Hilary Term
[2024] UKPC 1
Privy Council Appeal No 0046 of 2021

JUDGMENT

Attorney General of Trinidad and Tobago (Respondent) *v* Harridath Maharaj (Appellant) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Briggs
Lord Kitchin
Lord Burrows
Lady Rose
Lord Richards

JUDGMENT GIVEN ON
25 January 2024

Heard on 1 February 2023

Appellant
Peter Carter KC
Katie O'Raghallaigh
(Instructed by Freedom Law Chambers)

Respondent
Robert Strang
(Instructed by Charles Russell Speechlys LLP (London))

LORD RICHARDS:

Introduction

1. This appeal concerns a claim for the tort of malicious prosecution.

2. On 4 March 2004, the Appellant, Harridath Maharaj, a serving police officer, was charged with two offences under the Forests Act (Chapter 66.01) ("the Act"), as amended by the Forests (Amendment) Act 1999. First, he was charged together with another person with having felled a quantity of cedar and teak trees between Friday 1 August and Thursday 4 September 2003 at Quarry Village, Santa Flora in the County of St Patrick without a felling permit, contrary to section 7(1). Second, he was charged with having removed a quantity of cedar and teak timber between 1 August and 4 September 2003 from land at Quarry Village, Santa Flora, without a removal permit, contrary to section 7A(1).

3. On 13 November 2007, the charges were dismissed by the magistrate on a submission of no case to answer after the close of the prosecution case. The Board was not provided with any reasons given for the dismissal. In submissions to the Board, the Appellant did not rely on the fact of the dismissal as supporting the present claim nor did the Respondent submit that anything unexpected occurred at the hearing which explained the decision to dismiss the charges.

4. On 28 October 2011, the Appellant issued a claim for malicious prosecution against the Respondent, based on allegations against those involved in the investigation and in the decision to charge the Appellant, particularly Assistant Superintendent of Police ("ASP") Phillip.

5. In a judgment given on 15 March 2016, Seepersad J found for the Appellant and awarded aggravated damages of $185,000, exemplary damages of $65,000 and special damages of $40,000.

6. In a judgment given on 1 July 2020, the Court of Appeal (Mendonça JA, Mohammed JA and Rajkumar JA) allowed the appeal, set aside the judgment below and dismissed the action.

7. The Appellant appeals as of right to the Board.

The tort of malicious prosecution: the law

8. There is no dispute between the parties as to the legal principles governing a claim for malicious prosecution as regards criminal proceedings. As the Court of Appeal noted in para 37 of its judgment, a claimant must establish that (i) the defendant initiated a criminal charge against the claimant; (ii) the claimant was acquitted of the charge or the proceedings were otherwise determined in the claimant's favour; (iii) in instituting and continuing the prosecution, the defendant acted without reasonable and probable cause; (iv) the defendant was actuated by malice; and (v) in consequence, the claimant suffered damage.

9. In the present case, there was no dispute as regards the first and second elements or, if the third and fourth elements were established, that the claimant could establish loss.

10. The third and fourth elements are separate but cumulative requirements for a successful claim for malicious prosecution. The third element has both subjective and objective aspects. The subjective aspect is that the prosecutor must believe that there is a proper case to bring. The objective aspect requires that there existed proper grounds to bring the case, to be judged by reference to the evidence known to the prosecutor and such other evidence as would have been known as a result of any enquiries that should have been, but were not, made. However, the prosecutor does not have to believe that the proceedings will succeed. It is enough that, on the material on which the prosecutor acted, there was a proper case to lay before the court: see *Willers v Joyce* [2016] UKSC 43, [2018] AC 779 at para 54 per Lord Toulson; *Stuart v Attorney General of Trinidad and Tobago* [2022] UKPC 53; [2023] 4 WLR 21, at paras 26–28, per Lord Burrows.

11. The element of malice requires the claimant to prove that the proceedings initiated by the defendant were not a bona fide use of the court's process. While proceedings brought in the knowledge that they were without foundation may be the most obvious case, it will be sufficient if, for example, the defendant was indifferent whether the charge was supportable and brought the proceedings for an illegitimate collateral purpose: see *Willers v Joyce* at para 55 per Lord Toulson.

12. As Lord Toulson remarked in *Willers v Joyce* at para 54, the two requirements of the absence of reasonable and probable cause and malice can become entwined. In the present case, Seepersad J held that objectively there was no reasonable and probable cause for initiating the charges against the Appellant and from that he inferred that ASP Phillip had no belief that there were proper grounds for the prosecution and that he was actuated by malice. Accordingly, before the Court of Appeal and the Board, the submissions of both parties focused on whether the judge was right to hold that objectively there was no reasonable and probable cause for initiating the charges.

The evidence

13. Before considering the judgments below, it is helpful to summarise the state of the evidence which ASP Phillip had when he brought the charges against the Appellant. It is not suggested that changes in the evidence at a later stage made it wrong to continue with the prosecution. The Appellant's case is that it was flawed from the start.

14. There was no direct evidence that the Appellant had felled any trees or removed any timber. Direct evidence is not, however, required for a successful prosecution. Circumstantial evidence may be sufficient but will require careful scrutiny by the prosecutor and the judge or jury alike. As Gibbs CJ and Mason J said in *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521, para 15 (High Court of Australia), quoted by the Court of Appeal in the present case, at para 45:

> "… in a case depending on circumstantial evidence, the jury should not reject one circumstance because, considered alone, no inference of guilt can be drawn from it. It is well established that the jury must consider 'the weight which is to be given to the united force of all the circumstances put together': per Lord Cairns, in *Belhaven and Stanton Peerage* (1875) 1 App Cas 278 at 279…".

15. The evidence available to ASP Phillip comprised statements by witnesses, entries in police station records and timber identified as having come from the trees which had indisputably been felled.

16. The following summarises the evidence supporting the case against the Appellant.

17. Keith Jaggernauth gave a statement dated 9 September 2003. Mr Jaggernauth was a Forester I attached to the Ministry of Public Utilities and the Environment, Forestry Division, a post he had held since 1983. His responsibilities included the protection of the plantation and natural forest, requiring him to patrol the forests and investigate any illegal activities, such as the unauthorised felling and removal of trees. He said that on 3 September 2003, he received information that a cedar tree had been felled at Main Ridge Road, Quarry Plantation. The following morning, he went to investigate, taking with him Jaglal Sookdeo, a plantation overseer, and Sookraj Maharaj, a woodsman. They found a felled cedar tree on the road. The trunk had been cut off and the logs from it were missing. Mr Jaggernauth recorded the measurements of the stump and marked it with his official hammer. Some 20 feet away, another felled cedar tree was found, with its logs present. More felled cedar and teak trees were discovered in the

area. When Mr Jaggernauth and other witnesses refer to "logs", this may refer to the whole or parts of the trunk of a tree.

18. While the trees were being measured and marked, at about 10.30am, Mr Jaggernauth and his colleagues saw a tractor approaching, driven by a man recognised by Mr Jaggernauth as Boysie Ali, a self-employed wood cutter and logging contractor. Mr Jaggernauth asked him whether he had come for the wood, and he replied, "Don't ask me, ask the Police behind, them hire me". At about that time, two men arrived, who identified themselves as the Appellant and Sergeant ("Sgt") Harnarinesingh. Two other men had also arrived, one of whom Mr Jaggernauth recognised as Roger Ali, Boysie Ali's son.

19. The Appellant said that he had information on a suspect and that they had had the area under surveillance for a week. Mr Jaggernauth asked the Appellant what the tractor was doing there, and he replied that he was going to move the logs so that it would "look like a thief trying to thief from a thief". Mr Jaggernauth pointed out that, if the logs were moved, a thief would realise that someone was on his tail and would not be seen again. The Appellant asked him what he was going to do, and Mr Jaggernauth replied that he was in the process of seizing the material and would then report to his seniors. The Appellant told Boysie Ali to take the tractor away and said that he was handing the matter over to Mr Jaggernauth. He left with the rest of his party. Further felled trees were discovered close by in the course of the day, making a total of ten cedar trees and 25 teak trees. The logs from three cedar trees and 19 teak trees had been removed. Mr Jaggernauth measured and marked all the tree stumps. All the stumps and the remaining logs were removed to the Forestry Division's nursery at Cap-de-Ville in the period 5–8 September 2003.

20. Mr Jaggernauth said that on 6 September 2003, acting on information provided by his superiors, he went to Ragoonanan Trace in Penal and saw 14 teak logs on empty land opposite the Appellant's house. He placed markings on the logs and recorded their measurements. Thirteen logs were taken to the Forestry Office at San Fernando, and one was left behind, which was subsequently found partially burnt. A further 20 teak logs were seized at a commercial depot and removed to the Cap-de-Ville nursery.

21. All the logs and stumps were measured and photographed. The statements of Mr Jaggernauth and of Steven Leemoon, Assistant Conservator of Forests, gave details of the process and the measurements.

22. Mr Jaggernauth reported his findings to Superintendent ("Insp") Mohammed who was initially appointed as the investigating police officer.

23. Jaglal Sookdeo and Sookaraj Maharaj gave statements dated 16 September 2003, which were consistent with Mr Jaggernauth's statement.

24. Boysie Ali gave a statement dated 18 September 2003, in which he said that about three months earlier he had been hired by the Appellant to pull some cedar and other trees from land at Sobo, Palo Seco. He was paid $600 to pull the trees to the Main Road. On 3 September 2003, the Appellant asked him in a telephone call to pull some wood for him in Santa Flora. As agreed, Boysie Ali (and his son, Roger) met the Appellant at the Santa Flora police station the following morning. The Appellant told him that he had information that someone was stealing wood in the Mahaval Forest and that he wanted to move some logs to the roadside so that the police could watch over them and see who would steal them. The Appellant fetched Ramesh Narine, another woodcutter well-known to Boysie Ali. They all drove to Quarry Plantation, Boysie Ali in his tractor and the others in a police car. The Appellant pointed to the area where he said the trees were to be found. On reaching that area, Boysie Ali found that Mr Jaggernauth, whom he knew, was marking the logs. He asked Boysie Ali what he was doing there, and he replied that he should ask the police officers who had brought him. After a conversation between the Appellant and Mr Jaggernauth, the Appellant said to Boysie Ali, "Let us squash that deal", and they left.

25. Acting Police Corporal Dinoo ("Cpl Dinoo") gave a statement dated 27 November 2003, in which he withdrew an earlier statement dated 11 September 2003 that was supportive of the Appellant. He stated that he had been coerced by the Appellant into making it. In his second statement, he said that on 30 August 2003 he was instructed by the Appellant to meet him with a marked police vehicle at the Santa Flora police station. Once there, he was told by the Appellant that he had received information that some people were stealing logs in the forest near the Quinam Road. The Appellant, driven by PC Harripersad, followed by Cpl Dinoo in the marked vehicle, went to the Quinam Road. Cpl Dinoo there saw two winch trucks parked on the road. As the car driven by PC Harripersad went past the trucks, they pulled out and followed closely behind the car, with Cpl Dinoo in the rear. They turned off the Quinam Road and drove for 20–30 minutes along a badly maintained road. At a junction, the trucks continued down another road, but the cars stopped. The Appellant got out of his car and walked down to where the trucks had stopped. Cpl Dinoo and PC Harripersad stayed at the top of the hill for about half an hour and then walked down the hill where Cpl Dinoo saw men loading logs on to the trucks. The Appellant kept walking between the trucks. When they were loaded, the trucks drove off. The Appellant, Cpl Dinoo and PC Harripersad walked back to their vehicles. They drove to a place in the forest where there were several cut logs by the side of the road and some others inside the bushes. Cpl Dinoo remembered the Appellant asking him if the logs looked like good logs. Later the Appellant asked Cpl Dinoo to drive him to Penal Rock Road. On that road, they followed a blue and white truck which appeared to be one of the trucks used to move logs in the morning. Cpl Dinoo asked the Appellant whether it was one of the trucks and he replied, "Don't worry about that." When Cpl Dinoo returned to Santa Flora police station, Cpl McDonald asked him about the logs piled by the side of the

police station. Cpl Dinoo said he had not seen any logs when he had arrived that morning and he knew nothing about them. On 3 September 2003, he noticed that the logs had gone.

26. Other officers based at the Santa Flora police station gave statements concerning the presence of logs at the station. PC Gopaul arrived for duty at about 7.50am on 30 August 2003. During the day, he observed some logs at the side of the station, but he did not know how they got there. They were still there when he left at about 6.20pm but they had gone when he returned at 5.50pm on 31 August 2003. WPC Star Jacob stated that she had seen logs beside the police station when she arrived for her shift at 5.40pm on 30 August 2003. She asked about the logs and was told by PC Ramroop that "the logs concerned" the Appellant and that he would be returning "into the night to deal with the logs". PC Ramkissoon stated that he had seen some logs on the side of the police station on 31 August 2003.

27. Cpl Dinoo further stated that in mid-September, soon after he learnt that the Fraud Squad was investigating a report of stolen logs in the Santa Flora district, the Appellant called him into his office and told him that Senior Superintendent ("Supt") Alphonso wanted a statement from him. The Appellant showed Cpl Dinoo a statement that he had written and told Cpl Dinoo to write a statement along the same lines, or else Cpl Dinoo would be charged, as it was a serious matter. He also showed Cpl Dinoo a statement written by PC Harripersad which was similar to the Appellant's statement, and again told him to write along the same lines. The statement continues: "I then became fearful of being charged and losing my work so I wrote a statement along those lines and gave it to him and he said he is taking it to Mr Alphonso. He did not give me a copy of the statement I wrote." Cpl Dinoo further stated: "Since the investigation started Inspector Maharaj has been constantly calling me on my cell phone and at my workplace and telling me that if I don't stick to the first statement I would get in trouble."

28. Rickey Lee Fiddler, an Estate Police Constable, gave a statement dated 29 November 2003, in which he said that he lived at Ragoonanan Trace, two houses away from the Appellant. At some time between 11.00 and 13.00 on one of the days between 1 September and 4 September 2003, he saw a truck loaded with logs pull up on the vacant land opposite his house. He then saw the Appellant drive up with a uniformed police officer in it. The Appellant coordinated the offloading of the logs on to the land. Everyone left after the logs had been offloaded. The land was owned by the Appellant and his wife, as the Appellant told ASP Phillip when he was first approached for a statement. He said that people left things on it.

29. The following statements, as summarised below, supported the Appellant.

30. The Appellant himself submitted a written statement to ASP Phillip on 25 September 2003. He said that sometime in August 2003, having received certain information, a party of police officers, including himself, went to Mahaval Forest. On arrival, they saw a red Nissan Sunny car and three men, one wearing a brown uniform. There were power saws and fallen trees on the ground nearby. He spoke to the man in uniform who identified himself as Keith Jaggernauth, the officer in charge of the area. The Appellant said that a report of illegal logging had been made. Mr Jaggernauth said that he had received orders from Mr Mervyn Atkinson, his superior, to fell a sufficient amount of trees for the Minister of Agriculture and a senior officer in the Ministry. The Appellant returned to the police vehicle and told the other officers what had transpired. He said that the place was kept under surveillance, with periodical checks.

31. The Appellant's statement continued that, on 4 September 2003, he took Sgt Harnarinesingh, Boysie Ali and his son and Mr Narine to the same place in the forest, "having sought information that the wood would be removed". On arrival, they found the red Sunny car, Mr Jaggernauth and two other men. The Appellant and Sgt Harnarinesingh approached Mr Jaggernauth and the Appellant told him "about the removal of the fallen trees and he replied 'well, ah stamp twenty already as seized'". The Appellant asked if he needed any assistance. Mr Jaggernauth said that he did not need any help and that the Appellant and his men were acting outside their powers. As they walked away, Mr Jaggernauth called the Appellant back. The Appellant went back to him alone, and in a short conversation Mr Jaggernauth said "like all you police want to set we up or what? We know what to do". The Appellant's party returned to the Santa Flora police station and "the necessary entries" were made in the station diary.

32. The Appellant denied in his statement that he had been involved in the illegal felling or cutting of teak and cedar trees at Main Ridge Road or that he had attempted to remove fallen logs from those trees or that some of the logs were found on his land at Ragoonanan Trace.

33. On about 11 September 2003, the Appellant had been asked by Senior Supt Alphonso to submit a file of relevant evidence. In compliance with that request, the Appellant obtained and submitted written statements from PC Harripersad, Cpl Dinoo, PC Gopaul, Sgt Harnarinesingh, and Ramesh Narine.

34. In his statement dated 11 September 2003, PC Harripersad said that on 30 August 2003 he accompanied the Appellant and Cpl Dinoo to the Mahaval Forest area, where he saw a red Sunny car, two power saws on the ground, and three men, one of whom was later identified to him by the Appellant as Mr Jaggernauth. He saw the Appellant and Mr Jaggernauth have a conversation for about ten minutes. The Appellant reported that Mr Jaggernauth told him that he had been given instructions from his superior to fell trees for the Minister and a senior officer at the Ministry. The Appellant and the two other officers then left the area. PC Harripersad gave a further statement on

26 November 2003 to ASP Phillip, which was consistent with his statement of 11 September 2003.

35. Cpl Dinoo provided a statement dated 11 September 2003 to the same effect as that of PC Harripersad. As earlier explained, he later withdrew that statement and provided a statement dated 27 November 2003.

36. In his statement dated 22 September 2003, Sgt Harnarinesingh dealt with the events of 4 September 2003 in terms which corresponded in detail to the account given by the Appellant. He added that he understood from the Appellant that Boysie Ali and his son, and Ramesh Narine, were with them to assist in removing trees to the police station, if it became necessary.

37. Three statements were made by Ramesh Narine. The first, dated 6 September 2003 was obtained by the Appellant and contains an account of the events of 4 September 2003 which is consistent with the Appellant's statement. He did not hear the conversations between the Appellant and Mr Jaggernauth.

38. On 17 September 2003, Mr Narine gave a statement to ASP Phillip, after (according to ASP Phillip's evidence) being cautioned and told of his rights, including his right to consult an attorney. He said that earlier in the year, the Appellant paid him to cut two cedar trees at Soho Village, Palo Seco. At the end of August 2003, the Appellant came to his home with another police officer and said that he had some trees to cut. They went into the forest and the Appellant showed him some teak and cedar trees which he asked Mr Narine to cut. In the afternoon, the Appellant took Mr Narine home, paid him $100 and told him that he wanted more trees cut the next day. The following morning the Appellant again collected Mr Narine from home, saying that he wanted more trees cut, and took him back to the same area in the Mahaval Forest. On arrival, he saw a green truck leaving with logs that he had cut the previous day. The Appellant left him there and he felled some more teak and cedar trees. When the Appellant returned and took Mr Narine home, he again paid him $100. On the morning of 4 September 2003, a party comprising the Appellant, another officer, Mr Narine and Boysie Ali and his son returned to the same place in the Mahaval Forest. When they got there, Mr Narine watched the Appellant and the other police officer talking to a man in a khaki uniform, after which the party left the site and returned to the police station.

39. Mr Narine signed a further statement dated 23 September 2003 in which he retracted his statement of 17 September 2003, saying that he had signed the earlier statement under duress. He signed the statement dated 23 September 2003 in the presence of SR Maharaj JP who himself gave a statement dated 20 January 2004 about the circumstances in which the statement was made. He said that the Appellant and Mr Narine came to him in the morning of 23 September 2003. The Appellant told him that

he would prepare a statement and Mr Narine would sign it. During preparation of the statement, Mr Maharaj told the Appellant that he was prompting Mr Narine too much. The Appellant's son came and took over writing the statement, with the Appellant dictating what should be written. Mr Maharaj told the Appellant that if the statement were true, they could prepare it and bring it back for him to witness Mr Narine's signature. They later returned with the typed statement. Mr Maharaj read it over to Mr Narine who said it was true and signed it.

40. It is right to note, as did the courts below, that the evidence of Mr Narine was not admissible in criminal proceedings against the Appellant, his co-accused. It could, however, be relevant to whether ASP Phillip could reasonably decide not to pursue other suggested suspects. It was never put to ASP Phillip that he had subjected Mr Narine to duress, and no finding to that effect was made. ASP Phillip would of course know that he had not subjected him to duress and was entitled to treat Mr Narine's other statements with caution.

41. Contemporaneous records at Santa Flora police station contain the following relevant entries. On 27 August 2003, an individual named Jerry Peters made a telephone call to the Appellant and said "Inspector I observe someone felling trees in the area. I will give you more information" to which the Appellant replied, "I will look into the matter". The station diary contains the following entries for 30 August 2003. At 8.42am, the Appellant, PC Harripersad and Cpl Dinoo left with a fully loaded revolver "on enquiries in the Santa Flora district". At 6.10pm, the party returned "re enquiries in the district. All quiet." The station diary for 4 September 2003 records that at 8.45am, the Appellant, Sgt Harnarinesingh and PC Ramkisson (who returned unwell an hour later) left the station with a revolver and ammunition "on enquiries in the district". At 10.51am, the Appellant returned with Sgt Harnarinesingh and the diary records that he had met Mr Jaggernauth and two other men "and it was decided that they pursue the matter".

The judgment of Seepersad J

42. Very serious allegations were made by the Appellant in his statement of claim that those involved in the investigation had fabricated evidence, had obtained statements from witnesses by duress, had been reckless in the discharge of their duties as police officers and deliberately breached police standing orders, had known that there was no reliable evidence against the Appellant, and had sought to cover up the illegal felling of trees by a Government minister. These allegations were not, however, pursued and Seepersad J made no findings on any of them. It was not even put to ASP Phillip in cross-examination that he did not hold an honest belief that there was sufficient information to support the prosecution of the Appellant.

43. As earlier noted, Seepersad J decided the case by reference to his assessment as to whether objectively there was sufficient evidence to constitute reasonable and probable grounds for the prosecution.

44. Seepersad J addressed the substance of the claim at paras 13–37 of his judgment. Having summarised the Appellant's evidence as to the alleged events of 30 August 2003 at paras 13–14, he referred to the oral evidence of PC Harripersad which was consistent with his statement of 11 September 2003. He found PC Harripersad to be a forthright witness who instilled in the court a feeling that he was a witness of truth. At paras 16–17, the judge referred at some length to Cpl Dinoo's statement dated 11 September 2003 and his conflicting evidence before the Magistrates' Court. At para 18, the judge said that there was no evidence before him that ASP Phillip ever questioned Cpl Dinoo about the contents of his first statement. This is surprising, given that Cpl Dinoo's second statement dated 27 November 2003 was an exhibit to ASP Phillip's witness statement and was in the trial bundle. Cpl Dinoo did not give evidence before Seepersad J.

45. PC Harripersad gave evidence before the judge, who said at para 19, that he was impressed by his evidence and that there was no reason for the court to reject his version of the events of 30 August 2003. He said that ASP Phillip should have considered the statements given by PC Harripersad and Cpl Dinoo in September 2003. In fact, ASP Phillip not only took the second (conflicting) statement from Cpl Dinoo, he also took a statement dated 26 November 2003 from PC Harripersad who confirmed his earlier statement. That second statement was also in the trial bundle.

46. At para 19, the judge continued as follows:

> "Given the nature of the information allegedly received by the Claimant in the said conversation and having regard to the fact that the said information was contained in the statements which were submitted to Alphonso, the said statements should have been considered by the Complainant. Any police officer who has committed to discharge the oath of his office, ought to have proceeded with caution in the circumstances and the Complainant should have thoroughly investigated the issue as to what transpired on the 30 August 2003. In doing so Harripersad should have been interviewed and Dinoo should have been questioned in detail about the contents of the statement 'VD1'. Although the complainant stated in his witness statement that he interviewed Harripersad, no statement by Harripersad was ever disclosed during the trial at the Magistrates' Court and no statement from him was produced to this Court."

47. The judge summarised the Appellant's evidence of the events of 4 September 2003 at paras 20–21. He said that, having seen and heard the Appellant, he found that he was forthright, his responses were direct and he formed the view that the Appellant was a witness of truth. He also referred to the statement dated 22 September 2003 given by Sgt Harnarinesingh which was consistent with the Appellant's account.

48. At paras 24–25, Seepersad J summarised the evidence given by Mr Jaggernauth at the trial in the Magistrates' Court, which he assumed was consistent with his statement on the police file; in fact, his statement was in the trial bundle. At para 33, the judge noted that in his oral evidence before the Magistrates' Court he did not say that on 4 September 2003 the Appellant had said that he wanted to move the logs to make it look as "thief was trying to thief from thief".

49. Mr Jaggernauth gave evidence before Seepersad J. The judge gave his assessment at para 26: "… the Court found that, unlike the Claimant, he was evasive and at times refused to issue direct responses and his body language and gestures instilled in the Court the unshakeable feeling that he was not being honest and frank".

50. At paras 27–29, the judge briefly summarised the evidence given before the Magistrates' Court by Boysie Ali, Jaglal Sookdeo and Rickey Fiddler, none of whom gave evidence before the judge.

51. At para 32, the judge noted certain points about the evidence, including the following. First, he said there was no nexus on the evidence between the logs that Rickey Fiddler saw being offloaded at the open land at Ragoonanan Trace and the logs that were seized at Ragoonanan Trace and taken to the Cap-de-Ville nursery. Second, Cpl Dinoo's evidence at the trial before the Magistrates' Court conflicted with his statement dated 11 September 2003, as ASP Phillip would have known before the charges were brought. Third, no attempt was made to investigate the serious allegations of possible misconduct and corruption raised by the Appellant by virtue of the statements that he alleged had been made by Mr Jaggernauth on 30 August 2003, nor was Mr Jaggernauth "questioned frontally" about the events of 30 August 2003. There was no evidence to suggest that ASP Phillip had interviewed Mervyn Atkinson as to whether he had issued instructions to Mr Jaggernauth to fell trees for prominent political figures. In fact, a statement given by Mr Atkinson was in the trial bundle, but it is fair to say that it did not deal with the Appellant's allegation of what Mr Jaggernauth had told him. Fourth, there was no direct evidence that the Appellant did not have the requisite permits to remove logs.

52. The judge set out his conclusions at paras 35–37.

53. At para 35, the judge said that, given the factual matrix and that ASP Phillip was an assistant superintendent of police, "a more thorough investigation should have been conducted prior to the institution of the charges". ASP Phillip had the information that the Appellant had alluded to possible misconduct by senior politicians and officials; there were contradictory statements from Cpl Dinoo and Mr Narine; and there was no direct evidence that linked the Appellant to the offences charged against him. The judge said: "There were glaring gaps and deficiencies in the evidence." An officer of ASP Phillip's seniority "should have exercised a greater degree of caution and should have conducted a more in-depth and detailed investigation". Further, the Appellant "was himself a senior police officer and in such a circumstance, caution should have been exercised to ensure that no harm would be occasioned to the public's perception of the police service, unless there was cogent evidence to support the institution of the charges".

54. In para 36, Seepersad J raised concerns that it appeared that a memorandum issued by the Permanent Secretary of a government department had been sufficient to initiate an investigation and that Insp Mohammed was replaced as investigating officer by ASP Phillip without any reason being given. It was, the judge said, a matter of concern that the memorandum "resulted in the arrest of an officer who was conducting his own investigation into alleged illegal activity involving officers attached to the forestry division which fell under the purview of the very Ministry from which the memorandum emanated".

55. At para 37, the judge stated that "given the allegations that were made by the [Appellant] of alleged impropriety by political office holders, greater care should have been exercised by Officer Phillip". He concluded that ASP Phillip acted without reasonable and probable cause and that the court found and inferred malice.

The Court of Appeal's judgment

56. In his judgment, with which Mendonça JA and Rajkumar JA agreed, Mohammed JA began his consideration of the particular facts and circumstances of this case by observing at para 43 that the material gathered by ASP Phillip was of a circumstantial nature, rather than providing any direct evidence that the Appellant had been responsible for the felling or removal of any trees. For the reasons earlier discussed, the Court of Appeal correctly said that this did not mean that the material was incapable of providing reasonable and probable cause for charges.

57. At para 47, Mohammed JA identified the following germane features of the material gathered by ASP Phillip:

(i) The Appellant was present at Mahaval Forest on 30 August and 4 September 2003, and ostensibly directed the movement of the logs on the former occasion.

(ii) When asked by Mr Jaggernauth on 4 September 2003 why he wanted to move the logs, the Appellant replied that it was to make it appear that "a thief trying to thief from a thief". While this was exculpatory on one possible view, its implausibility made it a factor that ASP Phillip could legitimately take into account.

(iii) Boysie Ali said that the Appellant had told him on 4 September 2003 at the police station before leaving for the forest that he wanted to get the logs on the roadside so that they could be placed under police supervision to see who would steal them. This too was an implausible explanation. Boysie Ali's evidence that the Appellant said, "let's squash the deal", involving a sudden decision to abort the transaction when they encountered Mr Jaggernauth in the forest, was also a pertinent factor.

(iv) In his second statement, Cpl Dinoo said that on 30 August 2003 the Appellant coordinated the removal of the logs and, after they were loaded on the trucks, asked Cpl Dinoo "if the logs look like good logs". Cpl Dinoo's enquiries as to where the logs were being taken were dismissed by the Appellant. Cpl Dinoo also said that he had been coerced by the Appellant to give a statement in line with the Appellant's statement, such coercion continuing after ASP Phillip's investigation had started.

(v) The evidence of S.R. Maharaj JP showed that the Appellant was heavily involved in the recantation of Ramesh Narine's second statement and in the preparation of his replacement statement, at a time when both the Appellant and Mr Narine were suspects.

(vi) Rickey Fiddler stated that he saw the Appellant coordinating the offloading of logs on to the open land at Ragoonanan Trace owned by him and his wife.

(vii) The evidence of Mr Jaggernauth and Mr Leemon as regards the measurements of the felled trees demonstrated that three of the teak logs seized at Ragoonanan Trace were exact matches to stumps found in Mahaval Forest and taken to the Forestry Office at San Fernando.

58. The Court of Appeal reversed the judge's decision on the grounds that he had made four material errors, as follows:

> (i) The judge failed to appreciate the collective significance of the circumstantial evidence identified above and, instead, examined the material in silos. Even in the absence of direct evidence, and applying an appropriately cautious approach to its evaluation, this evidence was capable of providing reasonable and probable grounds for the charges. Insofar as any other inference was arguably capable of arising, this would be a matter for "the tribunal of fact", by which Mohammed JA clearly meant in this case the Magistrates' Court. The evidence that the Appellant might have been involved in securing statements from witnesses favourable to his case had no evidential value in and of itself, but it was at the minimum relevant to demonstrating to ASP Phillip that he was directing his attention to the right suspect.
>
> (ii) The judge focused incorrectly, at times, on the evidence led (or not led) at the Magistrates' Court, for example in relation to the evidence of Cpl Dinoo and Mr Jaggernauth. The proper focus of the enquiry must be on the information available to the arresting officer when charges are brought. Criminal trials, which very often pivot on issues touching credibility, may unfold in an unanticipated and unpredictable manner.
>
> (iii) The judge elevated what he took to be glaring gaps and deficiencies in the evidence into proof of the absence of reasonable and probable cause. The Court of Appeal rejected the suggestion that there were significant gaps and deficiencies, finding that there was nothing to suggest that the investigation was anything other than thorough, methodical and painstaking. The circumstantial evidence plainly pointed away from Mr Jaggernauth being the real suspect and there was no duty on ASP Phillip to pursue any investigation or inquiry along those lines. The removal of Insp Mohammed from the investigation, and similar issues, were not relevant factors and the judge simply engaged in a speculative exercise.
>
> (iv) The judge wrongly considered that the onus was on the prosecution to establish that the Appellant did not have the requisite permits to fell trees or to remove timber, whereas under the relevant legislation the onus lay on the defence.

59. The Court of Appeal considered that, for these reasons, the judge's order should be set aside and that, on the evidence, ASP Phillip had reasonable and probable grounds to charge and proceed against the Appellant, with the consequence that the appeal should be allowed. Although this was a sufficient basis for allowing the appeal, the

court went on to consider the question whether ASP Phillip was actuated by malice in initiating the proceedings against the Appellant. It held that, even if it had found that there was not reasonable and probable cause for the charges, malice was not established, in that there was nothing to suggest that the sole or dominant purpose of the prosecution was other than the proper invocation of the criminal law.

The Appellant's case

60. The Appellant emphasised that on an appeal against findings such as those made by the judge, the appellate court could not interfere with them simply because it took a different view of the evidence but was confined to interfering only on the limited grounds stated in authorities such as *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21; [2014] 4 All ER 418.

61. The Appellant submitted that, properly applying those principles, there was no basis for the Court of Appeal to interfere with the finding of Seepersad J that there were no reasonable or probable grounds for the prosecution of the Appellant. First, there was no clear evidential basis in Mr Jaggernauth's statement for correlating the descriptions and exhibit numbers of the felled trees, so as to find that any of the logs found at Ragoonanan Trace were among the logs found in Mahaval Forest. Second, there was no direct evidence that the Appellant had felled trees or removed timber. Third, ASP Phillip had made no attempt to ascertain whether the Appellant felled the trees. Fourth, even if the judge did analyse the evidence in silos, more was needed before his findings could be set aside. It must be shown that to have been a wholesale failure to analyse the evidence. Fifth, the Court of Appeal was wrong to have criticised the judge for having relied on evidence led at the Magistrates' Court, particularly the evidence of Cpl Dinoo. It was proper for the judge to make an adverse finding based on an inconsistency between the evidence called before the judge and the evidence called before the magistrate.

The correct approach on appeal

62. The Board wishes to emphasise that nothing detracts from the acquittal of the Appellant by the magistrate following the dismissal of the charges against him on an application of no case to answer. The issue is the entirely different one of whether ASP Phillip had reasonable and probable cause to bring the charges.

63. The proper approach of an appellate court is determined by the nature of the decision under appeal. In a case of malicious prosecution, both the subjective motives of the prosecutor and the reasonableness of the prosecutor's decision to bring charges are in issue. The trial judge is therefore required to make findings of fact on the first issue on the basis of the evidence before the court and to make an evaluative assessment of

whether the prosecutor had reasonable and probable cause to bring the charges on the basis of the information known to the prosecutor when the charges were brought and of information which would have been known if the prosecutor had undertaken such further inquiries (if any) as, in the circumstances, it was appropriate to pursue.

64. In *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd*, to which the Appellant referred, Lord Hodge, giving the judgment of the Board, considered the proper appellate approach to findings of fact. He said at para 12 that the appellate court must:

> "consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions."

65. This approach would be applicable if the appeal court were reviewing findings as to the prosecutor's motives and subjective beliefs relevant to the decision to prosecute. However, in the present case, the issues of subjective belief and malice were dependent on the determination of whether ASP Phillip had reasonable and probable cause to bring charges against the Appellant.

66. In the present case, the task of the judge was to identify and review the statements and other evidence gathered in the course of the investigation and to assess, on the basis of that evidence and of any other evidence that might have been gathered if further enquiries were called for, whether there was a reasonable and probable cause for the prosecution. An appellate court will be entitled to interfere with the judge's assessment not because its assessment of the facts is different but only on the familiar grounds of an error of principle or an identifiable flaw in the judge's reasoning, including a misdirection as to relevant factors or a failure to take into account relevant evidence, or a conclusion which no reasonable court, properly directing itself, could have reached: see *In re Sprintroom Ltd* [2019] EWCA Civ 932; [2019] 2 BCLC 617 at paras 68–77 and the authorities there cited.

Fundamental flaws in the judgment of Seepersad J

67. The Board is of the view that the Court of Appeal was correct to find fundamental flaws in the approach of the judge.

68. First, the judge did not set out the evidence which ASP Phillip had before him when he decided to charge the Appellant, but rather referred to parts of it in a piecemeal and critical manner. Instead of focusing on the evidence gathered by the investigation and on whether that evidence amounted to reasonable and probable cause for the charges against the Appellant, the judge placed significant and perhaps decisive emphasis on the evidence as it came out at the hearing before the Magistrates' Court and, with even less justification, on his own assessment of the oral evidence of the witnesses at the trial before him. Necessarily, a prosecutor must take the decision whether to bring charges before the evidence has been tested in court. As the Court of Appeal commented, trials do not always proceed as anticipated—indeed, it is commonplace for them not do so. More particularly, in circumstances where a witness's evidence is on the face of it credible, the investigating officer is generally not in a position to assess whether the witness will come across at trial as reliable and credible. Apparently credible witnesses may give directly conflicting accounts and, for the purposes of a claim in malicious prosecution, it is not generally for the investigating officer to choose between the inconsistent evidence of two or more witnesses, unless taken overall there is no reasonable and probable cause for a prosecution. It is to be noted that, although the judge formed an unfavourable view of Mr Jaggernauth's evidence having seen him give oral evidence and be cross-examined, he did not say that ASP Phillip who did not have that opportunity should have considered that Mr Jaggernauth was not to be believed.

69. Second, the judge laid great store by the lack of investigation into the allegation made by the Appellant that Mr Jaggernauth told him on 30 August 2003 that he was felling trees for a Government minister and a senior official. The judge suggested that there were grounds for thinking that there may have been high-level corruption and an attempt to organise a cover-up, which included replacing one investigating officer with ASP Phillip. The judge was right to characterise these as serious allegations, but there was no support for them beyond what the Appellant said he had been told by Mr Jaggernauth.

70. For a number of further reasons, the Court of Appeal was right to say that ASP Phillip was under no obligation to investigate these allegations before bringing charges against the Appellant. First, contrary to the judge's understanding, ASP Phillip interviewed both Cpl Dinoo and PC Harripersad in November 2003. While the latter maintained the account given in his earlier statement, Cpl Dinoo retracted his and gave an account which directly contradicted the appellant's statement. An allegation that ASP Phillip had subjected Cpl Dinoo to duress to obtain the second statement was not pursued at trial. Second, ASP Phillip was entitled to be sceptical about the Appellant's allegation, in view of the evidence of strenuous efforts made by the Appellant to obtain statements from Cpl Dinoo and Mr Narine which would support his version of events.

71. A further reason why ASP Phillip was under no obligation to investigate these allegations is the one given by ASP Phillip in his oral evidence before the judge, namely

the entry "All quiet" in the police station diary for 30 August 2003, following the return of the Appellant and the two other officers. ASP Phillip was reasonably entitled to take the view that this contemporaneous entry was inconsistent with the Appellant's account that he had gone to the forest to investigate illegal felling of trees and had found Mr Jaggernauth and his party engaged in tree-felling, apparently to fulfil orders for trees for a Government minister and a senior official, and that the Appellant had kept the place under surveillance making periodical checks.

72. Insofar as the judge relied on other "glaring gaps and deficiencies" in the investigation, he overlooked statements taken from witnesses, which were in fact in the trial bundle.

73. The third fundamental flaw in the judge's reasoning was that he placed reliance on the fact that the investigation was prompted by the Permanent Secretary at the Ministry of Public Utilities and the Environment, and that ASP Phillip was appointed to replace Insp Mohammed as investigating officer. The sequence of events was as follows. Following a report of evidence suggesting that the Appellant might be involved in the illegal felling of trees, a memorandum was sent by the Conservator of Forests to the Permanent Secretary to report these concerns. It was passed to the Assistant Commissioner of Police who on 11 September 2003 selected ASP Phillip as a more senior officer to replace Insp Mohammed as the investigating officer. There is nothing untoward about this sequence of events and, in any event, there is no evidence or grounds to suspect that ASP Phillip's investigation was in any way affected by political considerations.

74. In the light of these serious misdirections on the part of the judge, the Board is satisfied that the Court of Appeal was correct to set aside the judge's decision. It therefore fell to the Court of Appeal to assess whether the evidence gathered in the course of the investigation provided reasonable and probable cause for the charges brought by ASP Phillip against the Appellant.

Was there reasonable and probable cause for the charges against the Appellant?

75. The Court of Appeal reviewed the evidence gathered by ASP Phillip in the course of his investigation and concluded that the totality of circumstantial evidence, when viewed cumulatively but with the requisite caution, provided reasonable and probable grounds for charging him with the offences of felling trees and removing timber without a permit.

76. While, of course, there was evidence which was exculpatory, including the Appellant's own statement, supported by statements given by PC Harripersad and Sgt Harnarinesingh, the first statement of Cpl Dinoo and two of the three statements of

Ramesh Narine, there was a substantial body of evidence from which the inference could reasonably be drawn that the Appellant had committed the offences with which he was charged. This evidence included the statements of Mr Jaggernauth, Boysie Ali, Rickey Fiddler, Mr Jaggernauth's fellow forestry workers, the second statement of Cpl Dinoo and the statements of police officers as regards the presence of logs at the Santa Flora police station. It also included the entries in the police station diary of "All quiet" on 30 August 2003 and of "it was decided that they [Mr Jaggernauth and his colleagues] pursue the matter" on 4 September 2003, which were both inconsistent with the discovery of criminal activity on either date. Importantly, there was also the evidence of measurements taken by Mr Jaggernauth and Mr Leemoon, showing that at least three logs found at Ragoonanan Trace matched stumps found in Mahaval Forest. The judge was wrong to say that there was no nexus between the logs which Rickey Fiddler saw being offloaded by the Appellant at Ragoonanan Trace at some time between 1 and 4 September 2003 and the logs seized there on 6 September 2003 and taken to the Cap-de-Ville nursery. In the absence of any evidence to the contrary, it stretches credulity to suggest that the logs which Rickey Fiddler saw being offloaded were removed and replaced in that period not only with other logs but also with logs which happened to match stumps found at Mahaval Forest.

77. In the view of the Board, the Court of Appeal was entitled to conclude that there was sufficient evidence available to ASP Phillip, viewed with proper caution and taking account of the evidence in favour of the Appellant, to provide reasonable and probable grounds for the charges against the Appellant. Having itself reviewed the evidence, the Board concurs in that assessment.

78. The fourth material error found by the Court of Appeal was that the judge incorrectly thought that it was for the prosecution to prove that the Appellant did not have the requisite permits. This was an error by the judge, but the central question was not whether he had permits but whether he had been involved in the felling of the trees and the removal of timber.

79. It is unnecessary for the Board to consider the issue of malice. However, it is right to say that the Board sees no reason to disagree with the Court of Appeal's view that on the evidence in the case there is nothing to suggest an improper purpose in ASP Phillip's decision to charge the Appellant.

Conclusion

80. For these reasons, the Board dismisses the appeal.