

Neutral Citation no. [2003] NIQB 53

Ref: **KERC3991**

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: **tba/ 09/2003**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION

**ON APPEAL FROM THE COUNTY COURT FOR THE DIVISION OF
CRAIGAVON**

BETWEEN:

BREANDAN MacCIONNAITH

Plaintiff

and

CHIEF CONSTABLE OF THE ROYAL ULSTER CONSTABULARY

Defendant

KERR J

Introduction

[1] This is an appeal by Breandan MacCionnaith against the dismissal of his claim against the Chief Constable of the Royal Ulster Constabulary for damages for malicious prosecution on a charge of obstructing the public highway contrary to article 20 (1) of the Public Order (Northern Ireland) Order 1987.

[2] The events that gave rise to the prosecution of the appellant arose on 9 July 1995. On that date an Orange Order parade was due to take place on Garvaghy Road, Portadown. Residents of the area opposed the march and Mr MacCionnaith, as a representative of the residents, was in discussion with police officers and made representations on their behalf. He also gave advice to those who had come on to the road to oppose the march.

[3] As a result of disturbances on 9 and 10 July a number of loyalists were prosecuted. The appellant's case is that, because of those prosecutions, considerable pressure was brought to bear on the police and prosecuting authorities to institute criminal proceedings against those who initially opposed the parade. One of these was the appellant. He claims that his prosecution took place because of that political pressure. He also claims that the prosecution was instituted maliciously and without reasonable or probable cause.

The evidence

Breandan MacCionnaith

[4] Mr MacCionnaith gave evidence that in 1995 he was the chairperson and joint spokesman of the Garvagh Road residents' association. The annual Orange Order parade that had routinely taken place along Garvagh Road had caused a lot of resentment among the residents of the road. From 1976 until 1994 political parties such as the Social Democratic and Labour Party and Sinn Fein had objected to it passing along Garvagh Road. The parade had generated a lot of violence in 1994; and in 1995 it was decided that there should be a co-ordinated protest. After a meeting a residents' coalition was formed. The residents' coalition wrote to the Chief Constable of RUC and the Grand Master of the Loyal Orange Order outlining their opposition to the parade passing along the Garvagh Road.

[5] The residents' association also decided to apply for permission to march along Garvagh Road on the same date as the proposed Orange Order march and Mr MacCionnaith duly made application under article 3 of the 1997 Order on 2 July 1995 for permission to hold a protest march beginning at 11 am on 9 July.

[6] A meeting between residents' representatives and Superintendent Blair of RUC took place on Friday 7 July 1995. Mr MacCionnaith was present at the meeting. No resolution was reached.

[7] On the morning of Sunday 9 July 1995 people from the area assembled at the junction of Garvagh and Ashgrove Roads. Shortly before 10 am they moved from that position some 400 yards to the junction of Castle Avenue and Garvagh Road where they encountered a line of RUC landrovers and personnel. Superintendent Blair approached Mr MacCionnaith and said that he had an order banning the parade. Mr MacCionnaith asked on what grounds and the superintendent replied that the same legislation was being used to restrict the Orange parade. He then placed a copy of the order between Mr MacCionnaith's arm and his body.

[8] Mr MacCionnaith obtained a loudhailer and read out the Order to the assembled crowd. There were some 300 people present. He asked them to turn and go back along Garvaghy Road and they did so in an orderly fashion. For the next one and a half hours things remained peaceful. During this time a number of cordial exchanges took place between Mr MacCionnaith and Fr Stack on behalf of the residents and Chief Superintendent McCreesh and Assistant Chief Constable Hall for the police.

[9] At about midday Mr McCreesh informed Mr MacCionnaith that the police would like to bring some landrovers up. Mr MacCionnaith inquired why this was necessary and was told that they just wanted them in the area. At this stage most of the crowd were on the pavements on either side of the road and traffic was moving freely. Mr MacCionnaith asked whether it was necessary for the vehicles to come so close and Superintendent McCreesh said that this was necessary for public order reasons.

[10] On the approach of the landrovers some people became alarmed. They thought that they were going to be removed from the road forcibly. Some sat down on the road; others stood in the road and traffic was diverted. Other people remained on the footpaths. Relations between the crowd and the police continued to be good-natured, however. Police officers were able to move through the crowd without hindrance.

[11] At about 4 or 4.30 pm Mr MacCionnaith was informed that the Orange Order parade had been halted. He relayed this to the crowd and they dispersed peacefully.

[12] During Monday 10 and Tuesday 11 July intensive discussions between residents' representatives and mediators took place. They acted as a go-between for the residents, the RUC and the Orange Order. It was recognised that there was a "need to de-escalate the situation". Eventually after receiving assurances from Sir Ronnie Flanagan, then Chief Constable of the RUC, the residents did not oppose a march by Orangemen on 11 July, although a peaceful protest was held.

[13] Some months later police officers called at Mr MacCionnaith's home. They told him that they were investigating events on 9 July and they cautioned him and asked if he wished to make a statement about those events. He replied that he would not do so unless his solicitor was present. He later received a summons charging him with obstruction.

[14] Mr MacCionnaith gave evidence that he was aware that loyalists had been prosecuted for offences committed over the same period. He claimed, however, that these related to events on the evening of 9 and 10 July when "full-scale rioting" had taken place. He was also aware that the local MP, David Trimble, had been reported in the newspaper, the Portadown Times, as

having called for nationalists involved in the protests on Garvagh Road to be prosecuted.

[15] The summons against Mr MacCionnaith was heard on 25 June 1996 before Craigavon magistrates' court. Superintendent Blakely and Superintendent Blair gave evidence for the prosecution. Photographs and video evidence were also produced. Superintendent Blakely described the atmosphere as "fairly friendly". He said that he had no difficulty in walking from one location to another throughout the protest.

[16] Mr MacCionnaith described Superintendent Blair's evidence as follows. The superintendent gave evidence to the magistrate that he had received Mr MacCionnaith's application to organise a public procession. He had met the residents' coalition on at least one occasion. He was initially unable to remember when this was but he was permitted to interrupt his evidence to return to the police station to retrieve a log, which revealed that it had been on the Friday 7 July. The superintendent then gave details of the events on 9 July and the circumstances in which the march proposed by Mr MacCionnaith had been banned. He was asked about this order and said that he probably had it at the station. Proceedings were again interrupted and the superintendent left to obtain it. This took about an hour.

[17] When the superintendent returned with the notice he was (according to Mr MacCionnaith) adamant that this was the genuine order, despite the fact that the copy which he had obtained from the police station was unsigned. The actual notice served on Mr MacCionnaith was then produced and it was pointed out to the superintendent that there were a number of discrepancies between the two notices. Superintendent Blair accepted that he had signed the notice which had been produced by counsel for Mr MacCionnaith and, notwithstanding his earlier assertion, when confronted with the actual document, suggested that the document produced from the police station was not in fact the right document. He said that a number of documents had been prepared in advance to cater for a number of possible scenarios and he had obviously taken one of these from the police station.

[18] No further evidence was called for the prosecution and counsel for Mr MacCionnaith applied to the magistrate for a direction of no case to answer. Mr McFarland RM granted the application referring to the evidence against Mr MacCionnaith as "nebulous and flimsy".

[19] Under cross-examination Mr MacCionnaith denied that Superintendent Blair had told him that the protesters should disperse. He also refuted the suggestion that he refused to take the notice from Superintendent Blair when it was proffered to him. He claimed that he tried to get the superintendent to explain the reasons for the banning order and whether he would apply the

legislation in the same way to the Orange parade but that he received no response.

[20] In response to further cross-examination Mr MacCionnaith claimed that he had instructed the crowd to return along the Garvaghy Road and to stay there. He said that he had told them they were not to block the road and that they had complied with the notice that the superintendent had served on him and which he had read out to the crowd. In fact he claimed that it was not the crowd who had obstructed the road and caused traffic to be diverted; this happened as a result of the actions taken by the RUC. He rejected the suggestion that landrovers had moved to the area where the crowd was because the protesters had formed up across the road.

James Ronald Blair

[21] In July 1995 Mr Blair was a superintendent in the RUC. He was the sub divisional commander for Portadown. On 1 July 1995 Robert Wallace delivered a notice of intention to organise a public procession on behalf of the Orange Order. Mr MacCionnaith handed in a similar notice on the same date. Both parades were proposed for the same route and at substantially the same time. The police took the view that to allow both parades to proceed could create considerable public disorder but there was a willingness on the part of the police to try to facilitate both parties as best they could.

[22] A notice was served on the representatives of the Orange Order prohibiting the parade from proceeding along Obins Street and forbidding the playing of party political or factional tunes while parading along Garvaghy Road. The conditions imposed on the Garvaghy Road residents were that they should not process along the road beyond its junction with Castle Avenue and that it should disperse at that point.

[23] The superintendent said that he was on duty at Garvaghy Road at about 9.45 am on 9 July when he saw a number of people gather at the junction of Garvaghy Road/Ashgrove Road. Some of these moved out across the road holding a banner and the remainder formed up behind them. They moved in the superintendent's direction. He placed a number of officers at the Castle Avenue junction of Garvaghy Road to prevent the parade going beyond that point. It stopped a short distance from the police line. He then stepped forward to Mr MacCionnaith and explained that if the procession were to proceed it would result in serious public disorder and damage to property and in exercise of his powers under article 4 of the Public Order (Northern Ireland) Order 1987 he directed the parade to disperse. He offered a notice to the appellant but he refused to accept it so he placed it between his arm and body.

[24] The superintendent then described how Mr MacCionnaith addressed the crowd through a loudhailer and read the notice to them. The crowd eventually withdrew to the junction of Ashgrove Road. He tried to count the crowd at this stage and his estimate was that there were 178 people present.

[25] At 12.23 pm about 300 people emerged and sat down on Garvaghy Road at the Dungannon side of the junction. The crowd blocked the entire width of the road. The superintendent spoke to a number of people in an attempt to persuade them to move without success. Apart from sitting on the road, the crowd displayed no hostility to the police. Mr Blair spoke to Superintendent Blakely (who was the sector commander on the Garvaghy Road) to arrange to have the crowd warned that sitting on the road constituted a criminal offence and to direct them to disperse. At 12.33 pm a police officer delivered that warning to the crowd. Shortly after this Mr Blair left to deal with the Orange parade and did not return to Garvaghy Road for the rest of the day.

[26] Mr Blair was asked to explain why he had produced at the magistrates' court a different notice from that which had in fact been served on Mr MacCionnaith. He said that this had been produced in error. As soon as the actual notice was produced he realised that there had been a mistake. A number of different notices had been prepared because negotiations had been continuing certainly up until Saturday 8 July and possibly 9 July. The various notices were designed to deal with a number of possible scenarios that might develop. The actual notice served was, to the best of his recollection, prepared on 9 July itself.

[27] Mr Blair was asked about his view as to the appellant's conduct on 9 July 1995 in relation to the offence that was subsequently preferred against him. He replied that he thought that Mr MacCionnaith was certainly one of the main organisers of the protest. He was the main spokesman when the final accommodation was negotiated. In relation to the prosecution the Director of Public Prosecutions took the final decision as to the preferring of the charge.

[28] Mr Blair was cross-examined about a document entitled 'Garvaghy Road residents group protest march - Sunday 9 July 1995'. He was unable to remember preparing the document. It was pointed out to him that the document referred to the preparation of one notice only. He was adamant however that more than one document was prepared in order to deal with the various eventualities that were anticipated. Meetings were held almost daily with the Assistant Chief Constable discussing contingencies. These meetings may have been minuted but if so the minutes would have been kept in the ACC's office.

[29] Several areas of discrepancy between the document originally produced by the superintendent at the magistrates' court and the actual document served on Mr MacCionnaith were canvassed with him in cross-examination.

The first of these restricted the participants in the procession to the committee members of the Garvaghy Road residents group while the notice actually served contained no such restriction. Entirely different locations were referred to in each of the notices.

[30] Mr Blair's recollection was that there had only been one adjournment and that he had not required to retrieve the log from the police station during the magistrates' court hearing. He accepted that he did obtain a copy of a notice during a break in the proceedings and now accepted that this was not the notice that had been served on Mr MacCionnaith. He accepted that if there had been other notices in the file that he would have brought these to court also. He believed that the others must have been scrapped. He denied that he had prepared the notice that he had produced to the court during the time that the proceedings were adjourned.

[31] Mr Blair was then asked about the evidence that he had given at the hearing of the appellant's claim before the County Court. It was put to him that he had said that he had had no input in the decision to prosecute. He said that he was unable to remember having given that evidence. A copy of the recommendation that he had in fact made was put to him in which he stated that the appellant and another individual were "organisers of the protest" and that Mr MacCionnaith had displayed a "belligerent attitude" as evidenced by the fact that it took three days before a solution could be arrived at. He accepted that he had said this and that he had agreed with the recommendation that the appellant be prosecuted.

[32] Mr Blair accepted that he had not seen Mr MacCionnaith sitting on the road and that the only contact that he had had with him on 9 July was in the morning of that day. But he appeared to be the person who was organising the protest. He accepted, however, that Mr MacCionnaith may well have said that he wanted to make sure that the protest was peaceful and that he did not want a malevolent element taking it over.

[33] The witness was asked about statements made in his recommendations to the effect that "some of the nationalist community were threatened and coerced simply because they refused to openly lend support to the protest". He said that this statement was made as a result of what he had learned from contacts in the area and what he had been told in intelligence reports.

[34] Mr Blair was also cross-examined about an entry in his log to the effect that he had been involved in the stopping of "a Sinn Fein parade on the Garvaghy Road". He said that this was an "error of judgment" on his part. He accepted that there was no evidence that this was a Sinn Fein sponsored parade.

[35] The superintendent said that he was unaware of any representations made by any politicians for nationalists to be prosecuted. None had made any representations to him. He was referred to a report in the newspaper the Irish News in which Mr David Trimble was reported as having said that he had written to the DPP and the Chief Constable of RUC along these lines; the witness said that he could not recall having been aware of these representations.

[36] Finally Mr Blair was asked about his willingness to attend to give evidence on the hearing of this appeal. He denied ever having refused to accept a subpoena or that he had ever expressed any reluctance to attend the proceedings. He was, he said, well aware of his responsibilities and that he would have to attend to give evidence.

Francis Blakely

[37] This witness was a superintendent in the RUC in July 1995 and sub divisional commander for Armagh. He had been on duty on the Garvaghy Road on 9 July 1995. He observed the parade turn back from police lines. Subsequently he spoke to Mr MacCionnaith and Fr Slack. Mr MacCionnaith indicated that he was the spokesperson for the residents of the area. His main concern was that police should not send in a MSU (mobile support unit) patrol because it was, (in Mr MacCionnaith's words) "a peaceful protest" and that many women and children were involved.

[38] Shortly after noon as the time for the Orange parade neared initially small numbers of people and then about 300 came on to the road and blocked it. The protest was very peaceful, however, but the superintendent was aware that it was necessary to give the protesters due notice that they were breaking the law. He walked through the protesters to the MSU patrol and told Inspector Chambers to give the necessary warning. Cheering and banter greeted this but it was all good-natured. Later he heard that the Orange parade would not be permitted to proceed along Garvaghy Road. He informed Mr MacCionnaith of this and he told the protesters this and asked them to disperse. This they did "by dribs and drabs".

[39] Mr Blakely did not accept the suggestion put to him in cross-examination that the protesters did not block the road until the police announcement had been made and the landrovers had moved up. The road was blocked, he said, some time before these occurred.

[40] He agreed that he did not see Mr MacCionnaith sitting down but he dismissed the suggestion that the protest had been spontaneous. He said that Mr MacCionnaith had told him that he was going to manage the protest and that he was in charge of it. The superintendent was not within earshot when

Mr MacCionnaith spoke to the crowd, however, and he was not able to say that he had directed people to sit on the road.

The submissions

[41] For the respondent, Mr McAllister submitted that there were ample grounds for the police to conclude that Mr MacCionnaith had engineered the blocking of the road. He was the chairperson of the residents' coalition; he had signed the notice of intention to organise a procession; he had addressed the people involved in the protest and they had apparently accepted his instructions; and he had engaged in discussions with police officers as to how the protest should be handled. All of these factors indicated that he intended to manage the protest.

[42] Mr McAllister accepted that for the charge of obstruction to be made out it was necessary to establish that Mr MacCionnaith had actively encouraged the blocking of the road but he suggested that this could be readily inferred from his actions and from the obvious influence that he wielded over the crowd.

[43] On the issue of malice Mr McAllister suggested that there was no possible motive for Mr Blair to have fabricated the notice which he produced to the magistrates' court. He pointed out that the appellant had been charged under article 20 of the 1987 Order and it was not necessary to prove that he had been served with a notice in order to bring home that charge against him.

[44] For the appellant, Mr Ronan Lavery suggested that the outcome of the appeal depended largely on the resolution of the conflict of facts that emerged in the evidence. Whether there was a lack of reasonable and probable cause or the presence of malice depended largely on the court's conclusions on the facts.

Conclusions

[45] It is well established that to succeed in a claim for malicious prosecution a plaintiff must establish four propositions: he must show that he has been prosecuted; that the prosecution has been determined in his favour; that the prosecution was taken without reasonable and probable cause; and that it was motivated by malice.

[46] In *Hicks v. Faulkner* 8 Q. B. D. 167, 171 Hawkins J, explaining the concept of reasonable and probable cause to a jury, said: -

"I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon

reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.”

[47] This formulation was approved by the House of Lords in *Herniman v Smith* [1938] AC 305 where Lord Atkin said, at page 316, that the question of the absence of reasonable and probable cause was one of fact. The issue in the present case, therefore, (in relation to the question of reasonable and probable cause) is whether the appellant has shown that the prosecutor did not have an honest belief that he was probably guilty of the offence of obstruction.

[48] To sustain this proposition the appellant relies not only on the avowed dearth of direct evidence linking him to the offence but also on the claimed political pressure on the prosecuting authorities; the alleged fabrication of evidence by Superintendent Blair; and his lack of impartiality as demonstrated by the tenor of his report and recommendations. These factors are of course also relevant to the issue of malice; in the present proceedings, as is often the case, the issue of reasonable and probable cause tends to overlap and coalesce with that of malice. Each of the factors must be examined to see whether individually or cumulatively they provide sufficient support for the claim.

[49] One can understand how the resident magistrate concluded that the evidence against the appellant was insufficient to carry the case beyond the direction stage. This does not automatically equate with a lack of belief on the part of the prosecutor that the appellant was probably guilty of the offence. Inevitably, the question whether there is such lack of belief will be almost always a matter of inference and the characterisation by the magistrate of the evidence as “nebulous and flimsy” obviously goes some way to supporting such an inference. Set against this, however, is the consideration that the road was, I am satisfied, in fact blocked. Moreover, the appellant was, on the available evidence, acting in a way that strongly suggested that he was controlling the crowd and that they were responding to his directions. In this context one must, I think, acknowledge the danger of reasoning retrospectively. It is perhaps tempting to conclude that the weakness of the evidence exposed during the magistrates’ court hearing must have been apparent at the time that the decision to prosecute was taken but one must, I believe, approach the question from the standpoint of the prosecutor’s evaluation of the strength of the case before any court proceedings. The evidence against the appellant on the charge of obstruction was not strong but I cannot conclude that it was so weak as to allow the inference to be drawn that the prosecuting authorities did not entertain an honest belief that the appellant was guilty.

[50] There was no direct evidence that political pressure was brought to bear on the prosecuting authorities, much less that they bowed to such pressure. Certainly Superintendent Blair roundly denied that he had been subject to such pressure or that he would have been swayed by it. A newspaper article was produced in which David Trimble MP was recorded as having accepted that he had written to the DPP and the Chief Constable “urging that nationalist demonstrators ‘those who set in train the events of Garvaghy Road’ be prosecuted”. Leaving aside the question of the evidential status of this document, the statement attributed to Mr Trimble falls far short of establishing that the prosecuting authorities had improperly bowed to political pressure.

[51] I found Superintendent Blair’s evidence about the production of the notice to the magistrates’ court most unsatisfactory. I am satisfied that he asserted initially that this was the correct notice and was forced into a swift climb down from that position by the production of the actual notice. Moreover, I find the explanation of the preparation of a number of notices to cater for several possible scenarios difficult to accept. This seems a most curious way of proceeding. A notice restricting a parade should surely have been based on the perception of the police as to what was *actually* required at the time that the restriction was required rather than on an anticipation of what *might* transpire. Ultimately, however, I do not consider that my misgivings about this evidence are sufficient to ground a conclusion that there was not an honest belief on the part of the prosecution in the guilt of the appellant on the charge of obstruction. As Mr McAllister pointed out, there was no need to fabricate the notice in order to sustain the prosecution. I cannot therefore conclude that this evidence, troubling though it is, is sufficient to establish a lack of reasonable and probable cause.

[52] Some of the contents of the superintendent’s report and his log were also disturbing. In particular, his description of the residents’ march as a “Sinn Fein parade” was mystifying. There was no evidence whatever that this march was sponsored by that political organisation. But this strand of evidence alone is not sufficient to sustain the weight of the claim that the prosecution did not entertain an honest belief in the probability of the appellant’s guilt of the offence charged.

[53] It is of course necessary to consider the evidence for its cumulative weight as well as examining each element in isolation. I have done this carefully but have concluded that it has not been established to the requisite standard that the prosecution was either motivated by malice or that it did not have an honest belief in the probability that the appellant would be convicted. The appeal must be dismissed.