SANFT v. MINISTER OF POLICE AND ORS.

This is an appeal by the defendants (the Minister of Police and Ors.) from a decision of the Supreme Court (Hunter J.) which is reported at Page 117 of Vol. I of the Tongan Law Reports.

The Court of Appeal (Hammett C.J.) varied the judgment of the Lower Court. While it did not decide whether an action in tort lies against the Government it expressed doubts about it. This question is no longer of importance as right of action against the Crown in tort has now been given by Act No. 14 of 1961.

On the 5th October, 1960 the Privy Council delivered the following judgment :

This is an appeal against the decision of the Supreme Court dated 30th June, 1959 whereby the Respondent was awarded £153/0/0 damages and costs against the Minister of Police on behalf of the Government of Tonga and the second third and fourth Appellants personally, for an assault committed by the last three Appellants on the Respondent.

The learned trial Judge in a long judgment reviewed all the evidence and held as fact that the second third and fourth Defendant-Appellants did assault the Respondent although not as seriously as claimed by him.

He further held that the assault occurred, in part at least, during the course of the execution by these three Appellants of their duty as Police Officers. It is however quite clear that the Respondent's behaviour was very provocative.

We have examined the record and find there was ample evidence to support these findings. In these circumstances those of the several grounds of appeal against the decision based on the facts must fail.

The remaining grounds of appeal may be summarised briefly as follows :

1. That the learned trial Judge was wrong in law in holding that the Minister of Police was liable in either a personal capacity or as the representative of Government for the wrongful acts of individual Police Officers.
2. That the damages awarded were too high.

We will first deal with the position of the first Appellant, the Minister of Police. There is no evidence that he was present at, or authorised, or approved or in anyway accepted any personal responsibility or liability for the assault committed by the second third and fourth Appellants upon the Respondent. In these circumstances there were no grounds upon which the Minister of Police could be held to be liable in a personal capacity, save by holding he was vicariously liable for the acts of his agents or servants on a master and servant basis.

It has to be considered therefore whether a relationship of Master and Servant exists between the Minister of Police and Police Officers. It needs only a cursory examination of the Police

Act (Cap. 17) to show that this is not so. The Minister of Police may only enrol Police Constables with the consent of the Cabinet (Section 9). It is only the Cabinet that has the power to dismiss them (Section 34). The superintendence of the Police Force by the Minister of the Police is subject to the direction of the Cabinet (Section 7). In these circumstances the relationship of Master and Servant cannot be said to exist between the Minister of Police and individual Police Officers.

It next has to be considered whether the learned trial Judge was correct in holding that the Minister of Police was liable in damages as the representative of the Government of Tonga. He was not sued in a representative capacity. According to the record (the Judge's notes) Faleola who appeared for the Plaintiff-Respondent at the trial opened his case by saying that the action was against all the Defendants personally. In his concluding address Faleola submitted that the Minister was liable because he was the head of the Police. At no time did Faleola state he was sued in a representative capacity and we do not think he was so sued.

If the Plaintiff had been sued as the representative of the Government of Tonga or the Crown, or a Government Department was being sued, Order III Rule 9 of the Supreme Court Rules 1958 makes it clear that a copy of the summons should have been served on the Crown Solicitor. This was not done in this case, nor did the Crown Solicitor appear in the Court below.

In these circumstances we do not understand why it was that the learned trial Judge stated in his judgment "The Minister has been joined as the representative of the Government" since nothing had been said by either party to this effect during the trial of the action and the writ of Summons was not so headed. In our opinion the Minister of Police was not sued as representating the Government of Tonga but merely in his personal capacity on the basis that a relationship of Master and Servant existed between the Minister of Police and Police Officers.

Since the Minister of Police was not sued in a representative capacity representing the Government of Tonga and since, for the reasons we have given, he was not liable in his personal capacity the appeal by him against the judgment must be allowed.

Before we leave this subject however we feel reference should be made to the decision of the Privy Council referred to by the Court below namely "Ulukalala-Ata, the Minister of Police, and others v Sione Lopeti and another" (Privy Council Appeal No. 3 of 1958).

In that case two Police Officers, acting without any lawful authority, seized Lopeti's motor-cycle on the public highway and later removed it to Police Headquarters. When Lopeti asked Ulukalala-Ata, the Minister of Police at the time, to return it to him or allow him to inspect it, Ulukalala-Ata upheld the action of these Police Officers and refused to allow Lopeti to have his motor-cycle back, save under certain unreasonable conditions.

Lopeti then sued Ulukalala-Ata and the two Police Officers concerned for the return of his motor-cycle and damages for its wrongful seizure and detention. The Supreme Court held that the original seizure was unlawful and awarded damages against the Ulukalala-Ata, and these Police Officers. In the course of his judgment the learned trial Judge said that Ulukalala-Ata, the Minister of Police, was liable as representative of the Government of Tonga. Since the action was not brought originally against him in this capacity but only against him personally the award of damages against him should only have been an award against him in his personal capacity.

Ulukalala-Ata appealed in his personal capacity against the judgment of the Supreme Court. There were many grounds of appeal but not one of them complained that the trial Court had erred in law in giving judgment against him as the representative of the Government of Tonga. The grounds of appeal merely complained of the trial Court findings of fact, of the amount of damages awarded, of the amount of costs awarded and of the finding that the original seizure was unlawful. Ulukalala-Ata accepted the fact if he was liable at all, he was liable in a personal capacity, as he was originally sued in the name Ulukalala-Ata, Minister of Police. He signed the Petition of Appeal in his personal capacity and not as representing the Crown or the Police Department or the Government of Tonga.

The appeal was heard at the end of the last sittings of the Privy Council and because of the shortage of time available we announced our decision, dismissing the appeal without setting down our reasons. It is unfortunate that this has apparently led to a misunderstanding. We are unanimous in our view that Ulukalala-Ata, and the two Police Officers sued with him were all personally liable because they had all acted without lawful authority : they two Police Officers in seizing and Ulukalala-Ata in detining Lopeti's motor-cycle. The question of whether the Crown was liable in damages in these circumstances was not argued before us and was not considered by us. If it had been considered we would undoubtedly have held that the Crown was not liable for the simple reason that Ulukalala-Ata was not sued as representing the Crown but in a personal capacity. It is true that during the actual hearing the trial Court said it would allow an amendment to the proceedings but no such amendment was in fact made. No amended writ was filed, no fresh service was effected and the action continued without any amendment, in fact, at all to the names and capacity of the parties, according to the copies of the record supplied for our use by the Supreme Court.

We would like to emphasize that the naming of the parties to an action and the stating of whether they are sueing or are sued in a personal or a representative capacity is one of fundamental importance. Unless a Plaintiff states clearly and unequivocally on the writ of summons that a Defendant is sued in a representative capacity and states precisely on whose behalf or in what capacity

he is sued it will be assumed that he is in fact sued in a personal capacity. Again where a person has been sued in a wrong capacity, we do not consider it to be enough for a lawyer merely to state at the trial he wishes to sue him in another capacity. It is necessary in all cases (save for special reasons which should be recorded) for an amended writ Summons to be filed and, for this amended writ of summons to be served, and for adequate time to be allowed for the Defendant to file a defence to the amended summons, before the trial proceeds. The trial Court should also amend its own record accordingly.

We should perhaps record that apart from Section 129 of the Land Act (Cap. 45) which, since it deals with the question of costs being awarded to or against the Crown in Land cases, by implication suggests that it is possible to sue the Crown, we know of no Act of the Tongan Parliament, nor of any decision of the Privy Council, which supports the view that an action lies against the Crown in respect of the unlawful acts of its servants. If there is however any other authority then we shall have to consider that authority if this point is raised before us again before a Crown Proceeding Act has been passed.

As far as the second ground of appeal in the present case is concerned we are of the opinion that in view of the learned trial Judge's findings of fact that the effect of the assault was not as great as was claimed, and in view of the rather provocative behaviour of the Respondent the award of £153/0/0 damages was unreasonably high.

After considering the whole of the evidence we have decided to reduce the amount of the damages awarded. It is clear that the responsibility of the 2nd, 3rd, and 4th Appellants for this assault was not equal and as a result we shall not give judgment against them all jointly and severally. We award the Respondent £10 damages against the 2nd Respondent, £10 against the 3rd Respondent and £40 against the 4th Respondent.

The Respondent is entitled to costs in the Court below, but having regard to the fact that he has succeeded to the extent of £60 only whereas be claimed £2,000 damages we shall reduce the costs awarded him in the Court below.

In the result the appeal of the 1st Appellant, the Minister of Police is allowed, the appeal of the 2nd Appellant is allowed in part and judgment is to be entered against him for £10 plus £15 costs in the Court below and £3/3/0 costs in this Court: the appeal of the 3rd Appellant is allowed in part and judgment is to be entered against him for £10 plus £15 costs in the Court below and £3/0/0 costs in this Court and the appeal of the 4th Appellant is allowed in part and judgment is to be entered against him for £40 plus £15 costs in the Court below and £3/0/0 costs in this Court.