

**'Uhila v Tatola and others**

Supreme Court, Nuku'alofa  
10 Ward CJ  
Civil Case No.55/91

14,15,18 and 20 May, 1992

*Tort - assault - damages - attacked whilst housebreaking*  
*Damages - tort - assault - attacked whilst housebreaking*

20 The Plaintiff broke into the first defendant's house and was found and tied up. He claimed to have been assaulted by the first defendant at the house; taken to the police station and assaulted by the second defendant, a police officer; taken back to the house and assaulted by another police officer, the third defendant. The fourth and fifth defendants (the Minister of Police and the Kingdom of Tonga) were sued on the basis of vicarious liability for the Police Officers.

HELD:

- 30 1. The Court was satisfied, on the balance of probabilities, that the second defendant was not involved in any assault.
2. The first defendant did assault him however, in three stages. The first was after the plaintiff was tied up and was not in defence of family, self or home. It was not justifiable and was in anger as a result of the violation of his home. It would be unconscionable, however for a housebreaker to gain financially at the expense of the man whose home he had violated, and no damages should be awarded.
- 40 3. The second stage of the assault by the first defendant was different because he had stopped but then resumed; the third was when the police were there, and the assault recommenced in a deliberate and far more cold-blooded way. The plaintiff was awarded \$25 general damages for the second stage; and \$150 general damages for the third stage.
4. The third defendant assaulted the plaintiff with one blow not causing actual injury without any right or justification, and whilst the plaintiff was under arrest and in his custody. An award of \$75 general damages against third, fourth and fifth defendants was made.

50 Counsel for the Plaintiff : Mr Niu  
Counsel for the First Defendant : Mr Tonga  
Counsel for all other Defendant : Mr Williams

### Judgment

On 3rd January 1991 in the very early hours of the morning the Plaintiff was drunk and climbed over the fence and into the house of the First Defendant. He was seen by the First Defendant's daughter who called for her father and, after a short search, the Plaintiff was found hiding under a bed on the verandah.

The First Defendant then tied the Plaintiff's hands and feet with electric cable and proceeded to whip him with an additional length of cable folded over. The daughter called the Police and the Plaintiff was taken to the Police Station. Once there he alleges he was beaten by the Second Defendant with the flat side of a cane knife. Later that day he was taken back to the First Defendant's house to demonstrate how he had entered and, once inside, says he was assaulted by the Third Defendant by being punched on the face.

He claims damages for assault against all three. It is not disputed that, if he succeeds against the Second or the Third Defendants, the Fourth and Fifth Defendants are liable also.

Most of the facts were agreed but some areas of dispute needed to be resolved and, with one exception where I considered the medical evidence also, I resolved them on the creditability of the various witnesses.

In relation to the actual incident at Manulevu's house, the Plaintiff claimed he did not enter the daughter's bedroom. I find as a fact that he did do so. He described being tied hands and feet and also being tied to the verandah post. I am satisfied he was not tied to the post and was able to some extent to move about as he was being beaten. When the Police officer arrived, he was alleged to have told Manulevu to beat the Plaintiff some more and I accept that was said and that Manulevu beat the Plaintiff up to three more blows. Accounts of the total number of blows vary but I am satisfied there were at least 20 blows inflicted with considerable force.

The First Defendant does not deny the assault nor the fact it was unlawful. He explains he was extremely angry because of the way he and his daughter had been terrified by the intruder. Clearly he is liable and I shall return to deal with the assessment of damages.

The Second Defendant told the court that he was not on duty at the time of the alleged assault with the cane knife. I am satisfied of the balance of probabilities that he was not at the Police Station at that time and was not involved in any assault and I give judgment for the Second Defendant with costs. Whether an assault of the type described occurred at the hands of another Police Officer, I do not, therefore, need to decide but had I needed to, the medical evidence and the photographs do not, in my opinion, substantiate such an assault. I did not feel the Plaintiff's account of the assault was credible.

The Plaintiff claimed that, when they were back at Manulevu's house, the Third Defendant accused him of lying and struck him a blow with his fist on the Plaintiff's face. He took two more swings but the Plaintiff was able to avoid them.

The Third Defendant denies that assault. I am satisfied he did assault the Plaintiff but the Plaintiff has failed to prove to the required standard that the officer gave him any more than a single open handed slap on the face. However that is unlawful and I give judgment to the Plaintiff against the Third, Fourth & Fifth Defendant in relation to that assault.

I now pass to the question of damages.

Manulevu clearly carried out a very violent and severe beating that was totally

unlawful. I accept he was extremely provoked by the Plaintiff's action in breaking into the house but this was not a case of defence or necessity.

The law is clear that any person may use reasonable force in defence of himself, his family or his home. Whether the force used is reasonable does not require a minute examination of the degree used. Had the First Defendant used this amount of force to stop the Plaintiff entering or to make him stop his criminal activity and leave, it may well have been justifiable but that was not the case here. Having tied up the Plaintiff and rendered him helpless, he started a deliberate attack. He had no right as he suggested to teach the Plaintiff a lesson. Neither has he any right to take the law into his own hands. The provisions of the criminal law vest the power to punish for crimes in the State and individuals have no right to usurp that function.

Manulevu's evidence was that, after the first barrage of blows, he had to stop to gather his breath. Up to that point I accept, he was seized by anger about the violation of his home. Once he had regained his breath, he attacked again. That assault was in a different category. It was calculated and no longer excused by the initial anger. Manulevu again stopped only to renew the whipping at the suggestion of the police officer. It is most unfortunate the officer made such a comment. It was, for a policeman, a most serious violation of his duty and yet he is not a party to these proceedings.

The Plaintiff suffered severe pain. There is evidence Manulevu's daughter told the police to hurry in case her father killed the Plaintiff. He was heard by more than one witness to be crying and pleading with his assailant. I accept the pain at the time of the attack must have been severe. The doctor expected the pain to continue for some ten days but he agreed it was only in the sense of being tender to the touch. I accept that

It is, of course, also relevant that the Plaintiff was the author of his own misfortune by breaking into another man's house. Anyone committing a criminal offence must be taken as accepting to some extent the risk of retaliation and even excessive retaliation. Is the Court in those circumstances entitled to take the view that he, in effect, asked for it? I have already found that the assault by Manulevu was unlawful and the victim of an unlawful act is entitled to his remedy. However, this is a different situation from an unprovoked assault by another citizen on the one hand or an assault by a police officer on a man in his custody on the other. The latter cannot be justified and the victim is entitled to his remedy but, in the case of an attack by a member of the public whose home you have criminally violated, the situation must be different. Similarly, I feel it is unconscionable that a man who sets out deliberately to break into a house and is attacked by the householder should gain financially at the expense of the man whose home he violated. As far as the first phase of the attack by Manulevu is concerned, this would apply and I feel no damages should be awarded. The second assault, a little more deliberate than the first, does justify payment of some damages whilst the third, carried out at the police officer's suggestion, was a far more cold blooded act altogether.

The Plaintiff suffered a number of injuries that left no long term or permanent marks. They look bad but I am satisfied after the immediate severe pain they would be only moderately painful for a few hours and then for a number of days result only in local tenderness. Even in the case of the second and third phases, I feel the amount must be reduced because of the Plaintiff's criminal actions.

I shall award a nominal sum in general damages of \$25 for the second part of the assault and \$150 for the final phase - a total of \$175 and the First Defendant must pay

the Plaintiff's costs in his case.

The Third Defendant had no right or justification whatsoever to strike the Plaintiff. He was under arrest and in his custody. The slap was described as a momentary flash of anger and I accept that but the third Defendant is a professional policeman and should be able to control his anger at such times.

I do not consider there was any evidence of actual injury although I have no doubt the Plaintiff was shamed and frightened by it. I feel a proper award is \$75 general damages against the Third, Fourth and Fifth Defendants.

160 In this case the Plaintiff brought an action he has largely failed to substantiate against the Third Defendant. It was, as I have found, a minor assault. I feel it is appropriate in such a case to make no order for costs between the Plaintiff and the Third Defendant or the Fourth & Fifth Defendants in relation to this part of the claims.

Thus I give judgment for the Plaintiff against the First Defendant for \$175 general damages and costs.

I give judgment for the Second, Fourth and Fifth Defendants with costs in relation to the claim against the Second Defendant.

170 I give judgment for the Plaintiff against the Third, Fourth and Fifth Defendants for \$75 general damages but make no order for costs in relation to the claim against the Third Defendant.