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LITIWAI SETEVANO

v

THE ATTORNEY-GENERAL

[HIGH COURT, 1995 (Fatiaki J), 21 June]

Civil Jurisdiction

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Torts-malicious prosecution-false imprisonment-liability of the State for torts committed by a servant or agent-judicial immunity.

After a successful appeal against his conviction after trial in the High Court the plaintiff commenced proceedings seeking damages arising out of his

C conviction. On application to strike out the action HELD: The trial judge acted within his jurisdiction and was therefore immune from civil proceedings.

Cases cited:

Crispin v. Registrar of the District Court [1986] 2 NZLR 254
Lucas & Son (Nelson Mail) v. O'Brien [1978] 2 NZLR 289
D *Maharaj v. Attorney-General of Trinidad and Tobago* (No.2) [1979] AC 385
Nakhla v. McCarthy (1978) NZLR 291
Sirros v. Moore [1975] QB 118

Ruling on application to strike out.

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R. Chand for Plaintiff
I. Mataitoga Solicitor-General for Defendant

Fatiaki J: [21 June]

On the 2nd of March 1995 the plaintiff issued a Writ against the Attorney-
F General claiming damages for malicious prosecution and false imprisonment arising out of a successful appeal to the Fiji Court of Appeal against his conviction for an offence of Manslaughter after a High Court trial.

The Statement of Claim in its relevant parts reads :

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"3. THE Plaintiff was on or about the 12th day of February, 1988 charged and pleaded not guilty of murdering one Jeet Kuar (d/o Niranjan Singh).

6. THAT thereafter he was tried before a Judge of this Honourable Court with the assistance of three assessors in a trial starting from the 18th October,

1989 to the 1st of November, 1989.

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7. THE aforesaid assessors returned the unanimous opinion that the Plaintiff was not guilty.

8. THE learned Trial Judge then adjourned the trial until the 2nd of November, 1989 and on resumption delivered a judgment in which he over ruled the assessors verdict and convicted the Plaintiff of Manslaughter.

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10. THAT thereafter the Plaintiff through his Counsel appealed against the decision of the Learned Trial Judge in the Fiji Court of Appeal.

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13. THAT the Learned Judges of the High Court (sic) upheld the Plaintiff's appeal and the conviction was quashed and the Plaintiff was acquitted.

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14. THAT the Plaintiff after his conviction at the High Court on the 2nd day of November, 1989 until his release pursuant to the judgment of the Fiji Court of Appeal pronounced on the 27th day of May, 1991 spent a total of 574 days in imprisonment.

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21. THAT the said charge and the subsequent conviction was unwarranted, unjust, unfair, malicious and an abuse of the process of the Court."

On the 21st of April 1995 after an acknowledgment of service had been filed and in the absence of a Statement of Defence, the plaintiff's solicitor issued a summons purportedly under Order 19 r.7 of the High Court Rules seeking :

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"AN ORDER for final judgment in default of defence having been served on the Plaintiff."

I say purportedly advisedly because it is clear beyond question that the plaintiff's claim is a civil proceeding against the Crown not only by virtue of the Attorney-General being named as the statutory defendant (See : Section 12(2) of Crown Proceedings Act), but also in terms of the definition of such proceedings to be found in Section 18(2)(c) read together with Section 3(1)(a) of the Crown Proceedings Act (Cap.24) which latter provision sets out the liability of the Crown in respect of torts committed by its servants or agents.

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Given the above, the relevant procedural rule is not Order 19 r.7 but Order 77 r.6 which expressly requires the leave of the Court to any entry of default judgment against the State. Clearly this was not sought. Furthermore, the plaintiff's Statement of Claim in its present form does not fully or adequately comply with the mandatory requirements of Or.77 r.2(1) that it : "... include a statement of the circumstances in which the State's liability is alleged to have arisen and as to the government department and officers of the State concerned."

As was said by Cooke P. of the New Zealand Court of Appeal in Crispin v. Registrar of the District Court [1986] 2 NZLR 254 at 255 :

> "Claims in tort based on actions or omissions of Crown Servants can be put forward in three ways. First, there can be an action against the Crown, commonly represented by the Attorney-General, under the Crown Proceedings Act 1950, alleging vicarious liability on the part of the Crown. Secondly, there can be an action against the individual employee or employees alleged to have committed the tort : this would be against them personally, named as individuals, although it would often be the case that the Crown as a good employer would stand behind them financially. Thirdly, where a statute or subordinate legislation so permits, there may be an action against the holder of an office named simply as such holder: a class of case in which the legislation authorises the holder of the office for the time being to be sued *eo nomine*."
> (my underlining)

and later, in dismissing the appeal on the ground that the action was not properly constituted or pleaded, Cooke P. said at p.256 :

> "This is more than a mere technical objection. It is vital in such a case to determine precisely how the causes of action are alleged to arise and whether they are personal or vicarious."

Be that as it may, the application under consideration is a summons issued by the Attorney-General under Or. 18 r.18 of the High Court Rules and the Court's inherent jurisdiction, for an order that the plaintiff's originating summons (sic) be struck out on the ground that it discloses no reasonable cause of action and is scandalous, frivolous or vexatious.

In this regard, I would respectfully adopt the decision of the New Zealand Court of Appeal in Lucas & Son (Nelson Mail) v. O'Brien [1978] 2 NZLR 289 as being a convenient summary of the correct approach to the application and where it was

> "Held : The court must exercise its ... jurisdiction to strike out pleadings sparingly and with great care to ensure that a plaintiff

> was not improperly deprived of the opportunity for a trial of his case. However, that did not mean that the jurisdiction was reserved for the plain and obvious case ; it could be exercised even when extensive argument was necessary to demonstrate that the plaintiff's case was so clearly untenable that it could not possibly succeed."

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I am grateful to the learned Solicitor-General for his helpful written submissions. The submission generally summarises the factual events surrounding the plaintiff's cause of action and states :

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> "Paragraph 21 of the Statement of Claim states that the charge and the subsequent conviction was unwarranted, unfair, unjust, malicious and an abuse of the process of the Court. This in effect means that the Plaintiff is alleging that he was convicted by the High Court judge maliciously and that it was unfair and unjust."

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The submission then continues :

> "This claim discloses no reasonable cause of action and therefore is frivolous and vexatious because the High Court is absolutely immune from civil or criminal proceedings when acting judicially : See Sirros v. Moore [1975] QB 118 at p.140."

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No reference was made however to the Crown Proceedings Act (Cap. 24) or the terms of Section 3(5) which expressly provides :

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> "No proceedings shall lie against the Crown by virtue of this Section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connexion with the execution of judicial process."

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Learned counsel for the plaintiff in opposing the application submitted however that the Writ is "self-justifying" in that the plaintiff's acquittal by the Court of Appeal justified the claim (whatever that may mean). I cannot agree nor ought the principle of judicial immunity encapsulated in the above provision be so easily dismissed.

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In my view notwithstanding the numerous deficiencies in the plaintiff's Statement of Claim, given the almost complete reliance upon the plaintiff's acquittal on appeal as founding his cause-of-action, the applicability of the principle of judicial immunity will inevitably arise for c onsideration.

The scope and rationale for the age-old principle of judicial immunity is clearly A and succinctly set out in the following passage in the judgment of the New Zealand Court of Appeal in Nakhla v. McCarthy [1978] NZLR 291 at p.293, 294 :

> "An action complaining of the judicial work of a superior court judge is probably unique in New Zealand. In the United Kingdom B the number of recorded attempts to bring a similar action during the past 150 years or more can be counted on the fingers of one hand. None has succeeded.
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> It is not necessary to search for the reason. It lies in the right of men and women to feel that when discharging his judicial responsibilities a judge will have no more reason to be affected by C fear than he will allow himself to be subjected to influences of favour. Thus he is surrounded with an absolute immunity from civil proceedings for acts done or words spoken in the exercise of his judicial office. But that immunity is in no sense a private right which might be regarded as having been conferred upon him and which he then might be said to enjoy. He is merely the repository D of a public right which is designed to ensure that the administration of justice will be untrammelled by the collateral attacks of disappointed or disaffected litigants. That simple concept is gladly accepted, we believe, by the citizen and lawyer alike. And its strength extends to preventing civil proceedings against the judge in respect of his exercise of jurisdiction even though he may act E with gross carelessness or be moved by reasons of actual malice or even hatred."

The question that logically arises therefore, is whether the trial judge was acting within his jurisdiction in overturning the unanimous opinions of the assessors and convicting the plaintiff of Manslaughter at his trial before the F High Court. On this aspect Nakhla's case *(op.cit)* :

> "Held 2. In applying the principle of judicial immunity the test of the jurisdiction of a court (in so far as it is relevant) lies in authority to decide, not in the mode of decision or the manner in which the court's powers may have been exercised."

G In this latter regard Section 263 of the Criminal Procedure Code (Cap.21) provides:

> "Trials before the Supreme Court (now High Court) shall be by a judge sitting with assessors ..."

and more particularly, Section 299 of the Criminal Procedure Code (Cap.21)

provides (so far as relevant for present purposes) :

> "(1) When the case on both sides is closed, the judge shall sum up and shall then require each of the assessors to state his opinion orally, and shall record such opinion.
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> (2) The judge shall then give judgment but in doing so shall not be bound to conform to the opinions of the assesssors:
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> Provided that, ... when the judge does not agree with the majority opinion of the assessors, he shall give his reasons, which shall be written down and be pronounced in open court, for differing with such majority opinion ..."

From the foregoing it is patently clear that the learned trial judge in the criminal trial of the plaintiff had both the jurisdiction and the power to disagree with the assessor's opinions and in doing so, I am satisfied that he was acting within his judicial powers and jurisdiction, and is therefore, absolutely immune from civil proceedings.

The fact that the learned trial judge was subsequently held by the Court of Appeal in Criminal Appeal No : 14 of 1989, to have misdirected himself in the exercise of his statutory power to differ from the opinions of the assessors does not, under any conceivable circumstance, give rise to a cause of action sufficient to support or maintain a civil proceeding against the state.

Lord Diplock in delivering the majority judgment of the Privy Council in Maharaj v. Attorney-General of Trinidad and Tobago (No.2) [1979] AC 385 in which a barrister purported to include a claim in tort against the Crown arising out of his committal for contempt by a High Court judge, said at p.394 : (of the claim in tort)

> "To this extent the application was misconceived. The Crown was not vicariously liable in tort for anything done by Maharaj J. while discharging or purporting to discharge any responsibilities of a judicial nature vested in him ; nor for anything done by the police or prison officers who arrested and detained the appellant while discharging responsibilities which they had in execution of judicial process."

Furthermore in discussing the nature and scope of the alleged breach of the appellant's fundamental freedom not to be deprived of his personal liberty under the Constitution, Lord Diplock said at p.399 :

> "... no human right or fundamental freedom ... is contravened by a

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> judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair."

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In the circumstances I am firmly of the view that the plaintiff's action as pleaded is improperly constituted, discloses no reasonable or arguable cause of action and is doomed to failure. Accordingly to allow it to continue in its present form would be, not only vexatious but also an abuse of the process of the court.

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The application is granted and the plaintiff's Writ is struck out with costs to the Attorney-General to be taxed if not agreed.

(Application granted; writ struck out.)

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