

BRITISH VIRGIN ISLANDS

COURT OF APPEAL

CIVIL APPEAL NO. 4 OF 2001

BETWEEN:

ANDREW THOMAS BELL

Appellant

and

**THE COMMISSIONER OF POLICE
OF THE BRITISH VIRGIN ISLANDS**

Respondent

Before:

The Hon. Mr. Albert Redhead
The Hon. Mr. Adrian Saunders
The Hon. Mr. Brian Alleyne, SC

Justice of Appeal [Ag.]
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Gerard Farara Q.C. for the Appellant, Miss Tana'ania Small-Davis with him
Mr. Arden Warner and Miss Arlyn Gordon for the Respondent

2004: January 12;
January 26.

JUDGMENT

- [1] **REDHEAD J.A. [AG.]:** The appellant was a Police Officer in the service of the British Virgin Islands Police Force. He was made head of the British Virgin Islands Police Force Drug Squad.
- [2] The appellant alleged that on or about 13th May 1994 he was required as part of his training, to take part in firearm training with a variety of powerful weapons at Deadman's Chest. He claims that during the exercise he suffered injury including irreparable ear damage which severely affected his hearing and forced him into retirement permanently from the police force in the U.K., to which he returned.

[3] On 30th September 1995 the Appellant filed a statement of claim in which he alleged that in spite of requests the respondent failed to provide him with any protective equipment for his ears during the firearm training exercise. As a result he suffered irreparable ear damage. This severely affected his hearing and forced him into retirement.

[4] The appellant claimed among other things:

- (1) loss of salary as a police officer up to 29th September 1997 \$28,123.00 and continuing at the rate of \$28,643.12 per annum
- (2) reduced pension entitlement
- (3) medical fees.

He also claimed Damages, Costs and Interest.

[5] In his particulars of negligence the appellant alleged that the respondents, their servants or agents:-

- (1) Failed to take any adequate precautions for his safety while he was engaged upon (sic) his employment.
- (2) Exposed him to a risk of damage or injury which they knew or ought to have known
- (3) Failed to provide him with basic safety equipment
- (4) Failed to provide and maintain a safe system of work.

[6] On 28th October 1999 the respondent filed an amended defence. By that defence the respondent pleaded –

- (2) It is admitted that the plaintiff [appellant] took part in firearms training on the date and at the location alleged in paragraph 2 of the statement of claim. It is denied that the plaintiff [appellant] was required to take part in this training and it is denied that a variety of powerful weapons were used as alleged.
- (3) It is denied that the Plaintiff [appellant] requested protective equipment as alleged or at all and it is denied that the defendant [respondent] failed to provide such equipment as alleged or at all.
- (4) It is denied that the plaintiff [appellant] suffered injury loss and damage as alleged

(5) If, which is not admitted, the plaintiff [appellant] suffered the alleged or any injury, loss and damage, the same were not caused by the alleged or any negligence of the defendant, his servants or agents but were caused solely or contributed by the negligence of the plaintiff.

[7] In his particulars of negligence the respondent alleged that the appellant who was a senior police officer knew or ought to have known of any risk of damage or injury. He failed to make use of the protective equipment in the form of earmuffs, available to him. And the appellant who was an experienced police officer having undergone firearms training on previous occasions. By reason of these premises the appellant knew or ought to have known of any risk of injury to his ears and hearing and by participating in the firearms exercise he impliedly consented to run the risk of injury.

[8] The respondent pleaded in the alternative:

“ this action was not instituted within six months next after the ceasing of any continuance of injury or damage.”

[9] When the matter came before the High Court in April 2000 the respondent made an application pursuant to a notice under the summons for directions for a preliminary point of law to be tried before the trial of the substantive action. The preliminary point to be tried was:

“whether the action is barred by section 2 (a) of the Public Authorities Protection Act Chapter 62 of the Laws of the British Virgin Islands (Revised Edition 1991) not having been instituted within six months next after the act, neglect or default complained of nor within six months next after the ceasing of any continuance of injury or damage.”

[10] It was ordered that all further proceedings be stayed pending the determination of the preliminary point of law.

[11] I reproduce hereunder the relevant provisions of the Public Authorities Protection Act:

“Section 2: Where any action, prosecution or other proceedings is commenced against any person for any act done in pursuance or execution or intended execution of any Act or Ordinance, or of any public duty or authority or of any alleged neglect or default in the execution of any such act, duty or authority, the following provisions shall have effect:-

- (a) the action, prosecution or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or in the case of a continuance of injury or damage, within six months next after the ceasing thereof ...”

[12] The learned trial Judge in determining the issue, posed and answered the following question:-

“Whether, by requiring the Plaintiff [appellant] to attend and participate in a firearms training exercise, the Defendant was performing an act in pursuance or execution or intended execution of the duties imposed by the Police Act or any public duty or authority and whether the act of negligence complained of in the statement of claim was a neglect or default in the execution of the Commissioner’s duties under the Police Act.”

[13] I make one observation that the question posed is premised on the wrong factual basis, when the learned trial Judge said that:

“by requiring the plaintiff to attend and participate in a firearms training exercise, the Defendant was performing an act in pursuance or execution or intended execution of the duties imposed by the Police Act.”

[14] The respondent in his defence denied that the appellant was required to take part in the training. If the appellant was not required to take part in the training exercise then the respondent cannot, in the circumstances, claim that he was acting by virtue of the Police Act or any other authority.

[15] The learned trial Judge found that the Commissioner is charged with ensuring that the Police Officers under his command are suitably equipped as well as trained to carry out the objects of the Force. He stated that the use of firearms is contemplated by section 10(1) of the Police Act and according to the learned trial Judge it is automatic that police officers must be trained in the proper and effective use of such arms.

[16] The learned trial Judge also found that failure to provide such training would amount to an abrogation of the objects set out in section 4 of the Police Act both from the point of view of the public’s safety and security as well as that of the individual police officer.

[17] The learned trial Judge then held that the Defendant in the capacity constituted by section 3 of the Police Act, acted in pursuance of or execution of the duty imposed upon the office

by the said Police Act. Accordingly the present proceedings ran afoul of section 2(a) of the Act having been commenced more than six months after the alleged act of negligence complained of. He then declared that the action was statute barred and ordered that the claim be struck out.

[18] I now refer to the relevant sections of the Police Act:

S. 4(1) The objects of the Force are:

- (a) the maintenance of law and order
- (b) the preservation of Peace
- (c) the defence of the territory from external aggression or threat thereof
- (d) the protection of life and property
- (e) the prevention and detection of crime; and
- (f) the enforcement of all laws that it is required to enforce."

S. 10(1) Members of the Force shall wear such uniform as the Governor may direct and any such uniform and arms or accoutrements supplied therewith shall remain the property of the crown."

[19] I agree with the learned trial Judge that section 10(1) contemplates the use of firearms. I go further and say following from that, that firearms may be issued to police officers. But there is nothing in the Police Act and nothing has been drawn to our attention therein which mandates the Commissioner of Police to issue arms to Police Officers and to train them in the use of such arms.

[20] Could it then be said in these circumstances when the appellant's hearing was made defective by the alleged unprotected use of powerful weapons, that it was the result of an act done in pursuance or execution or intended execution of any Act or Ordinance or of any public duty or authority or of any alleged neglect or default in the execution of any such duty or authority? I think not.

[21] In **Bradford Corporation v Myers**¹ the appellants, a municipal corporation, were authorized by Act of Parliament to carry on the undertaking of a gas company and were bound to supply gas to the inhabitants of the district and they were also empowered to sell the coke produced in the manufacture of the gas. The corporation contracted to sell and

¹ 1916 A.C. 242

deliver a ton of coke to the respondent, and by negligence of their agent the coke was shot through the respondent's shop window. More than six months afterwards the respondents commenced an action in negligence against the corporation. The Corporation pleaded S.1 of the Public Authorities Act 1893 as a bar to the action.

[22] It was held that the act complained of was not an act done in direct execution of a statute or in discharge of a public duty or the exercise of a public authority and there the Public Authorities Protection Act, 1893 afforded no defence to the action.

[23] At page 247 of the judgment Lord Buckmaster L.C. opined:-

“... It is not because the act out of which an action arises is within the power that a public authority enjoys the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority. I regard these latter words as meaning a duty owed to all the public alike or an authority exercised impartially with regard to all the public. It assumes that there are duties which are non public, and that in the exercise or discharge of such duties or authorities this protection does not apply.”

[24] In the instant case it cannot be said by any stretch of the imagination that a statutory duty was placed on the Commissioner of Police to require his police officers to undergo training in firearms. Neither can it be said that he was discharging a public duty or exercising a public authority to require police officers to undergo training in firearms.

[25] What is of vital importance in this appeal is that the respondent in his defence denied that the appellant was required to take part in the firearms training exercise. How then can he seek to rely on a statutory provision?

[26] The action brought by the appellant is to my mind a matter, which involves master and servant. The appellant alleges in his pleadings that the respondent failed to provide him with necessary safety equipment to protect him from injuries. As a result, he suffered injuries. Having regard to the appellant's claim, no one but the appellant is entitled to bring this action. In any event, the duties of the Commissioner as they relate to the appellant do not encompass a public authority and therefore the Public Protection Act is inapplicable.

[27] The appeal is allowed. The case is remitted to the High Court for its determination. Costs to the appellant agreed in the sum of \$5000.00.

Albert Redhead
Justice of Appeal [Ag.]

I concur.

Adrian Saunders
Justice of Appeal

I concur.

Brian Alleyne, SC
Justice of Appeal