

PELESIKOTI, MINISTER OF POLICE AND GOVERNMENT OF TONGA v TAVAKE

Supreme Court
Harwood J
Civil App 226/82

15 June 1984

Pigs - if found at large on road or public property may be shot even although they have subsequently entered private property.

Tavake brought civil proceedings in a Magistrate's Court for damages for the unlawful destruction of two pigs owned by him which had been shot by a policeman, Pelesikoti, who was acting on instructions from the Minister of Police to shoot stray pigs. The defendants relied upon s9 of the Town Regulations Act and s18 of the Pounds and Animals Act.

The Magistrate gave judgment for the defendants in respect of one of the pigs and judgment for the plaintiff in respect of the other pig. The defendants appealed to the Supreme Court.

HELD:

Upholding the appeal.

1. Section 9 of the Town Regulations Act (Cap.37) could not serve as a defence because the policeman did not make any enquiry as to whether the pig was unlicensed before shooting it, and because the boundaries of Nuku'alofa had not be specified.
2. Section 18 of the Pounds and Animals Act (Cap.72) could serve as a defence because the pig when first seen was on a road on public property, even although at the time it was shot it had entered private property.
3. Section 18 of the Ponds and Animals Act (Cap.72) was not inconsistent with clause 10 of the Constitution of Tonga.

Statutes referred to

Constitution of Tonga, cl 10

Pounds and Animals Act (Cap.72) s18

Town Regulations Act (Cap.37) s9

Counsel for appellants: Mr Taumoepeau

Counsel for respondent: Mr Niu

Harwood J

Judgment

In a civil claim brought in the Magistrate's Court the Respondent, as Plaintiff, sued for a total of \$471.80 for the unlawful destruction of two pigs - though from the particulars contained in the summons the figures appear to total \$473.60. Briefly, on 15th May 1982 a police officer named Fotu Pelesikoti who was joined as the First Defendant in the proceedings, acting on the instructions of the Minister of Police (the Second Defendant), went out to shoot stray pigs in the area of Sopa and Kolomotu'a. Two pigs were shot dead by him - one when it was actually inside some person's private allotment, and the other (a smaller one) when it was on public ground. When seen by the police officer, just before the killing, both pigs were on or beside the public road. Those were the basic findings of fact by the magistrate and, for the purposes of this appeal, the parties agree that those findings are correct.

The Plaintiff, as owner of the pigs, brought proceedings also against the Government of Tonga as Third Defendant. The Magistrate gave judgment in favour of all three Defendants as regards the smaller pig, and against them in respect of the larger one, and he thereupon ordered the Defendants to pay \$150 being half the claimed value of the larger pig plus Court fees and legal fees of \$23.

The defence to the proceedings was that the killing was, in the case of both pigs, lawful and the Defendants relied upon firstly section 9 of the Town Regulations Act (Cap.37) and secondly section 18 of the Pounds and Animals Act (Cap.72). Both these statutory provisions lie at the very root of this appeal and I must set them out though it is not necessary to do so in full.

Cap.37: "9. Any person who shall permit any live hogs sows pigs or goats within the boundaries of Nuku'alofa (including Ma'ufanga) Pangai (including Tongaleleka) and Neiafu (including Fungamisi and Falaleu) except under licence in the Form prescribed in Schedule I shall be guilty of an offence and it shall be lawful for any constable or other peace officer to shoot any unlicensed live hog pig or goat found within any of the above-mentioned areas. Should any such hog sow pig or goat not be claimed by its owner or his representative within one hour of its so being killed it may be disposed of in such manner as the Minister of Police or his deputy may direct."

Cap.72: "18. It shall be lawful for any constable or other peace officer to kill any pig found at large upon any road or public property."

It has been contended by the Respondent that section 9 is contrary to clause 10 of the Constitution because it authorizes the shooting of a person's pig when that person has not been tried or convicted or sentenced for the commission of any offence. It has been further submitted that the areas mentioned in the second part of section 9 have never been defined since its amendment by Act No. 5 of 1974.

I consider section 9 of Cap. 37 to be a most unsatisfactory piece of legislation. Firstly it undoubtedly creates the offence of permitting certain unlicensed animals to be within certain areas when unlicensed, yet it fails to provide for any punishment in respect of that offence that could be imposed by a Court. Secondly the reference to, for example, "the boundaries of Nuku'alofa" is quite meaningless until those boundaries have been properly defined as required by Act No. 5 of 1974 and section 2A of Cap. 36 (see Act No. 6 of 1974), yet those boundaries do not appear to have been so defined. I note, in passing, that the reference to any unlicensed "live hog pig or goat" in line 7 of the section (in the English

version of the Act itself) does not correspond, as it obviously should, with the words "any such hog sow pig or goat" in line 8 - because in line 7 the word "sow" has been omitted. Thirdly, the section purports to authorize the shooting of "unlicensed" animals when they are "found" yet it is impossible to know whether an animal is unlicensed unless its owner has first been ascertained - but if its owner has been ascertained he should only be punished according to law if he has no licence and yet the Act makes no provision for such punishment as is the case with section 2, 3, 4, 5, 6, 7, 8, 10, 11, 12(3), 13, 14, 15 and 16. I must conclude therefore that section 9 affords no defence to the shooting of the larger pig (which, incidentally, was a sow) because no enquiry as to its ownership was ever made by the First Defendant before he shot it and therefore he could not have known whether it was unlicensed - and so far as I know there has never been any evidence that it was not - and because the boundaries of Nuku'alofa have never been specified since Act No. 5 and Act No. 6 of 1974. As to whether section 9 offends the principle of section 10 of the Constitution I prefer to make no specific finding, for that is not necessary.

I turn to section 18 of Cap. 72 recalling again that it was in respect of the larger pig that the magistrate found the Defendants liable. It seems clear from the record of the Magistrate's finding that it was because this pig had reached the sanctuary of a neighbouring allotment that he found them liable and not entitled to rely upon section 18. Interestingly enough the magistrate found that section 18 is not contrary to the Constitution - and that is a finding with which I entirely agree for the following reasons. Unlike any other section of Cap. 72, section 18 deals exclusively with pigs and no other animal. It clearly seems to be a section designed to deal with a particular situation. The Respondent contends that it imposes a punishment. I do not agree with that submission. The seemingly obvious purpose of it is to enable a constable or peace officer to clear any road or public property of straying pigs. Part II of the Act is headed "Trespass by Cattle". By section 18 it is not intended to inflict any punishment, in my opinion, nor does the section necessarily do so because the trespassing pig might well have no known or ascertainable owner. The section provides the authorized officer with a quick remedy for an undesirable situation. The Respondent's lawyer described the power as enabling such officer to play the part simultaneously of complainant, judge and executioner - and this is true - but so far as the owner (if any) of the pig is concerned the purpose is not to punish him, nor indeed is the presence of the pig ipso facto evidence of the commission of an offence (e.g. under section 16) by the owner (if any). Clause 10 of the Constitution reads as follows:

"Accused must be tried 10. No one shall be punished because of any offence he may have committed until he has been sentenced according to law before a Court having jurisdiction in case".

The clause is designed to ensure due process of law (i.e. sentencing by a competent Court) for the punishment of all persons who have committed an offence. In my opinion the section has no relevance as regards section 18 of Cap. 72.

However, it was further submitted that the First Defendant exceeded the power given by section 18 in that he killed the larger pig after it had reached the sanctuary of the neighbouring allotment and section 18, he says, cannot be construed as widely as that. I disagree with that submission. In my opinion the wording of section 18 is wide enough. I observe that there is no qualification of the operation of this section at all (for example, by any proviso) so as to limit its scope; such limits as there are must be looked for in the

wording of the section as it stands. The words "It shall be lawful" altogether preclude the commission of a civil wrong, subject of course to compliance with what follows thereafter. "To kill" means here to deprive of life by what-ever means may be used; thus if (to take a somewhat absurd example) a constable were to employ for this purpose a burst of machine-gun fire or a bomb, the killing would nevertheless be lawful although any other harmful consequences might well be actionable. "Found at large" means untethered or unenclosed or otherwise free to roam when first seen - there can be no other meaning - but, when first seen, the pig must be "upon any road or public property". If, when first seen, a pig is at large upon private property the section does not authorize any constable to kill it; but if, as in this case, a pig that is "found at large upon any road or public property" takes fright and runs on to private property the killing remains, on the part of the constable, lawful though the act of killing must be at his own risk (i.e. the risk of becoming liable for any damage resulting from the method employed by him in the process of killing it). This view is, I think, fortified by the fact that there is no indemnity section in Cap. 72 that would relieve an authorized officer from liability, for example, for damage caused in consequence of his pursuit on to, or the discharge of a firearm into, private property.

In my judgment the killing of the larger pig (as well as the other pig) was lawful by reason of section 18 of Cap. 72, and that section affords the Defendants a good defence to the action for damages brought against them. I therefore allow this appeal and I consider that the proper order to make is as follows -

1. The cross-appeal of the Respondent is dismissed.
2. The award of damages and costs made by the magistrate in favour of the Respondent is quashed.
3. There will be judgment for the Defendants/Appellants with costs (if any) in this Court and the Magistrates' Court, to be taxed if not agreed.