Neutral Citation Number: [2012] EWHC 1146 (QB)

Case No: HQ11X00510

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/05/2012

**Before** :

**THE HONOURABLE MRS JUSTICE SHARP DBE**

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**Between :**

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| **Besnik Qema** | **Claimant** |
| **- and -** | |
| **News Group Newspapers Limited** | **Defendant** |

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**Nicholas Bowen QC and Alex Gask** (instructed by **Guile Nicholas Solicitors** ) for the **Claimant**
**Mark Warby QC and Victoria Jolliffe** (instructed by **Simons, Muirhead & Burton**) for the **Defendant**

Hearing date: Wednesday 29th February 2012

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MRS JUSTICE SHARP DBE

**Mrs Justice Sharp:**

*Introduction*

1. This is an application by the Defendant, News Group Newspapers Limited, as publishers of the erstwhile newspaper, the News of the World, for summary judgment pursuant to CPR 24.2 and/or for an order striking out the claim pursuant to CPR 3.4(2) brought against it for malicious prosecution, by the Claimant, Besnik Qema. The action is brought against the Defendant on the ground that it is vicariously liable for the conduct of Mazher Mahmood (also known as the "Fake Sheikh") who was at the time material to this application, the investigations editor of the News of the World.

2. In an action for malicious prosecution a claimant must prove first that he was prosecuted by the defendant, that is to say that the law was set in motion against him on a criminal charge; second, that the prosecution was determined in his favour; third, that it was without reasonable and probable cause; and fourth, that it was malicious: see Lord Keith of Kinkel in *Martin v Watson* [1996] A.C. 74 at 80C (citing Clerk v Lindsell on Torts 16th ed (1989) p. 1042, para 19-05).

3. *Martin* established that a private individual who does not sign the charge sheet or bring a private prosecution but who is a lay informant can nonetheless be treated as the prosecutor in certain circumstances, and it is part of the Claimant's case that Mr Mahmood, and therefore the Defendant, is properly to be regarded as the prosecutor for the purposes of this claim.

4. The Defendant strongly disputes that the Claimant will be able to establish any of the elements necessary to found a claim for malicious prosecution. But this application focuses entirely on the third of those elements, that is, the prosecution was without reasonable and probable cause, or there was an "absence of reasonable and probable cause" which is the phraseology used in most of the decided cases.

5. It is the Defendant's case that on the facts which are not in dispute, the Claimant has no realistic prospect of establishing the prosecution was without reasonable and probable cause, and it is therefore entitled to summary judgment on that ground alone.

6. In February 2005 the Claimant supplied cocaine to Mr Mahmood and was filmed and recorded doing so. Shortly afterwards, he went to a pre-arranged meeting at the Hilton Hotel in Park Lane in possession of more cocaine and a forged passport for the purpose of supplying them to Mr Mahmood, and was then arrested by police in possession of both. Shortly after his arrest, the Claimant pleaded guilty to 3 criminal charges; possession of, and possession with intent to supply class A drugs, and possessing a fraudulent instrument (the forged passport). In March 2005 he was sentenced to 4 ½ years imprisonment for those offences, a term subsequently reduced by 9 months on appeal. The Defendant's case on this application centres on the simple and undisputed facts of the Claimant's acknowledged criminal conduct which was observed by Mr Mahmood personally.

7. The Claimant is able to bring these proceedings because of what happened subsequently. Though his subsequent appeals against the default period of a

confiscation order and his conviction were dismissed, in 2010 the Criminal Cases Review Commission (the CCRC) referred the Claimant's case to the Crown Court on the ground there may have been material non-disclosure by the prosecution and/or that the prosecution may have been an abuse of the process. Southwark Crown Court then permitted the vacation of the Claimant's guilty pleas, the prosecution offered no evidence and formal verdicts of not guilty were then recorded. The Claimant had by then served his term of imprisonment.

8. For the purposes of this action it is the Claimant's case that he was 'set up' by a man called Florim Gashi acting on Mr Mahmood's instructions (that is, induced to commit the offences in question, which would otherwise not have been committed), that Mr Mahmood failed to reveal Gashi's involvement to the police, that the Defendant is responsible for causing the Claimant's prosecution which was an abuse of the process for which the Defendant is responsible. It is also said that the 'set up' was engineered for the purpose of enhancing Mr Mahmood's professional reputation with the Defendant; and in all the circumstances the Claimant is entitled to damages for malicious prosecution, including aggravated and exemplary damages, from the Defendant, including for the indignity and humiliation of his arrest and subsequent period in custody and his loss of liberty.

9. The Defendant's case on the other hand is that the Claimant is a thoroughly dishonest person who was disposed, ready and willing to commit the offences in question, and that Mr Mahmood's conduct in posing as a customer and then passing to the police the information on which the prosecution was based was entirely proper.

10. It is common ground that there are many disputed issues of fact in the case, that these are unsuitable for summary determination and that for present purposes I must accept the Claimant's account of those events where they are controversial.

*The Claimant's pleaded case*

11. In summary, it is said that in late January 2005 or early February 2005 Mr Mahmood asked Florim Gashi, a contact of his who he had used in other sting operations, to find someone who could be implicated in a story he or the News of the World wanted to run about false passports, guns and drugs. Gashi then adopted the identity of a female called Aurora and through an internet chat room used by expatriate Albanians, established contact with the Claimant.

12. Over the course of 4 or 5 lengthy telephone calls, Gashi then "honey trapped" the Claimant. Using his false female identity, he held out the prospect of romance/sex between them and also the prospect that the Claimant might be able to get employment as a security guard with a rich Arab family at the rate of £8,000 a month. Gashi told the Claimant 'she' had facilitated a meeting between him and a member of this family called Mohammed, and that the Claimant's chances of employment would be enhanced if he could supply the family with cocaine and a false British passport. Mohammed was in fact Mr Mahmood.

13. The Claimant obtained 3 grams of cocaine from a man called Mehmet, a person he says was previously unknown to him. On 4 February 2005 at a pre-arranged meeting

at McDonald's in Liverpool Street the Claimant then supplied those drugs in three individual wraps to Mohammed in return for £210 and further supply was discussed. Mohammed was accompanied by Kishan Athulathnudazi (KA), an employee of the News of the World, who was posing as a member of Mohammed's family.

14. Gashi, again under the guise of Aurora, then asked the Claimant to obtain a false British passport for Mohammed because, so it was said, Mohammed wanted one for a cousin of his who was in the country illegally. At further meetings with KA, the Claimant was given a passport photograph to use in the false passport and a £200 deposit for it which he then handed over to Mehmet. On 11 February 2005 arrangements were made between the Claimant and Aurora for more cocaine and the false passport to be handed over to Mohammed on 12 February 2005 at the Hilton Hotel in Park Lane.

15. Mr Mahmood then tipped off the police that an undercover operation had led the newspaper to discover via a confidential source that the Claimant was actively involved in crime in dealing with drugs, and false passports and he had access to firearms. He supplied the police with a photograph of the Claimant and told them analysis had shown the powder already supplied by the Claimant on 4 February was cocaine. He also told them the Claimant would be in possession of more cocaine and a false passport at a meeting arranged to take place at the Hilton Hotel on 12 February 2005.

16. He did not tell the police however that the confidential source was Gashi, or of the circumstances in which the Claimant came to be in possession of cocaine and a false passport, in particular, of the inducement offered of a job as a security guard, or that the drugs had been a suggested sweetener to enhance the Claimant's chances of getting the job.

17. On 12 February 2005 the Claimant met Mohammed at the Hilton Hotel. In a car outside the Hilton the Claimant was given 3 grams of cocaine and a false French passport by Mehmet. He went back into the Hilton and was arrested by police in the coffee shop minutes later, in possession of both the cocaine and the false passport. He says that by this point he had seen that the photograph in the passport was of Mohammed, not of another member of his family, and had written "for police" on the envelope with the intention of going to the police.

18. On 14 February 2005 the Claimant pleaded guilty at Bow Street Magistrates Court to 3 charges: one of supply of a class A drug (the 3 grams of cocaine supplied to Mr Mahmood), one of possession with intent to supply a class A drug, and one of possession of a false instrument (respectively the drugs and the false French passport he had in his possession when arrested). He was remanded in custody and committed to Southwark Crown Court for sentencing.

*Further events pre and post conviction*

19. To complete the picture it is necessary to refer to some pre-conviction facts, and the evidence put before the court for this application, including matters referred to in the CCRC Report and transcripts of various hearings which have been referred to.

20. The Claimant made no comment when interviewed by the police. In a pre-interview consultation with his solicitors, the Claimant gave an account of his entrapment and told them the cocaine and passport had been supplied to him by a friend and acquaintance of his.

21. On 14 March 2005 the Claimant appeared for sentence before HH Judge Dodgson at Southwark Crown Court. In his witness statement prepared for the prosecution, Mr Mahmood did not reveal the name of Gashi, but said he had been told of his activities by a confidential source; and he exhibited to his statement a recording of one of the telephone conversations between the Claimant and his confidential source.

22. During the Claimant's plea in mitigation an account was given to the Judge of his entrapment by Mr Mahmood and his colleagues from the News of the World involving a female called Aurora. Counsel accepted on the Claimant's behalf that: "*It is one of those cases …where entrapment can be used as full mitigation, not a defence"* and said "*it is accepted that this defendant* [the Claimant] *was a willing participant in the matter*." It was also said that the Claimant had been "*momentarily blinded by an offer, fake as it was, of a glamorous and well-paid job…*", that "*He fully accepts by his plea of guilty that that* [the supply of drugs] *was an entirely stupid thing to do*" and that entrapment "*does not afford a full defence. He went in with his eyes open as it were*."

23. The Judge sentenced the Claimant to a total of 4 ½ years imprisonment: 3 years imprisonment for the supply of cocaine; 12 months concurrent for possession of cocaine with intent to supply and 18 months imprisonment consecutive for possession of a false instrument.

24. On 24 June 2005 the Claimant's sentence was reduced by 9 months on appeal.

25. On 16 May 2006 HH Judge Dodgson made a confiscation order against the Claimant pursuant to the Proceeds of Crime Act 2002 in the sum of £70,724.58 with an order that 20 months be served consecutive to the other sentences in default of payment. A subsequent appeal against the default period was unsuccessful.

26. The Claimant was released on licence on 17 August 2006 but tagged, and made the subject of a curfew.

27. On 18 August 2006 the Claimant sought leave to appeal against his conviction out of time on the basis that material had come to light as a result of other trials which had taken place following "sting" operations by Mr Mahmood and his associates, but the Court of Appeal declined jurisdiction: given his plea of guilty in the Magistrates Court the only route for him to challenge his conviction was via the CCRC.

28. On 5 October 2006 the Claimant's solicitors therefore wrote to the CCRC on his behalf. They said in summary that information, some of which was known to the prosecution at the time of the Claimant's conviction, but was not disclosed, had subsequently come to light concerning Mr Mahmood's integrity and his use of subterfuge in conducting investigations.

29. The information to which they referred included various statements made by Gashi at different times in which he described playing a key role in various sting operations by Mr Mahmood including in the Claimant's case; and in addition, interviews with Mr Mahmood and transcripts of Mr Mahmood's evidence from the abuse of process hearing in the Dirty bomb case (see paragraph 33 below).

30. In an interview with the police on 6 September 2005 Gashi claimed that Mr Mahmood had told him he needed a story about someone who could get a British passport, a gun and drugs, so Gashi had gone on the internet posing as a female under the name of Aurora and found the Claimant. He said the Claimant was a really nice man, and that, posing as Aurora, he had induced the Claimant to obtain drugs and a false passport. Gashi also said the following:

> "He [the Claimant] will say I can't do this but for your sake I'll do it but I won't carry drugs in my pocket. I say please do this, he will ask his friend who are dealing in drugs, I don't know his friend to bring the drugs up to the hotel and then give it to [the Claimant]…
>
> He [Claimant] did get drugs from his friend but his friend brought the drugs up to the meeting…
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> Q: "Do you know where the faked passports came from? A: From some Moroccan guy. Q: Did he get them or did Maz [Mr Mahmood] get them? A: No no, no he get them. They did together and the passports he did get them. Q: Right. A: From some Moroccan guy there's nothing necessary (inaudible) he made them ok, he knew somebody obviously you probably know. Q: I just want to distinguish the difference between him bring[ing] drugs to Maz and the passports to Maz as opposed to Maz giving you things to give to him to take back to Maz. A: I couldn't give to him […] but his friends will give to him ok?... Q: His own friends? A: Yeah his own friends. Q: Nothing to do with you, nothing to do with Maz. A: Exactly yeah."

31. Amongst the other cases referred to by Gashi, there are three I should mention.

32. The first is what is called the Beckham kidnap case. In 2003 a number of defendants were charged with conspiring to kidnap Victoria Beckham and other offences. The principal witness in the case was Gashi, who had pretended to be part of the conspiracy. On 1 June 2003, the prosecution offered no evidence in respect of the

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1. Including by the police in the course of two police investigations, one in 2003 and one in 2005 called Operation Canopus 1 and 2 which they mounted into Gashi's allegations to discover whether there was a case to answer that Mr Mahmood had perverted the course of justice or committed criminal offences in the course of his work. Both concluded there was insufficient evidence to substantiate Gashi's allegations.

2. It is this which appears to found the Claimant's case on the circumstances of his entrapment, insofar as he did not already know it from his own involvement in the relevant events: see Further and Better Particulars: 1 a.

kidnap plot and some of the other charges which relied on Gashi's evidence. This was because it was unable to put forward Gashi as a witness of truth in a case in which *"great reliance had to be placed on Gashi's testimony"*. In his statement to the court explaining the prosecution's position, prosecuting counsel, Brian Altman QC said this, amongst other things:

> "The Prosecution no longer believes that Gashi can be put forward as a witness of truth. Indeed for the reasons given the prosecution does not have any confidence that it can rebut the suggestion that Gashi was or may have been instrumental in instigating the plot to kidnap Victoria Beckham.
>
> If it was or might have been Gashi who suggested this very high profile target to these defendants (about which there is great concern), albeit enthusiastically endorsed by them, no prosecution of this case could or should proceed. The whole edifice upon which it is built crumbles."

33. The second is *R v Martins and ors*, also known as the Dirty Bomb case. The defendants were accused of terrorist offences at the Central Criminal Court and were tried before the Recorder of London in September 2005 (i.e. after the Claimant's conviction in this case). It was alleged they were part of a plot to purchase from Mr Mahmood a consignment of radioactive material for use in an explosive. All the defendants were eventually acquitted. They had earlier made an unsuccessful application to stay the proceedings as an abuse of the process on the ground they had been entrapped into committing the offences, and also based on the lack of honesty and reliability of Mr Mahmood and his informant, B.

34. Part of the evidence relied on by the defendants for the purposes of the abuse application came from the interview given by Gashi to the police on 6 September 2005. In the event, one of reasons given by the Recorder of London for rejecting the abuse application was what was described in his ruling of 22 December 2005 as the prosecution's "*compelling*" submissions that Gashi's evidence to the court was unreliable and unworthy of belief.

35. The third case concerned allegations made in 2002 by Gashi, then a traffic warden and Mr Mahmood that some of Gashi's fellow traffic wardens had supplied cannabis whilst they were on duty to Mr Mahmood. It is said in the CCRC Report that after an internal investigation the traffic wardens' employers had decided to take no action against them. This was because they had simply gone along with Gashi's request to help out a friend of his made because he knew them to be recreational users of cannabis. According to the CCRC Report, after the Beckham kidnap case had concluded, a police investigation into the traffic warden allegations was brought to a close in the light of concerns about a lack of cooperation from Gashi and Mr Mahmood, and no further action was taken.

36. The CCRC Report dated 11 January 2010 identified a number of concerns: about the nature of the 'private entrapment' of the Claimant by Mr Mahmood and Gashi, as it was said to be; that Mr Mahmood was, quite legitimately permitted to withhold the

identity of his confidential source (Gashi) from the police as a result of the operation of section 10 of the Contempt of Court Act 1981, and that the prosecution may have failed to disclose material relevant to whether it was in the public interest to prosecute the Claimant, including for example what was known of Mr Mahmood's methods and the outcome of his previous exposés (which may have led the defence to apply to stay the prosecution).

37. In the event the CCRC referred the Claimant's case to Southwark Crown Court pursuant to section 14(4A) of the Criminal Appeal Act 1995 on the following basis:

> "There is a real possibility that, in the light of:-
>
> - Fresh evidence concerning the circumstances in which Mr Qema came to commit the offences and the role of Mr Gashi, the journalist's source, in those offences, and/or
>
> - Material non-disclosure (prior to interview and the entering of a plea) [by the prosecution] of matters affecting the credibility of the key prosecution witness, the journalist Mazher Mahmood.
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> the Crown Court will set aside the pleas of guilty and stay any further proceedings against Mr Qema as an abuse of the process."

38. On 9 September 2010 at Southwark Crown Court with the consent of the CPS, the Claimant was permitted to vacate his guilty plea. His convictions were then quashed, the case was formally re-opened, the prosecution offered no evidence, and on the judge's direction, not guilty verdicts were then entered on the charges the Claimant had previously faced.

*The Claimant's case on absence of reasonable and probable cause*

39. Against that background, the Claimant's case that the prosecution was without reasonable and probable cause is pleaded in this way.[1]

> "<u>The 3rd Requirement</u>
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> 22. The classic definition of this element of the tort is set out per Hawkins J in Hicks v Faulkner (1878) 8 QBD 167 at 171 as approved by the House of Lords in Herniman v Smith [1938] AC 305 at 316:
>
> *"An honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of the state of circumstances which, assuming them to be true,*

[1] In Voluntary Particulars provided in answer to a Part 18 Request for Further Information .

> *would reasonably lead any ordinary 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."*
>
> 23. Did [Mr Mahmood] in his role as prosecutor have an honest belief in the case he was making against the Claimant? If the answer is no (which on the facts alleged he did not as the crimes were manufactured by [Mr Mahmood/Gashi] then the Claimant will have established [absence of] reasonable and probable cause.
>
> 24. Whilst it is right that the Claimant was guilty of criminal conduct [Mr Mahmood]'s state of mind was not honest, his intent was malicious as he was seeking to entrap the Claimant in order to create a newspaper story about the crimes of a man who would not otherwise have committed those crimes but for the actions of [Mr Mahmood] and Gashi/Aurora.
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> 25. But even if the answer to the Hicks test was "yes" due to the Claimant's "criminality" then a further objective question arises. Was [Mr Mahmood]'s role as a prosecutor and the role he played in relaying misleading and incomplete information to the police objectively reasonable? If the answer is "no" (as per the Claimant's case) then the Claimant will have established a lack of reasonable and probable cause."

40. Mr Bowen Q.C. for the Claimant does not admit there is any inadequacy in the pleaded case. But in his skeleton argument and oral submissions however, the matter is put somewhat differently.

41. In summary, he submits that as a matter of law, the critical question is whether the defendant had reasonable cause to prosecute through the courts, or a proper case to bring before the courts or put before the court. It is not whether the defendant had reasonable cause to believe that the claimant carried out the acts which constitute the offence.

42. Thus he says, even if the prosecutor reasonably believed or even knew that the claimant had committed the acts constituting an offence, an absence of reasonable cause can be established by showing that he nevertheless did not honestly and reasonably believe that there was a realistic prospect of securing a conviction after a fair trial.

43. He makes two further points. First, he submits that in considering the objective test on reasonable cause, the judge must have regard only to evidence that is admissible. But what cannot be taken into account is evidence which it is well-known to the prosecutor will never in practice be relied on.

44. In addition, he says it is settled law that a failure in all but the plainest case of a prosecutor to seek legal advice will be evidence from which the judge may infer absence of reasonable and probable cause, and that the expectation of the prudent and

cautious man is that he would seek advice on whether a "prosecution is justified" – not on whether or not the suspect carried out acts amounting to elements of an offence.

45. Applying those principles to the facts he submits in summary there is a realistic prospect of showing Mr Mahmood knew there was little or no prospect of the Claimant being brought to and convicted after a "fair and impartial trial" because he was aware that the crucial evidence on which the prosecution would be based was that of Gashi, whose evidence could not be relied on by the prosecution; and because he knew the Claimant had been entrapped and that if the circumstances of the entrapment became known, it was unlikely that a prosecution would be brought, or if it was, it was likely to be stayed and therefore unlikely to be successful having regard to his unreliability and what had happened in the Beckham kidnap case and the traffic warden case.

*The Defendant's case on reasonable and probable cause*

46. The Defendant's case on reasonable and probable cause is succinctly set out in its defence in this way:

> "It is denied that the prosecution was without reasonable and probable cause. There was ample cause for prosecuting the Claimant. He had performed criminal acts with the necessary intent, and the Defendant through [Mr Mahmood] and KA knew this. The Claimant admitted his guilt to his lawyers; he later admitted it to the Court, both by pleading guilty to the charges against him and by admitting, via his Counsel in mitigation of sentence that he was a "willing participant" in the criminal activity. He admitted his guilt to the CCRC. Further he admits in the [Particulars of Claim] (paragraph 26 and elsewhere) and [Voluntary Particulars] (paragraph 24) that he carried out the criminal conduct for which he was convicted. Even if, contrary to what is pleaded above, it is an abuse for the state in the form of the police and/or the CPS to initiate and pursue proceedings against the Claimant it would not follow that the prosecution was without reasonable and probable cause. Still less would it follow that the Defendant acted without reasonable and probable cause."

47. In response to the arguments advanced by the Claimant, Mr Warby Q.C. submits that the essential requirement of reasonable and probable cause is concerned and concerned only with the "guilt" of the accused (as explained below) and an honest and reasonable belief in that. He submits the law of malicious prosecution does not require the prosecutor to assess other factors.

48. There are some qualifications or additions to the general rule. One is that it is not reasonable to prosecute a person just because you believe them to be guilty, if you know there is no sufficient admissible evidence to prove that is so. Another is that while a prosecutor only has to look at whether there is a case to advance, and not at

whether there is a defence, a prosecutor who knows there is a defence and evidence to support it, may act unreasonably in prosecuting. But subject to those points, if the prosecutor believes on reasonable grounds that the accused committed the criminal acts concerned and that there is a sufficient evidential case to put that proposition before the court, then the prosecutor cannot be liable for malicious prosecution.

49. He says the authorities are all concerned with guilt and evidential sufficiency and belief in that. That is what the cases are dealing with when they refer to a 'proper case' to put before the court. No other element is required.

50. He says there is no support for the proposition that the prosecutor should assess generally whether it is 'reasonable to prosecute' still less that he should determine whether it is in the public interest to conduct a prosecution. Where therefore the prosecutor reasonably believes (a) that the now claimant has committed the criminal acts alleged and has no defence to the charges, and (b) that there is sufficient admissible evidence to create a realistic prospect that a jury would convict, a claim for malicious prosecution cannot succeed. In those circumstances a claimant does not meet the requirement that he must demonstrate a want of reasonable cause by alleging and proving that the public interest did not require a prosecution, or even that a prosecution was contrary to the public interest.

51. Thus, the focus of the Defendant's case on this application is, and always has been on what actually happened and what Mr Mahmood knew about it at the time the proceedings were set on foot (the material point at which the reasonable and probable cause test must be applied). The Claimant plainly knew he had been entrapped; his counsel so submitted to HHJ Dodgson. But he also knew it afforded him no defence. On the undisputed facts (a) Mr Mahmood did believe the Claimant had committed the criminal acts, and there is no suggestion and never has been, that the Claimant had any defence, let alone that Mr Mahmood knew or believed he had one; (b) there manifestly was sufficient admissible evidence to create a realistic prospect that a jury would convict, hence the Claimant's plea of guilty.

*Discussion*

52. I start with some uncontroversial matters of law.

53. Malicious prosecution cases are jury cases under section 69(1) of the Senior Courts Act 1981. Though the question whether there was reasonable and probable cause is a question of fact, nonetheless it is a question for the Judge and not for the jury: *Glinski v McIver* [1962] AC 726, 741-2 per Viscount Simonds. The jury's role is only to determine any disputed facts relevant to that determination on which the judge needed their help: *Glinski* at 742, 768 and 779.

54. This anomaly is designed to ensure the delicate balance between the competing interests ("*of prosecutor and accused*") is properly held: *Herniman v Smith* [1938] AC 305, 316 per Lord Atkin. "*Only by firm adherence to this rule can people be protected in their public duty of bringing offenders to justice."* Per Lord Denning in *Leibo v Buckman Ltd* [1952] 2 All ER 1057, at 1062-3, cited by Viscount Simonds in *Glinski,* at 741-2.

55. The question whether there was absence of reasonable and probable cause has two strands: the objective and subjective. Reasonable and probable cause involves both an honest belief in the guilt of the accused and reasonable grounds for that belief.

56. The point of time for the relevant assessment is the point at which the law is set in motion against the accused. The judge arrives at the answer to the question whether there was reasonable cause by examining the facts as they were known to or appeared to the prosecutor: "*The facts upon which the prosecutor acted should be ascertained …When the judge knows the facts operating on the prosecutor's mind, he must then decide whether they afford reasonable and probable cause for prosecuting the accused*": per Lord Atkin, *Herniman v Smith* at 316.

57. However the onus is on the claimant, who must prove the absence of reasonable cause to adduce some evidence of "*a lack of honest belief in the guilt of the accused": Herniman v Smith* at 316; *Glinski* at 744 per Viscount Simonds.

58. Absence of reasonable cause must be established, like each of the elements of malicious prosecution, separately. Moreover, want of reasonable and probable cause can never be inferred from malice:

    i) "*From the most express malice, the want of probable cause cannot be implied. A man, from malicious motives, may take up a prosecution for real guilt, or he may, from circumstances which he really believes, proceed upon apparent guilt: and in neither case is he liable to this kind of action*": *Johnstone v Sutton* (1786) 1 Term Reports 510, 545;

    ii) "*The importance of observing this rule cannot be exaggerated…It behoves the judge to be doubly careful not to leave the question of honest belief to the jury unless there is affirmative evidence of the want of it*": *Glinski* at 744 per Viscount Simonds.

59. So far as entrapment is concerned, entrapment does not afford a defence to the charges faced by a defendant. See *R v Looseley; A-G's Reference (No 3 of 2000)* [2001] 1 WLR 2060 (HL). Allegations of entrapment can assist a defendant in a criminal case by founding an application for a stay on the grounds of abuse of the process, if it is established to the satisfaction of the Court that executive agents of the state misused the coercive law enforcement of the courts and thereby oppressed citizens. "*A defendant is excused, not because he is less culpable, although he may be, but because the police have behaved improperly*" per Lord Nicholls at [19].

60. "*The position in relation to misconduct by non-state agents is different; the rationale of the doctrine of abuse is absent"*; *Archbold 2012 4-97 at p379.* At its highest, in relation to alleged misconduct by non-state agents such as journalists, it can be said that the authorities leave open the possibility of a stay on the basis that in the case of sufficiently gross misconduct it might be an abuse for the state to rely on the resulting evidence: *Archbold ibid, Re Saluja; The Council for the Regulation of Health Care Professionals v GMC and Saluja* [2007] 1 WLR 3094.

61. I turn then to the issue around which the argument before me has centred which concerns the scope of the test for reasonable and probable cause. Is it a reference to a

sufficiency of evidence to support the prosecution of the offence in question and the defendant's knowledge of and honest belief in that, or does it encompass the point which seems to underlie the Claimant's case, that it is not enough for a prosecutor to believe or have reasonable grounds for believing the facts which add up to the crime in question, if he knows or believes a prosecution might be an abuse of the process?

62. I start with the case of *Johnstone v Sutton* since Mr Bowen has relied in particular on a citation from the opinion of Lord Denning in *Glinski* which referred to the case. The facts of the case (as summarised by Lord Denning in *Leibo* at 1067) were these.

> "On 16 April 1781, an English squadron under the command of Admiral Johnstone was lying off the island of St Jago in the West Indies when it was attacked in great force by a French squadron. The English beat it off and the French sailed away. Admiral Johnstone ordered his ships to slip their cables and follow them. They formed in line of battle and bore down on the French at sunset, but, darkness coming on, the French got away. One of the English ships was the Isis, commanded by Captain Sutton. She had been much damaged in the battle. Her foretopmast had been wrecked. On that account Captain Sutton did not obey the order to slip cable immediately it was given and did not keep up with the line of battle. The admiral then charged Captain Sutton before a court-martial with two charges: (i) disobedience to orders in not slipping his cable; (ii) for delaying and obstructing the public service in that he fell astern and did not keep up with the line of battle. At the court-martial Captain Sutton was honourably acquitted of both charges. He then brought an action against Admiral Johnstone for malicious prosecution. The jury at Guildhall found in his favour and awarded him £6,000 and their verdict was upheld in the Exchequer. The Court of Exchequer held that there was probable cause for prosecuting him on the first charge of disobedience to orders, but not on the second charge of delaying the public service…the decision was reversed by the Exchequer Chamber and the House of Lords. The reasons are contained in the celebrated opinion of Lord Mansfield CJ and Lord Loughborough CJ. They were of opinion that there was probable cause for both charges, both the disobedience and the obstructing the public service."

63. I should add that one of the complaints made by Captain Sutton in his action against Admiral Johnstone was the failure of the Admiral to hold a court-martial in St Jago, with the result that he was detained under arrest for some 2 years and 7 months before his eventual discharge after the court-martial held in London.

64. At the hearing of the court-martial Captain Sutton admitted "*The flight, the signals, the attempt to pursue, the enemy sailing off*" and the fact that orders were given and he did not obey them. His case before the court-martial was that he was justified in not obeying the orders because damage to his ship meant the orders were impossible

to obey. In the light of those admissions, the reason Lord Mansfield CJ and Lord Loughborough CJ gave at 547 for their opinion that there was probable cause for the charges was this:

> "Under all these circumstances, it being clear that the orders were given, heard, and understood; that in fact they were not obeyed; that, by not being obeyed, the enemy were enabled the better to sail off; that the defence was an impossibility to obey - a most complicated point - under all these circumstances, we have no difficulty to give an opinion that in law the commodore had a probable cause to bring the plaintiff to a fair and impartial trial."

65. Following the decision of the House of Lords in *Herniman v Smith* which approved Hawkins J's definition of reasonable and probable cause in *Hicks v Faulkner* (see paragraph 39 above) the issue of reasonable and probable cause came before the House of Lords again in *Glinski* where it was decided that the question of want of honest belief is relevant to that of want of reasonable and probable cause, but that the question should only be put to the jury if there is affirmative evidence of want of honest belief.

66. At 766 to 767 Lord Devlin said this:

> "…what is meant by reasonable and probable cause. It means that there must be cause (that is, sufficient grounds; I shall hereafter in my speech not always repeat the adjectives "reasonable" and "probable") for thinking that the plaintiff was probably guilty of the crime imputed: *Hicks v. Faulkner*.
>
> This does not mean that the prosecutor has to believe in the probability of conviction: *Dawson v. Vandasseau* [*Vansandau*]. (1863) 11 W.R. 516, 518. The prosecutor has not got to test the full strength of the defence; he is concerned only with the question of whether there is a case fit to be tried. As Dixon J. (as he then was) put it, the prosecutor must believe that "the probability of the accused's guilt is such that upon general grounds of justice a charge against him is warranted": *Commonwealth Life Assurance Society Ltd. v. Brain*. Perhaps the best language in which to leave the question to the jury is that adopted by Cave J. in *Abrath v. North Eastern Railway Co*.: "Did [the defendants] honestly believe the case which they laid before the magistrates?"

67. He went on to say this:

> "I venture to think that there is a danger that a jury may be misled by a question in the form left to them in the present case in which the word "guilty" is used without any qualification. The defendant at the trial is usually pressed, as he was in the

> present case, to declare that he no longer believes that the plaintiff was guilty. Where, as here, the defence was not called on at the criminal trial, and the only new factor for the defendant to weigh is the trial judge's ruling that there was no case to go to the jury, or no case on which it would be safe for them to convict, the jury in the civil case may ask themselves whether that would be enough to cause an honest man to change his belief. They may not appreciate, unless they are carefully directed in the summing-up, that there is a substantial difference between a case that warrants the making of a charge and one that survives the test of cross-examination with sufficient strength left in it to require consideration by a jury which is concerned only with guilt beyond reasonable doubt. In the course of his cross-examination in the present case the defendant assented to the proposition that "you must not prosecute anybody for an offence in this country unless you as the officer honestly believe that he is guilty of that offence," and said that on September 29, 1955, he did believe that the plaintiff was guilty. It would have been sufficient if he had replied that he believed that he had a good enough case to warrant a prosecution."

68. At 758 in *Glinski* Lord Denning said this:

> "…the word "guilty" is apt to be misleading. It suggests that, in order to have reasonable and probable cause, a man who brings a prosecution, be he a police officer or a private individual, must, at his peril, believe in the *guilt* of the accused. That he must be sure of it, as a jury must, before they convict. Whereas in truth he has only to be satisfied that there is a proper case to lay before the court, or in the words of Lord Mansfield, that there is a probable cause "to bring the [accused] to a fair and impartial trial": see *Johnstone v. Sutton*. …"

69. Viscount Simonds said this at 746:

> "Upon this matter it is not possible to generalise, but I would accept as a guiding principle what Lord Atkin said in Herniman v. Smith [1938] A.C. 305] that it is the duty of a prosecutor to find out not whether there is a possible defence but whether there is a reasonable and probable cause for prosecution."

70. More recently it was said in *Thacker v Crown Prosecution Service* [1997] EWCA Civ 3000: "*it is not necessary for the prosecutor in the person of the CPS lawyer or a police officer to believe in the guilt of the person accused, he has only to be satisfied that there is a proper case to lay before the court. "Guilt or innocence is for the Tribunal and not for him*."" per Kennedy LJ,; and in *Coudrat v Commissioners of Her Majesty's Revenue and Customs* [2005] EWCA Civ 616 at [41]: "*an officer is entitled*

*to lay a charge if he is satisfied there is a case fit to be tried. He does not have to believe in the probability of conviction."*

71. Although the matter has been put in various ways in the decided cases, in my view, it is clear (whatever the language used) that whether one considers the objective or subjective element of reasonable and probable cause, the focus is and always has been on the sufficiency of evidence to support the prosecution of the offence in question, and the defendant's knowledge of and honest belief in that. This much is clear from the cases I have referred to and from the courts' approach to the often detailed facts of the cases before them of which *Johnstone v Sutton* is an example.

72. It seems to me therefore that Mr Warby is right when he submits that this is what the cases are referring to, whether the formulation is for example of a "proper case to put before the court"; or "a proper case to be tried"; or "a proper case to lay before the court" or "there is a probable cause to bring the [accused] to a fair and impartial trial" or "sufficient evidence to justify a prosecution".

73. Thus the question is not, so far as the subjective element is concerned, whether the prosecutor actually believes in the suspect's guilt or believes the suspect will probably be convicted, nor is he under a duty to find out whether there is a possible defence. Equally, so far as the objective element is concerned the question is not whether the material is sufficient in law to secure a conviction (see for example, *Dawson v Vansandau* (1863) 11 WR 516, *Tempest v Snowden* [1952] 1 KB 130, 135; *Glinski* at 758 and 766-7 and *Coudrat* at [41]). As Eady J said in *Howarth v The Chief Constable of Gwent Constabulary* [2011] EWHC 2836, at [16]:"*It is necessary to consider whether there is adequate material to place before a jury, rather than to predict what the jury will conclude*."

74. Against that background, in my view the Claimant has no realistic prospect of establishing absence of reasonable cause in this case. To put the matter at its simplest, if, when the judge examines what facts the defendant 'prosecutor' acted upon, it is apparent that the defendant knew from personal observation sufficient facts to prove the criminal charges brought against the defendant (and nothing by way of a defence), it would be impossible to conclude that the charges were brought without reasonable and probable cause.

75. It is unarguable in my view, that this is what happened here. Despite the murky background to what happened, as it is said to be, there can be no doubt that the Claimant in this case, Mr Qema, deliberately supplied illegal drugs to Mr Mahmood (the prosecutor for this purpose) and possessed illegal drugs and a forged passport with intent to supply them to Mr Mahmood. Indeed it is part of the Claimant's pleaded case that this is what happened.

76. The fact that thereafter, the prosecution by the CPS, after the matter had been put into its hands, either failed to investigate the matter sufficiently to find out about Gashi's involvement in the sting operation, or there was material non-disclosure by the prosecution, which might have led to the conclusion the state abused the process including by relying on the evidence of Mr Mahmood, does not mean that Mr Mahmood did not have reasonable cause for setting the prosecution in motion as set

out above. The failures were ones of the state, and Mr Mahmood was not a state agent for these purposes. It is true that the cases leave open the possibility that sufficiently egregious conduct by a non-state agent, can lead to a stay of any prosecution by the state in reliance on it (see *Saluja*) although there has yet to be such a case. But even if that particularly high threshold is met, abuse of the process is not a defence; it does not mean the person concerned has not committed the criminal acts in question with the necessary mens rea (or in this case that Mr Mahmood did not know that the Claimant had done so) which are the matters here which do not leave open a finding of absence of reasonable cause as against Mr Mahmood and therefore the Defendant.

77. In my view Mr Warby is right to submit there is no support in the decided cases for the proposition that a prosecutor should assess generally whether it is reasonable to prosecute still less whether it is in the public interest to conduct a prosecution (i.e. something akin to the second limb of the prosecutorial test). In this context it is to be borne in mind that the tort originally developed in the time of private prosecutions, and long before the development of the public interest test or the doctrine of abuse of the process in *Looseley.* The tort is not one of malicious prosecution where the public interest does not require it or the circumstances make it contrary to the public interest. A claimant therefore does not meet the requirement that he must demonstrate a want of reasonable and probable cause by alleging that the public interest did not require a prosecution or that a prosecution was contrary to the public interest.

78. An attempt was made to mount a claim for malicious prosecution in the Australian case of *Emanuele & Ors v Hedley* [1997] ACTSC 136, on facts which bear some comparison with those of this case, and in which the English law of malicious prosecution was applied. It received very short shrift. Summary judgment was granted to the defendants and the decision was upheld on appeal by the Australian Federal Court: [1998] FCA 709.

79. Mr Emanuele was a businessman of previous good character who was interested in tendering for the purchase of a shopping complex owned by the Commonwealth Government and which was to be sold by public tender. Mr Hedley was a state official who chaired the Committee in charge of the sale. Mr Emanuele gave a large bribe to Mr Hedley, at a meeting which was recorded and observed by the police, and was then prosecuted and convicted for bribery. His defence at trial that the money was simply a gift was rejected.

80. His conviction by the Magistrates was set aside on the grounds that the prosecution was contrary to public policy and an abuse of process "*having regard to the manner in which [he] came to commit the offence and to the delay in finalising the prosecution"*. Mr Emanuele and his companies then sued Mr Hedley and others involved in the prosecution process for malicious prosecution, amongst other causes of action. It was not disputed that Mr Emanuele had offered the bribe, but he argued that he would not have done so but for the dishonest conduct and malicious persuasion of Mr Hedley who had set him up. The judge at first instance, Higgins J, who had been the judge who had earlier set aside the claimant's conviction on grounds which included his entrapment, observed at [34] that there was no basis on which doubt could seriously be cast on the correctness of the finding of guilt, and at [35] that Mr Emanuele's counsel did not allege that there was. At [37] he characterised the case as *"one in*

*which the plaintiffs claim to be entitled to damages because Mr Emanuele was improperly induced by Hedley to commit an offence which he otherwise would not have committed and for which he was thereafter prosecuted.*"

81. The Judge then held at [53] that Mr Hedley could not be the prosecutor, but went on to say as follows:

> "60. Even if Hedley was a prosecutor, his alleged conduct in "setting up" Emanuele would not diminish the fact that Emanuele, by permitting himself to succumb to temptation, had provided even to Hedley, reasonable and probable cause for his prosecution. Further, there is not and could not be said to be evidence of a lack of belief in reasonable or probable cause, see Commonwealth Life Assurance Society Ltd v Brain (supra).
>
> 61. The plaintiff would [therefore] necessarily fail to establish against any defendant a lack of reasonable or probable cause"

Mr Emanuele's other claims (including for negligence and abuse of process) were also struck out.

82. The Federal Court (Wilcox, Miles and R.D Nicholson JJ) dismissed Mr Emanuele's appeal, concluding that on the plaintiff's own case his claim was "*hopeless*".

83. The court observed that the bribe offer was a deliberate, rational and voluntary act and went on to say as follows:-

> "Having regard to the fact that this is an application for summary judgment, it should be assumed for present purposes that Mr Emanuele could establish at trial that Mr Hedley was actuated by malice towards him. But could it be said that Mr Hedley's report to the police that Mr Emanuele had offered him a bribe was false information? Surely not; on Mr Emanuele's own case that is exactly what he had done.
>
> This point overlaps the requirement of absence of reasonable and probable cause. On Mr Emanuele's own case, there was a reasonable and probable cause for the prosecution; he had committed the criminal action charged against him. It is true he did so under circumstances that amounted to entrapment, so that public policy required exclusion of the evidence necessary to establish his guilt. But that did not affect the fact that Mr Emanuele carried out an act that constituted the offence for which he was prosecuted. A finding of absence of reasonable and probable cause is therefore not open.
>
> We note that counsel for Mr Emanuele submits that, if Mr Hedley was actuated by malice in relation to his client, "it is impossible to conclude that Hedley had reasonable and probable cause to prosecute or cause the prosecution". He says

> that "if Hedley was a cause of the prosecution and was actuated by malice, he necessarily lacked belief in reasonable and probable cause". This is fallacious. In **Brain** Dixon J spoke of a prosecutor acting "maliciously **and** without reasonable and probable cause". The point, of course, is that a person may be actuated by malice in performing an act but nonetheless have reasonable and probable cause for doing so. The claim of malicious prosecution, made in action SC994 of 1996, must fail, on legal grounds."

84. I should add that I simply do not think the particular considerations which vexed the courts in the decided cases to which I have referred and on very different facts, would have arisen if, as here, it had been acknowledged that the claimant had committed the criminal acts in question (or to put it in the way it is pleaded by the Claimant – "the Claimant was guilty of criminal conduct") to the knowledge of, and in the presence of the particular prosecutor concerned. As it is I have reached the same conclusion as the court did in *Emanuele* for the reasons I have explained.

85. Mr Bowen submits that the Defendant's reference to, and reliance on the Claimant's 'guilt' is erroneous because in circumstances where the prosecution had offered no evidence against him he is properly to be regarded as not guilty. He submits that an individual is either guilty or not guilty, and there is no concept of innocence recognised by English law (see for example, the discussion of this issue in the context of applications for compensation for miscarriages of justice under section 133 of the Criminal Justice Act 1988 in *Regina (Adams) and ors v Secretary of State for Justice (Justice and anor intervening)* [2012] 1 AC 48).

86. Thus he says the focus of the Defendant on the 'guilt" of the Claimant is misplaced: ultimate "guilt" in legal terms of a potential claimant in a malicious prosecution claim, or their moral unworthiness, if truly guilty, are issues which are capable of being met, in the former case by the requirement that a prosecution must be terminated in a claimant's favour before an action for malicious prosecution can lie, and in the latter, by a defence of illegality (*ex turpi causa)*.

87. Certainly one of the points made by Mr Warby in his skeleton argument is that the tort is not concerned to protect the guilty but to provide compensation to innocent persons who are prosecuted both maliciously and groundlessly, and there is support for that submission in a number of the decided cases.

88. In the Exchequer Chamber's decision in *Johnstone v Sutton* it was said that: *"a man, from malicious motives, may take up a prosecution for real guilt …* [but] *is* [not] *liable…*". In the subsequent Exchequer Chamber decision of *Heslop v Chapman* (1853) 23 QBNS 49 the plaintiff complained that he had been maliciously prosecuted for perjury. The Court unanimously endorsed the Judge's direction to the Jury *"that if the plaintiff had in fact sworn falsely … then there was reasonable and probable cause for preferring and prosecuting the indictment"*. Jervis CJ expressly stated (at 52 col 1) that *"That is so, whether the defendant believed him guilty or not"*. Pollock CB

(at 52 col 2) expressly agreed with the Chief Justice *"in thinking that if* [the plaintiff] *had sworn falsely, though the defendant thought he had not, there was reasonable and probable cause for the prosecution"*.

89. More recently, both Lord Devlin and Lord Denning expressed similar views in *Glinski.* Lord Devlin said at 776:

> "… a malicious prosecutor… is in any event, and even though he does not believe in the guilt of the accused, immune from suit if the evidence on which he has acted turns out to be strong enough to sustain a conviction. That is as it should be, for a man who is guilty cannot complain of prosecution whatever the motives and beliefs of his prosecutor"

90. Lord Denning said at 762:

> "It must always be remembered that, if a charge is genuine, the mere fact that the prosecutor has made an unfair use of it will not take away his protection. It may show malice, but it does not raise any inference of a belief that there was no reasonable or probable cause: see *Turner v. Ambler* by Lord Denman C.J."

91. Those statements certainly provide strong support for the view that a person ought not to be able to recover damages for malicious prosecution in circumstances where they had committed the criminal acts in question with the requisite intent because in those circumstances there is reasonable and probable cause for his prosecution. At the very least it might be said that the truth of the charge could have a potentially significant effect on the issue of damages, even if a favourable verdict were to be returned in a malicious prosecution claim.

92. In the end however, it is not necessary for me to consider whether actual "guilt" (in the absence for example of honest belief in it at the material time) is a bar to an action for malicious prosecution since the Defendant's ultimate submission in this application is more nuanced. Thus, its argument on this application has not been that a termination on the merits is a pre-requisite for bringing an action for malicious prosecution[2] nor that subsequently determined guilt in fact is decisive against a malicious prosecution claim, since it is accepted by the Defendant, and indeed is common ground that the point in time at which the reasonable cause test must be applied is when the prosecution is initiated, and that the prosecutor's state of mind is part of that test.

93. This does not render irrelevant however the Claimant's admission that he committed the criminal acts or that they were witnessed by Mr Mahmood to the issue of absence of reasonable and probable cause. These matters are material because they put beyond argument for present purposes those fundamental facts which are relied on by the Defendant for the purposes of this application in order to establish that the Claimant

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[2] Wicks v Fentham and anor (1791) 4 Term Reports 247 100 E.R. 1000;

has no realistic prospect of establishing absence of reasonable cause. As already indicated, the focus of the Defendant's case is on what actually happened (the commission of the criminal acts) and what Mr Mahmood knew about it at the time the prosecution was set in motion.

94. Though as I have said, the Claimant's arguments did not focus on his pleaded claim, for the sake of completeness I should add that the propositions upon which it is based are misconceived in law. Want of reasonable and probable cause for a prosecution cannot be inferred from malice: see paragraph 58 above, and there is simply no authority for the proposition that a prosecutor's role must be objectively reasonable.

95. This brings me to the additional discrete issues which Mr Bowen relies on: in particular, those relating to admissibility of evidence and legal advice (citing for example part of the ex tempore judgment of Mitchell J, in *Pathmalingham v Customs and Excise* [2002] EWHC 560 (QB) which sets out the judge's summary of many of the cases to which I have already referred).

96. Neither the admissibility point nor the legal advice point is relied on by the Claimant in his pleaded case. Whether or not, as Mr Warby submits, that is because the Claimant is casting around for an arguable case on this issue, the mere fact that these matters are not pleaded would not preclude the Claimant from relying on them, if necessary by amendment, if they had any merit. In my view however they do not.

97. Mr Bowen cites the observations of UpJohn LJ in *Abbott v Refuge Assurance Ltd* at 454 that it is "*clearly settled*" that the reasonable prosecutor "*would finally consider the matter on admissible evidence only"*; the citation by Ormerod LJ in the same case at 445 of the trial judge's observations that "*I think no one could say a prosecutor had reasonable and probable cause to prosecute, if he believed that the accused was guilty, but nevertheless knew that he had not the evidence to establish his guilt*"; and those of the court in *Coudrat* at [42] that there must be prima facie admissible evidence of each element of the offence. Mr Bowen then goes on to argue that reliance by the prosecutor on inadmissible evidence or evidence which a prosecutor knows will never be relied on, could ground a case of want of reasonable cause.

98. It is true that it may not be reasonable to prosecute a person just because you believe them to be guilty if you know there is no admissible evidence to prove that it is so. But the significance of this point to this case is, as Mr Warby submits, hard to understand.

99. It is clear beyond sensible dispute that the evidence on which the Claimant's conviction was based was admissible evidence. It was first-hand evidence, supported by recordings showing the Claimant had supplied cocaine, and possessed further cocaine and a forged passport. The other matters relating for example to Gashi's role in his entrapment, were not relied on by anyone in deciding to prosecute the Claimant. In short, evidence from Gashi was not required nor was it relied on to prosecute the Claimant. Nothing that Gashi could say afforded the Claimant a defence or undermined the case that the Claimant had committed the criminal acts alleged with the requisite intent. Gashi's role and his unreliability were in the circumstances immaterial.

100. Second, Mr Bowen submits in reliance on a dictum of UpJohn LJ *Abbott v Refuge Assurance Co Ltd* [1962] 1 Q.B. 432 at 454 that it is a settled proposition that a reasonable prosecutor must take reasonable steps to inform himself of the true state of the case – and this includes in all but the plainest cases he would seek legal advice on the merits of a prosecution. Although the matter has not been dealt with by the Defendant in its pleaded case (not least because the point has been raised for the first time for the purposes of this hearing) Mr Bowen invites the court to conclude this could be relevant here because there is nothing to suggest that it (or Mr Mahmood) did so.

101. *Abbott* itself concerned an action for malicious prosecution brought following a failed private prosecution for insurance fraud, brought against one of the alleged perpetrators, Mr Abbott by the insurance company, Refuge Assurance Co Ltd which had taken legal advice before bringing the prosecution. It is to be noted that both Ormerod LJ (at 448) and UpJohn LJ (at 454) when discussing this point emphasised much depends on the facts.

102. However in *Glinski* (which was decided after *Abbott)* Viscount Simonds in approving what was said, obiter by Bayley J in *Ravenga v Mackintosh* (1824) 2 B & C 693 at 697) said this at 697:

> "...where in the administration of criminal justice the information is laid by a particular police officer who is in charge of the prosecution and responsible if it is held to be malicious, but it is, as a matter of police organisation, obvious that he must act upon the advice and often upon the instruction of his superior officers and the legal department…What, my Lords, is the position of a police officer in such a case? …Can he rely on the legal advice given to him? ...It appears to me that, just as the prosecutor is justified in acting on information about facts given him by reliable witnesses, so he may accept advice upon the law given him by a competent lawyer. That is the course that a reasonable man would take and, if so, the so-called objective test is satisfied. Applying this principle to the case of a police officer who lays an information and prefers a charge, and at every step acts upon competent advice, particularly perhaps if it is the advice of the legal department of Scotland Yard, I should find it difficult to say that that officer acted without reasonable and probable cause."

103. There is an obvious distinction it seems to me between saying that a reasonable prosecutor must take legal advice in all but the plainest of cases, and asking the question whether if he takes legal advice, he is justified in accepting and acting upon it. Such issues are likely to arise in the context of a claim for malicious prosecution in the circumstances considered by Viscount Simonds, that is where the prosecutor for this purpose is a police officer or as is normally the case now, the CPS.

104. However this case is a very different one on its facts, involving as it does a lay informant who is treated as the prosecutor for the purpose of the tort. If necessary I

would say that this is one of the plain cases to which UpJohn LJ referred but in my view, the suggestion that an inference of absence of reasonable and probable cause could be drawn because an individual in a case such as this, who has personally observed the commission of what are acknowledged to be criminal acts has then failed to then take legal advice before setting the law in motion, is simply untenable.

105. I should add that the cautionary observations of Moore-Bick LJ in *Hunt v AB* [2009] EWCA Civ 1092 (albeit applying to the issue which arose as to whether a complainant in a rape trial could be treated as a prosecutor, following the decision in *Martin v Watson*) are in my judgment, equally apposite here. These were that statements of principle in the decided cases must be read and understood against the background of their particular facts. To treat them as tests of universal applicability risks losing sight of the essential principles.

106. Mr Bowen's fall-back position is that this case is unsuitable for summary determination because it may be a case where some development of the law is required to cover the point at which the law of entrapment meets that of absence of reasonable cause, and the facts of this unique case require that any developing or novel legal argument be determined against real as opposed to hypothetical facts after a trial. He also says that if the law does not provide a remedy, the Claimant has been done an injustice. Because of the actions of Mr Mahmood he spent time in prison in relation to a matter where his conviction was ultimately quashed. But the mere fact that the Claimant was imprisoned for an offence, and in the result his conviction was ultimately quashed does not of itself give a right to bring a claim for malicious prosecution. There are many who go through the criminal process and who are acquitted after a trial or who have their convictions quashed on appeal, and who may be in an arguably stronger position than that of the Claimant (because there is no admission they committed the criminal acts) but who cannot bring a claim either. There are remedies available for those who have suffered a miscarriage of justice if the circumstances are appropriate.

107. In the end however, the Claimant must demonstrate he comes within the established boundaries of the tort, the ambit of which is narrowly defined for the public policy reasons explained by Lord Steyn in *Gregory v Portsmouth City Council* [2000] 1 A.C. 426 at C-H.

> "The law recognises that an official or private individual, who without justification sets in motion the criminal law against a defendant, is likely to cause serious injury to the victim. It will typically involve suffering for the victim and his family as well as damage to the reputation and credit of the victim. On the other hand, in a democracy, which upholds the rule of law, it is a delicate matter to allow actions to be brought in respect of the regular processes of the law. Law enforcement agencies are heavily dependent on the assistance and co-operation of citizens in the enforcement of the law. The fear is that a widely drawn tort will discourage law enforcement: it may discourage not only malicious persons but honest citizens who would otherwise carry out their civic duties of reporting crime. In the

> result malevolent individuals must receive protection so that responsible citizens may have it in respect of the hazards of litigation. The tort of malicious prosecution is also defined against the backcloth that there are criminal sanctions, such as perjury, making false statements to the police, and wasting police time, which discourage the mischief under consideration. Moreover, the tort must be seen in the context of overlapping torts, such as defamation and malicious falsehood, which serve to protect interests of personality.
>
> The enquiry must proceed from the premise of the law as it stands. The tort of malicious prosecution is narrowly defined. Telling lies about a defendant is not by itself tortious: *Hargreaves v. Bretherton* [1959] 1 Q.B. 45. A moment's reflection will show what welter of undesirable re-litigation would be permitted by any different rule."

108. In the result, for the reasons given the Defendant has satisfied me that the claim, whether as pleaded or argued before me, has no realistic prospect of success, there are no other compelling reasons why it should be tried and the Defendant is accordingly entitled to summary judgment.