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IN THE SUPREME COURT)
)
OF THE TERRITORY OF)
)
PAPUA AND NEW GUINEA)

CORAM : CLARKSON, J.
Tuesday,
22nd July, 1969.

BETWEEN DAN MURPHY
Plaintiff

AND JOHN MUNDELL
Defendant

1969

Jul 10, 11, 15 and 22.
PT MORESBY.

Clarkson,J.

The plaintiff sues for damages for assault. That the defendant struck the plaintiff several times with a police baton and caused injuries to the plaintiff was not seriously contested but the defendant raised a number of defences to which I will refer later.

The plaintiff, a works supervisor recently employed by the Public Works Department, was sent to Ihu early in November 1968 to supervise certain works there. There is no hotel or similar accommodation at that centre so that, as in many other small centres in the Territory, it was necessary for the plaintiff to be accommodated in the home of a local resident who then receives a payment for the board and lodging of the visitor.

The defendant, who is an Assistant District Officer with the Department of District Administration, was on November last the Officer-in-Charge of the Ihu Patrol Post. Arrangements were made for the plaintiff to be accommodated by the defendant who with his wife and small son occupied the Patrol Officer's residence.

The plaintiff arrived on 4th November and commenced his duties. The relationship between the plaintiff and the other occupants of the house, if not altogether happy, appears to have been without incident until Sunday, 10th November. By this time Mr. Huth, a diesel mechanic, had arrived at Ihu and was also accommodated by the defendant.

During the Sunday the plaintiff and Huth did some work together and on at least two occasions visited the home of Mr. Counsel, a local resident, for refreshment. A number of other people also visited Mr. Counsel's house and late in the afternoon - apart from Mr. Counsel - the party included at least the plaintiff, the defendant and his wife, and Huth.

Most of those who gave evidence gave the impression that very little beer was drunk on that day but I am satisfied they have underestimated what was consumed. I prefer the candid statement of

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Mr. Counsel that on that day something of the order of three cartons of beer was drunk. But apart from the statement of the defendant's wife that she knew the plaintiff had "drunk an awful lot" there was no suggestion that any of the persons with whom I am concerned were visibly intoxicated.

The plaintiff and Huth returned first to the defendant's home and continued drinking. Some time later the defendant and his wife arrived and the latter commenced to prepare the evening meal.

I do not propose to recount in detail what then occurred. There are some discrepancies in the evidence but it is sufficiently clear that some incompatibility between the defendant's wife and the plaintiff became manifest. Mrs. Mundell described the plaintiff as demanding and bossy, interfering and inquisitive. Immediately on her return to the house she took exception to something said by the plaintiff and showed her annoyance. A stupid domestic argument became a quarrel between the plaintiff on the one hand and the defendant and his wife on the other, as to whether the plaintiff should leave the house that night. Huth remained an embarrassed spectator.

The defendant left the house to arrange accommodation for the plaintiff elsewhere. When, having done so, he returned, the plaintiff refused to leave until the morning and the quarrel continued. Mrs. Mundell, who at this stage was playing a leading role in events, went into the plaintiff's room with her domestic servant and commenced packing the plaintiff's bags. There were further harsh words and mutual recriminations. The plaintiff's bags were sent to Mr. Counsel's house. The defendant went to obtain a truck to convey the plaintiff there but was unsuccessful. During all this time feelings ran high and I am satisfied the plaintiff was behaving in a thoroughly unreasonable manner and was making no attempt to end the argument.

I am also satisfied that at this stage the defendant was quite exasperated by the plaintiff's behaviour and the failure of attempts to persuade him to leave the house.

The defendant and his wife left the house to visit Mr. Counsel and were away for about an hour during which time the plaintiff and Huth remained in the living room.

On his way back to his house, the defendant deviated to his office and picked up a police baton. On his return to the house the defendant told the plaintiff that he could stay the night and announced that he and his wife were going to bed. He also told the plaintiff that if the plaintiff made any move to go to their bedroom or their son's bedroom

"he would be for it". The defendant and his wife then retired. The plaintiff showered and went to his bedroom leaving Huth writing letters in the living room.

At this stage, the plaintiff was well aware that his bags containing his belongings had been taken out of the house and were at Mr. Counsel's house and the defendant was equally aware that the plaintiff had nothing but the clothes he was wearing.

The plaintiff then called out in what Huth described as an above average voice asking the defendant where the plaintiff's pyjamas and glasses were. It was a stupid thing to do. The plaintiff must have realized, if he thought at all, that his calling would disturb the defendant and revive the quarrel. The sensible thing to do, if he did not want to go to Mr. Counsel's in the dark, was to retire to bed in his clothes. His calling woke the defendant's child. The defendant's wife went to the child's bedroom to get him and while so doing berated the plaintiff for waking the child.

The defendant and his wife say the plaintiff used words which amounted in effect to a challenge to fight. I do not accept this. I prefer the evidence of Mr. Huth whom I found reliable and observant in what must have been for him a most distasteful situation. At this point his evidence confirms that of the plaintiff that no such challenge was made.

Apparently the plaintiff called out three or four times. The defendant told his wife to stay in the bedroom. He came out armed with the police baton I have referred to. He was closely followed by his wife carrying the child. She said she was too frightened to stay in the bedroom. The defendant advanced into the plaintiff's bedroom where the plaintiff was standing away from the door and near his bed. Either in the passageway or as he entered the room the defendant spoke menacingly to the plaintiff. There is some dispute as to the words used. Huth's version was that the defendant said, "Righto Dan, you're going to get it now". The defendant's version was that as he struck the plaintiff he, the defendant, said, "Righto, I've had enough, you're getting out now". It was put to Mrs. Mundell that she knew her husband intended to use the baton and she replied, "Yes, he said 'here I come'."

Little really depends on the exact words that were used. The real significance is that the defendant made it clear that he was about to attack the plaintiff which he then did with the police baton. He struck the plaintiff at least three blows while the plaintiff was still standing and one of these caused a three-inch scalp wound just above the left ear. The plaintiff fell and his doing so probably caused the fracture of the neck of his right humerus which was subsequently found to have occurred.

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The plaintiff maintained that the defendant thereafter hit him and kicked him for some period while he lay helpless on the ground. I am satisfied this account is exaggerated. At the same time, the defendant's account that he hit the plaintiff only three times and then only while the plaintiff was standing does not explain the welt mark which Huth observed on the plaintiff's stomach nor all of the bruises subsequently observed by Dr. Seymour.

The defendant left the bedroom and entered the living room where he handed the baton to his wife with instructions to "clobber" the plaintiff if he came near her and then went to summon the medical assistant.

Huth went in and helped the plaintiff onto his bed and then cleaned up the plaintiff who had blood on his face and clothes and he also mopped up two pools of blood on the floor and blood sprayed on the walls of the bedroom. The plaintiff was treated by the medical assistant and moved to Mr. Counsel's house.

The next morning the defendant discussed at some length with Inspector Adamson the events of the previous evening and I attach some importance to the account he then gave. In spite of the efforts of defence counsel to suggest otherwise I am satisfied that the defendant gave his explanation of events at length and without prompting. The story he gave was clearly intended to indicate that he struck the plaintiff in defence of himself and his family and he gave no indication that he had lost control of himself. At this trial no attempt has been made to preserve the first contention and the defendant has been at pains to suggest he completely lost control of himself to an extent that he was unable to remember part of what occurred and was only brought to his senses by seeing a trickle of blood on the plaintiff's head or neck.

Before proceeding further I wish to comment on the actions of Mrs. Mundell at about the time of the attack.

The defence attempted to show that the plaintiff was terrorising the defendant's wife and child and that Mrs. Mundell became quite distraught with fear. I have however noted that when she went for her child, she had to pass within easy reach of the plaintiff and that when doing so she scolded him for waking the child. I am satisfied that when she joined Huth in the living room she was frightened but not solely because of the plaintiff's behaviour. Her emotional state was in no small measure due to fear of the consequences for her husband who, angered and excited, had gone armed with a police baton to attack the unarmed plaintiff.

With this summary of facts I turn to the defences raised. These were:

(a) that the plaintiff voluntarily assumed the risk of what occurred;

(b) reliance on the doctrine ex turpi causa non oritur actio;

(c) provocation.

I hope counsel for the defence will not think me unsympathetic to his careful argument but I find myself completely unable to accept that a man in the plaintiff's position, persisting with an altercation in which there has been no threat or show of force, was voluntarily taking the risk of being attacked by the defendant with a baton and of suffering the injuries he did.

Similarly, I cannot see how the defendant can benefit by any known application of the doctrine ex turpi causa non oritur actio. I adapt what was said by Salmon L.J. sitting in appeal in Lane v. Holloway(1), a similar case:

> " To say in circumstances such as those that ex turpi causa non oritur actio is a defence seems to me to be quite absurd. Academically of course one can see the argument, but one must look at it, I think, from a practical point of view. To say that this (plaintiff) was engaged jointly with the defendant in a criminal venture is a step which, like the judge, I feel wholly unable to take." (p.389).

This brings me to the defence of provocation. There is authority in Queensland to the effect that the defence of provocation as defined in the Criminal Code as an excuse for assault may be pleaded in a civil action for damages for assault as well as in a criminal proceeding for the offence of assault. See White v. Connelly (2), King v. Crowe (3).

Whether this is good law in the Territory or not I do not have to decide because I am completely satisfied on the facts that the defence would not be available to the defendant.

I feel considerable sympathy for the defendant. He holds a responsible and at times difficult position which requires him to perform a great variety of duties at all times of the day or night. One of the burdens which he and his family are expected to bear is the obligation of taking into his home all sorts of persons, many of whom are complete strangers and some of whom, like the plaintiff, appear to be illmannered and demanding.

But this cannot excuse the sort of attack which occurred here. Whether one says that the mode of resentment must bear some reasonable

(1) (1968) 1 Q.B.379.
(2) 1927, St.R.Qd.75.
(3) 1942, St.R.Qd.288.

relationship to what is said to be provocative or whether one adopts the test laid down by the Code that the force used must not be disproportionate to the provocation, the result is the same. The defendant's savage attack with a baton on the unarmed and complaining plaintiff was out of all proportion to the plaintiff's irritating behaviour and complaints. Furthermore I think it beyond doubt that the attack was likely to cause grievous bodily harm as it did.

I am forced to the clear conclusion that the defence fails and that the plaintiff has established a right to damages.

The plaintiff claimed aggravated and exemplary damages as well as what are called compensatory damages. I have no hesitation in rejecting the claim for anything other than compensatory damages. It was once thought that even compensatory damages could be reduced on account of the plaintiff's conduct and if that were the law I would seriously consider applying it here. But it seems clear that since Fontin v. Katapodis (4) and Lane v. Holloway(supra)(5), I cannot do so whatever criticism I may have of the plaintiff's conduct.

I have already referred to the two main injuries suffered by the plaintiff and I am satisfied that he suffered a good deal of pain and inconvenience while in hospital. He was in hospital for a month and received further treatment as an outpatient. He still suffers some pain as a result of the fracture and the head injury and this appears likely to continue for some time. At the same time, I think he overestimates the likely effect of his injuries. There is some limitation of movement of the shoulder joint but the plaintiff has not satisfied me that this is as great as he says nor that it will either affect his earning capacity or restrict his possible fields of employment.

It was not suggested that as a result of the limitation of shoulder movement the plaintiff was hampered in any sporting or social activities. The claim that his hearing had been affected was abandoned at the trial. The fact that it was made at all seems to indicate the tendency of the plaintiff to exaggerate the effects of the injuries.

The only special damages proved at the trial was a hospital account for $152.30. The plaintiff sought to recover the total amount of "sick pay" received by him while off work. It is clear this is not a good claim although in some circumstances an allowance can be made (Graham v. Baker(6)). Here, some small allowance which I have included in general damages is justified because the plaintiff, within a few months of starting employment, has exhausted his annual cumulative sick pay entitlement.

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(4) 108 C.L.R.177.
(5) (1968) 1 Q.B.379.
(6) 106 C.L.R.340.

I think a reasonable assessment of the plaintiff's damages is as follows:

Special damages (hospital account)	$ 152.30
General damages	$1000.00
	$1152.30

Solicitors for the Defendant : Craig Kirke & Pratt.

Solicitors for the Plaintiff : N. White & Reitano.