CIV/A/9/90

IN THE HIGH COURT OF LESOTHO

In the matter between:

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| MOKHAHLA GEORGE | 1ST APPLICANT |
| THABO NOHA | 2ND APPLICANT |
| MOLETSANE MOTOLI | 3RD APPLICANT |
| LEBAMANG GEORGE | 4TH APPLICANT |

vs

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| ZAKARIA MOKOMA | RESPONDENT |

Before the Hon Chief Justice B.P. Cullinan

For the Applicants : Mr M. Ngakane
The Respondent in person

JUDGMENT

The respondent ("the plaintiff") sued the four applellants in the Mants'onyane Local Court, in respect of the ~~assest~~ arrest and alleged assaults of his son, then aged 17 years. The appellants were referred to as "respondents" in the Local Court, but in view of the multiplicity of appeals it is best to refer to them as "defendants".

Very briefly, the defendants suspected the plaintiff's son Mputana Mokoena & another, Keketso Sekola, then aged 18 years of having stolen the first defendants 5 sheep, arrested them & took them to the police station. It is alleged that the defendants assaulted the two youths before handing them over to the police: The youths were subsequently charged with theft of

the sheep before a Magistrate's Court, but were acquitted. The plaintiff's cause of action in the Local Court then read as follows:

> "Dispute : M300.00 being a joint compensation for having assaulted Mputana Mokoena (*sic*) after arresting him and injuring him alleging that he had stolen their sheep..."

The Court President of the Local Court, in a carefully reasoned judgment, dismissed the plaintiffs claim ordering each party to pay his own costs. On appeal to the Central Court at Thaba-Tseka, that Court reversed the Local Court decision, granting judgment for the plaintiff, ordering the return of the plaintiff's security deposit, but making no order as to costs. The judgment of the Central Court was apparently based solely on the observation that,

> "there was nothing which showed that Mokhahla George and his associates did report to their Chief or to the police that they have lost their sheep, beside that they had just attacked plaintiff's cattle post".

Not surprisingly, the learned Judicial Commissioner on appeal held

> "that that was not a good reason for concluding that therefore by such incasion they have therefore assaulted

Mputana".

The learned Judicial Commissioner, however, held that there was nonetheless "sufficient evidence that Mputana was assaulted by the appellants when they arrested him". In the result he dismissed the appeal against judgment, but reduced the guantum of damages to M150, to be paid jointly & severally by the defendants, and granting costs to the plaintiff. It is against that decision that the defendants now appeal.

The plaintiff's son gave evidence in the Local Court. He was cross-examined in turn by each of the defendants. He gave detailed evidence of the nature of the assault upon him and his colleagues, that is, in cross examination. In examination in Chief he gave no evidence whatever of assault, other than to say that,

> "the matter (case) is for arrest and assault. We were caused to carry a ten of (sheep's) suet."

In cross-examination he testified that when delivered to the police, the police had asked him whether they had been assaulted: he informed them that they had in fact been assaulted : nonetheless the police did not request them to remove their blankets, so as to observe their inquiries. Subsequently, however, he testified that

"I didn't tell the policeman you had assaulted me because I was afraid of them. I only said it out on my way back from police station (some two weeks later) that I had been assaulted".

Keketso Sekola again gave no evidence of assault, as such, in chief, other than to say that they had been "fastened" (tied) at the cattle - post and that they had been "caused to carry suet and fat." When it came to cross-examination, he testified that on arrival at the police station,

"We told the police that we have been assaulted myself and Mputana. Police did nothing....."

Again, despite Mputana's earlier evidence that the police had not examined them, Keketso in cross-examination testified that,

"Mputana informed the police that you had assaulted him when he arrived at the police station. Police found that he had some wounds. Police did nothing in relation to the injuries he sustained."

and again

"Mputana was examined when he arrived that (*sic*) you had assaulted him. There were some bruises caused by a sjambok

and a slick, the police saw them. I don't know what the police did in regard of this criminal act you have committed"

and further on again,

"..... you brought Mputana to Marakabei police station. Mputana showed the police that you had assaulted him."

It will be seen therefore that the evidence of the plaitiff's witnesses as to assault was contradictory. Furthermore the defendants' evidence that they had not assaulted either youth was consistent. It was corroborated by that of a police officer who testified that when the youths were brought to the police station, they did not report any assault upon them and that he had first heard of such allegation from the plaintiff himself.

Further again, the plantiff testified that after his son was released from custody, after some two weeks, and before the criminal trial took place, he had him examined by a doctor. He tendered his son's medical book in evidence. A doctor's report indicates, that the plaintiff's son bore some injuries. The medical book, however reveals that the plaintiff's son was examined by a doctor long after the criminal trial (when a complaint of assault by the police could have been laid before the Magistrate) and indeed some six months after the alleged

assault.

The learned Judicial Commissioner did not observe the contradictions in the evidence for the plaintiff. Furthermore, he observed that the particular police officer, Mafathe, was not present when the suspects were brought to the police station: but that was not the evidence of the police officer or the defendants. More importantly, the learned Judicial Commissioner observed that the plaintiff's son was examined on a date less than two weeks after the arrest and alleged assault: but that was a misdirections: the report indicates, as I have said, that examination took place some six months later. Had the learned Judicial Commissioner considered all of those aspects I cannot see that he could have held that the plaintiff had on a balance of probabilities made out his case, that is, as to the allegation of assault.

The question arises, however, as to the exact nature of the plaintiff's claim. The claim, as earlier reproduced, discloses in my view, not one but two separate claims; the plaintiff complains in effect not alone of assault, but also of wrongful arrest. This becomes clearer from the plaintiff's opening address to the Local Court, namely,

> "I claim M300.00 jointly from (defendants) being compensation for arresting and assaulting my child Mputana Mokoena and took him to Marakabei police post alleging that

he had stolen their sheep and the trial court found them not guilty and discharged" (Italics added).

When it came to judgment in the Local Court, the learned President observed that the plaintiff claimed "compensation of M300 jointly from the respondents for having assaulted and causing plaintiff's son to carry suet."

Further on the learned President observed that,

"It is clear that this case is of two different types, one was an assault and the other was for carrying suet and a tin of fat yet the accused was not guilty".

The carrying of the suet, in my view, constituted a compulsion, effected under the custody of the defendants, the gist of the complaint being the custody itself. This is clear from the plaintiff's opening address where he submitted, in effect, that his son having been acquitted, the arrest was unlawful. The learned President quite correctly observed that an acquittal did not automatically entitle an accused person to compensation. Earlier, however, having summarised the evidence in the case, he had observed:

"(The plaintiff's son) was liable to carry (suet and fat) since it was recognized as stolen property and was unable to give an explanation how the property was found in his possession, and

for these reasons he was considered as a thief or having accepted a stolen property yet he knew quite well it was a stolen property."

Neither the learned Central Court President, nor the learned Judicial Commissioner, referred to that aspect in their judgments. The question arises whether the finding of the learned Local Court President in the matter accorded with the evidence. While the plaintiff's claim was instituted in the Local Court, the actions of the defendants in arresting the plaintiff's son were covered by the statutory law, namely the provisions of Part V (A) of the Criminal Procedure and Evidence Act, 1981 and in particular those of the amnibus section 30, which reads:

"30. Any private person, may without warrant arrest any other person upon reasonable suspicion that the other person has committed any of the offences specified in Part II of the first schedule".

Two of the offences so scheduled are "Theft, either at common law or as defined by any statute" and "Receiving any stolen goods or property knowing the same to have been stolen." Part II of the First schedule also includes "offences the punishment whereof may be a period of imprisonment exceeding 6 months, without the option of a fine." It will be seen, therefore, that the defendants had the power of arrest, "upon

reasonable suspicion." If there was, objectively, no basis for reasonable suspicion, then their action were unlawful. In this respect, I cannot but see that, whether the plaintiff's claim was instituted in the Local Court or elsewhere, and whether the claim was founded in cutomary law or the common law, the same standard of reasonable suspicion must apply. Again, I cannot but see that the presumption of innocence applied also in a Local Court, as under section of the Central and Local Courts Proclamation No.62 of 1938, to hold otherwise would be inconsistent with the common law and indeed "repugnant to justice." That being the case, as with the common law, once the plaintiff proved the arrest, which was admitted, the onus surely feel upon the defendants to establish reasonable suspicion.

In this respect, the arrest took place at the cattle - post of the plaintiff, where his son was herding. The latter testified that the defendants found him in possession of suet. The first defendant alleged that the suet was that of one of his missing sheep. The plaintiff's son replied that the suet had come from a slaughtered sheep belonging to his father. He testified that,

> "You (first defendant) didn't ask me to prove the ownership of the sheep. You said I had referred to tell the truth you then fastered and assaulted us ..... I tried to convince you by producing a carcass of the sheep to prove

that it was its suet. You then caused me to carry the suet."

Keketso Sekola, when cross - examined by the first defendant, testified:

"You arrested me even though I proved to you by a carcass of Zakaria's (the plaintiff's) sheep".

When it came to the defendants evidence the first defendant in cross-examination testified:

"My sheep bear marks. They were marked Leripa on the left ear. This mark wasn't there in the suet ..... I did burden your child with suet *since he didnt convince me* that a *sheep* belongs to you. *I would be convinced by way of placing him before the Court of Laws.* The decision of the Court discharged him" (Italics added)

The second defendant merely testified that,

"We had caused your son to carry suet *since we thought it was for respondent No.1's sheep* "(Italics added)"

The third defendant testified

"Maokhahla showed me suet before we could arrest them; suet

was not marked. I was convinced when he (first defendant) *told me* that suet was for his sheep" (Italics added)

The fourth defendant however, in cross-examination, introduced an aspect not mentioned by the other defendants. It was his evidence that

"Your son hidden the suet which proved that it wasn't your sheep's suet."

Nowhere did the other defendants mention that aspect. If it were the case that the suet or carcass was *hidden* as such, I imagine that the other defendants, and particularly the first defendant, would not have hesitated to mention it, and to make capital thereof. The fourth defendants evidence on the point was surely unreliable. It was the plaintiff's evidence that the suet was from one of his sheep. The defendants did not dispute the evidence of the plaintiff's witnesses that they had produced a sheep's carcass to them. Indeed, the first defendant's evidence seems to confirm this aspect. I pause here to observe that a slaughtered carcass might well be *covered* rather than *hidden, as such, and the fourth defendant might well have made capital of this aspect. In any event, nowhere did any of he defendants testify that the carcass produced to them bore the first defendant's identifying mark.*

*As I see it, the first defendants own evidence indicates his state of mind. Clearly he was not satisfied that the sheep's carcass belonged to him, but nonetheless considered that it was for the plaintiff's son to convince* him that the carcass belonged to his father. His evidence thereafter indicates that it was for the Court to decide whose carcass it was. The subsequent acquittal however serves but to confirm the situation at the cattle - post: there simply was no satisfactory evidence whatever against the two youths from the very beginning. In brief, there was nothing on which reasonable suspicion could be based that is, by any of the four defendants.

None of the three courts below examined the aspects of the evidence outlined above. Had they done so I am satisfied that they would inevitably have found that the arrest of the plaintiff's son was wrongful and that his father was entitled to damages in respect thereof.

The appeal succeeds therefore to the extent that the decision of the Local Court in dismissing the plaintiff's claim for damages for assault is restored and such claim accordingly stands dismissed. However, the dicision of all three courts below in effect, in dismissing the plaintiff's claim for damages for wrongful arrest is set aside and I give judgment accordingly to the plantiff in respect of that claim, that is against the four defendants jointly and severally.

The learned Judicial Commissioner reduced the award of damages to M150. He gave no reasons therefor. I assume that he did so, as in his view the plaintiff had succeeded in proving only half of his claim. The same situation still applies and I do not propose therefore to alter the guantum of damages. Accordingly give judgment to the plaintiff in the amount of M150. I also grant costs in this Court to the plaintiff.

Dated this 29th Day of March, 1995.

B.P. CULLINAN

(B.P. CULLINAN)

CHIEF JUSTICE