IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY **C.NO.1236/99**

BETWEEN : **SIONE LANGOIA 'I PANGAI LAVAKA** : ***Plaintiff***

AND : **1. MINISTRY OF POLICE**
2. KINGDOM OF TONGA : ***Defendants***

BEFORE HON JUSTICE FINNIGAN

Counsel : Mr Fifita for Plaintiff, Mr Pouono for Defendants

Date of Hearing : 7 & 8 February 2000
Date of Judgment : 25th February, 2000.

JUDGMENT OF FINNIGAN, J

The plaintiff claims that on 13 October 1998 when he was 14 he was unlawfully arrested by a police officer, unlawfully detained and unlawfully assaulted while in custody. He seeks damages of $5,500 for the assaults, $3,000 for the unlawful imprisonment, $2,000 for loss of reputation, $2,000 for emotional distress and discomfort and $5,000 as exemplary damages. The plaintiff was born on 29 September 1984. He is now 15 and sues through his next friend.

THE FACTS

Four witnesses gave evidence, all for the plaintiff. I have very little discretion about my findings of fact. The facts of the matter were clearly stated by the witnesses and were not challenged. The defendants called no witnesses and although counsel cross-examined the plaintiff's witnesses, he avoided questioning their narrative of what occurred.

Some time before midnight on Tuesday 13 October 1998 there was a theft from a house at Pea and the police were called. The owner of the house was Fale'ako Vao. The plaintiff and another youth Lesini Tonga were said by some to have been the thieves. They were taken to a house and they stayed there till the police arrived. Two officers came in a white marked police car, and the plaintiff knew one of them as Vilisoni. The other he did not know, but was in uniform. The one named Vilisoni took charge. He got out of the car and called to the youths to get into the car or he would beat them. The youths did not want to get into the police car, but got into the car. The plaintiff got into the car because the police officer had said he would come

and beat them if he did not. At Veitongo the police officers stopped the car and, it seems, went to Fale'ako's house. While out of the car, the officer named Vilisoni beat the youth named Lesini Tonga. After that the car proceeded with its four occupants to the central police station.

The station diary from the central police station was produced in evidence by a chief inspector of the police. From the movements recorded in the diary the chief inspector gave evidence that a call had come in from Pea, reporting that there had been a house burglary, and that the person who seemed to have entered the house was known but had run away. He said the officer who responded to the call from Pea was named Finau, and that this officer returned from Pea with two people who were to be questioned about the Pea complaint. In response to a question about how many had been arrested, the chief inspector replied that there were two but that they had not been arrested. The times in the diary have been altered, but the legible recorded time of the return to the station is 15 minutes past midnight.

The officer known to the plaintiff as Vilisoni and to the chief inspector as Finau then began to hit the plaintiff, in an office downstairs in the police station. The plaintiff said it was in the room where they charge people. Lesini Tonga was there. The beating was with a black police uniform belt and the blows were delivered to the plaintiff's chest and back. The plaintiff said in evidence that he was standing leaning against a wall, and that there were approximately 20 blows. He said he asked why he was being beaten and that Vilisoni replied, what had they done? He said he replied that they had done nothing and that this caused the policeman to beat him some more. He said that by this time he was in distress and hurting very much.

After that the policeman went upstairs with the plaintiff. He told the plaintiff to open the door of a room and go inside. He then told the plaintiff to fetch a piece of iron and give it to him and then to hold on to the table. The plaintiff described the piece of iron to the Court. He said it was about 2 feet long, though his demonstration made it about 1 meter. It was triangular, in that its end-section was triangular. He said he was struck on the back with the piece of iron 5 times.

Up to this point the plaintiff had made no statement to the police officers about the burglary allegation. He was told to go downstairs and that Lesini should come up. He said in evidence that after this he made a statement to other police officers about why he had been arrested. There is no further record in the station diary, but he was kept in the police station until about 11 or 12 the following day. There had been a separate diary kept in the criminal investigation department where these events occurred, but that diary cannot now be located. The chief inspector, who was giving evidence on subpoena to bring the police documents, said he had been advised that these diaries and other [illegible] locked room in the police station. He surmised that the diary had been destroyed when that room was flooded during the hurricane in December 1998. I daresay it was fortunate that the station diary for the same day was preserved. The chief inspector said there were also from these events an investigation report, but

that this was not available either. However, a copy of it had been sent to the Crown Law Office in respect of a prosecution that had been commenced against Lesini Tonga.

The plaintiff was not formally arrested, he was not charged, and he was not taken before a Magistrate for an order relating to his custody. The police made no contact with his guardian. He was not offered the opportunity of consulting a lawyer, nor the opportunity of having his guardian present. No copy of any written statement he may have made to the police has been produced. The following day at about 11 am-noon, he was taken back to Pea by police officers who attended a traffic accident at Takomololo. After attending the accident they took him and left him at Pea, some distance from his home.

He said in evidence that all this time he had been feeling homesick and very sore, and in great distress. When he arrived home he was observed by his guardian, who is his uncle, to be depressed, and on being asked why the plaintiff said that the police had beaten him. Being asked where, he took off his T-shirt. He himself saw the bruises on his chest and with a mirror, those on his back. His uncle observed bruising on his back and chest, mostly on his chest. The plaintiff told him he felt distressed and his uncle bathed his bruises with warm water. This treatment continued for a week, but no medical intervention was sought. During that time the plaintiff stayed around the house, being still distressed, and was reluctant to go to school because he was taunted about being a burglar. From the time of these events he has not been regarded as a suspect in the burglary.

The facts of this case intertwine with those of another claim, which has been brought by the other youth Lesini Tonga (C1045/99). Neither party sought consolidation, the two cases were tried separately and at different times. Each is decided separately on its own evidence and submissions.

THE DAMAGES CLAIMS, AND THE SUBMISSIONS

Mr Fifita put a simple case for the plaintiff. He submitted that the plaintiff was aged 14, and though not formally arrested was taken into custody for the purpose of questioning. He submitted that this was beyond any lawful police power. He referred the Court to the judgment of the Court of Appeal in *Fifita & Edwards* (CA6/98, unrep, judgment 7 August 1998). There, at pp5-11, the Court considered at length the provisions of s 22 of the Police Act cap 35, which sets out the procedure for police to follow after an arrest without warrant. The Court concluded, at p11, that a suspect whom the police wish to detain without warrant must be taken before a magistrate before he is questioned. The Court said:

> *Delay caused by a desire to ask questions is not authorised by [s22]; indeed, the bringing of the person arrested before a magistrate as soon as practicable is the safeguard for the citizen the legislature has chosen to provide...A few simple questions may resolve some doubt, and even lead to the immediate release of the suspect. But the safeguard*

requiring that the arrested person be brought before a magistrate without unnecessary delay is primary, and must be fully observed.

He pointed to the evidence and submitted that the police officers had detained him without warrant from a magistrate, and that while he was detained, one of them assaulted him. He submitted that the police lacked justification for taking him into custody, lacked justification for assaulting him, lacked justification for detaining him, and at the end still had no reason to charge him with any crime and did not charge him.

He pointed to the evidence and submitted that the arrest, assault and detention and the resultant physical injuries were adequately proved, along with mental and emotional disturbance and distress.

He submitted that, if the Court found the arrest was lawful, then still there had been no warrant for detention by a magistrate as required by s 22 of the Police Act cap 35 in cases of arrest without warrant. Further to that, he submitted, there had been abuse of police powers in not contacting the plaintiff's guardian or allowing him to do so. He referred the Court to the judgment of the Court of Appeal in *Teisina v Rex* (CA 3/99, unrep, judgment 23 July 1999), at p 7, on the topic of police dealings with young people. I note that this judgment was handed down after the events in question. There the Court was discussing the obligation to inform an arrested or detained person of the right to consult a lawyer, which is imposed by some codes overseas on the police. It went on to say:

> *There is no such express provision in the Constitution of Tonga, nor in any enactment. We accept that there may be circumstances when fairness may require the interviewing officer to advise or even encourage the person to be interviewed to seek the advice of a lawyer, or to have present during the interview a lawyer, family member, or friend. This could be the case, for example, if the person being interviewed were young or suffering from a disability.*

No grounds in any event had been found for charging the plaintiff, and he submitted that, even assuming a lawful arrest, the plaintiff should have been released long before he was.

In respect of the claim for damage to reputation he submitted that both the plaintiff and his family had suffered from the unfounded allegation that he was a burglar. He submitted that the evidence amply justified the award that the plaintiff claimed.

In respect of the claim for exemplary damages he submitted that the unlawful arrest, detention and beating of a 14-year-old had all occurred at the hands of those whom we trust not only to uphold the law, but also to keep us safe from others who would do such things. He accepted that an award of exemplary damages is rare, but submitted that this is a proper case. He submitted that what the police had done was the contrary of their

duty, and that it engendered fear, which should be allayed by an exemplary award.

Mr Pouono in reply drew attention to the origin of the night's events, and pointed out that police officer Finau entered the scene as a police officer doing his duty. He was investigating in response to a complaint from a member of the public. The information given to him was that two persons were said to have broken into a house and that the two were known. He submitted that it was part of the police officer's duty to arrest without warrant, under s 21(a) of the Police Act cap 35, "any person whom he suspects on reasonable grounds of having committed a crime". He submitted that in the circumstances what the police officer did at Pea was not unlawful. On the question of reasonable suspicion, he referred me to the judgment of Lord Devlin in *Hussien v Chong Fook Kam (PC)* [1970] AC 942, at page 948 B to D. Indeed, I take note of the whole of that judgment. It is noteworthy for the distinction it draws between reasonable suspicion, which is all an arresting constable needs to justify an arrest, and prima facie proof. It is clear also in stating that first the Court must apply the statutory code governing powers of arrest, but that where the code embodies common law principles, as it does here, then the common law can be helpful in applying the code.

About the claim of assault, Mr Pouono relied on *Collins v Wilcock* [1984] 3 All ER 374, and submitted that there must be an element of mens rea in an allegation of assault or battery. In his submission the evidence did not disclose an intention in the police officer while doing his duty and detaining the plaintiff, to assault him in the criminal sense. I have read that judgment with interest. It is relevant to the exercise by the constable of his powers in the present case, but I find ultimately that the decision I have to make is to be made on the evidence.

About the claim that the police had unlawfully held the plaintiff overnight, Mr Pouono submitted that the police had no alternative. To require them to return a suspect after their questioning is finished is, in his submission, to set too high a standard, which imposes burdens on the police in their work of suppressing crime. He submitted that it is fair to overlook the fact that the plaintiff was detained overnight. On that basis he submitted that the claim for damages for unlawful imprisonment should not be allowed.

In respect of the claim for reputation, Mr Pouono submitted that the damage to reputation, if any, did not arise from anything that the police had done. It arose, in his submission, from the complaint itself. He referred me to two authorities on this topic, particularly one on remoteness of damage. I have considered those authorities, but believe the decision of this part of the claim is to be made on the facts.

In respect of the claim for emotional distress, Mr Pouono referred me to *Flint v Lovell* [1934] All ER Rep 200. He submitted that the onus is on the plaintiff to show that there are psychological factors that have had a

significant impact on his life. In his submission the plaintiff had failed to do that, and this part of the claim should be dismissed.

About the claim for exemplary damages, Mr Pouono cited *Rookes v Barnard* [1964] AC 1129; 1 All ER 367, and submitted that the present case comes within the first category of the cases mentioned there. That is the category of case in which there is oppressive, arbitrary or unconstitutional action by the servants of the government. He relied upon a submission that the police officers in the present case were acting in pursuance of their duties as laid down in law, and thus cannot be within that category.

In the alternative, Mr Pouono referred me to a judgment of the Court of Appeal for the principles to be applied in assessing damages. This is *Kaufusi v Lasa*, which both counsel may note is reported at [1990] Tonga LR 139. The judgment at first instance is also reported in that volume.

Both parties sought costs, and were agreed that these should follow the event.

CONCLUSIONS

To begin I shall make findings of fact in respect of each head of claim and apply the law to each factual claim according to the findings. I shall consider the claims for damages after that. First, the claim of unlawful arrest. It is clear that the police officers went to Pea to investigate a complaint, with the information that there was a known suspect who had run away. They settled on the plaintiff and Lesini Tonga as two persons whom they elected to question. Neither officer gave evidence and there is no evidence why they did that. In their pleadings the defendants admit that the arresting officers were Vilisoni Finau and another. Vilisoni Finau told the plaintiff and his companion to get into the police car or he would beat them. The plaintiff was then taken to the police station. The chief inspector, after reading the station diary, was of the opinion that the two youths on arrival at the station had not been arrested, but Mr Pouono has submitted that they were arrested pursuant to the powers of arrest without warrant in s 21 (a). They were definitely in police custody, under threat of a beating. That in my opinion amounts to arrest under s 21(a). Any arrest is prima facie an unlawful interference with the right to liberty, and has to be justified by the person directing the arrest– see the dictum of Lord Atkin in *Liversidge v Anderson* cited by the Court of Appeal in *Fifita & Edwards v Fakafanua* (above) at p2. The onus is on the police officer who arrested the plaintiff to justify his arrest by showing that he suspected on reasonable grounds that the plaintiff had committed a crime. There must be a finding of fact about the officer's state of mind, and an objective assessment of whether there were reasonable grounds for his suspicion if he had one – *Castorina v Chief Constable of Surrey*, cited by the Court of Appeal in *Fifita & Edwards* (above) at p5.

The officer did not give evidence. Without evidence, the Court can make no finding about the officer's state of mind. There is no evidence why he told the plaintiff to get into the police car. The police officer has not discharged

the onus on him to justify his action. That being so, the prima facie interference with the plaintiff's right to liberty remains what it appears to be – an interference with that right that has not been justified and was contrary to law. I so hold.

I turn now to the claim of unlawful imprisonment. False imprisonment is complete deprivation of liberty for any time, however short, without lawful cause, and the constraint may be physical or merely the apprehension of physical force – *'Otuafi v Sipa & Ors* (Webster, J, unrep., C42/89, judgment 3 August 1990, at p12). I find the facts to be as follows. The officer named Finau detained the plaintiff and has not shown that he had reasonable grounds to suspect that the plaintiff had committed a crime. This amounted to an unlawful arrest of the plaintiff. Without any right to detain the plaintiff, or to remove him from where he had been, the police officers brought him and his companion to the central police station for questioning. The plaintiff was brought against his will under threat of a beating. Once there he was kept in a room and was struck about 20 times with a police belt. After that he was directed to another room which he himself was directed to open and once there was struck again with a bar, which he himself was directed to fetch. He was struck on the back 5 times after being directed to hold on to a table. After that he was kept in the police station and the total time he was in the station was about 12 hours. There is no evidence that force was used to detain him after those assaults, but it would be foolish to conclude on the balance of probabilities that after what occurred, this 14-year-old felt free or was left free to leave the station. He left the station when some police officers took him, while on other police business. The station diary shows that the following morning was a Wednesday, but no move was made to take the plaintiff to a Magistrate to charge him or to obtain a warrant to detain him, and no charge against him was prepared.

These facts need only be recounted for them to appear, as a matter of fact, to be an interference with the plaintiff's right to liberty. What was the situation at law? The key to the legality of his detention in the police station is s22 of the Police Act cap 35. The interpretation of s22 offered to me in the submissions of counsel is the judgment of the Court of Appeal of Tonga in *Fifita & Edwards* (above) at pp5 – 11 (the section is set out at p3) and the judgments mentioned therein on this topic, together with the judgment of the Privy Council in *Hussien v Chong Fook Kam* (above). I accept that those judgments state the law for the present case. It is not necessary for me to re-state in detail here the fundamental principles of our law governing the liberty of the subject. They have been re-stated recently in Tonga several times. They are well known already from the judgments of the Privy Council and the Court of Appeal and of this Court. One assumes also that in particular police officers have been instructed in the law that is laid down for them by those judgements. I note that the events in question occurred two months after the judgment of the Court of Appeal in *Fifita & Edwards* (above).

I think it is important to reinforce the legal position by going back to *Soakai v Taulua & Ors* (Privy Council, No 6/1983, unrep., judgment 6 May 1983). Although it is not the strongest recent judicial statement on the topic, this landmark judgment has been available to police officers since 1983, and the position has not changed. It is not reported, though the judgment at first instance is, at [1981-1988] Tonga LR 46. In its judgment, the Privy Council stated, at p6 – 7:

> *It is common ground that the appellant was arrested without a warrant. .... The gravamen of her claim is an allegation that [after she was arrested] she was not dealt with in accordance with her legal rights. The matter turns solely on the true construction of Sec 22 of the Police Act 1968 which is a provision aimed at safeguarding the rights of a citizen to freedom from arrest and detention without a formal warrant first being obtained for that purpose.*

The Court then went on to say:

> *.....appellant should have had her arrest dealt with by bringing her before a magistrate. She was entitled to have the charge then dealt with according to procedures laid down before a magistrate. The police had no right to hold her longer than was reasonably necessary for the charge to be dealt with by the available magistrate. There was a clear breach of Sec 22 (1) after the expiry of that time and thereafter she was unlawfully detained until her subsequent release. For that detention she is entitled to damages.*

In my view, that statement of the law by itself, without the other clear statements of other Courts on this topic, makes it plain that in the facts of the present case the law favours the plaintiff. Had he been lawfully arrested, his detention without a warrant would have been lawful until the soonest time within 24 hours of his arrest that he might reasonably have been brought before a magistrate. In the present case that may have been the following morning at the beginning of the working day. In the present case in my view, the plaintiff was unlawfully detained from the time he was unlawfully arrested. I so hold.

I turn now to the claims of assault. I have set out my factual findings as part of the facts of the unlawful detention. Clearly the plaintiff was assaulted, first downstairs and then upstairs in the police station. He had been assaulted within the definition of that term in the Criminal Offences Act when he was forced by threats to enter the police car – s 112(g), Act No 12/95. I hold accordingly.

THE AWARDS OF DAMAGES

I turn first to the claim of $3,000 for unlawful imprisonment. There is no separate claim for the unlawful arrest. I include the facts of that within the consideration of this claim. I have considered the principles as set out in *'Otuafi* (above), particularly at pp 15 – 16, and in *Hussien* (above), particularly at pp 949 – 950, and in *Kaufusi v Lasa* (SC & CA) [1990] Tonga

LR 39 & 139. As Webster J pointed out in *'Otuafi,* (p 12), it had already been held (in *Murray v Ministry of Defence* (HL) [1988] 2 All ER 521) that the law attaches such supreme importance to the liberty of the individual that a wrongful interference with it is actionable even without proof of damage. There is in the present case proof not only of the unlawful interference, but also of damage. In my opinion, this detention of a 14-year-old boy in the central police station without recourse to his guardian and without recourse to legal assistance during part of a night and part of the following day must have had all the mental consequences that the plaintiff described. He said about this part of the events that "I was in great hardship, I was homesick and hurting very much". After observing him give evidence I accept that as an understatement. I have considered all the evidence and the above judgments, and conclude that the $3,000 claimed as compensation for the loss of liberty and for the mental anguish in addition, both of which were proved, is justified and I allow it in full.

In respect of the reputation claim, I know there are some cases where an unlawful arrest and unlawful detention have resulted in proof of injury to reputation. This can be a factor for an award of compensation in a case of unlawful imprisonment without the need to plead it separately. In the present case I am satisfied that there was a slur on the plaintiff's reputation in that some of the people in his village and/or school said of him that he was a burglar, and that that allegation was not shown to be justified. However, I am unable to hold that this was caused by any action of the police officer or officers. There was no evidence about why the police officer Finau called to the plaintiff and his companion to get into the car. There is only conjecture, and it probably was because somebody had accused him. But it was not the police who accused him, on the evidence before me. This part of the claim must be declined.

I come now to the $5,500 claimed for assault, itemised as $3,000 for assaults with the belt and $2,500 for assaults with the iron bar. I treat them as one. The belt was a police officer's uniform belt. The blows with that were to the chest and back. The 5 blows with the bar were to the back. The bar was about 2 feet long and of triangular section. The plaintiff and his uncle described bruises on his back and chest, mostly on his chest. The plaintiff told him he felt distressed and his uncle bathed his bruises with warm water. This treatment continued for a week, but no medical intervention was sought. During that time the plaintiff stayed around the house, being still distressed. The level of injury described indicates blows at a medium level of force, as distinct from full force, but in my opinion, the distinction is immaterial in the circumstances of this case. This was an assault by a police officer, supposedly doing his duty, on a 14-year old boy from whom he was trying to exact a confession in the face of denials. The boy was assaulted while being held in custody in the police station unlawfully, late at night and without any communication to his guardian. At one time, the police officer made the plaintiff enter a room and fetch the bar with which he was to be beaten, then told him to hold on to a table while being hit. This was an appalling abuse of power and dereliction of duty. These assaults in these circumstances constitute by themselves a case of

wrongful interference with liberty where proof of the events is sufficient, and specific injury need not be proved in order to sustain a claim for damages. For the assaults themselves and the specific injuries proved, although the injuries are not in themselves grievous, the separate claim of $5,500 seems to me to be justified, and I award it in full.

There is a further claim of $2,000 for emotional distress and discomfort, but in assessing damages for unlawful imprisonment and assault I have already taken that injury factor into account, and make no further awards.

I come to the final claim, which is for exemplary damages of $5,000. In *Kaufusi v Lasa* (above) the Court of Appeal increased an award of exemplary damages to $5,000. It noted the established law that a wrongful arrest by a police officer comes within one of the three categories of cases where exemplary damages may be awarded, such arrest being an oppressive, arbitrary or unconstitutional action by a servant of the government. It commented that in the *Kaufusi* case there was not only a wrongful arrest but also a serious assault and wrongful detention. The assaults in the present case were possibly, in their physical character at least, less serious than the kick delivered in that former case, and less serious in their consequence, and I have to bear that in mind. Having read the judgments in *Rookes v Barnard* (above), I have no doubt that the present case is one of those rare cases when an award of exemplary damages may be made. From the judgment in *Kaufusi* I conclude that the claim in the present case for $5,000 is justified, and I award it in full.

In summary, then, the awards which I have made are:

Unlawful imprisonment	-	$3,000
Assault	-	$5,500
Exemplary	-	$5,000

Costs on this judgment are awarded to the plaintiff. These are to be agreed, or else taxed.

NUKU'ALOFA; 25th February, 2000

COURT TONGA

JUDGE