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IN THE COURT OF APPEAL OF TONGA
NUKU'ALOFA REGISTRY
IN CIVIL APPEAL

No. 19/90

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BETWEEN : KENETI 'OTUAFI Appellant
an infant suing through his
father and next friend
LISIATE 'OTUAFI, Ma'ufanga

AND : 1. MA'AKE SIPA Respondents
2. MINISTER OF POLICE,
NUKU'ALOFA
3. KINGDOM OF TONGA

CORAM : Roper J
Ryan J
Morling J

HEARING : March 1992

JUDGMENT :

JUDGMENT OF THE COURT

This is an appeal from a decision of Webster J in proceedings in which the appellant ("Keneti") sued Ma'ake Sipa ("Ma'ake"), the first defendant at the trial for damages arising from a series of assaults upon him on 8 April 1989 when Ma'ake severely beat and ill-treated him. Ma'ake was a police officer at the time. Keneti also sued the Minister of Police ("the Minister") and the Kingdom of Tonga ("the Kingdom") as additional defendants, claiming that they were vicariously liable for the assaults of the first defendant.

On the day of the assault, Keneti was living with Tilema Onedera ("Tilema"), the second defendant at the trial. He also sued her for false imprisonment for a short time after the assault occurred. When the appeal was first lodged only the Minister of Police and the Kingdom of Tonga were named as respondents.

Subsequently Ma'ake was added as an additional respondent, since Keneti (who succeeded against him at the trial) sought to have the damages awarded against him increased.

At the trial, Ma'ake admitted liability but put the amount of damages in issue. The Minister and the Kingdom denied vicarious liability for Ma'ake's claiming that he was a Crown servant with independent statutory powers under the Police Act 1968 and was not their employee. In addition, they claimed that, in any event, Ma'ake was off duty and acting outside the scope of his employment when he assaulted Keneti.

When the appeal was called on for hearing a question arose as to whether Ma'ake had been properly served with the amended notice of appeal. Rather than adjourn the hearing the court decided (with the consent of counsel) to determine the question whether the Minister and the Kingdom are vicariously liable for Ma'ake's conduct. If this question is answered in the negative, the question of damages which is raised in the amended notice of appeal does not arise.

The facts as found by Webster J were substantially as follows:

1. Ma'ake was on 8 April 1989 a Police Constable in the Tonga Police Force. He was stationed at the Central Police Station, Nuku'alofa with the Criminal Registry Office, where his duties were concerned with collecting criminal statistics and maintaining criminal records and fingerprints etc. His duties did not include receiving complaints of crimes. His normal working hours were from 8.30 a.m. to 4.30 p.m. Monday to Friday, although he was also called on to work extra hours from time to time.
2. Under s.20(b) of the Police Act 1968 Ma'ake was deemed to be on duty at all times, with the additional duties of preventing the commission of offences and of detecting offenders and bringing them to justice.

3. After finishing work at 4.30 p.m. on 7 April Ma'ake went on a drinking spree which continued until he arrived at his home at day-break on 8 April, when he went to bed.
4. On 8 April Keneti was aged 11 years. He had been staying with Tilema for about five weeks at her home at Ma'ufanga. She was a first cousin of Keneti's father. At the time Keneti's mother was overseas.
5. On the morning of 8 April Tilema believed that Keneti had taken her gold watch, a charge which Keneti denied. At about 7 a.m. Tilema took Keneti in her car to Ma'ake's home. Ma'ake is a first cousin of both Tilema and Keneti's father, Lisiate. They all came from the same village of Ha'alaufuli in Vava'u.
6. Ma'ake was roused from his sleep and questioned Keneti about the watch. He said that he did so partly because he was a police officer and partly because he was related to Tilema. Keneti denied taking the watch and Ma'ake kept questioning him as Tilema said Keneti was lying. Ma'ake told Keneti in the presence of Tilema that he would hit him with a cane knife if he did not admit taking the watch. Tilema did not ask or tell Ma'ake to do this, but neither did she prevent him from doing so.
7. Ma'ake took Keneti into the kitchen and beat him on the buttocks with the cane knife. After the beating Keneti lied to Ma'ake and said that he had hidden the watch in Tilema's house so that Ma'ake would stop hitting him.
8. Tilema then drove Ma'ake and Keneti back to her house and a fruitless search for the watch ensued.

9. When the watch was not found Ma'ake became angry with Keneti. He plugged in and switched on an electric iron which was in the bedroom of the house. When the iron was hot, he applied it to Keneti's face. When the boy continued denying that he had the watch, he made him kiss the iron with his lips. After further denials by Keneti, Ma'ake put the tip of the iron on Keneti's penis and chest. When Ma'ake was using the iron he and Keneti were in a room with the door shut. Tilema did not tell Ma'ake to burn Keneti, but Webster J found that she must have known that Ma'ake was likely to assault Keneti and cause him further injury. Subsequently Ma'ake produced a knife and made a wound on Keneti's chest. Thereafter Tilema drove Ma'ake home while Keneti remained at her house.
10. The whole incident at Tilema's house took between 1 and 2 hours.

The Police Commander gave evidence, which Webster J accepted, that, because police officers are on duty at all times, if a complaint of an alleged crime is made to an officer at home he should do whatever is possible at that time and should then contact the Charge Office to take up the case and investigate it. Police officers are taught about the way they should perform their duties when at home. Ma'ake agreed in evidence that if an incident happened when he was at home, after taking initial action it was his duty to bring the offender to a Police Station as soon as possible. The Police Commander said that Ma'ake had not been wrong to start investigating the alleged theft but that all that had been done by Ma'ake, after the allegation was denied by Keneti, was not performance of his police duty because it exceeded Ma'ake's powers of investigation.

Webster J found a verdict against Ma'ake in a sum of \$10,935. He also found a verdict against Tilema and awarded \$3,000 damages against her. However, he found that neither the Minister nor the Kingdom were vicariously liable to Keneti for the assaults committed by Ma'ake.

The only question which presently arises for determination is whether Webster J was correct in holding that the Minister and the Kingdom were not vicariously liable for Ma'ake's assaults.

Counsel for Keneti submitted that it was within the scope of Ma'ake's employment to take initial action on Tilema's complaint. He submitted that as Ma'ake did not have any evidence upon which he could arrest Keneti, it was within the scope of his authority take initial action and to make enquiries to ascertain whether an offence had been committed. It was argued that the initial action which Ma'ake was authorised to take included searching Keneti and his belongings and questioning him despite his denials of taking the watch. It was conceded that Ma'ake was wrong to threaten to hit Keneti with the cane knife if he did not admit taking the watch, but that the threat was made during the course of the questioning and was therefore part of the initial enquiry.

It was further submitted that Ma'ake's subsequent questioning and beating of Keneti was all pursuant to the enquiries as to whether or not an offence had been committed and that those enquiries were carried out within the scope of Ma'ake's employment as a police officer.

In our opinion, Webster J was correct to find that the assaults carried out by Ma'ake were not carried out within the scope of his employment. It is true that an employer is liable for the actions of his employee, even though they are not authorised, if they are so connected with acts which he is authorised to carry out that they may rightly be regarded as modes - although improper modes - of doing them. See Clerk & Lindseel on Torts, 16th ed., para. 3-17. But an employer will not be liable for the acts of his employee where the employee has clearly departed from the scope of his employment. It is a question in each case whether what is done by the employee is done on his own initiative or whether it is done in the wrongful exercise of a discretion which his employer has vested in him.

Pursuant to s.20(b) of the Police Act 1968 Ma'ake was deemed "to be on duty at all times". But that is not to say that everything that he did whilst on duty was within the scope of his employment. The assaults took place outside Ma'ake's ordinary working hours. He had not received any instructions from his superiors to interview Keneti. It is obvious that Tilema took Keneti to Ma'ake because Ma'ake was one of her relatives. As Webster J observed, mutual assistance within the extended family is common in Tonga.

The extended family relationship between Ma'ake, Tilema and Keneti is of considerable significance in determining whether, on the facts of the present case, Ma'ake's employer was liable for his actions. Courts will more readily make an employer liable for the intentional wrongdoing of his employee when the employee's conduct is prompted by a desire to further the interests of the employer and was reasonably incidental to his duties : Fleming, on The Law of Torts 6th edn p.349; Auckland Workingmen's Club & Mechanics Institute v. Ronnie (1976) 1 N.Z.L.R. 278. It is very difficult indeed to say that on the facts of the present case Ma'ake's conduct in assaulting Keneti was prompted, or was in any way motivated by, a desire to further the interests of the Minister of Police. Rather the sole motivation of his conduct was to further what he concerned to be his cousin Tilema's interests. In making this observation we do not overlook the evidence of the Police Commander that if a complaint of an alleged crime is made to an off-duty police officer he should do whatever is possible to investigate the complaint and then contact the Charge Office. But it would be unrealistic to regard Ma'ake's conduct as being the investigation of an alleged crime. We do not think Ma'ake or Tilema ever had in contemplation that Keneti would be charged with an offence. Thus the present case is distinguishable from Carrington v. Attorney General and Murray (1972) N.Z.L.R. 1106 where the Crown was held liable for the consequences of the wrongful exercise of a police officer's power to investigate a person suspected of crime.

We have considered an argument that it is Ma'ake's conduct at his own house was within the scope of his authority as a servant of the Minister of Police, whereas his conduct at Tilema's house was outside the scope of that authority. There is some attraction in this argument as it is easier to say of Ma'ake's initial questioning of Keneti that it

was undertaken within the scope of his authority as a police officer. However, we think that it cannot be said of this initial conduct that it was motivated by Ma'ake's desire to further his employer's interests or was undertaken in the course of pursuing those interests.

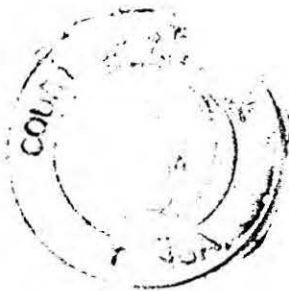
However, Ma'ake was not authorised to do anything other than make a preliminary enquiry and possibly arrest Keneti and take him to a police station. When he embarked on the series of assaults on Keneti he was plainly acting outside the scope of any authority that he had. What he did was not merely an improper mode of doing something which he was authorised to do; what he did was independent of any authority which he had. In these circumstances, we think the appeal against Webster's finding that the Minister and the Kingdom were not vicariously liable for Ma'ake's actions must fail.

As the trial it was submitted to Webster J on behalf of the Minister and the Kingdom that police officers were neither servants of the Crown nor of the Minister of Police and that therefore Keneti's only legal remedy lay against Ma'ake himself. This argument was rejected by Webster J. He distinguished the position of a police officer in Tonga from the position of an English police officer. In his careful reasons, Webster J referred to Tongan legislation which provides that Tonga police officers are enlisted and appointed by the Minister of Police with the approval of Cabinet (ss.8(1) and 11 of the Police Act 1968) are paid out of moneys provided by Parliament (s.5 of the Police Act). He therefore was of the view that the Minister of Police and the Kingdom may be liable for the actions of a police officer, depending upon the application of the general criteria for vicarious liability of the Crown for the actions of its servants.

We do not find it necessary for the purposes of disposing of the present appeal to decide whether Webster J's decision on this point is correct. Even if it is not (and we express no opinion upon it) the appeal could not succeed because of our finding that the actions of Ma'ake were not such as to render the Minister and the Kingdom vicariously liable for them.

We must emphasize that our decision is confined to the special facts of this case. There may very well be situations where the Minister of Police will be vicariously liable for the actions of police officers and as a result liable in damages for those actions.

In the result, the appeal is dismissed. However, on the special facts of this case, we do not think the Appellant should be ordered to pay the Respondents' costs. The real question argued on the appeal was the extent of the liability which may attach to the Minister of Police in respect of the actions of one of his officers whilst off-duty. That question is one of general public importance and it would not be right for the Appellant to have to bear the cost of it being determined. Accordingly we make no order as to costs.



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