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Police Law Briefing

No crime without malice

In *Rees & Ors v Commissioner of Police for the Metropolis [2018] EWCA Civ 1587*, the Court of Appeal grappled with the question of whether a police officer had committed the tort of malicious prosecution where, as the trial judge found "*… even if his methods are open to criticism, his motive was not*". Further they had to consider whether the appellants had in any event suffered any loss.

DCS Cook was the Senior Investigating Officer ("SIO") in an unsolved murder from 1987. The appellants were prosecuted for the murder. An important part of the Crown's case was the evidence of Gary Eaton ("Eaton"). Eaton made a statement in 2007 saying that he came on the scene shortly after the murder and saw two of the appellants in a car with the victim's body on the ground close by with an axe in his head.

DCS Cook compromised the de-briefing of Eaton by making and receiving an extensive number of unauthorised direct contacts with Eaton in the period leading up to the making of Eaton's statements, in contravention of express procedures for keeping a "sterile corridor" between the debriefing officers and the investigation team. In the course of the debriefing process, Eaton moved from being unwilling to name directly any of the participants in the murder to naming the three appellants and giving his graphic (as it turned out obviously inaccurate) description of the murder scene. Eaton's evidence was excluded by the trial judge and the prosecution later collapsed.

In the trial of the appellant's claims for damages for malicious prosecution and misfeasance in a public office, Mitting J found that DCS Cook had committed the crime of doing an act tending to and intended to pervert the course of justice. However, he found that DCS Cook had not committed the tort of malicious prosecution and that, while he was guilty of misfeasance in a public office, the appellants suffered no loss thereby because, on the balance of probabilities, prosecuting counsel and the CPS would have decided to prosecute the appellants on the basis of evidence available when they were charged, other than that of Eaton.

Questions on Appeal

Were the appellants prosecuted by the defendant?

The Commissioner of Police for the Metropolis ("MPC") argued that this was not a case where all the evidence was known to Cook and further that the case against the appellants was not based entirely upon the evidence of Eaton. It was therefore argued that DCS Cook did no more than the rape complainants, in the reported cases, who supplied false evidence to the police, but were not liable as the prosecutor (as for example in *AH(unt) v AB 2009 EWCA Civ 1092*).

McCombe LJ, however, held that the judge failed fully to take account of DCS Cook's position as the most senior police office in the case. DCS Cook was intending to pervert the course of justice and knowingly presented the fruits of that criminal

offence to influence the CPS charging decision. McCombe LJ held that the relevant question was to ask what the CPS would have done if they had known as much. Eaton was the only supposed eyewitness. The rest of the evidence was "dodgy" and circumstantial. In McCombe LJ's judgment it was "inconceivable" that in such circumstances the CPS would advise that murder charges might be brought without DCS Cook being removed and a fresh review of the material. DCS Cook had manipulated the CPS into taking a course which they would not otherwise have taken. He had deliberately "overborne or perverted" the decision to prosecute and deprived the CPS of the ability to exercise independent judgment. The case therefore fell squarely within *AH(unt) v AB)* and DCS Cook was a prosecutor.

Was the prosecution without reasonable and probable cause?

This of course is a question with both an objective and subjective element. The Court of Appeal upheld the judge's finding that there was an objective reasonable and probable cause for the prosecution. This was supported by the fact that the prosecution continued even after exclusion of Eaton's evidence.

McCombe LJ then asked – "*Does a prosecutor have subjective reasonable and probable cause for a prosecution if he presents a case heavily reliant upon evidence which, because of his own misconduct, he knows is "certain or at least highly likely" to be ruled inadmissible by any trial judge*?" No authority directly on point was cited, but McCombe LJ referred to *Glinski v McIver [1962] AC 726* which was a case concerning the correct formulation of the question to be put to juries on the issue of subjective reasonable and probable cause. He held that the case presented by DCS Cook to the CPS was not "proper" (Lord Denning's formulation in *Glinski*) or "fit to be tried" (Lord Devlin). There was no evidence that DCS Cook gave any thought to the question of whether there was a fit or proper case, absent the tainted evidence. Therefore, it could not be said that, as a prosecutor, DCS Cook believed that he had reasonable and probable cause to lay murder charges against these appellants.

Was the prosecution malicious?

McCombe LJ next posed the question - "*Can it be the law, as assumed by the judge, that because a prosecutor believes a person is guilty of an offence, he prosecutes that person without malice (in the sense of dishonesty), even if the case which he presents to prove guilt is heavily reliant on the evidence of a witness which he has procured by subornation amounting to a criminal intention to pervert justice*?"

The short answer was no; bringing a prosecution in that manner is not bringing a criminal to justice. DCS Cook was seeking deliberately to misuse the processes of the court. His role was tainted by criminality and his belief in guilt could not prevent the prosecution having been malicious.

McCombe LJ concluded "*To find that the element of malice was not satisfied in this case, to my mind, would be, quite simply, a negation of the rule of law*." King LJ agreed and added "*any other conclusion would, in the eyes of the general public, defy common sense*."

Have the appellants suffered any actionable damage?

While there was admissible evidence which might have passed the test of there being a case to answer by appellants, McCombe LJ found it inconceivable that any properly informed prosecutor, or counsel, would (on the date that the prosecution was brought) have countenanced the preferring of charges which were based on the report of an SIO who procured a significant plank of the proposed Crown case by committing the crime of perverting the course of justice. A prosecutor would have wanted to be assured that the taint of DCS Cook's conduct had not otherwise affected the investigation.

Further, while it was true that the prosecution was not immediately abandoned after Eaton's evidence was ruled inadmissible, it is one thing to continue with a long running prosecution and another to

decide to initiate one. There was in truth no evidence that the prosecution would have been started in April 2008 if the CPS and counsel had known the true facts about what DCS Cook had done Therefore the appellants had established that they had been caused loss for the purposes of both the tort of malicious prosecution and of misfeasance in a public office.

Conclusion

Stories of the Law and How It's Broken by the Secret Barrister contains a chapter defending our adversarial system and critiquing the "dangerously untenable" twin assumptions that underlie inquisitorialism – "that the state is competent to find the truth, and that its neutrality in seeking it is unimpeachable". This decision confirms the principle that, however pure a police officer's motive might be in seeking to bring to justice a person that they believe to be guilty, there is a higher public interest in preserving the rule of law. A police officer who undermines the rule of law acts maliciously, whatever their justification.

By Ella Davis