2 K.B. 421, where the English rule 33 of Order 36 was discussed. That was an appeal from a county court to the Divisional Court (Bankes and Ridley JJ.). The respondent did not appear. After hearing the argument of the appellant and considering the point in dispute from the respondent's angle, the appeal was allowed. The respondent applied to the Divisional Court to have the appeal restored to the list. That was a decision on appeal, and it has been held rule 33 of Order 36 does not apply to appeals, but only to trials at first instance. However, the reasons are similar.

Bankes J. said at page 423: ". . . such an application may be either (1) to restore a case which has merely been struck out and has never been heard and decided because the appellant did not attend; or (2) to restore a case in which the appellant has appeared and argued his appeal in the absence of the respondent and the court has heard the appeal and come to a decision. In the first case, the application is to restore an appeal which has not been heard; in the second case the application is to set aside a decision after a hearing which in the respondent's view is not satisfactory because he was not present."

and at page 424:

". . . It is clear, therefore, that this is an application to review an order deliberately made after argument and to entertain a fresh argument upon it with a view to ultimately confirming or reversing it. Has the court jurisdiction to do this?"

It was held that it had not, under any rule or statute or under its inherent jurisdiction.

I think that similar reasoning must apply to the interpretation of our rule and that where there has been a hearing on the merits, in the absence of the defendant, and judgment has been given and drawn up and entered, and so perfected, it cannot be set aside by that court so as to have the matter tried on the merits a second time, although the defendant could appeal against the judgment.

For these reasons I would allow this appeal and set aside the order appealed from and restore the judgment drawn up on December 20, 1960.

[COURT OF APPEAL]

Freetown
March 5,
1962

Ames Ag.P.
Benka-Coker
C.J.
Dove-Edwin
J.A.

UNITED AFRICA COMPANY LTD. . . . . *Appellant*

v.

JOHN COBY SAMUELS . . . . . *Respondent*

[Civil Appeals 8 and 11/61]

Tort—Malicious prosecution—Whether appellant's accountant was prosecutor—Whether appellant's accountant had authority to start criminal prosecution.

Respondent was under contract with appellant to carry kerosene from Freetown to Segbwema. After respondent received the kerosene, it was alleged that he had not delivered it but had stolen it. Respondent was prosecuted on this charge, but was discharged. He thereupon brought an action

against appellant for malicious prosecution and false imprisonment, and recovered judgment for £1,665 damages. Appellant appealed.

At the trial, respondent testified that after he had been arrested, appellant's accountant (Brown) had said that if respondent agreed to pay for the kerosene, he (Brown) would withdraw the case. But there was also evidence that the police had initiated the prosecution after obtaining certain information from Brown. As grounds for the appeal, appellant argued "that the learned trial judge was wrong in law in holding that Mr. Brown held himself out as prosecutor" and "that the learned trial judge was wrong in law in holding that the plaintiff (respondent) was prosecuted by the defendant company acting through their accountant, Mr. Brown."

Held, allowing the appeal, (1) that there was no case made out as to false imprisonment.

(2) That the burden was on respondent to prove that appellant was the prosecutor in the criminal action.

(3) That the evidence did not support the judge's finding that Brown was the prosecutor; and

(4) That there was no evidence that Brown had authority from appellant to start criminal prosecutions on their behalf.

Case referred to: *Abrath* v. *The North Eastern Railway Company* (1883) 11 Q.B.D. 440.

E. Livesy Luke for the appellant.

Cyrus Rogers-Wright for the respondent.

AMES AG.P. This is an appeal against a judgment awarding the respondent £665 special damages and £1,000 general damages, and costs, on a claim for damages for malicious prosecution and false imprisonment.

The respondent is a transport contractor with a fleet of 10 motor lorries, and was at the time a carrier for the U.A.C. Ltd., the appellants. In February 1956, and again in April 1956, there was a contract for the respondent to carry 20 drums of kerosene for the appellants from Freetown to Segbwema. The respondent received the kerosene and it was afterwards alleged that he had not delivered it and indeed that he had stolen it while bailee.

From October to December 1956, there was a prosecution of the appellant in a Magistrate's Court, about one of the lots of 20 drums, which resulted in his discharge. And from January 1957, to February 1957, there was a prosecution of him about the other lot of 20 drums in a Magistrate's Court and the Supreme Court, which also ended in his discharge.

The writ of summons claiming damages for malicious prosecution and false imprisonment was issued on April 18, 1957. The filing of pleadings was completed on June 14, 1957.

The hearing of the case did not start until February 23, 1960, which is nearly three years later. It ended on June 1, 1960, when the learned trial judge reserved judgment, and adjourned to a date of which notice was to be given.

It is to me remarkable that judgment was not delivered until September 18, 1961 (not 1960). There is no note as to the reason for this long delay of over 15 months and I assume that there was good reason for it. I can but think that it was unfortunate and must have made more difficult a decision, which anyhow would have been difficult enough, having regard to the sketchy nature of the evidence put before the court by the parties.

Mr. Rogers-Wright, for the respondent, said to us that at the close of the hearing in the court below he abandoned the claim in so far as it was for damages for false imprisonment. There is no note to that effect in the record, but it can be presumed. The record shows that Mr. Luke, for the appellants, had addressed the court below as to both false imprisonment and malicious prosecution. Mr. Rogers-Wright addressed only as to the latter. The learned judge's judgment contains no reference to false imprisonment, notwithstanding that the damages appear to have been awarded on the plaintiff's claim as a whole, and so does the formal order as drawn up. There clearly was no case made out as to false imprisonment as Mr. Wright's remark to us concedes. The Superintendent of Police swore to an information after he had made an investigation and a magistrate issued a warrant of arrest. The information referred to both lots of drums. The warrant was for only one of them, that in respect of which the respondent was discharged in the Magistrate's Court. It is not clear how he was brought before the court for the preliminary inquiry held by the magistrate in the charge about the other lot, which went to the Supreme Court.

The burden was on the respondent to prove all matters necessary to enable him to succeed, including all minor questions needed to prove the whole, and including even the negative aspects of the matter.

In *Abrath* v. *The N.E. Ry.* (1883) 11 Q.B.D. 440 Brett M.R. said at p. 449:

> ". . . If in order to show that there was an absence of reasonable and probable cause there are minor questions which it is necessary to determine, it seems to me that the burden of proving each of these minor questions lies upon the plaintiff, just as much as the burden of proving the whole does . . .,"

and Bowen L.J. said, at p. 457, concerning proof of the absence of reasonable and probable cause:

> ". . . In one sense that is the assertion of a negative, and we have been pressed with the proposition that when a negative is to be made out the onus of proof shifts. That is not so. If the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff. . . ."

The first thing which the respondent had to prove was that the appellants, the U.A.C. Ltd., were the prosecutors The learned judge found that the actual prosecutor was a Mr. Brown, an accountant of the appellants, and he held that the appellants, whose accountant he was, were liable vicariously. There was no evidence as to whether what Brown did in the matter was or was not in the course of his employment, which has to be proved, before the company become liable.

But before getting to that stage, it is necessary to consider what evidence there was that Brown was the prosecutor. For this purpose the test is "who set the law in motion?"

The respondent's evidence was:

> "In July or August 1956, the accountant for U.A.C. in Freetown spoke to me in his office and said that their Segbwema factory had reported that they had not received consignment of 20 drums kerosene and 20 drums petrol which U.A.C. had given me to send to Segbwema. I asked the accountant to check themselves and that my driver had returned to me a

receipted invoice from Segbwema which I had presented to U.A.C. and for which I had been paid. The accountant said that what I had suggested about U.A.C. making a check did not interest him. What he was concerned with was the report from Segbwema that Segbwema had not received the consignments of petrol and kerosene. I recalled to the accountant my long business transaction I had had with U.A.C. in the Protectorate for 15 years and further two years in Freetown. The accountant said that he was not concerned about that. The accountant said that I should pay for the 20 drums petrol and 20 drums of kerosene. I refused to pay as I had evidence that the petrol and kerosene had been delivered at Segbwema. I asked the accountant to interrogate any of my drivers who drove the lorries in which the kerosene and petrol were transported. I then went away,"

and also:

"After I had been arrested, I called on the accountant on the matter which led to my arrest. I told him that I felt he wanted to disgrace me. He said he did not care. He said that if I had stolen the kerosene and petrol he could debit my account with the cost of the kerosene and petrol. I said I had not stolen the kerosene and petrol. He said that if I agreed to pay he would withdraw the case. I said I would not pay."

What seems to have influenced the learned judge most was this remark that if the respondent agreed to pay, he (Brown) would withdraw the case.

The respondent speaks of 20 drums of kerosene and 20 drums of petrol, while the prosecutions were both about kerosene.

The evidence of the Assistant Superintendent of Police was this:

"In 1956 I was attached to C.I.D. and investigated a case of the non-delivery of 20 drums of kerosene. I also investigated another case for 20 drums of kerosene. The report was first made to me by the security officer, Mr. Wilson. I then saw a Mr. Brown, accountant of U.A.C. Brown made a report to me about J. C. Samuels, the plaintiff here. I arrested Samuels as a result of my investigation. I swore to information on which the warrant was issued. I produce it."

The information sworn by this witness was as follows:

"The information and complaint of Walter Wray S/I taken this 9th day of October in the year of our Lord 1956 before the undersigned J.P. of Her Majesty's Justices of the Peace in and for the said Colony of Sierra Leone.

"Who saith that upon certain report made by the accountant of U.A.C. Ltd., Mr. John Frederick Brown, that on February 25, 1956, an invoice for 20 drums of kerosene, valued at £209, was given to one, John Coby Samuels, a motor transporter, to receive the said 20 drums kerosene from Shell Installation, Kissy, to be delivered to U.A.C., Segbwema. I have conducted an inquiry and arrived at a conclusion that the 20 drums of kerosene were not received from John Coby Samuels at U.A.C., Segbwema. I am, therefore, applying for a warrant for his arrest to be dealt with according to law."

There was no evidence as to who Mr. Wilson was, whether a security officer of the Customs, of the oil company at Kissy, where the kerosene used

to be collected from, of the appellants or of whom. Whoever he was, it seems that he first reported the matter to the police and that his report was such that the C.I.D. made investigations, and interviewed Brown and got certain information from him and examined certain documents in his office. The fact that they considered the result of their investigations to be sufficient to institute a prosecution does not seem to me to make Brown the prosecutor. Nor does it, if coupled with the remark about withdrawing the prosecution. There was no cross-examination as to that and it must be taken that the remark was in fact made; but at the time when it was made Brown could not have withdrawn the prosecution, even if he and no one else had started it.

Of the several grounds of appeal which have been filed, the second and third are these:—

"(2) That the learned trial judge was wrong in law in holding that Mr. Brown held himself out as prosecutor.

"(3) That the learned trial judge was wrong in law in holding that the plaintiff (respondent) was prosecuted by the defendant company acting through their accountant, Mr. Brown."

This appeal is by way of rehearing: we have not seen the witnesses as did the learned judge, and so we are limited to evaluating the evidence, on which he made his findings. I have already set out that relevant to the question of whether Brown was the prosecutor or not, on which the learned judge must have based his finding that he was.

I have already said that, in my respectful opinion, the evidence did not support that finding: but suppose I am wrong and the learned judge was right; there is the question of whether or not it was within the course of Brown's employment for him to institute prosecutions. The judge must have found that it was, although he does not say so in so many words. He does not state the evidence on which he so found. There was evidence that Brown was the accountant, but I can see no evidence to indicate that, as accountant, his duty included the launching of criminal prosecutions. In my opinion this finding was not supported by the evidence.

I think that both these grounds of appeal are good grounds. There are others, but it is not necessary to consider them.

I would allow the appeal and set aside the judgment and enter judgment for the appellants and I would also dismiss the cross-appeal.

[COURT OF APPEAL]

Freetown
March 7,
1962

OSWALD HARDING *v.* REGINA

[Criminal Appeal 24/61]

Ames Ag.P.
Benka-Coker
C.J.
Dove Edwin
J.A.

Criminal Law—Falsification of accounts—Fraudulent conversion—Trial—Trial with assessors—Misdirection by judge.

Appellant was convicted of falsification of accounts and fraudulent conversion. At the relevant time, he was sub-accountant in the Government Sub-Treasury at Moyamba. If a Native Authority wanted to deposit money in