

Kaufusi v Lasa & Others

Supreme Court, Nuku'alofa
Webster J.
Civil case No. 29/1989

7, 8, 9 and 16 February 1990

¹⁰ *Tort – unlawful arrest – assault – unlawful imprisonment – negligence*

The plaintiff claimed that he had been unlawfully arrested and assaulted by the first defendant at a night club and had then been unlawfully detained at a police station by the first and second defendants, who had also failed to obtain appropriate medical treatment for him while he was detained, and were therefore negligent.

HELD:

- ²⁰ (1) There were reasonable grounds for the arrest of the plaintiff for being drunk in a public place, and the first defendant did honestly believe the plaintiff to be drunk but the arrest was unlawful because the grounds of the arrest were not made known to the plaintiff;
- (2) The assault on the plaintiff by the first defendant was unlawful because it was done in the course of an unlawful arrest; and even if the arrest had been lawful the assault by kicking him in the eye when he was lying on the ground was excessive;
- (3) Although there had been no breach of the statutory procedures for dealing with a detained person, the detention in the police station was unlawful because
- ³⁰ (4) The serious condition of the plaintiff's injured eye should have been apparent to the first and second defendants and they were negligent in failing to obtain medical treatment before his release the next day;
- (5) The court awarded general damages of \$15,000 and exemplary damages of \$1,000, less \$1,180 for the value of traditional gifts. (Damages were later increased on appeal - see Court of Appeal decision).

⁴⁰ Counsel for the plaintiff	:	Mr L. M. Niu
Counsel for the defendant	:	Mr K. Whitcombe

Judgment

The Plaintiff Taulanga Kaufusi sues the Defendants Sisi Lasa and Kitione Kepu, at the relevant time both police officers at Futu Police Station, 'Eua, plus their employers the Minister of Police and the Kingdom of Tonga, on four separate grounds.

The Plaintiff firstly claims that he was unlawfully arrested by the First Defendant at the Maxi Disco Hall, Futu on the evening of Saturday 4th March, 1989. Secondly he claims that even if his arrest was lawful the correct procedure was not followed at Futu Police Station with the result that he was falsely imprisoned when he was kept in custody there overnight until 9.00 am on Sunday 5th March. Thirdly the Plaintiff claims that the Defendants were negligent while he was in custody in that they failed to perform their duty of care to him by making sure that he received medical treatment for his injured right eye. Finally and most importantly the Plaintiff claims that between the time of his arrest and reaching the Police Station the First Defendant assaulted him by punching him or kicking him on the head so that his right eye was ruptured and had to be removed two days later.

For these torts the Plaintiff claims special damages of \$200 for loss of wages and expenses; general damages of \$100,000 and exemplary damages of \$100,000 for the unlawful arrest, assault and negligence; and general damages of \$10,000 plus exemplary damages of \$10,000 for the false imprisonment.

The defence of the Defendants was that the arrest of the Plaintiff was lawful as there were reasonable grounds to arrest him for being drunk; that there was no assault as the injuries arose during a struggle when the Plaintiff was trying to escape from custody and the First Defendant used reasonable force to restrain him, the injuries being unintended; that there was therefore no false imprisonment of the Plaintiff as the procedures at the Police Station were also carried out correctly; and that there was no negligence as the seriousness of the injuries was not apparent to the Defendants but the Plaintiff was released for treatment as soon as this was realised and in any event once the eye injury had occurred there was no treatment available for it.

The Plaintiff gave evidence himself and was supported by other witnesses who corroborated various parts of his evidence. Sela Vailea had been dancing with him when he was arrested but was not sure whether he was drunk. Hupiloa To'a was a fellow worker who had been drinking with the Plaintiff beforehand and when he heard the Plaintiff was injured went to the Police Station at 1.00 am and saw him and then returned early on the Sunday morning and made sure that he was released and taken to Niu'eiki Hospital for treatment. Panepasa Tamaelau saw the Plaintiff lying on the ground and then being pulled to his feet and assisted to the Police Station by the First Defendant and later told Fine Sole of this. Tevita Panu had been drinking with the Plaintiff earlier and said the Plaintiff was drunk when he went to the dance; he saw the Plaintiff lying on the ground and being kicked on the head by the First Defendant, causing him to cry out "Oh my eye".

The Plaintiff also led evidence from the two doctors who had treated him, Dr Sengili Moala who had seen him in 'Eua on the Sunday and referred him to

the eye specialist at Vaiola Hospital; and the specialist himself Dr Samiuela Taumoepeau who on the Monday removed the front part of the Plaintiff's eye and later fitted an artificial eye. Dr Moala said that in his 19 years' experience most injuries like this were caused by a kick from a shoe or a punch: a circular post could produce the same result if it was small enough to go inside the eye socket. Dr Taumoepeau from his 46 year's experience as an eye specialist thought the injury had been caused by a blunt instrument (as opposed to a knife) possibly a first blow or kick or even something like a coconut which could penetrate to the eye itself.

100 Both doctors were clear that once this particular injury had occurred nothing could have saved the sight of the eye. Dr Taumoepeau said that the longer treatment was delayed, the more danger there was of sepsis.

The First Defendant gave evidence himself of his arrest of the Plaintiff for being drunk, of a prolonged scuffle when the Plaintiff tried to escape while being led to the Police Station, during which he heard the Plaintiff yell out "Oh my eye has been ruptured" ..and the subsequent detention of the Plaintiff at the Police Station and his release the next morning. The only other witness for the Defendants was Sione Tukia, a police officer from 'Ohonua Police Station who took an uncautioned

110 statement from the Plaintiff on the evening of Sunday, 5th March: he also said he charged the Plaintiff then and took a confession statement but this was not produced, nor any other evidence of this except in the Investigation Diary.

The Plaintiff and the First Defendant also gave evidence of visits by the First and Second Defendants and their families to the Plaintiff and his family at their home at Ha'alalo, Tongatapu bringing gifts. The Second Defendant came first with a cooked pig worth \$50 and then the First Defendant brought tapa (\$600), a mat (\$200) and a live pig (\$350): the First Defendant gave slightly different values than the Plaintiff for individual items but the total was almost identical. The purpose

120 of these visits was to make an apology and to try to effect a reconciliation in Tongan custom and also to attempt to have the court case withdrawn or settled. The Plaintiff accepted the gifts but gave no answer about the case.

At the centre of this case there is a conflict between the evidence of the Plaintiff Taulanga and the First Defendant Sisi. Where this occurs I prefer the evidence of Taulanga.

In general Taulanga's evidence had the ring of truth, even though there were passages where he was exaggerating or taking flights of fancy - as when he said that a whole page of the Cell Book (Exhibit 2) was blank when he signed it, including

130 entries dating back to January. His evidence was corroborated by other witnesses on his drinking partners, the amount he drank that night, the middle of the night visit by Fine Sole, and by the First Defendant that some of the Cell Book was left blank when Taulanga signed. In general also all the Plaintiff's evidence fitted together eg Fine was told of the injury by Pasa who saw Tevita at the scene of the assault. Tevita had been drinking with them and later saw Sisi kicking Taulanga on the ground.

On the contrary Sisi's evidence was not supported by other evidence, especially about the fight. Sisi's account of the fight was too detailed and meticulous to be

140 true and must have been contrived. Nobody taking part in a struggle like that lasting

several minutes can remember all the details as Sisi claimed to eg which hand he held or punched Taulanga with when he said he was being bitten. It is unlikely that there would be such a long struggle as Sisi was the bigger man and had police training and experience in arresting people. Therefore I do not accept Sisi's evidence about the struggle. Even on whether or not Taulanga was charged with offences (which was not put to Taulanga), Sisi's denial was contradicted by Sione Tukia and his Investigation Diary (Exhibit 8).

The arrest

150 I believe that Taulanga probably was drunk when he was arrested by Sisi. Tevita said Taulanga was drunk when he went to the dance and Sela was not sure. Significantly Dr Moala entered in his notes that, even next morning, there was "smell of liquor" so Taulanga must have drunk enough for the smell to remain. However I do not place any weight on the statements attributed to Taulanga that he was 'too drunk' in the Station Diary (Exhibit 3) and in the statement taken by Sione Tukia (Exhibit 1); he was in considerable pain from his eye at the time and it is quite likely that words were being put into his mouth. I must also criticise strongly the attempt by the police here to get information and obtain statements without proper
160 cautioning of the Plaintiff where he was already clearly under suspicion of committing crimes.

No evidence was led to show which power of arrest Sisi believed he was using, but he said he told Taulanga he was being arrested for being drunk in a public place. This is an offence under section 3(q) of the Order in Public Places Act (Cap 26) and section 5 (if necessary read with section 21 (i) of the Police Act 1968) gives power to arrest without warrant. But even if the arrest was made under section 21 (a) or (b) or (c) of the Police Act it is immaterial. The test comes down to the same thing in each case - did the police officer have reasonable grounds for the
170 arrest? That requirement is very limited (*Dumbell v Roberts [1944] 1 All E.R. 326(CA)*) and the police have to act at once, on the facts as they appear on the spot and the arrest should be justified by these and not on an analysis in the courtroom later (*Wiltshire v Barrett [1965] 2 All E.R. 271 (CA)*). The arrest is valid if the police officer honestly believes that an offence has been committed within his view on reasonable grounds derived wholly from his own observation (*Wills v Bowley [1982] 2 All E.R. 654(HL)*) and the Counsel for the Plaintiff Mr Niu conceded that the arrest would be lawful if Sisi honestly believed Taulanga to be drunk.

180 There were plenty of reasonable grounds for Sisi to believe that Taulanga was drunk: his flushed face, smell of liquor, shouting and unusual behaviour on the dance floor and I accept that Sisi had an honest belief that he was drunk. It was quite possible for Sisi to have this honest belief at the same time as his dislike of his relative Sela's relationship and dancing with Taulanga, which was further evidenced the following morning when Sisi falsely told him that Sela had complained about him. But all that did not make Taulanga any less drunk at the time of his arrest and so on the balance of probabilities I find that the initial stage of the arrest was lawful.

190 However on an arrest without warrant the police officer must tell the person why he is being arrested unless by the circumstances he must know the general

nature of the alleged offence (*Halsbury's Laws (4th Ed.) Vol. 45 para. 1338*) and *Christie v Leachinsky [1947] 1 All E.R. 567(HL)*). Sisi claimed that he told Taulanga in a loud voice that he was arresting him with the offence of being drunk in a public place but no other witnesses spoke to this and I do not believe it. I accept Taulanga's account that he asked why he was being taken away but got no answer: for a man who had just been invited to dance by a girl for two consecutive dances it would not be so obvious to him that he was being arrested for being drunk that nothing needed to be said. Therefore although there were grounds for the arrest it was made unlawful by the First Defendant's failure to advise the Plaintiff of these.

So the arrest amounted to a false imprisonment and the consequence is that any detention based on the arrest is also false imprisonment and anyone such as the Second Defendant who helps to continue it is also liable (*Clerk & Lindsell on Torts (15th Ed.) paras. 14-15*). So the whole detention of the Plaintiff from his arrest at 10.30 pm until his release at 8.50 am the next morning was unlawful and all the Defendants are liable in damages to the Plaintiff.

A further consequence of this was that Taulanga was entitled to use reasonable force to resist the unlawful arrest (*Halsbury Vol. 45 para 1336 and R v Jones (Yvonne) (1978) 3 All E.R. 1098(CA)*). This was not affected even if at that point Taulanga accepted that in fact he had been arrested.

The assault

As I have stated I do not accept Sisi's evidence on the struggle and it is unfortunate that the Court did not have the benefit of Kitione's evidence. In any event the alternative explanations put forward by the defence that Taulanga's eye injury was caused by him falling or rolling onto a fence post, a small stick, a small rock or a coconut while on the ground do not make sense. They are most unlikely and would have left other marks round the eye.

I do accept Taulanga's account that he was assaulted by Sisi by kicking him on the eye when he was lying in the ground. As Mr Niu pointed out, this is a dirty way to fight by kicking a man when he is down. The kick resulted in Taulanga's right eye ball being ruptured so that he lost the sight of his right eye and had to have most of it removed. Taulanga's evidence was corroborated by the eye witness account of Tevita Pani who saw the kick and to a lesser extent by Pasa who saw him lying on the ground and being pulled up by Sisi. Further corroboration was provided by the medical evidence of the two doctors already referred to; and by the family apology and gifts to Taulanga for Sisi's fault.

I therefore find on the balance of probabilities that Sisi assaulted Taulanga so that the First, Third and Fourth Defendants are liable in damages to the Plaintiff for this.

Even if Sisi had been carrying out a lawful arrest, he was only justified in using such force as was reasonable in the circumstances as apparent to him including the seriousness of the evil (a drunk person is hardly a dangerous criminal who must be taken at all costs) and the possibility of preventing escape by other means (such as a simple unarmed combat hold) (*Clerk & Lindsell paras 14-31 & 34*). It is clearly excessive and unjustified to kick an unarmed person when he is lying on the ground and only exceptionally should a police officer have reasons to punch

a person while making an arrest (*Faka'osi & Latu v Talanoa Crim Apps 1 & 2/89*): this does not authorise violent or heavy punches. Police in other countries are able to make arrests without punching or kicking offenders so there is no reason why the Tongan Police should not be able to do so also.

Taulanga admitted trying to escape and may even have hit or punched Sisi in doing so, but because I have found that the arrest was unlawful the legal result is that he was entitled to do so and it did not give Sisi legal grounds for using greater force. Further it certainly did not justify the force used in this incident by Sisi. Counsel for the Defendants Mr Whitcombe submitted that the attempted escape gave the First Defendant a separate independent power of arrest under section 21(d) of the Police Act, but that paragraph only applies to escapes from lawful custody and so cannot be relevant here. So this assault was not justified by Taulanga's attempted escape.

The detention overnight

I have already found that because the arrest was unlawful the whole detention was false imprisonment. But in case I am wrong in this I also have to consider the submission by Mr Niu that the detention was further unlawful because the correct procedures in section 22, particularly subsection (1), of the Police Act were not followed in that Taulanga was not formally taken before Kitione as officer in charge of the station before he was put into a cell. There was no dispute that this had not been done.

Section 22 and police procedures were considered extensively by the Privy Council in *Soakai v Taulua and others (App 6/83)* where it was ruled that each case depends on its own particular circumstances and that whether the procedure had been carried out "without unnecessary delay" was a question of fact in each case for the court. The meaning of the words "without unnecessary delay" and their application to police procedures was considered extensively by this Court in *Fifua and others v Moata'ane (Civ App 7/85)* and I shall follow what was said there without repeating it. The police are not required to take a person arrested before a magistrate forthwith (*John Lewis & Co Ltd v Tims [1952] 1 All E.R. 1203 (HL)*) but are allowed a reasonable time in whatever are the particular circumstances to carry out their procedures.

There was no evidence about whether a magistrate was or was not available when the Plaintiff was arrested, but I am satisfied on the evidence before the Court that there was no unnecessary delay. Up until midnight both police officers had other important work to perform keeping the peace at the dance at the Maxi Disco Hall and when they returned to the station Taulanga was asleep. He was probably still at least partially drunk and/ or suffering from the kick to his head and the pain in his eye and it might not have been fair to him to charge him in that condition. In a small police station with minimum manning everything cannot be expected to be done as promptly as in a larger station with more officers available and it is reasonable and sensible that the officers should have time off to sleep. Taulanga was dealt with the following morning without unnecessary delay.

Nor do I accept Mr Niu's submission that in the circumstances of this case section 22(1) applied so that as soon as he got to the Police Station Taulanga had

to be taken formally before the officer in charge. As *Soakai* makes clear this requirement only comes into play if it is not practicable to bring the person arrested before a magistrate within 24 hours (section 22(2)). In any event as officer in charge Kitione was well aware of the arrest and surrounding circumstances and implicitly authorised the detention of Taulanga overnight.

I therefore find that if the original arrest of Taulanga was lawful, his detention overnight did not amount to false imprisonment.

The delay in getting medical treatment

300 It was accepted by the defence that where a person is in police custody there is a duty of care on the police to provide or obtain medical assistance where the need for assistance is or ought to be apparent. There is authority for this in *Ellis v Home Office [1953] 2 All E.R. 149 (CA)*.

Mr Whitcombe submitted that on the evidence the need was not apparent to the police officers as they believed Taulanga's injuries were only superficial and he did not ask for treatment, even when Fine Sole came enquiring in the middle of the night. But the legal standard which applies is not that of the defendant, but of an ordinary person using ordinary care and skill and having regard to the probability of harm and the probable seriousness of harm (*Halsbury Vol. 34 paras* 310 *10 and 11*). A defendant cannot excuse an obvious failure by saying it was established practice (*para 11*) so it would not be an excuse even if it was police practice never to have an injured person treated until the next morning.

But on the evidence I believe Taulanga's need for treatment ought to have been apparent to the police officers. Sisi knew that he had kicked Taulanga and said in evidence that he had heard him cry out "Oh my eye is ruptured" using the Tongan word *fafa* which literally means squashed like a fruit; that ought to have put Sisi on the alert that medical attention might be needed in the case of a delicate and vital organ like the eye. He knew that Taulanga had just washed his face 320 presumably to remove dirt and blood and he saw Taulanga holding his right eye closed. All these signs should have told the First and Second Defendants that the Plaintiff needed immediate medical treatment, though it is obvious that they did not want to do anything to draw attention to the assault on Taulanga.

I therefore find that the Defendants were negligent in not providing proper medical treatment for the Plaintiff during the time from his arrest at 10.30 pm until his release at 9.00 am the next day, a total of 10½ hours: they are liable to the Plaintiff in damages for this failure.

330 I accept the medical evidence that once the injury had been inflicted prompt treatment would not have saved the eye, so the only damage which Taulanga has to be compensated for as a result of this negligence is the extra pain and suffering he had to endure overnight. I shall include this in the damages awarded for the assault and loss of the eye.

Damages

Dealing first with *special damages*, the only amount proved was two weeks loss of wages immediately following the incident. These came to \$120. No other sums such as out of pocket expenses were proved in evidence. I am glad to be 340 able to record that the Plaintiff has suffered no continuing loss of wages as a result

of his injury and has in fact had more than one rise since then. So I shall award special damages of \$120.

Turning to *general damages*, in cases of trespass to the person such as assault and false imprisonment actual damage need not be proved and a successful plaintiff is entitled at least to nominal damages. Substantial damages are recoverable for discomfort and inconvenience, injury to dignity and in the case of false imprisonment damage to reputation (*Halsbury Vol 12 para 1158*). In addition general damages are recoverable for physical injury for the plaintiff's pain and suffering and loss of amenity and enjoyment of life (*para 1146*): these constitute a conventional sum which is taken to be the sum which society deems fair (*para 1147*). Among factors to be considered are the Plaintiff's age (30), loss of job satisfaction (he finds it difficult to check on his work as a painter and so do a really good job, nor can he assist carpenters in lining up), for a bachelor reduced prospects of marriage (girls may consider him as a blind man), inability to continue to take part in sport (though at 30 his rugby playing days were in any case drawing to a close) and the general frustration caused by the loss of a faculty especially important to him. The Plaintiff has no dependents at present.

Mr Niu submitted that the sum of \$100,000 claimed as general damages for the assault was reasonable but could not refer the Court to any precedents from Tonga or other countries for such a large sum being awarded for the loss of one eye. While it can only be an indication and not a precedent, *para 1147 footnote 2* shows that in England over the years awards for the loss of one eye have been very much lower. Mr Niu submitted that his figure could be justified by the need to give the Plaintiff a large sum of money in the bank to give him confidence for the future, but that is not one of the recognised principles by which awards are computed and I cannot accept it as such.

The Court must also consider levels of ordinary income in Tonga and the value of money and general conditions here. The figure put forward by Mr Whitcombe of a minimum of \$5000 for the loss of one eye going up to \$10,000 or possibly \$15,000 seems a much more realistic estimate of the damages.

It was agreed by Counsel that the value of the traditional gifts presented to the Plaintiff should be deducted from whatever sum is awarded. The value was agreed as \$1180.

The Plaintiff did not seek aggravated damages so the Court will not award any. In any case the aggravation was balanced and reduced by the formal apology.

Although the Plaintiff rightly claims under several separate grounds of law, they all arose from the one incident or series of incidents and so it is proper for the Court to award one lump sum covering all aspects of damages due to the Plaintiff. There should not be overlapping of damages (*para. 1149*). It is appropriate for the Court to consider the totality of damages awarded in the perspective of the incident as a whole.

Therefore the unlawful arrest and consequent false imprisonment, the assault and the loss of an eye, and the failure to provide medical treatment I shall award general damages of \$15,000 from which has to be deducted \$1180 for the gifts, making a net figure of \$13,820.

The Plaintiff also sought *exemplary damages* of a further \$100,000. These are damages which are awarded to punish the Defendants and vindicate the strength of the law (*Halsbury Vol. 12 para. 1190*). Since *Rookes v Barnard* [1964] 1 All E.R. 367(HL) they may only be awarded in actions in tort, and only in 3 categories of cases. The first category is oppressive, arbitrary or unconstitutional action by servants of the government. In *Holden v Chief Constable of Lancashire* [1986] 3 All E.R. 836 (CA) it was decided that this included an unlawful arrest by a police officer.

400 Mr Whitcombe submitted that exemplary damages should only be considered if the Court finds that the Plaintiff was arrested for personal motives rather than proper cause and the injury was caused by a kick given when the Plaintiff was lying helpless on the ground. I have already found the latter to be so, but as regards the former I do not accept that is the test. In *Holden* there was no allegation of improper motives. The authority to arrest without warrant and deprive a person of his liberty is such a powerful one that it must always be exercised strictly as laid down: any failure to do so will almost inevitably be oppressive, arbitrary or unconstitutional. Therefore this is an appropriate case for an award of exemplary
410 damages.

But where exemplary damages may be awarded the Court must ask itself whether the sum it proposes to award as compensatory damages is adequate not only to compensate the Plaintiff but also to punish and deter the Defendants. The power to give exemplary damages is a weapon that should be used with restraint.

Taking all these considerations into account there is clearly no call for exemplary damages of \$100,000 and I shall award \$1,000 to mark the Court's special censure of the First Defendant's arbitrary and oppressive conduct, which I hope will be brought to the notice of the Minister and Chief Superintendent for appropriate
420 action.

Costs

I also award costs as agreed or taxed to the Plaintiff against the Defendants.