IN THE HIGH COURT, ACCRA

6/11/1975

ABBAN J.

MILLER v. ATTORNEY-GENERAL

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Practice and procedure—Pleadings—Failure to plead complete defence—Preliminary objection raised at trial that action statute-barred by certain enactments—Manner in which enactments affect action not stated in pleadings— Facts showing action was statute—barred not stated in pleadings—Whether preliminary objection well founded—High Court (Civil Procedure) Rules, 1954 (L.N. 140A), Order 19, r. 16 and Order 25, rr. 2 and 3.

Public officer—Police—Assault—Police officer suspecting plaintiff of having committed a crime of stealing—Plaintiff chased by police officer and two other policemen all wearing plain clothes—Plaintiff unaware of persons chasing him being policemen—Police officer firing warning shot and pointing gun at plaintiff—Plaintiff shot and wounded by police officer—Whether police officer liable for assault.

Police—Powers—Arrest without warrant—Police officer suspecting plaintiff of having committed a crime of stealing— No reasonable grounds existing for police officer to suspect plaintiff—Plaintiff not armed but chased and shot in the head by police officer under guise of effecting arrest—Whether police officer justified in shooting down plaintiff to effect arrest.

The plaintiff, a boy of sixteen years of age, was given a kente cloth by his father, but because he did not like the cloth, his father agreed that he should sell it. The plaintiff together with a friend, one Sadiku, took the cloth to the Cantonments area with the hope of selling it to some of the affluent people living within that area. After three fruitless attempts, they came to the bungalow of L., a police officer, who refused to buy the kente cloth at the stated price because it was too old. The plaintiff and Sadiku therefore left his bungalow and started walking towards the Cantonments Police Station, but after they had walked a distance of about twenty yards L. sent someone to inform them that he had changed his mind and now wanted to buy the kente cloth. This call was ignored by the plaintiff and Sadiku who continued walking in the direction they were going. On reaching the Aquinas Secondary School, they saw a car coming from the opposite direction and when it was almost abreast with them, they heard a shout after which the car was driven over to where they were walking and a shot fired by the driver of the car. On seeing that they were being attacked, the plaintiff and Sadiku took to their heels but were chased by two plain clothes policemen. The plaintiff was later shot by L. in the head as a result of which he suffered head and brain injuries. He therefore brought the present action through his father against the Republic as the master of L., for ¢50,000.00 damages.

L., in his defence admitted shooting and injuring the plaintiff, but said he did so as a police officer and in the course of arresting the plaintiff whom he suspected of having stolen the kente cloth he had wanted to sell to him. He alleged that he was attacked by the plaintiff and Sadiku in his bungalow, and they also tried to dip their hands into his pocket in the course of the attack. Before the hearing commenced, counsel for the Republic raised an objection under order

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25, rr. 2 and 3 of the High Court (Civil Procedure) Rules 1954 (L.N. 140A), that the action was statute-barred and should therefore be dismissed.

Held: (1) if a party intended to raise a point of law as a preliminary issue to be determined under Order 25, it was not only necessary that the point of law in question be clearly indicated in his pleadings as required by Order 19 r. 16, but also the material facts upon which he was to rely to establish that preliminary point must be pleaded. A point of law must be raised on the facts pleaded, and the material facts upon which the said point of law was to be grounded must be clearly pleaded to enable the court to determine whether or not the preliminary point of law as raised was well founded. In the preset case, since the defendant stated that the plaintiff's action was statue-barred by virtue of certain enactments without indicating in what way those enactments affected the action, the defendant's objection was misconceived and could not be sustained.

(2) In order to found an action in assault and battery, there must have been a direct and intentional application of physical force to the person of the plaintiff by the defendant, such as a blow inflicted with the hand or with a weapon or some other object. To point a loaded revolver at another person in such a hostile manner and within a shooting distance as in the present case, and which conduct put the other person in reasonable fear or apprehension of an immediate battery constituted an assault. Dicta of Lord Denning M.R. in Letang v. Cooper [1964] 3 W.L.R. 573 at p. 577, C.A. and of Willes J. in Osborn v. Veitch (1858) 1 F. & F. 317 at p. 318 applied.

(3) The common law principle was that a police officer or a constable had a right to arrest without warrant any person whom he reasonably suspected of having committed a felony although no crime had in fact been committed. However, the police officer was under a duty to satisfy himself that there were reasonable grounds for the suspicion of the guilt and the reasonable grounds must have existed at the time of the arrest and not after the arrest. In the present case, the shooting down of the plaintiff in such a savage manner and in the circumstances such as this under the guise of effecting the arrest of the plaintiff was not only unreasonable but was quite out of proportion of the occasion. The exigency of the situation did not at all warrant any shooting. On the evidence, L. did not have any reasonable or probable grounds or cause for suspecting that the plaintiff and Sadiku had stolen the Kente cloth or had committed any criminal offence, and there was no justification whatsoever for the assault and battery which L. committed on the plaintiff. Dictum of Scott L.J. in Dumbell v. Roberts [1944] 1 All E.R. 326 at p. 329, C.A. and Hussein v. Chong Fook Kam [1969] 3 All E.R. 1626, P.C. applied.

Cases referred to:

(1) Buobuh v. Minister of Interior [1973] 2 G.L.R. 304, C.A.
(2) Letang v. Cooper [1965] 1 Q.B. 232,; [1964] 3 W.L.R. 573; 108 S.J. 519; [1964] 2 All E.R. 929; [1964] 2 Lloyds Rep. 339, C.A.
(3) Osborn v. Veitch (1858) 1 F. & F. 317.
(4) Christie v. Leachinsky [1947] A.C. 573; [1947] L.J.R. 757; 176 L.T. 443; 63 T.L.R. 231; 111 J.P. 224; [1947] 1 All E.R. 567, H.L.
(5) Dumbell v. Roberts [1944] 1 All E.R. 326; 113 L.J.K.B. 185; 170 L.T. 227; 108 J.P. 139; 60 T.L.R. 231; 42 L.G.R. 111, C.A.

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(6) Hussien v. Chong Fook Kam [1970] A.C. 942; [1970] 2 W.L.R. 441; [1969] 3 All E.R. 1626, P.C.

ACTION by the plaintiff against the Republic for damages for head and brain injuries suffered at the hands of a police officer. The facts are fully stated in the judgment.

S.A.X. Tsegah for the plaintiff.
S.E. Asamoah, Senior State Attorney, for the defendant.

Abban J. The plaintiff is a boy of sixteen, and he brought the action through his father as his next friend. He is claiming ¢50,000.00 as damages for the head and brain injuries he suffered at the hands of one C. O. Lamptey who at the material time was a chief superintendent in the Ghana Police Service. On 2 October 1971, the plaintiff was shot by the said Lamptey in front of Aquinas Secondary School near the Cantonments roundabout, Accra. The plaintiff's version of the circumstances which led to the shooting was given by the plaintiff's second witness, Baba Sadiku.

The plaintiff's case

Baba Sadiku said the plaintiff's father gave a kente cloth to the plaintiff. The plaintiff did not like the cloth and, with the consent of the father, the plaintiff wanted to sell it. Baba Sadiku and the plaintiff had been friends since their elementary school days and they had continued seeing each other whenever the plaintiff came down to Accra from Adonten Secondary School, Aburi, on vacation. On 2 October 1971, the plaintiff was still on vacation and at the request of the plaintiff Baba Sadiku accompanied the plaintiff to the bungalows around the Cantonments area to find a purchaser for the kente cloth, probably, thinking that the residents of that area being usually very important personalities and generally well-to-do could offer a better and higher price for the kente cloth.

After they had visited about three bungalows without getting a purchaser, they arrived at the bungalow of the Chief Superintendent Lamptey. They met someone near Lamptey's garage and they informed that person of the purpose for their visit. While talking to that person, Lamptey came out and stood in the verandah of the bungalow and from there inquired from them what they wanted. They told Lamptey that they were desirous of selling a kente cloth. They went near Lamptey and gave the cloth to him. Lamptey examined it and asked for the price which, according to Sadiku, they said it was ¢140,00. Lamptey on hearing the price, gave the cloth back to the plaintiff and said he could not buy it at that price since it was an old one. Lamptey then questioned them about the ownership of the kente cloth. The plaintiff told Lamptey that the cloth belonged to the plaintiff's father.

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Since Lamptey could not buy the cloth they left Lamptey's bungalow and walked towards the Cantonments roundabout. After they had walked for a distance of about twenty yards, they heard someone calling them from behind. It turned out to be the person whom they had earlier on met near the garage of Lamptey's bungalow. This person told them that Lamptey wanted them to go back to the bungalow as he had changed his mind and was prepared to buy the kente cloth. Sadiku and the plaintiff ignored Lamptey's message and treated it with contempt.

They continued their journey to the Cantonments roundabout where they turned towards the Cantonments Police Station. On reaching Aquinas Secondary School, they saw a car coming from the opposite direction. When the car was almost abreast with them a shout was heard. They turned to the direction from which the shout had come, and they saw that the car was crossing the main Cantonments Road to where they were walking. The car stopped near them and the driver of the car raised a pistol and fired a shot. Sadiku and the plaintiff got frightened and started to run away. Sadiku ran from Aquinas Secondary School and crossed the road to the opposite side of the said school. Sadiku was still running when he heard a second shot. He immediately fell down in a gutter which was full of mud. When he was picked from the mud he saw that the plaintiff had been shot in the head and was lying down at the gate of Aquinas Secondary School. Sadiku was taken to the

Cantonments Police Station, but the plaintiff was rushed to the Military Hospital. Sadiku later discovered that it was Lamptey who did the shooting.

The father of the plaintiff confirmed that the kente cloth belonged to him and it was he who gave it to the plaintiff. The father said the plaintiff did not like that kind of kente cloth; and so he gave the plaintiff permission to sell it and use the proceeds thereof in buying a better one. The father categorically denied that the kente cloth was stolen property. One Yeboah, the chief inspector in charge of the Cantonments Police Station, tendered that part of the station diary which showed the entries that were made about this case on the day of the incident. It must be remembered that the action is against the Attorney-General who under the law is standing in for the Republic of Ghana, the real defendant in the case. That is, the Republic is being sued, as it were, through the Attorney-General for the acts committed by Lamptey, a servant of the Republic.

The defendant's case

Lamptey admitted shooting and injuring the plaintiff, but he said he did so as a police officer and in the course of arresting the plaintiff whom he suspected of having committed a crime of stealing. Lamptey said when the plaintiff and the plaintiff's second witness went to his bungalow to sell the kente cloth, he was in the hall. The plaintiff and Sadiku knocked at the door at the rear of the bungalow. He opened the door and invited them to the hall, where they offered to sell him the kente cloth. The plaintiff was holding the bag which contained the cloth; and Sadiku opened

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the bag and brought out the kente cloth. They named the price as ¢30.00 and thereupon Lamptey inquired from them whether they were dealers in kente cloths. Sadiku retorted and told Lamptey not to ask questions if he was not interested in the cloth. At that stage Lamptey said he revealed to them that he was a police officer and to convince them of his identity he pointed to them his police uniform which was then hanging on a wall of the sitting room.

Sadiku, at that stage, put the kente cloth back into the bag, and while the bag was being passed on to the plaintiff by Sadiku, Lamptey got hold of it and immediately Sadiku also held Lamptey by the waist. A struggle then ensued between the plaintiff and Sadiku on one hand and Lamptey on the other. Lamptey shouted for help and a nephew of his who was resting in an adjoining bedroom came out. But when Sadiku saw that the said nephew was coming to the rescue of Lamptey, Sadiku, according to Lamptey, told the nephew something while at the same time Sadiku pointed what looked like "a weapon" at the said nephew. So the nephew halted in his track and could not do anything to assist Lamptey in the struggle. All this time Lamptey was holding the bag and at the same time trying to free himself. During the struggle it "appeared" to Lamptey that Sadiku "was tapping" Lamptey's pocket. Lamptey eventually mustered courage and pulled himself violently from his assailants and fell into a chair near by and "pieces of wood holding the chair got broken." The plaintiff and Sadiku then ran away.

After the plaintiff and Sadiku had escaped, Lamptey collected his service revolver and drove down to Cantonments Police Station passing through Labone Estate. He made a complaint to the officer in charge of the charge-office at that time. The complaint was entered in the station diary before two police officers the defendant's first witness and one Constable Anansu were detailed to accompany Lamptey ostensibly to go and effect the arrest of the plaintiff and Sadiku. These two constables sat in Lamptey's car and Lamptey drove towards Cantonments roundabout. But while approaching the said roundabout, they saw the plaintiff and Sadiku walking near Aquinas Secondary School. On seeing Lamptey and the two constables, the plaintiff and Sadiku ran away into the lane which led to the compound of the said secondary school. Lamptey quickly drove into that lane and chased them with the car. When he caught up with them the plaintiff and Sadiku ran back. Lamptey then

stopped; he and the two constables came out of the car. The two constables gave chase while Lamptey stood and called out to the plaintiff and Sadiku to halt; but they paid no heed. Lamptey at that point fired a shot which he described as "a warning" shot. But still the plaintiff and Sadiku ran on.

What happened next can be described better in Lamptey's own words:

"They were both running in a zigzag fashion. When they reached the edge of the main road, and were about to cross it into the thicket on the opposite side of the road, I aimed at the leg of one of them and kept on waiting for him to run into the course of my aim. As soon as he ran into my aim, I pressed the trigger. I noticed that in coming that way he had slipped at the time I pressed the trigger. He fell

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down. I went to where he had fallen and I noticed that he had sustained injuries on the head instead of on the leg....."

The plaintiff was then lifted into the back seat of Lamptey's car and after collecting the bag which had been thrown away during the chase, Lamptey rushed the plaintiff to the Military Hospital. As for Sadiku, "who was faster than the plaintiff," he crossed the road and while "jumping a very big ditch to enter a thicket" he fell into the ditch. He was arrested and escorted to the Cantonments Police Station.

The second witness for the defendant, Constable Awenbil, narrated how Lamptey arrived at the charge-office of the Cantonments Police Station with a revolver in his hand and requested for men. Awenbil said he and Constable Anansu were asked to go with Lamptey. I should remark that Awenbil described the shooting incident practically in the same terms as Lamptey, except that the evidence of Awenbil made it quite clear that Lamptey, when he came out of the car, never took part in the chase. He only walked for about ten yards and fired "a warning shot" and followed it up with the second shot which hit the head of the plaintiff.

The defendant never disputed that Lamptey caused the injuries complained of in the course of his employment as a police officer of the Republic. So that if Lamptey's conduct was found to be not legally justified, the defendant could properly be held vicariously liable to the plaintiff's claim.

Preliminary objection

Before the hearing commenced, learned counsel for the defendant raised a preliminary objection under Order 25, rr. 2 and 3, contending that the action was statute-barred and should therefore be dismissed. Counsel based himself on paragraph 5 (b) of the amended statement of defence in which four different statutes were pleaded, namely: (i) the State Proceedings Act (Amendment) Decree, 1969 (N.L.C.D. 352), (ii) section 12 of the State Proceedings Act, 1961 (Act 51), (iii) sections 2 (1) (a) and 3 (1) of the Public Officers Act, 1962 (Act 114), and (iv) the Limitation Decree, 1972 (N.R.C.D. 54). It may be observed that the defendant simply stated that the plaintiff's action was "statute-barred by virtue" of those enactments without indicating in what way those enactments affected the action.

In other words, nowhere in the statement of defence, as amended, did the defendant plead the facts which, to him, showed that the action was statute-barred. This is a special defence and it is essentially a point of law. If a party intends to raise a point of law as a preliminary issue to be determined under Order 25 of the High Court (Civil Procedure) Rules, 1954 (L.N. 140A), as learned counsel for the defendant did in the present case, it is not only necessary that the point of law in

question must be clearly indicated in his pleadings as required by Order 19, r. 16 of L.N. 140A, but also the material facts upon which he is to rely to establish that preliminary point of law must be pleaded. A point of law must be raised on the facts as pleaded. Otherwise how can the court, at that stage of the

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proceedings and in the absence of those facts from the pleadings, determine whether or not the said preliminary point of law as raised is well founded. Order 25, r. 2 gives a party the right to raise any point of law by his pleadings. But, in my view, the material facts upon which the said point of law is to be grounded must be clearly pleaded.

However, the plaintiff in his amended reply denied that the action was statute-barred and contended that "at the trial" he would "lead the necessary evidence to show that his action is not statute-barred." The defendant's said motion was dismissed because the so-called preliminary legal point was in the first place misconceived, as I have tried to show above; and secondly, even if it was not, it could not properly be determined without evidence. After the close of the case for the parties, learned counsel for the defendant did not again press his contention. He in fact never addressed the court on the evidence at all, even though he was given opportunity to do so. It was then apparent that learned counsel, in view of the evidence adduced, had conceded to the plaintiff's contention that the action was not statute-barred.

Nevertheless, out of abundance of caution, I will deal specifically with each of the four statutes. The State Proceedings Act (Amendment) Decree, 1969 (N.L.C.D. 352), amended section 1 of the State Proceedings Act, 1961 (Act 51), by abolishing the Attorney-General's fiat. It substituted completely new provisions for that of section 1 of Act 51. Under the N.L.C.D. 352, proceedings can now be brought against the Republic in respect of any cause of action which arose after 1 May 1969, without the Attorney-General's fiat. But such proceedings can be commenced only after the Attorney-General has been served with a written notice of the intended proceedings. The written notice in question must set out the particulars of the claim and of the person who intends to bring the action; and one month must elapse between the date of the service of the written notice and the date on which the action is instituted. In the present case, l find that the plaintiff's solicitor wrote to the Attorney-General on 21 December 1971 giving full particulars of the plaintiff's claim against the Republic; and on 1 January 1972, the said solicitor again wrote to the Attorney-General giving him notice that an action was going to be commenced against the Republic by the plaintiff. All those letters where posted under registered cover. No evidence was led to show that the Attorney-General never received those letters or that those letters were returned to the plaintiff's said solicitor. I hold that all those letters reached the Attorney-General. The action was instituted on 20 April 1972, more than three months after the Attorney-General had received the second letter from the plaintiff's solicitor. I am therefore satisfied that the statutory requirements of the N.L.C.D. 352 were strictly complied with before the writ of summons herein was issued.

I do not really understand why the Limitation Decree, 1972 (N.R.C.D. 54), was pleaded. Because the said Decree, even though it was published in 1972, did not take effect until 1 January 1973, and it applies only to causes of action which arose after that date, The cause of action in the

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case herein arose on 2 October 1971 when the Decree had not yet come into operation. Thus the Decree cannot apply to this case.

The third statute was the Public Officers Act, 1962 (Act 114), ss. 2 (1) (a) and 3 (1). These sections provided that any action against a public officer, like Lamptey, should be commenced within three

months of the act or commission complained of, otherwise it would be statute-barred; and any process taken in contravention of the Act "shall be void." The present writ of summons was issued on 20 April 1972, more than six mouths after the alleged assault and battery had taken place. However, in the case herein it was the Republic, represented by the Attorney-General, that was sued and not Lamptey, and since the Republic does not fall within the term "public officer" the limitation of three months in favour of a public officer cannot be enjoyed by the Republic; that is, by the defendant. So therefore sections 2 (1) (a) and 3 (1) of Act 114 are inapplicable: see Buobuh v. Minister of Interior [1973] 2 G.L.R. 304, C.A. It may be noted that paragraphs (a) and (b) of section 2 (1) of the Public Officers Act, 1962 (Act 114), have, since 1 January 1973, been repealed by section 35 (1) of the Limitation Decree, 1972 (N.L.C.D. 54).

The fourth and the last statute pleaded was section 12 of the State Proceedings Act, 1961 (Act 51), which provides that documents required to be served on the Republic in connection with civil proceedings shall be delivered at the office of the Attorney-General or to any officer "specified in that behalf under the law for the time being in force." There is no evidence that papers or documents which were intended to be served on the Republic in this case were never delivered at the office of the Attorney-General. On the contrary, l find that all the relevant documents and processes in the case, intended to be served on the Republic, were properly delivered at the defendant's office. In the result, l am of the opinion that the Plaintiff's action was never barred by any of those four statutes.

Findings

I will now advert to the evidence. The main issues agreed upon were Whether the plaintiff and his friend Sadiku attacked Lamptey when they visited Lamptey's bungalow and "dipped their hands" into Lamptey's pocket; whether in the bungalow they threatened a nephew of Lamptey with any object; whether Lamptey aimed the gun at the leg and not at the head of the plaintiff; and finally whether Lamptey was justified in shooting at the plaintiff's head.

The claim is based on assault and battery. It is common place that in order to found an action in assault and battery there must have been a direct and intentional application of physical force to the person of the plaintiff by the defendant, such as a blow inflicted with the hand or with a weapon or some other object. In Letang v. Cooper [1964] 3 W.L.R. 573, C.A. at p. 577, Lord Denning M.R. said:

"If one man intentionally applies force directly to another, the plaintiff has a cause of action in assault and battery, or, if you so please to describe it, in trespass to the person. The least touching of another

in anger is a battery, per Holt C.J. in Cole v. Turner (1704) 6 Mod. 149."

In the present case, how Lamptey drove his car across the road when he saw the plaintiff and Sadiku near Aquinas Secondary School leaves a lot to be desired. What l think happened was that he drove the car towards them and pulled up too close to them and hailed them to halt in a very hostile and intimidating manner. He, at the same time, pointed the loaded revolver at them. I find that when the plaintiff and Sadiku did not obey him, he chased them about with his car. He was not in his police uniform and there was no evidence that the two constables with him were also in their uniforms to indicate to the plaintiff and Sadiku that they were police officers. Indeed, there was no evidence that when Lamptey stopped near the plaintiff and Sadiku, or at any time before the shooting, either Lamptey, or any of the two constables with him, made the plaintiff and Sadiku aware that they were police officers who were intending to effect their arrest. The plaintiff and Sadiku, not having committed any offence and not knowing what Lamptey and his two companions were about,

naturally thought that they were being unlawfully attacked and got frightened. They therefore quite sensibly, in my view, took to their heels to avoid any physical impact. To point a loaded revolver at another in such a hostile manner and within shooting distance, as in the present case, and which conduct puts that other person in reasonable fear or apprehension of an immediate battery constitutes an assault: see Osborn v. Veitch (1858) 1 F. & F. 317 at p. 318 per Willes J.

The plaintiff has also been able to prove battery. It is clear to me that Lamptey intentionally applied force to the person of the plaintiff. It was not the situation where Lamptey had wanted or intended to shoot some object or some other person but the bullet went off its course to hit the plaintiff; or that the revolver went off accidentally. On Lamptey's own showing he aimed at the plaintiff and intentionally fired at the plaintiff. Lamptey said he had intended to shoot the plaintiff's leg and not the head. But I do not believe him. He aimed at the plaintiff's head and shot the head. In any case, he intended to inflict injury to the body of the plaintiff and the head which is part of the body was hit. In the circumstances, l find that Lamptey committed both assault and battery on the plaintiff.

The defence of Lamptey was manifestly that of justification. He contended by his pleadings and by his evidence that the plaintiff and Sadiku were his assailants and he suspected that they had stolen the kente cloth, and it was in the course of arresting them as a police officer that the injuries were inflicted; and so he could not be held liable. The common law principle is that a police officer or constable has a right to arrest, without warrant, any person whom he reasonably suspects of having committed a felony, although no crime has in fact been committed. see Christie v. Leachinsky [1947] A.C. 573 at p. 596, H.L per Lord Du Parcq. However, there is a very important overriding qualification attached to this common law power of the police, namely, it must be exercised reasonably. This places a duty on the police officer to satisfy himself that

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there are reasonable grounds for the suspicion of the guilt and the reasonable grounds must exist at the time of the arrest and not after the arrest: see Dumbell v. Roberts [1944] 1 All E.R. 326, C.A. At p. 329, Scott L.J. said:

"The power possessed by constables to arrest without warrant, whether at common law for suspicion of felony, or under statutes for suspicion of various misdemeanours, provided always they have reasonable grounds for their suspicion, is a valuable protection to the community; but the power may easily be abused and become a danger to the community instead of a protection. The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt."

(The emphasis is mine.)

The case of Shaaban Bin Hussien v. Chong Fook Kam [1969] 3 All E.R. 1626, P.C. does not only emphasize but also demonstrates in a striking manner the importance of the existence of a reasonable suspicion at the time the arrest is contemplated. The defendants in that case were two policemen of the Government of Malaysia. An occupant of a car was killed and another injured when the windscreen of the car was smashed by a piece of timber which had fallen from the trailer of a lorry which was passing in the opposite direction to that in which the car was travelling. The lorry did not stop. The next day the two policemen found the plaintiffs - a driver and an attendant of a lorry which the policemen believed was the one involved in the accident. They arrested the plaintiffs under section 23 (1) (a) of the Criminal Procedure Code, 1927 (Laws of the Federated Malay States, Rev. 1934, C. 6), "on reasonable suspicion of being concerned, inter alia, in an offence of reckless or dangerous driving causing death." The plaintiffs were later released after the police had found that there was insufficient evidence to proceed against them. The plaintiffs then

sued for false imprisonment. On the facts of the case, the Privy Council held, among other things, that the policemen did not have a reasonable suspicion at the time of the arrest which was therefore premature, though they did have a reasonable suspicion a few hours later. Thus they were liable in damages but as the finding of the Privy Council reduced the period of false imprisonment to the few hours during which the police did not have reasonable suspicion, this might be reflected in the award of damages.

It must also be borne in mind that the burden of proving that a reasonable suspicion existed at the time of the arrest, lies on the police officer. So in the case herein it was for Lamptey to establish that he had reasonable grounds, at the time of the shooting, to suspect that the plaintiff had committed the criminal offence of stealing.

After a thorough examination of the evidence, l have come to the conclusion that Lamptey's story that he was attacked in the bungalow by

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the plaintiff and Sadiku was not true. I find that when the plaintiff and Sadiku got to the bungalow they never went to Lamptey's hall at all. Lamptey rather came out and met them at the door at the rear of the bungalow. It was at the entrance of the corridor or verandah which led to the hall that the plaintiff and Sadiku explained to Lamptey their mission for coming to the bungalow. They showed Lamptey the kente cloth they wanted to sell. I am convinced that Lamptey did not buy the cloth because he felt that the cloth, being an old one, was too dear for the price the plaintiff wanted to sell. There was no nephew of Lamptey who was sleeping in a room in the bungalow at the material time. The only person in the bungalow at that time was on the compound of the bungalow and was near the garage. The defendant did not see it fit to call the so-called nephew to testify. As I have already said, there was never any such person who witnessed an attack on Lamptey.

In the amended statement of defence paragraph (11) it was averred as follows: "The plaintiff and the other person thereupon pounced upon and struggled with the said Chief Superintendent [Mr. Lamptey] while one of them dipped his hands into and searched his pockets as the other held him firmly." (The emphasis is mine.) In his evidence Lamptey significantly changed this story. He said his "pocket" was just "tapped" and no hand was "dipped into his pockets," neither were those pockets "searched." Sadiku is a lanky boy of about five feet tall. He seems to be of a quiet disposition and in fact does not appear to be a strong boy. The plaintiff did not attend court during the hearing because of his physical incapacity. But there was no evidence that the plaintiff is a bulky type of person. On the other hand, Lamptey is tough and well-built and looks very strong. So that with his training and experience as a police officer, Lamptey could easily have given those two boys a thorough beating in the bungalow if the boys had dared to touch him.

I further find that after the boys had left the bungalow Lamptey sent the person whom the boys had met near the garage to call them back to the bungalow, but the boys refused to return and treated Lamptey's message to return with contempt. It was at that moment that Lamptey, as a chief superintendent of police, felt that the boys had been disrespectful and rude to him. Lamptey became annoyed and decided, surprisingly, to teach the boys "where power lies." I think he behaved like a big bully and abused his position as a police officer. The disrespect or the rudeness which the boys might have shown to him could not constitute an assault on him. A person who is rude cannot be termed an assailant nor his rudeness an assault. In his anger Lamptey just picked his service revolver and dashed to the Cantonments Police Station where he asked for the assistance of policemen.

Lamptey went to that police station on two occasions that afternoon. The first was immediately after the plaintiff and Sadiku had left the bungalow; and his second visit was after the shooting incident.

Under cross-examination Lamptey said he told the officer who was in charge of the charge-office at the material time about everything that took place at the bungalow between him on one hand and the plaintiff and Sadiku on

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the other and the same was entered in the station diary exhibit A. Yet complaints of a "struggle over the kente cloth," an attack on him, an attempt to pick his pocket, the pointing of a weapon at his nephew and damage to his chair as a result of the "struggle" were all significantly and conspicuously absent from the station diary. These matters were supposed to be fresh in Lamptey's mind at the time he went to the said police station, and why he never mentioned them to the officer in the charge-office for the same to be entered in the station diary beats my imagination. When Lamptey was hard pressed he said he rather informed Awenbil and Anansu about the bungalow episode on their way towards the Cantonments roundabout. In his re-examination Lamptey said: "I did not tell anyone at the police station about what the boys did to me in the bungalow because there was no senior police officer around. I simply asked for two policemen to accompany me." (The emphasis is mine.) In this piece of evidence, Lamptey clearly confessed that after all he never told anybody in the police station, even the officer-in-charge of the charge-office at the time, anything about the alleged attack on him. Why then did he earlier on in his evidence positively state that he told the officer at the charge-office everything that happened in the hall of his bungalow? If Lamptey's intention was to reveal the attack on his life only to "senior police officers" why then did he inform Awenbil and Anansu about it since these persons were not senior officers but very junior constables? Obviously, Lamptey could not be a truthful witness. He knew himself that he was telling a lie when he said he was attacked and assaulted in the bungalow by those two boys. I was really surprised at the way he invented the story of the "struggle" and "attack" on him, especially because he is an officer of a very high rank in the Police Service.

As for the kente cloth, l believe the evidence of Sadiku that when Lamptey questioned them about it, they told Lamptey that the cloth was given to the plaintiff by the plaintiff's father. With this explanation, Lamptey never made any attempt whatsoever to snatch the cloth from the plaintiff or Sadiku and no struggle, as l have found, took place over the kente cloth. I am therefore of the view that at the time Lamptey left his bungalow for the Cantonments Police Station he knew very well that there did not exist a state of circumstances which should reasonably lead him, or any ordinary prudent and cautious man placed in his position, to suspect that the kente cloth was or could be stolen property, or that the plaintiff and Sadiku were or could be criminals.

Indeed when Lamptey set out from the Cantonments Police Station with the two constables to go after the plaintiff and Sadiku, Lamptey knew that no reasonable grounds existed for thinking or believing that the two boys were thieves. So that right from the time Lamptey left his bungalow up to the time he fired at the plaintiff, Lamptey was perfectly aware that he was engaged in an unlawful expedition. He knew he had embarked upon effecting an unlawful arrest under the colour of his office.

Assuming for the purpose of argument that Lamptey genuinely believed that the boys were thieves and therefore wanted to arrest them, the fact

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still remained that it was not right and reasonable, having regard to the circumstances of the case, to use a revolver in the way he did. He intentionally and, indeed, wilfully used excessive force. A police officer is not justified in shooting or in beating up any person merely because he wants to make an arrest. For the police officer to go to that extreme there must have existed a very dangerous

situation created by the person intended to be arrested. When the boys were first sighted at Aquinas Secondary School and before Lamptey scared them with his revolver, the boys were not running. They were walking and conversing and Lamptey, Awenbil and Constable Anansu could easily have arrested them without splitting a hair. It is even difficult to understand why Lamptey should have thought of shooting the boys when the two constables were still chasing them and had not given up the hope of apprehending them. Lamptey said the boys were running into "thickets." What Lamptey described as "thickets" were the hedges around Aquinas Secondary School. The whole area is built up and the scene is quite close to the Cantonments Police Station. Pedestrians and vehicles were "passing and re-passing" at the time of the shooting, which was about 5.00 p.m. The scene was described by Constable Awenbil as follows:

"At the time of the shooting incident there was heavy traffic on the main Cantonments Road. There were also pedestrians who were at the time passing and re-passing. Mr. Lamptey fired both shots while standing at the entrance of Aquinas Secondary School. The plaintiff was shot on the same side of the road as Aquinas Secondary School."

It can be seen from the passage just quoted above that Lamptey could have solicited the assistance of any of the many civilians around if he thought the three of them could not effect the arrest. Or he could have gone back to the Cantonments Police Station, which was only a few yards from the scene, to collect more policemen. Or he could have blown his whistle and one blast of it could have brought a host of policemen to the scene. What was more, the boys never showed any violence towards Lamptey or any of the two constables with him. Lamptey confessed that at the scene where he purported to effect the so-called arrest, he never found any offensive weapon or any object like a weapon on the boys. Both Lamptey and Awenbil admitted that the only things the boys had before and after the shooting were the kente cloth and the bag in which the cloth was kept. That is to say, the boys were not armed and there was nothing to show that their escape would have constituted a danger to the public; and after all the value of the alleged stolen property, according to Lamptey himself, was only ¢30.00. I think to shoot down a person in such a savage manner and in the circumstances such as this, under the guise of effecting that person's arrest, is not only unreasonable but is also quite out of proportion of the occasion. The exigency of the situation did not at all warrant any shooting. On the evidence, I hold that Lamptey did not have any reasonable or probable grounds or cause for suspecting that the plaintiff and Sadiku had stolen the kente cloth or had committed any criminal offence. The purported arrest and the

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shooting were, in the circumstances, unlawful. There was therefore no justification whatsoever for the assault and battery which Lamptey committed on the plaintiff. Consequently, the defendant ought to be condemned in damages.

Assessment of damages

The nature of the injuries sustained by the plaintiff and the plaintiff's state of health, as at present, were vividly described by the plaintiff's third witness, Mr. Mustaffa. Mr. Mustaffa is a neuro-surgeon attached to the Korle Bu Teaching Hospital. After the shooting the plaintiff was first sent to the Military Hospital. He was admitted unconscious and was having epileptic attacks involving the whole body. He remained in that state for about one week.

Ten days later, on 12 October 1971, he was transferred to Korle Bu Teaching Hospital where he came under the care of Mr. Mustaffa. Mr. Mustaffa said when he first saw the plaintiff, he had gained consciousness but his speech was slurred and he could not name objects. After examination, Mr. Mustaffa found that the plaintiff had sustained, on the left and the right sides of the head, entrance and exit missile wounds. From the exit missile wound dead brain was then coming out and

there was blood clot under the skin of the head. The plaintiff had also sustained "compound comminuted depressed fracture" at the right parietal bone and "avulsion of the left parietal bone." He was then paralysed on the left side due to the brain injury. He was spastic in the right lower limb and was weak in the right upper limb and his toes were becoming numbed. The plaintiff was given "deconjections and antibiotics" and was eventually operated upon. I will here state what was done to the plaintiff during the said operation in the language of Mr. Mustaffa:

"On the following day 13 October 1971, I operated upon his head. On the right side of his head l removed bone fragments and removed and washed away dead brain tissue, and put silver clips in the brain to stop the bleeding. I removed on the right side of the head blood clot which had collected under the skin. On the left side of the head l removed dead brain tissue. I also removed from the same left side bone fragments. The tract was lower on the right side and more anterior on the left side. I closed the wounds. He was given blood transfusion during the operation. Whilst in the hospital he had several fits involving mainly the left side of the body."

The plaintiff was discharged from the hospital on 30 November 1971, after a period of nearly two months. But he has, up to date, been attending the Neuro-SurgicaI Clinic at the Korle Bu Teaching Hospital as an out-patient. It is astonishing that the plaintiff is still alive. Due to the efficiency of the surgeon the plaintiff seems to have improved considerably but it appears his recovery can never be complete. His permanent disability is enormous - 100 per cent. I find that as a result of the injuries, part of the plaintiff's intellectual centre has been lost forever. Before the injuries he was not an epileptic, but now he is going to be troubled with epileptic fits

and will have to be under anti-epileptic drug for the rest of his life. Henceforth, he cannot walk without support. Mr. Mustafa said:

"He has recovered from the paralysis on the left side of the body, but he is weak on that side. So that he now walks with a stick. He has to support himself with a stick. His recovery will never be complete because loss of some part of the brain is total and permanent and once his nervous tissue is damaged it can never regenerate. There is now impairment of intellectual and physical activity. He would never obtain intellectual heights which he would otherwise have obtained if he had not suffered the brain damage ... This particular patient has suffered injuries of such magnitude which to my mind qualifies him for the award of 100 per cent of permanent disability."

Mr. Mustaffa has had twelve years' experience in neuro-surgery and there was no other medical evidence to rebut his findings and I accept them. The father's evidence further showed that the plaintiff cannot think properly and cannot concentrate and there is no hope that he can ever continue his education. The father has been bathing the plaintiff because the plaintiff cannot do it himself. From all indications the plaintiff will need constant attendance and will depend on others, probably for the rest of his life. Also his life expectancy has greatly been reduced.

The plaintiff was in form two in a secondary school at the time of the incident; and there was no evidence that he was not a clever boy. The possibility therefore was that the plaintiff could have gone through his ordinary and advanced levels successfully and proceeded on to a university or any other institution of high learning. He has completely lost that opportunity. He has now been placed in a situation where he cannot fend for himself but will have to depend upon others for his physical, financial and material needs, probably for the rest of his life on this earth.

The pain is of a continuing nature and he may have to put up with it for the rest of his existence. I therefore find that the pain element is very great. I think the elements of suffering and loss of amenities in this case cannot clearly be distinguished. Because it is possible, for example, to

contend that the plaintiff's knowledge of complete physical dependence on others for the rest of his life, or his knowledge of loss of opportunity to pursue his education is suffering rather than loss of amenity; or it can equally be well argued that such a knowledge amounted to loss of amenity. I do not therefore intend to separate these elements but will take them together. Consequently, l will award a global figure for pain and suffering, loss of amenity and loss of expectation of life. Having regard to all the matters stated (supra) and to the fact that the plaintiff's permanent disability is estimated at 100 per cent, l think an amount of ¢24,000.00 should be reasonable and adequate compensation.

Accordingly, I enter judgment for the plaintiff and against the defendant for the sum of ¢24,000.00 with costs assessed at ¢300.00.

Judgment for the plaintiff.