CULLEN

v.

AMPOL PETROLEUM LIMITED

Heard: 30th, 31st October, 1st November, 1972.

At: Sydney.

	Dist.	Retd.	Recd.	Retd.
Barwick C.J.	14/11		28/11	
Menzies J.	14/11		29/11	
Walsh J.	14/11			
Gibbs J.				
Stephen J.	14/11			

Joint Judgment of the Court

ORDER: Appeal dismissed with costs.

Delivered: 1st DECEMBER 1972.

At: SYDNEY.

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JUDGMENT

BARWICK C.J.
MENZIES J.
WALSH J.
GIBBS J.
STEPHEN J.

CULLEN

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AMPOL PETROLEUM LIMITED

This is an appeal from the Court of Appeal Division of the Supreme Court of New South Wales allowing an appeal by Ampol Petroleum Limited, the defendant, against the judgment for $105,113 damages for malicious prosecution entered upon a verdict returned by a jury in favour of Victor Leslie Cullen, the plaintiff. The plaintiff, now appellant, who had been employed by the defendant up to 14th December, 1965, was subsequently charged with the embezzlement of £435 which he had received in cash from a customer of the defendant, one Bottalico, the proprietor of an Ampol Service Station, on or about the 30th November, 1965. A magistrate, after a preliminary enquiry, committed him for trial at Quarter Sessions but the Attorney-General did not file a bill. Consequently, he was not indicted.

In the trial of the action the facts found to have been known to that officer of the respondent, whom the plaintiff in this appeal treats as the prosecutor for whose actions the defendant is responsible, were as follows. The plaintiff had received the sum of £435 in cash from the defendant's customer, Bottalico. That sum ought, in the due course of the financial procedures of the defendant, to have been paid to the cashier

and a receipt given or sent to the customer. Bottalico had said that he was not given a receipt for the cash paid by him to the appellant. If the cash had been paid to the cashier its receipt ought to have been recorded upon the cash register and the record of its receipt in cash to have appeared on the cash register roll. The cash register roll did not show the receipt of such a sum in cash. But an amount of £435 had been recorded on the cash register roll on that day as having been received by cheque. That sum had been credited to Bottalico in the defendant's ledgers. No cheque for such a sum had in fact been received but a cheque for £1,000 received that day from another customer Radecky, who owned at least two service stations, had been divided for entry in the records of the defendant into two sums, namely £435 and £565, both intended by Radecky to be credited to him in respect of different service station accounts. The amount of £435 had been entered to the credit of Bottalico and not to Radecky. The entries on the cash register roll and in the ledger of the sum of £435 to the credit of Bottalico must have resulted either from a written authority actually deriving from the plaintiff who was the credit manager or from an authority purporting to be by or from the plaintiff. The document or documents by virtue of which the false entry of the credit to Bottalico was made were missing. They may have been part of a bundle or bundles of records called for by the plaintiff whilst still in the employ of the defendant but they were not subsequently in the bundle or bundles when examined after the plaintiff had left that employ.

All the elements of the cause of action for malicious

prosecution were undisputed except the absence of reasonable and probable cause and the presence of malice.

The learned trial judge came to the conclusion, in relation to the absence of reasonable and probable cause for the prosecution, that the only matter upon which a verdict of the jury was requisite to enable him to decide whether the defendant had no reasonable and probable cause for the prosecution was whether the officer of the defendant who instituted the proceedings "... did not honestly believe in the prosecution ...". This was submitted to the jury as a question and was answered in the affirmative. His Honour, having reached the conclusion that the material known to the defendant when the prosecution was instituted would constitute reasonable and probable cause if what we will call "the question of belief" were to be answered in favour of the defendant, upon the answer of the jury, found an absence of reasonable and probable cause. His Honour left to the jury the question of malice which the jury found to have been present, presumably because of a lack of belief in the prosecution.

The Court of Appeal, considering that there was no evidence to support the answer of the jury, set aside the verdict and judgment, and, in keeping with the conditional conclusion of the trial judge which it endorsed, found that there was no absence of reasonable and probable cause. Judgment was accordingly entered for the defendant.

By this appeal, the plaintiff seeks (1) the restoration of the verdict and judgment in his favour, or (2) a new trial. At the hearing of the appeal, leave to amend the Notice of Appeal was granted to cover an application for a new trial on the

limited ground :-

> "THAT the Court of appeal erred in holding that there was no evidence of lack of reasonable and probable cause and on the evidence should have held that there was lack of reasonable or probable cause ...".

The material upon which the prosecution was instituted for what was unquestionably the embezzlement of £435 pointed strongly to the guilt of the plaintiff. We have already indicated its nature. It was a reasonable inference from those facts known to the prosecutor that whoever took the cash paid in by Bottalico was responsible for the false credit of a like sum to him. It was also a reasonable inference that it was the plaintiff who had authorised the false credit and that he had taken the money. Having considered the transcript of the evidence given at the trial, and the submissions of counsel for the plaintiff in this appeal, we have come to the clear conclusion that there was no evidence of any counteracting fact, that is to say, fact cutting down the acceptability or significance of any of the basic facts we have detailed as having been present to the mind of the "prosecutor": nor was there any evidence of any disbelief on his part as to the truth of any of those facts or of any disbelief in the inference of the connection of the false credit with the taking of the cash or in the inference that the plaintiff had authorised the false credit and had taken the money. Nor can we see any evidence of disbelief on the part of the prosecutor in the propriety of launching the prosecution. We fully agree, therefore, with the Court of Appeal that the trial judge ought not to have submitted to the jury the question as to the officer's honest belief in the prosecution. He ought to have decided that there was no evidence of an absence of reasonable and probable cause.

Further, there was, in our opinion, no evidence of malice in the launching of the prosecution. Whether malice be sought in an improper motive or in a lack of honest belief in the propriety of launching the prosecution, there was no evidence of it. That being so, we have no need to discuss any aspects of the summing up.

However, three matters upon which counsel for the plaintiff relied do warrant particular consideration. The first is that the plaintiff, an employee of twelve years' standing with a good record, was not questioned before it was decided to prosecute him. The second was the contention that the defendant's cashier, Mr. Selwood - to whom it was the duty of the plaintiff to pay the £435 - went on leave on 10th December, 1965, and was absent from work until after the 20th December, 1965, and notwithstanding this, it was pretended by the officers of the defendant, including Selwood himself, that he had been questioned in the course of the defendant's inquiry. Furthermore, it was argued that Selwood and other officers of the defendant had falsely given evidence of his presence and of his participation in the inquiry into the embezzlement. The third criticism was that it was apparent to the officers of the defendant that there could be nothing incriminating the plaintiff in the crediting to Bottalico of the £435 out of Radecky's £1,000 cheque because the plaintiff's authorising of the split of that cheque into sums of £565 and £435 had obviously occurred before Bottalico paid the plaintiff £435 in cash. So it was said that it was but coincidence that £435 was paid by Bottalico in cash on the day when the plaintiff had authorised this split of Radecky's £1,000 cheque into two sums, one of which was £435.

It was the fact that the plaintiff was not questioned before his prosecution was instituted but that circumstance did not warrant the conclusion either, that there was an absence of reasonable and probable cause for the prosecution on objective grounds, or, that there was an absence of belief that those objective facts did warrant the prosecution of the plaintiff. The plaintiff had left the employment of the defendant before the embezzlement of the £435 was discovered and the laying of a charge against him upon what has already been described as a strong case against him without questioning him provided no ground for finding either an absence of reasonable and probable cause or any lack of belief that his prosecution was the proper course to take in all the circumstances. It may be that in a case where what has been discovered about a crime points with but a wavering finger at a particular suspect, reasonableness would require that an explanation should be sought from him and that he should be given an opportunity to clear himself of suspicion before proceedings were to be instituted against him. This, however, as has already been shown, was not such a case.

With regard to the second contention, the plaintiff gave evidence that before he gave up his employment with the defendant on 14th December the cashier, Selwood, had already gone on leave but even if that evidence could have constituted ground for an issue as to that particular matter, it afforded no ground in itself for a finding of lack of reasonable and probable cause or of a lack of belief in the prosecution. Moreover, the evidence that Selwood was not on leave when the embezzlement was discovered and the inquiry took place was overwhelming. The judge, with the responsibility of finding absence of reasonable and probable

cause, could not and did not regard the plaintiff's evidence that Selwood went on leave on 10th December as affording any reason for a negative conclusion. It is clearly apparent that, what is really a false issue, arose out of a palpable mistake by Selwood in the evidence which he gave at the preliminary examination before the magistrate when he did say, incorrectly, that he had gone on leave on 10th December.

How it was that the cash register roll of the defendant did show that by successive entries, £565 was credited to Radecky in respect of his Britannia garage account, and £435 was credited to Bottalico in respect of his White Cliffs garage account, is an intriguing question, if as it may be, those entries were made before Bottalico handed the £435 in cash to the plaintiff. Although it seems that nothing was made of this at the trial or upon the appeal in the Court of Appeal, it was plausibly suggested by counsel for the plaintiff before this Court that the entries must both have been made before noon on 30th November. It was argued, therefore, that the plaintiff could have had nothing to do with crediting Bottalico with a sum out of Radecky's cheque to cover up the stealing of £435 in cash. Nevertheless, if it be that the two entries were made before Bottalico paid the cash to the plaintiff, it must be, if the original allocation was not to Bottalico as to £435, that the roll was tampered with for the records do show that entry of the sum of £435 did, in its final form, credit Bottalico with part of Radecky's cheque. Counsel for the plaintiff suggested that the original allocation receipt authorising the credit of £435 to Radecky in respect of his Fairlight garage must have been removed and replaced by another allocation receipt purporting

to come from the plaintiff and authorising the credit of that sum to Bottalico and that the original entry in relation to the sum of £435 had been falsified by the other officer who made the substitution. This suggestion is not easy to accept. It depends upon (1) the coincidence of Bottalico's £435 in cash coming into the hands of an officer to whom the original allocation receipt in favour of Radecky's Fairlight garage was available and (2) the fact that that officer replaced the genuine receipt by a forged receipt, and then tampered with the cash register roll in the presence of other employees. But be that as it may, what is now suggested at a time when it cannot be properly investigated was certainly not a possibility which could reasonably have occurred, as a matter for their investigation, to the defendant's officers making the inquiry. The records were seemingly regular, and there could be no doubt that the missing allocation receipt must have been one requiring the account of Bottalico to be credited with £435 from the Radecky cheque. The after-thought now advanced as a matter that should have been investigated before prosecution does not afford ground for the conclusion that either there was absence of reasonable and probable cause for the prosecution, or the defendant's officer who instituted the prosecution did so without believing that the circumstances disclosed warranted the prosecution of the plaintiff.

We see no need to discuss in detail the evidence given at the trial. The Court of Appeal has done so fully and carefully in the reasons for judgment of its members. Some criticism was made of minor aspects of those reasons but none of these, even if accepted, required the conclusion that the

Court of Appeal was in error in its decision.

For the reasons stated, the appeal should be dismissed.