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Compensation for frivolous or vexatious prosecution

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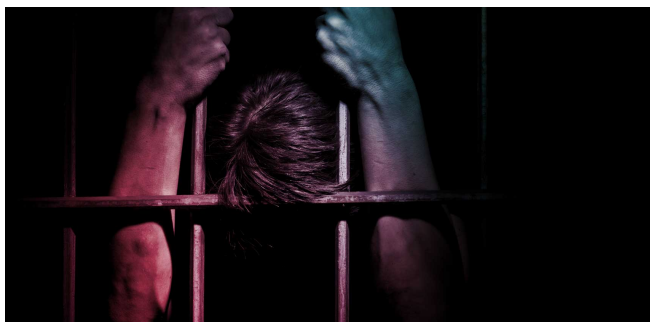
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FEATURE - October 2021

Compensation for Frivolous or Vexatious Prosecution

15 min read

by Benjamin Joshua Ong

Parti Liyani v Public Prosecutor [2021] SGHC 146

According to section 359(3) of the Criminal Procedure Code, an acquitted accused person may receive compensation if the prosecution was “frivolous or vexatious”. In *Parti Liyani v Public Prosecutor*, Singapore’s High Court – for the first time – comprehensively discussed what section 359(3) means and how it is to be applied. This article aims to outline and comment on the High Court’s decision, and to highlight several issues which may be explored in future.

Introduction

1. If a person has been accused of a crime but subsequently acquitted, may that person recover compensation? At common law, such a person might be able to recover damages from the prosecutor for the torts of malicious prosecution and/or false imprisonment. In Singapore, there is an additional possibility. Section 359(3) of the Criminal Procedure Code (**CPC**) provides:

“

“If an accused is acquitted of any charge for any offence, and if it is proved to the satisfaction of the court that the prosecution was frivolous or vexatious, the court may order the prosecution or the complainant or the person on whose information the prosecution was instituted to pay as compensation to the accused a sum not exceeding \$10,000.”

2. One might think that acquitted persons would invoke this provision as a matter of course. But section 359(3) has been invoked very rarely. Similar legislation has existed in Singapore since 1900.¹ Yet, before 2021, there were just three cases from Singaporean and Malayan colonial courts;² one case from present-day Malaysia;³ a few cases from colonial India and Ceylon (which had similar legislation); and *obiter* remarks in two cases from present-day Singapore.⁴ The Singapore courts never had the opportunity to examine and explain section 359(3) comprehensively until the 2021 case of *Parti Liyani v Public Prosecutor*.

3. The case was about a domestic worker, Ms Parti Liyani, who had been accused of stealing from her employer and his family members. The District Court convicted her of four charges of theft,⁵ but Chan Seng Onn J, sitting as the High Court, overturned the convictions.⁶ Ms Parti received a discharge amounting to an acquittal on a final pending charge of possessing stolen property.⁷ She then argued that she was entitled to compensation from the Public Prosecutor under section 359(3) of the CPC.
4. In a detailed judgment, Chan J explained the meaning of section 359(3). Before that, his Honour remarked on the relevance (or lack thereof) of the Public Prosecutor's constitutional role to the inquiry. His Honour then concluded that, on the facts, the prosecution was not "frivolous or vexatious". Finally, his Honour offered some *obiter* remarks on how compensation is to be calculated.
5. In this article, I aim to highlight and comment on important points from Chan J's judgment. While I will focus on the law of Singapore, the case may also be of interest in the various other jurisdictions around the world which have similar legislation to Singapore's section 359(3) (including Bangladesh, Brunei, Ghana, Malaysia, Nigeria, Pakistan, Seychelles, Sri Lanka, and Tanzania).

The Constitutional Role of the Public Prosecutor

6. One might think that the starting point would have been Article 35(8) of the Constitution, which states that the Attorney-General (who is also the Public Prosecutor) "shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence." The courts have taken this to be a statement of the wide discretion enjoyed by the Public Prosecutor.⁸
7. However, Chan J recognised that Article 35(8) says nothing about section 359(3) of the CPC. Article 35(8), whatever it means, applies only to the Public Prosecutor's power to "institute, conduct or discontinue any proceedings for any offence". Nothing in section 359(3) even purports to stop the Public Prosecutor from instituting, conducting, or discontinuing a prosecution.⁹ This point is important because, like the recent case of *Lim Chit Foo*,¹⁰ it highlights that not everything done by the Public Prosecutor comes within the ambit of Article 35(8).
8. There is an additional point. Section 359(3) applies to all prosecutions, both public and private. Therefore, I submit that the meaning of section 359(3) cannot depend on any factor specific to the Public Prosecutor. Indeed, there are only two instances where Chan J mentioned that the prosecution was brought by the Public Prosecutor (rather than a private prosecutor),¹¹ and even then, the only point his Honour made was that the burden of proof rests on the applicant – a point which is not specific to *public* prosecutions.
9. There is one more issue that was canvassed in submissions though not addressed in the judgment: Will there ever be a case where a public prosecution appears to have been "frivolous or vexatious"; there is evidence showing that it was, in reality, not so; but it would be against the public interest for the Public Prosecutor to disclose that evidence in open court? The solution to this problem, should it ever arise, probably lies in section 126 of the Evidence Act¹² and/or the common law on public interest privilege.¹³ I do not propose to go into more detail, save to make one point: even though the Public Prosecutor is "presumed to be acting in the public interest", that does not mean the court will not invent excuses for the Public Prosecutor where the prosecution appears to have been "frivolous or vexatious" and the Public Prosecutor does not provide at least some evidence or explanation in response.¹⁴

When Compensation May be Ordered

10. Mostly the High Court's judgment was devoted to interpreting section 359(3). I would like to highlight the following points.

Compensation under Section 359(3) Does Not Include Legal Costs

11. Compensation under section 359(3) cannot cover losses suffered by the applicant in the form of legal costs.¹⁵ Legal costs are governed by section 355(2), not section 359(3). Ms Parti had chosen not to make an application under the former,¹⁶ so the Court only discussed the latter. That said, because the two provisions are similarly worded, I submit that everything the Court said about section 359(3) would similarly apply to section 355(2).¹⁷
12. I also submit that an accused person may recover costs under section 355(2) even if he/she was represented by counsel acting *pro bono*.¹⁸

A Prosecution May be “Frivolous or Vexatious” Even if it is Not Tortious

13. At common law, an acquitted person may attempt to sue the prosecutor for two possible torts: (a) malicious prosecution; (b) false imprisonment. One might think that section 359(3) is merely a “shortcut” for the acquitted person to obtain what he/she could obtain through a civil action for those torts. But the High Court held that this is not so:¹⁹ a prosecution may be “frivolous or vexatious” even if it does not amount to the commission of one of those torts.

Meaning of “Frivolous or Vexatious”

14. The High Court declined to “set out an exhaustive definition of ‘frivolous or vexatious’”,²⁰ but it did offer useful guidance on when a prosecution is *objectively* and/or *subjectively* “frivolous or vexatious”.

(1) Objective test

15. A prosecution is *objectively* “frivolous or vexatious” if, regardless of the prosecutor’s motive²¹ or *bona fides*, it ought not to have taken place,²² or ought to have been discontinued but was not.²³ Evidently, this includes prosecutions that are “trivial”; “trifling, silly, or without due foundation”;²⁴ or “legally unsustainable” or “factually unsustainable” (as those phrases are used in the context of striking out pleadings in civil proceedings).²⁵ It appears (though the High Court did not explicitly say so) that a prosecution may also be “frivolous or vexatious” if the prosecutor has no substantial evidence for its case.²⁶
16. In this regard, the key inquiry is the “evidential sufficiency of the commencement and continuation of the prosecution”: the Court will ask “whether an objective reasonable Deputy Public Prosecutor (**DPP**) would have considered that there was sufficient evidence to render the case fit to be tried [or continued] before the court”.²⁷
17. Because the prosecutor would not have had the “benefit of hindsight”,²⁸ a prosecution is not necessarily “frivolous or vexatious” merely because the accused person is eventually acquitted. This is especially so when the Court only reaches its decision to acquit after engaging in “detailed analysis of all the evidence”.²⁹
18. It appears that a prosecution on a charge is not “frivolous or vexatious” as long as there is sufficient evidence relating to *some part* of the conduct referred to in the charge that would render that charge “fit to be tried”. In *Parti Liyani*, the Defence highlighted the Prosecution’s alleged failure to disclose a weakness in its evidence relating to one of the allegedly stolen items. According to the Defence, this failure rendered the prosecution “frivolous or vexatious”. The High Court disagreed because that item was only one of the several items covered by that the charge.³⁰

(2) Subjective test

19. Even if a prosecution was not *objectively* “frivolous or vexatious”, it can be *subjectively* so. This will be when the “prosecution was instituted or continued dishonestly, maliciously, for an improper motive (such as a desire to harass or annoy an accused person without a *bona fide* or legitimate purpose)”.³¹ Although the High Court did not explicitly say so, Malaysian case law suggests that a prosecution may also be “frivolous or vexatious” if the prosecution does not even attempt to prove an element of the offence;³² this may be evidence of a lack of seriousness.

Prosecutors’ Continuing Duty to Ensure that the Prosecution Does Not Become “Frivolous or Vexatious”

20. A prosecution can *become* “frivolous or vexatious” even if it was not so at the outset. Therefore, prosecutors should “asses[s] the sufficiency of the admissible evidence”, not only at the “commencement of the prosecution”, but also “continually... throughout the continuation of the prosecution taking into account new developments”. The prosecutor should always be ready to “re-evaluate its case” and “discontinue the proceedings”, for example, if “cross-examination at trial reveals severe weaknesses in the testimony of the witnesses or new evidence is discovered that destroys the very crux of the Prosecution’s case”.³³ But “this does not mean that each time there is a weakness in the Prosecution’s case, the Prosecution should discontinue the prosecution”.³⁴

21. Ultimately, the question is whether, given the state of the evidence known at any given point in time, an “objective reasonable Deputy Public Prosecutor would have considered that there was sufficient evidence to render the case fit to be ... continued before the court”.³⁵

Prosecutors’ Conduct, in and of Itself, Cannot Make a Prosecution “Frivolous or Vexatious”

22. Section 359(3) has nothing to do with the *manner* in which a prosecution is conducted or the “conduct of the prosecutors at trial”.³⁶ For example, a prosecution does not become “frivolous or vexatious” merely because it was conducted inefficiently.³⁷ This is partly a matter of practicality: it is “part and parcel of litigation” that “there are likely to be imperfections at several instances”, including even the raising of “unnecessary or unmeritorious points”.³⁸ The proper forum to deal with the manner in which a prosecution is conducted is disciplinary proceedings against the prosecutor (or, in the case of a represented private prosecutor, the prosecutor’s counsel).

23. Therefore, there is no redress for an inefficient prosecution which was not otherwise “frivolous or vexatious”.³⁹ I submit that the Legislature should consider reforming the CPC to address this. After all, it is possible that a prosecution, even if justified, can cause loss to an accused person because of the manner in which it is conducted. Indeed, even a *successful* prosecution can cause loss in this manner.

When the Accused Does Not Suffer Prejudice as a Result of Mistakes by the Prosecution

24. At several instances, the High Court stated that certain conduct by the Prosecution in *Parti Liyani’s* case, even if mistaken, did not render the prosecution “frivolous or vexatious” because it did not disadvantage the Defence⁴⁰ or cause the Defence to have to waste resources doing unnecessary work.⁴¹ One may ask why this mattered, given that the High Court’s definition of “frivolous and vexatious” did not state that prejudice must have been suffered by the accused.

25. It is respectfully submitted that the issue of prejudice is better seen as relating to causation (which will be discussed later). In short, compensation is only available in respect of losses *caused* by a legal wrong. Therefore, even if the prosecutors had committed lapses that rendered Ms Parti's prosecution "frivolous or vexatious", no compensation would have been payable because the lapses had not caused Ms Parti any loss.

Relevant Rules of Procedure and Evidence

26. The acquitted person bears the burden of proving that the prosecution was "frivolous or vexatious".⁴² The standard of proof is the balance of probabilities, and not anything more onerous.⁴³

27. If the Defence does not make a submission of "no case to answer", that can be a "good indicato[r]" (though not determinative) that the prosecution was not "frivolous or vexatious".⁴⁴

28. In attempting to prove that the prosecution was "frivolous or vexatious", the Defence is not limited to adducing evidence that emerged at the trial. The Defence may also adduce new evidence at the hearing of the application for compensation, provided that that evidence is "admissible and relevant to the assertions being made".⁴⁵

Determining the Quantum of Compensation

29. Because the High Court found that the prosecution was not "frivolous or vexatious", it did not have to comment on how the amount of compensation was to be calculated. That said, the High Court made several remarks on that question.

General Principles

30. First, "the basis of compensation would be to give a remedy necessary to put the applicant in a position as though the frivolous or vexatious prosecution had not been committed".⁴⁶ This means that the egregiousness of the frivolousness or vexatiousness does not matter. (One wonders whether there is room for any award of compensation on a punitive basis, just as there is in tort law.⁴⁷) In addition, the High Court tentatively accepted that "the law only awards compensation [for] injuries to certain legally protected interests".⁴⁸

31. The High Court also tentatively accepted that the "principles of causation, mitigation and remoteness" apply.⁴⁹ This has several important implications.

(1) Causation

32. First, much would depend on *why* the prosecution is "frivolous or vexatious".

33. If the prosecution was "frivolous or vexatious" from the outset, then the very initiation of the prosecution was legally wrongful. In that case, the compensation should put the accused person in the same position as though he/she had not been prosecuted at all.

34. On the other hand, if the prosecution was initially not "frivolous or vexatious", but *became* "frivolous or vexatious" midway during the prosecution, then things become more complicated. Similar issues would arise when the accused person is convicted on some charges but acquitted on others, and the

prosecution in respect of the latter charges but not the former was “frivolous and vexatious”. In such cases, it may well be that the accused person would be able to recover no compensation.

35. For example, suppose that after a trial has gone on for three days, the Prosecution ought to realise that it would be “frivolous or vexatious” to continue prosecuting, yet it fails to discontinue the prosecution (which goes on for another five days). In this case, only the last five days of prosecution, not the first three, are wrongful. The aim of compensation should therefore be to put the accused person in the same position as though the prosecution had only gone on for the first three days. This could be difficult to quantify. Besides, what losses would the accused person have suffered? He/she would have had to hire lawyers for five days more than necessary, but that is covered by section 355(2) of the CPC (which deals with costs).⁵⁰ It may be that the prosecution caused damages to the accused person’s reputation; but surely most of the reputational loss stems from the initiation of the prosecution, which was not wrongful. (Does a person subject to a longer prosecution really suffer greater damage to his/her reputation compared to one whose prosecution is brief?)

(2) Mitigation

36. Then there is the issue of mitigation: “it may be relevant for the court to consider whether the applicant had brought the requisite issues to the Prosecution and/or the court’s attention at any point during the trial.”⁵¹ If the accused person can do anything to make clear that the prosecution is without basis, but does not do so, the accused person cannot then complain about it. One must remember, however, that in tort law and contract law, the plaintiff only has to take *reasonable* steps – not necessarily all possible steps – to mitigate his/her losses. In practice, how would this rule be transposed to the context of section 359(3)?

37. The High Court provided two hints:

- a. If the Prosecution makes an incorrect assertion (e.g., that Ms Parti was employed on a certain date, when in fact she was not), and the Defence can easily bring the truth to the court’s attention, the Defence ought to do so.⁵²
- b. Even if the Prosecution’s introducing new evidence at a late stage could make the prosecution “frivolous or vexatious”, this will not count against the Prosecution if the Defence could have “request[ed] an adjournment to review and take further instructions on these materials” but did not.⁵³

Judicial Discretion to Depart from the General Principles?

38. In my submission, there is an additional complication which the High Court did not address. According to section 359(3), even if the accused is acquitted and the prosecution was frivolous or vexatious, the court “may” – not must – order compensation. It is an open question what principles govern the Court’s discretion to decline to order compensation. One also wonders whether the Court has the discretion to order compensation, but in a sum different from that calculated in accordance with the principles described above.

Apportionment of Compensation Between Prosecutor and Informant?

39. Section 359(3) speaks of compensation not only from the “prosecution” or the “complainant” (i.e. a private prosecutor), but also the “person on whose information the prosecution was instituted”. Which of these persons will be ordered to pay compensation? In my submission, an example of when the

Court might order an informant to compensate the acquitted person is when the prosecutors should have realised, but failed to realise, that the informant's account was false.⁵⁴

Statutory Maximum Amount of Compensation

40. Section 359(3) specifies a limit of \$10,000 in compensation, but it is not entirely clear whether that limit applies *in total* or *per charge*. The High Court tentatively held that “the statutory maximum of \$10,000.00 applies whenever the applicant is acquitted, whether of one or multiple charges”.⁵⁵ I respectfully submit that there may be occasion to revisit this issue in a future case.

Conclusion

41. While Ms Parti's application was ultimately dismissed, the High Court has provided much useful guidance for prosecutors, defence counsel, and judges. That said, one hopes that prosecutors will never act in such a manner as to warrant an award of compensation.

The author made submissions at the hearing of Parti Liyani's application for compensation as an *amicus curiae*.

Endnotes

Criminal Procedure Code 1900, sections 179 and 426. The Criminal Procedure Code 1892 contained similar provisions (see sections 183 and 397), but that version of the Code was never brought into force. On the history of the Criminal Procedure Code, see Andrew Phang Boon Leong, 'Of Codes and Ideology: Some Notes on the Origins of the Major Criminal Enactments of Singapore' (1989) 31 *Malaya Law Review* 46 at 63ff.

R v Mohamed bin Sudin (1935) SSLR 309; *R v K Haji Meydeen* (1933) SSLR 86; *Sabastian Ratnam and Thangavelu v PP* (1934) 1 MLJ 225.

Malacca Municipality v Ng Leong Wah (1973) 2 MLJ 183 (High Court, Malaysia).

Huang Liping v PP (2016) 4 SLR 716 (CA); *Arun Kaliamurthy v PP* (2014) 3 SLR 1023 (HC).

PP v Parti Liyani (2019) SGDC 57.

Parti Liyani v PP (2020) SGHC 187.

It appears that this charge was under s 35 of the Miscellaneous Offences (Public Order and Nuisance) Act: see Lydia Lam, 'Parti Liyani, former maid of CAG chairman, cleared of last remaining charge', *CNA* (8 September 2020) <<https://www.channelnewsasia.com/singapore/parti-liyani-former-maid-cag-chairman-cleared-last-remaining-charge-693991>> accessed 31 August 2021.

The courts have even gone so far as to describe this discretion as being "unfettered" save only that it may not be exercised unconstitutionally or in bad faith: *Law Society of Singapore v Tan Guat Neo Phyllis* (2008) 2 SLR(R) 311 at (145) read with (149).

Parti Liyani v PP (2021) SGHC 146 ("*Parti Liyani (Compensation)*") at (4).

Art 35(8) "does not vest the Attorney-General the power to determine how the proceedings as a whole, involving both the Prosecution and the Defence, will be managed and conducted": *Lim Chit Foo v PP* (2020) 1 SLR 64 (CA) at (22). See also *PP v Soh Chee Wen* (2021) 3 SLR 641 (HC) at (20) and (24)-(25), which highlights that the Attorney-General does not have the *exclusive* power to "institute, conduct or discontinue" prosecutions.

Parti Liyani (Compensation) at (118), (131).

"No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer by the disclosure." As to how the court may review an assertion that "the public interest would suffer by the disclosure", see *Chiu Teng Enterprises Pte Ltd v AG* (2011) SGHC 77.

Mah Kiat Seng v AG (2021) SGHC 202.

By analogy, consider the Court of Appeal's recent statement in *Saravanan Chandaram v PP* (2020) 2 SLR 95 (CA) at (154) about the "presumption of constitutionality": it is "no more than a starting point that legislation will not presumptively be treated as suspect or unconstitutional", and to take it as anything more would "entail presuming the very issue which is being challenged".

Parti Liyani (Compensation) at (164).

Parti Liyani (Compensation) at (40).

See *Parti Liyani (Compensation)* at (83): "in most cases, ss 355(2) and 359(3) of the CPC apply in tandem. The Legislature used the same phrasing '(i)f an accused is acquitted of any charge for any offence, and if it is proved to the satisfaction of the court that the prosecution was frivolous or vexatious' in both provisions.. It is likely the case that the Legislature intended that the court may award compensation (under s 359(3) of the CPC) and/or costs (under s 355(2) of the CPC) to an accused person who is acquitted if it is satisfied that there was a 'frivolous or vexatious' prosecution."

One may draw an analogy with the law on costs in civil proceedings: see *SATS Construction Pte Ltd v Islam Md Ohidul* (2016) SGHC 99.

Parti Liyani (Compensation) at (87).

Parti Liyani (Compensation) at (115).

Parti Liyani (Compensation) at (118).

Parti Liyani (Compensation) at (86).

Parti Liyani (Compensation) at (92), (93).

Parti Liyani (Compensation) at (68)-(69), citing *Beni Madhub Kurmi v Kumud Kumar Biswas* (1903) ILR 30 Cal 123 (High Court, Calcutta) 129 and *Musammatt Jaina v Santukdas* (1919) 54 Indian Cases 249 (Nagpur Judicial Commissioner's Court) 250.

Parti Liyani (Compensation) at (65)-(67), citing *The "Bunga Melati 5"* (2012) 4 SLR 546 (CA) at (39).

Parti Liyani (Compensation) at (71), citing *R v Mohamed bin Sudin and Kassim bin Abdullah* (1935) Straits Settlements Law Reports 309 (Supreme Court, Straits Settlements).

Parti Liyani (Compensation) at (116) read with (124).

Parti Liyani (Compensation) at (148).

Parti Liyani (Compensation) at (148).

Parti Liyani (Compensation) at (157).

Parti Liyani (Compensation) at (80). In particular, "if the tort of malicious prosecution is made out on the facts, the court will most likely be satisfied that the prosecution was 'frivolous or vexatious'": (126).

Parti Liyani (Compensation) at (71), citing *Sabastian Ratnam & Thangavelu v PP* (1934) 1 MLJ 225 (Supreme Court, Selangor).

Parti Liyani (Compensation) at (118).

Ibid.

Parti Liyani (Compensation) at (124).

Parti Liyani (Compensation) at (110).

Parti Liyani (Compensation) at (111). Similarly, the "use of foul language, intimidation, harassment or other undesirable conduct" cannot in and of themselves render a prosecution "frivolous or vexatious", although they can serve as evidence that the institution and/or continuance of the prosecution was subjectively "frivolous or vexatious": *ibid.*

Parti Liyani (Compensation) at (141).

There is no tort of inefficient prosecution. There is a Compensation Fund established by the Legal Profession Act, but that only pays out to victims of dishonesty by a solicitor: Legal Profession Act, s 75(11). Nothing in the Legal Profession Act presently provides that an advocate and solicitor or a Legal Service Officer who is guilty of a breach of the Professional Conduct Rules, "misconduct unbefitting an advocate and solicitor", or "misconduct unbefitting a Legal Service Officer" may be ordered to compensate a person who has suffered loss by reason of such breach or misconduct. Moreover, of course, the Legal Profession Act cannot possibly say anything about the conduct of self-represented private prosecutors.

Parti Liyani (Compensation) at (154)-(155): while certain pieces of evidence were disclosed to the Defence at a relatively late stage, this did not render the prosecution "frivolous or vexatious".

For example, the charge of theft as a servant was legally unsustainable because the alleged theft took place after Ms Parti's employment had been terminated, yet this did not render the prosecution on that charge "frivolous or vexatious": see *Parti Liyani (Compensation)* at (147). This appears to be because there was ultimately sufficient evidence to justify prosecution for theft *simpliciter*, whose elements were largely identical as the elements of theft as a servant. Moreover, the Prosecution's mistake could easily be fixed by amending the charge.

Parti Liyani (Compensation) at (128).

Parti Liyani (Compensation) at (128)-(131).

Parti Liyani (Compensation) at (120).

Parti Liyani (Compensation) at (133).

Parti Liyani (Compensation) at (162) (emphasis removed).

See *ACB v Thomson Medical Pte Ltd* (2017) 1 SLR 918 (CA) at (199)-(206) for the position in tort law generally.

Parti Liyani (Compensation) at (163).

The High Court expressed “tentative agreement” with the proposition that the “principles of causation, mitigation and remoteness from the law of contract and tort” would apply: *Parti Liyani (Compensation)* at (163)-(164).

Parti Liyani (Compensation) at (164).

Parti Liyani (Compensation) at (166).

Parti Liyani (Compensation) at (147).

Parti Liyani (Compensation) at (153).

There is arguably a *lacuna* in s 359(3) in that there is no recourse against a reckless or even dishonest “person on whose information the prosecution was instituted” if the prosecution was not “frivolous or vexatious”. It is arguably somewhat perverse that an informant who falsely accuses someone of a crime may escape having to pay compensation to the accused person by successfully covering it up (such that a reasonable prosecutor would not have discovered the lie, which would mean that prosecuting the accused person based on the informant’s statement would not be “frivolous or vexatious”). This might mean that whether the acquitted person is entitled to compensation would turn on how obvious the lie was.

Parti Liyani (Compensation) at (170).

Tags: ACQUITTAL, CRIMINAL COMPENSATION, CRIMINAL PROCEDURE, OL, PROSECUTION



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