

SANFT v. MINISTER OF POLICE & OTHERS.

(Civil Action. Hunter J. Vava'u, 13th May, 1959).

Arrest of Plaintiff — assault by Police Officer — Liability of Crown for acts of servants — Minister of Police joined as representing the Crown — Damages.

The Plaintiff claimed £2000 damages for assault by police while arresting him. His claim was against the police officers whom he alleged assaulted him and also against the Crown for the wrongful actions of their servants. He joined the Minister of Police as defendant as representing the Crown. The facts sufficiently appear in the judgment.

HELD. The relationship of Master and Servant exists in Tonga between officers of the Police and Crown.

The Minister was rightly joined.

Mafua & Faleola for the Plaintiff.

Hama for the Defendants.

C.A.V.

HUNTER J.: The Plaintiff by his writ is claiming £2000 for injuries he alleges he suffered as the result of an assault by the police.

He has brought the action against the Minister of Police and an Inspector and three constables. The Minister has been joined as the representative of the Government; the Plaintiff's submission being that the Government is answerable for the torts of its servants (the police) committed in the course of their employment. The other four defendants are proceeded against in their personal capacities.

The history of the matter is as follows :

On the 23rd May, 1958 a party in honour of the Governor of Vava'u was held at the Court House, Neiafu. This party (a dance) finished about midnight and after most of the guests had left the Plaintiff (who had attended the party) and some others were sitting on the verandah talking and having one or more final drinks. The clerk who was looking after the Court House asked the defendants Fine and Luki to tell the people to leave as he wished to close the building. There was some sort of an argument between the Plaintiff and Luki and Fine but nothing serious eventuated and the people left. Defendant Fine left before the Plaintiff, and started off across the adjacent football field to escort one of the guests (a girl) home. The Plaintiff followed shortly afterwards and called out to the girl (he says) to wait for him. The Defendant Fine then turned back and approached the Plaintiff. They met and a fight ensued. The Plaintiff says that Fine attacked him but this is denied by Fine. The facts set out above are practically common ground. It is from this point on that the stories diverge materially.

The Plaintiff's story is that shortly after the fight started he was knocked down and then Luki and Finau arrived. Luki pulled

the Plaintiff to his feet and he (Luki) and Finau held him. While he was being held, Fine continued to punch him. He was then taken to the police station (which was quite close) and on the way, while held by Luki and Finau he was continually punched by Fine. He was forcibly put into a cell and there assaulted by one or two of the three police officers. There is no doubt that he suffered severe injuries. The Defendants, on the other hand, while admitting the fight, say that once Luki arrived on the scene the Plaintiff was pulled to his feet, placed under arrest, escorted to the Police Station and put in the cell and that no assault was committed by them either on the way to Station or when the Plaintiff was put in the cell. Any injuries the Plaintiff suffered, they say he received during the fight with Fine.

My view of the fight is that it was engaged in voluntarily by the Plaintiff and therefor on the principle of *volenti non fit injuria* the Plaintiff cannot complain of the injuries (if any) he received then.

If the Plaintiff is entitled to a verdict the assault must have taken place between the time Luki took him in charge and the time he was placed in the cell; that is if I am correct in the view I take of the fight. Of course if the Plaintiff's evidence is accurate there is no doubt that he was brutally assaulted during this period. What is the evidence to corroborate the Plaintiff's story of the assaults?

Masao Paasi. Magistrate's clerk said: He saw the Plaintiff and Fine fighting. He saw Luki stop the fight and saw Luki and Finau take charge of the Plaintiff. "I remember Fine was still punching the Plaintiff while Luki held him." "On the way to the station I didn't see any of the Police do anything to the Plaintiff" (Paasi was following behind).

"Between the lavatory and the Mango tree I heard one or two punches but don't know who delivered them."

"When Luki went into the cell I heard the sound of struggling, I didn't hear any kicking."

"When Fine went into the cell I heard the same sound again."

Eddie Williams. He saw Fine and Plaintiff fighting. "Luki then held the Plaintiff up. Fine attacked him but Luki stopped him." "At the time Luki was holding the Plaintiff Fine was trying to attack him rushing at him." At the corner of the Court House "I heard bangings, three times they sounded like punches."

Pesamino Kuli-Ha'apai. He drove slowly past in a truck while Plaintiff was being taken to the police station: "I could hear sounds of grunts from Ralph (Plaintiff)."

Paula Faleola. He was on the scene at the fight. He saw Luki lift the Plaintiff up and saw Luki and Finau take him towards the road." When the truck moved on "I then saw Fine punch the Plaintiff, the Plaintiff grunted, then Fine punched the Plaintiff again. The two police were still holding the Plaintiff."

"I heard stamping coming from inside the cell." He said

that he saw Fine later and Fine "told me that he had beaten the plaintiff about the head and kicked him and he thought he was seriously injured."

Excluding the evidence of the Plaintiff himself what is set out above is all the evidence of the assault. The three police, Fine, Luki and Finau all gave evidence and denied that the Plaintiff was assaulted in anyway. Fine also denied that he admitted to Faleola that he had beaten him about the head and kicked him. If the evidence of the Plaintiff's witnesses is to be disregarded how are the injuries to be explained? They may have been received during the fight with Fine. This of course, is the contention of the Defendants, though there is some evidence that when the Plaintiff was being led away from the scene of the fight his face showed no sign of injuries. If I am satisfied that the Plaintiff was assaulted after his arrest he is entitled to damages, but the amount of damages will depend on the seriousness of the injuries. I find it impossible to say when or where the Plaintiff received the blow over his eye which was the most serious of his injuries, nor am I satisfied that he was assaulted while in the cell. But was he assaulted at all by the police in the execution of their duty? Unless I am prepared to disregard completely the evidence of the Plaintiff himself and that of the four witnesses referred to above I must find that he was. No reason has been suggested why Paasi, Williams, Pesamino or Paula Faleola should come to court and commit perjury and on the whole I accept their evidence. This means that the Plaintiff is entitled to a verdict.

Having decided that he was assaulted by the police in the course of their duty the next matter which I have to consider is this: To what damages is he entitled?

The Plaintiff is claiming heavy damages on the ground that the assault has permanently impaired his sight. This, if correct would be a justification of an award of very heavy damages indeed. But I am not satisfied that this is correct; in fact after hearing the medical evidence I am quite satisfied that his defective sight has nothing whatever to do with the blows he received but is due to some physical defect from which he has suffered for years. This means that the claim he puts forward for reimbursement for the expenses he incurred for his trip to Suva to consult an eye specialist goes by the board.

That being so the question I have to put to myself is this: What is a just and reasonable sum to compensate the Plaintiff for his pain and suffering and any medical expenses and loss of salary he has incurred excluding of course anything for permanent injury. He was admitted to hospital on the 24th May and discharged on 2nd June a matter of some nine days and this I think can fairly be regarded as a result of the assault, but the other period for which he says he was incapacitated cannot. He incurred £3. 3. 0 hospital expenses at Neiafu which he is entitled to recover. In my view he is entitled to nothing for loss of wages or income for I do not think the assault occasioned any. Making the fairest estimate I can, I find that the damages to which he is entitled is £153. 3. 0.

A further question remains. Should the verdict be against all the defendants, or if not all, which of them ?

It is quite clear that there must be a verdict against the 3rd 4th and 5th defendants (i.e. Fine Taufatofua, Luki Veikoso and Finau Tali) in their personal capacities.

There is no evidence whatsoever against the 2nd Defendant (Inspector Tapueluelu) in his personal capacity and if he was joined as representing the Government this was unnecessary as the first Defendant has been sued in that capacity. I therefore find a verdict for the 2nd Defendant.

With regard to the 1st Defendant — the Minister of Police as representing the Government the question is more difficult. Is the Tongan Government responsible for the tortious acts of members of the police committed in the course of their employment ?

There is a recent decision of the English Privy Council (A.G. for N.S.W. v. Perpetual Trustee Co. (1955 1 All ER. 846) in which their Lordships exhaustively examined the nature of a police constable's office and whether he is a servant of the Crown. Certain portions of the judgment in that case suggest that although in some sense a constable is a servant of the Crown the relationship between them is not for all purposes that of master and servant and that the Crown is not liable for wrongs committed by members of the Police Force. However their Lordships were not concerned with the effect of the tortious act of a police constable. The point at issue was whether the Crown was entitled to succeed in an action against a third person for injuring a policeman and so depriving the Crown of his services. It was held that the Crown was not so entitled, but the decision turned on the nature and history of the action for servitium amisit and the peculiar position in which a constable stands under the English Common Law. The facts of the present case and the point at issue are quite different and I can see no reason to suggest that in Tonga the Government is not answerable for the tortious acts committed by police officers in the course of their employment. I am strengthened in this view by a recent case decided by the Privy Council here, in which police officers had wrongfully seized a motor cycle. The Privy Council held that the Crown was liable in trespass. (See Sione Lopeti & Anor. v. 'Akau'ola & Anor. Privy Council 12. 12. 58). It is true that the English case referred to above was not cited, but the Chief Justice was present to advise on the law and no doubt the case was familiar to him. In any case, whatever view I may take I am bound to follow this decision of our Privy Council.

I therefor hold that the Government is liable and find a verdict against the 1st Defendant.

I therefore find a verdict for £155. 3. 0 against the first, third, fourth and fifth defendants and a verdict for the second defendant.