the police officer who visited the place the next day that she was sought to be ravished by the defendant, seizing upon the nefarious opportunity by offered by the absence of her husband in the house. Her explanation of the defendant's incised injury was puerile. In fact, the learned Munsif, after adverting to the pros and cons came to the conclusion that while the story of assault by the plaintiff was "unconvincing", the plaintiff had "something to do with the injury". He disbelieved both the versions and concluded that the ingredient of absence of reasonable and probable cause had not been made out. The learned District Judge, I am afraid, has strained the probative circumstances to reach a

desired end instead of landing on a conclusion they naturally led him into. A judge, like any other person, is apt to adapt, exaggerate or underrate the import and effect of evidence and overlook in admissibility, to justify the verdict which appeals to him as true. This unwitting 'process has to be carefully eschewed in the art of judging.

14. The prosecution case may be false but one cannot therefore conclude it must be false for, the distance between 'may be' and 'must be' is long and to leap from one to the other without the assistance of additional clinching circumstances is judicial folly. Since the defendant had to prove his case in the criminal court beyond reasonable doubt and he failed, the plaintiff was acquitted; but since the plaintiff has to make out the defendant to be the prosecutor, in the civil court, she must fail if the onus is not discharged properly. Pertinent to the present point is whether the complaint has been shown to be false to the knowledge of the defendant so that, on the strength of 1960 Kerala 264, it may be held that he is the de facto prosecutor.

15. The investigating officer has not been examined a defect which is sometime vital and it is not possible to state whether the police asked the complainant to come to the scene or he went there to assist the police and mislead them, and what other role he played during the investigation and later. The learned District Judge has referred to the pouring of water as susceptible of misleading the police, but there is no evidence in the suit as to whether the police noticed water on the footpath and whether the defendant had taken them to that place and pointed out this circumstance. The evidence on this point has been, to an extent, misread by the appellate judge. Nor can the fact of acquittal be efficacious by itself to show that the complaint was false to the knowledge of the defendant. While decisions have gone to the extent of stating that the acquittal in a criminal case, where the complaint proceeds on the personal knowledge of the complainant, may give rise to a rebuttable presumption of absence of reasonable and probable cause and of malice there is no decision which goes to the extent of holding that merely because the criminal court has acquitted the accused in such a case, there must be presumption that he is the prosecutor. If independently of the criminal court judgment it is made out that the complaint was false to the knowledge of the complainant, the 1960 Kerala case is authority that that circumstance is sufficient to hold him to be the prosecutor. However, the judgment of acquittal not being permissible

material for proving that the complaint was false to the knowledge of the complainant, there must be evidence aliunde. There is none in this case which goes beyond the line of improbability into the area of falsity. Nor are there other circumstances to prove that the defendant, beyond giving information and evidence and doing what the police directed him, was an activist in the scheme of the prosecution. I am not therefore, prepared to hold that the defendant is the prosecutor.

16. In the result, the appeal has to be allowed. I have already observed that the versions set up by both the parties remain unproved and, as the learned trial judge has observed, there are improbabilities in both. The truth lies somewhere in between and is obscured by the false hoods indulged in by both sides. Naturally, they must suffer by being called upon to bear their costs throughout.