

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 24 of 2000

BETWEEN:

CRAIG HARTWELL

Appellant

and

KELVIN LAURENT
THE ATTORNEY GENERAL

Respondents

Before:

The Hon. Sir Dennis Byron
The Hon. Mr. Satrohan Singh
The Hon. Mr. Albert Redhead

Chief Justice
Justice of Appeal
Justice of Appeal

Appearances:

Mr. S. Bennett for the Appellant
Miss B. Aziz for the Respondents

2001: June 21;
September ,17.

JUDGMENT

- [1] **REDHEAD J.A:** The first-named respondent was a police constable in the service of the British Virgin Islands Police Force. He joined the Police Service on 2nd July, 1992 and after a period of training for about six months he was first posted to Virgin Gorda Police Station. In April 1993 he was transferred from Virgin Gorda to Road Town, Tortola Police Station, "after the police learnt of a domestic incident involving the officer".
- [2] In fact that was the beginning of 19 charges against the first-named respondent in his 19 months career with the police.

- [3] As a result of these charges this led the learned trial judge to make the comment:
- "The plaintiff sought to buttress the plaintiff's case by reference to the recorded misconduct of P.C. Laurent Collated from his date of establishment in the Force on 2nd July, 1992 to 2nd February, 1994 i.e. a period of 10 months. It is my considered view that the nineteen "charges of misconduct" in truth and in fact represent a history of minor misdemeanors/infractions which no way support the serious allegations set in paragraph 2 of the plaintiff's statement of claim, item No. 19 for example relates to the complaint made by Murphy Flavien at the Virgin Gorda Police Station on the night of the 16th January, 1994 where P.C. Laurent allegedly threatened to kill him over his relationship with his girlfriend. P.C. Laurent was at the time stationed at West Police Station."
- [4] It was with item 19 in fact that the appellant through his Counsel took serious issues as well as other issues with the learned trial judge's findings of the facts and inferences which he has drawn from those facts. For, learned Counsel contended that facts are not in dispute but he took issue with the judges inferences of the facts and of course his application of the law to those facts. It is quite obvious that learned Counsel is asking this court to draw different inferences from those drawn by the learned trial judge. I must bear in mind the injunction laid down in this regard.
- [See **Bennax v Austin Motor Co. Ltd** (1955) 1 ALL ER 326at 329]
- [5] To encapsulate the facts in this matter they are, the first appellant joined the British Virgin Islands Police Force on 2nd July, 1992. After his enlistment he was sent for training. The record shows that he had some infractions with the commandant while in training school. After graduation he was first posted to Virgin Gorda Police Station and was transferred from there to Tortola because he was involved in a domestic dispute.
- [6] As I have said the learned trial judge said that there was nineteen minor "misdemeanors" I shall concentrate on the more serious of those. On 16th January, 1994 the police had a report by Murphy Flavien of Virgin Gorda that on the night of 16th January, 1994 the first-named respondent in a house in Virgin Gorda threatened to kill him over his (Flavian's) relationship with the first respondent's girlfriend.

- [7] On 1st February, 1994 complaint was made to the senior officer of the first-named respondent that the latter was seen walking in the public street in Jost Van Dyke with a police service revolver in his waist without permission.
- [8] These are the serious incidents which the appellant pointed to and argued that this ought to put the police authorities on notice that the first-named respondent is a person of violent disposition and should never be entrusted with or given possession of a firearm as he was likely to use it to endanger not only the lives of Murphy Flavian and Lucy Ann La Fond but also those in close proximity with them.
- [9] The facts are as the learned trial judge himself found:
- “The undisputed evidence is that on the night in question (2nd February, 1984) P.C. Laurent who was the only police officer stationed on the island of Jost Van Dyke left the sub station armed with a police service revolver and ferried to Virgin Gorda where he entered the Bath and Turtle Pub in the valley and fired a number of shots in the crowded building and wounded a number of persons including visitors as well as employees of the Pub including the plaintiff who himself a visitor seated at the time at the bar where he was struck and seriously injured by a bullet from the said firearm by P.C. Laurent”.
- [10] To complete the evidential picture in order to understand the legal landscape from which the appellant mounted his legal assault, I must perforce refer to the evidence of Station Sergeant Fahie who was at the material time the immediate supervisor of the first-named appellant. Sergeant Fahie testified that as a result of a conversation which he heard while at his residence at Sea Cows Bay, he proceeded with Inspector Glasgow to Jost Van Dyke, accompanied by another police constable. He said that he arrived at Jost Van Dyke Police Station at about 2.30 a.m. on 3rd February. He then discovered that police vehicle V189 was parked in front of the police station compound with all its doors locked. The police station was also locked with all lights on. On calling out to Laurent, he said that there was no reply so he made a forced entry into the building by removing four louvers from an eastern window.
- [11] On checking inside he said that he discovered a brown padlock on a strongbox. The station key to the strong box and the keys to the jeep were together. Sergeant Fahie said

he did not see the keys to the station so he took a hard object and broke off the padlock of the strongbox only to observe that the police service revolver, the holster and the rounds of ammunition were missing.

[12] The gravamen of the appellant's case is that the appellant was, as is said above, seriously injured as a result of the indiscriminate shooting by the first-named appellant in an attempt to, at least injure his girlfriend, Lafond and her paramour Murphy Flavian.

[13] The first-named respondent was the lone, officer stationed at Jost Van Dyke Police Station and put in possession of a fireman and ammunition with which he seriously injured the appellant.

[14] The appellant's action in the High Court for damages for the injuries which he suffered was dismissed.

[15] In dismissing the appellant's action Georges J said that:

"In my judgment there was no foresight, no proximity and therefore no liability on the part of the defendant. In deed there was no breach of the duty of care by the defendant. Apart from vicarious liability (which has not been proven) a person is not responsible for the actions of a third party in the absence of special relationship."

[16] The learned judge having "gratefully and respectfully" adopted the reasoning in-

Hill v. Chief Constable of West Yorkshire 1988 2 ALL ER.238

Held that on the facts of this case there was no reason to believe that P.C. Laurent was liable to endanger the public in general and not a fit person to have custody of a police service revolver at Jost Dyke. The Forces Standing Order on the issue and use of firearm had worked satisfactorily in the past throughout the Virgin Islands and continue to do so. They impose a restriction on user which in his view is adequate given the circumstances.

[17] Learned Counsel, Mr. Bennett argued on behalf of the appellant that having regard to the violent propensity of the first-named respondent, particularly in relation to Murphy Flavian and Lafond, a special relation arose. The appellant did not argue his case on the basis

vicarious liability but on basis of a special relationship which existed between the first-named respondent and those whom he threatened and including persons who may be in close proximity to them.

[18] Learned Counsel argued that the learned trial judge erred in law when he said at paragraph 37 that there was no proximity and therefore no liability. He argued that proximity is not limited to persons who are close to the tortfeasor [Donohue v Stevenson-1932 A.C. 562]

“Who is my neighbour?” Could not in my opinion be limited to persons only who are in Scotland but to person in the wider world who bought and drank the contaminated ginger beer and was affected by it. I therefore agree that proximity, in my view, cannot have a defined geographical boundary. It matters not whether he journeyed from Jost Van Dyke to Virgin Gorda to carry out his “nefarious activity” as the learned trial judge put it-

In **Swiney and Another v the Chief Constable of the Northumbria Police** 1966 3 ALL ER. 449.

In that case the plaintiff passed on information to the police about the identity of a person implicated in the unlawful killing of a police officer. She gave information in confidence and requested that any contact with her be made in confidence by telephone. The police knew that the person was violent but nevertheless recorded the information in a document naming the first-named plaintiff as the informant.

[19] The document which was left in an unattended police vehicle which was broken into by criminals was subsequently obtained by the person implicated. Thereafter the first plaintiff and her husband, the second plaintiff were threatened with violence and arson and suffered psychiatric damage. The plaintiffs issued proceedings against the chief constable alleging negligence in failing to keep the confidential information secure, on the basis that it was reasonably foreseeable that they might be harmed if the information was obtained by the criminal fraternity. The claim was struck out under RSC Order 18 R19 as disclosing no reasonable cause of action and the plaintiffs appealed. The judge allowed their appeal holding that there was a special relationship of proximity between the plaintiffs and the police so as to give rise to a duty of care. The Chief Constable appealed, contending

that the police owed no duty of care to the plaintiffs or alternatively public policy precluded the prosecution of the plaintiffs' claim since the police was immune from prosecutions for claims arising out of their activities in the investigation and suppression of crime.

[20] It was held that it was at least arguable that a special relationship existed between the police and an informant who passed on information in confidence, implicating a person known to be violent which distinguished the informant from the general public as being particularly at risk and gave rise to a duty of care on the police to keep the information secure..... On the facts as pleaded in the statement of claim, it was arguable that a special relationship existed which rendered the plaintiffs particularly at risk....."

[21] Learned Counsel, Mr. Bennett argued that this case clearly demonstrates that proximity is not limited, to "close proximity." As he argued it did not matter where the informant lived in relation to the person implicated. I yield to this argument. As in my view it makes good sense and good reasoning.

[22] It should be noted that the husband was not the informant but the wife. Both husband and wife suffered as a result of his treats of violence and arson.

[23] There would obviously be a special relationship between the police and the wife who disclosed the information to the police. The husband of course would be in close proximity to his wife.

[24] In my judgment there could be no other reason for the Court of Appeal holding:
"That a special relationship which rendered the plaintiffs particularly at risk".

[25] Similarly in my judgment the police authorities in the British Virgin Islands ought to have been aware of the violent propensity of Laurent towards Lucy Lafond and Murphy Flavian and persons close to them as indeed was the appellant. Indeed in my view, it is beyond argument that the first-named respondent was placed in possession of police service revolver and ammunition which he used to seriously injure the appellant. He was the only

police officer at Jost Van Dyke Police Station. He had access to the key which opened the locked box which contained the firearm and ammunition.

[26] The police commissioner swore on oath that he did not know of those threats. In my judgment it does not matter because the evidence is that a report was made and threats were listed in the police station diary. The appellant argued that the fact that it was not filtered up cannot be visited upon him because Lafond and particularly Murphy Flavian had done all that was reasonable in their power to bring the matter to the attention of the authorities and it is not reasonable to visit their lack of knowledge on the appellant.

[27] In **Smith v Leurs** 1995 7 CLR 261 at 262 Dixon said:

“...One man may be responsible to another for the harm done to the latter by a third person; he may be responsible on the ground that the act of the third person could not have taken place but for his own fault or breach of duty. There is more than one description of duty the breach of which may produce this consequence. For instance it may be a duty of care in reference to things involving special danger. It may even be a duty of care with reference to the control of actions or conduct of the third person.

....the general rule is that one man is under no duty of controlling another to prevent him doing damage to a third. There are, however, special relations which are the source of a duty of this nature.”

[28] In my judgment the learned trial judge erred when he held that there was no proximity between the appellant and the first-named respondent. He also erred when he held that there was no special relationship between the appellant and the first-named respondent.

[29] For these reasons the appeal is allowed. The judgment of the learned trial judge is set aside. The case is remitted to the High Court for assessment of damages.

[30] Costs for the appellant in this court and the court below to be taxed, if not agreed.

Albert Redhead
Justice of Appeal

I Concur

Sir Dennis Byron
Chief Justice

I Concur

Satrohan Singh
Justice of Appeal