1963
Sept. 23-25
1964
Aug. 10

BETWEEN:

MARCEL TIMM .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Crown Liability Act, S. of C. 1952-53, c. 30, s. 3(1)(a) and 4(2)—Negligence of prison authorities—Duty owed to prison inmates—Inmate injured through unforeseeable independent act of violence of fellow prisoner.

The suppliant claims compensation for personal injuries sustained by him when, as an inmate of the Federal Penitentiary at Kingston, Ontario, he fell from an open truck to the roadway while being transported under guard as one of a work party, from the penitentiary to a nearby quarry. The suppliant alleged that the servants of the Crown were negligent in requiring him to ride on the truck in circumstances which they should have realized to have been dangerous, in failing to provide adequate supervision during the journey to the quarry and in failing to deny access to a scrap pile to the prisoner, Mallette, from which he obtained an iron bar with which he struck the suppliant, thereby causing him to fall from the truck.

The evidence established that the truck was being driven carefully and at a moderate rate of speed when the suppliant fell out and that a blow delivered by the prisoner, Mallette, to the suppliant's head with an iron bar was the cause of his fall.

Held: That the duty the prison authorities owe to the suppliant is to take reasonable care for his safety as a person in their custody and it is only if the prison authorities failed to do so that the Crown may be held liable.

2. That while the prisoner, Mallette, had a long record of convictions for crimes, including robbery with violence, his conduct in the penitentiary was not such that the prison authorities would have had any reason to believe that he had extraordinarily violent propensities over and

above those of ordinary prison inmates, so that there was no reason for them to segregate him or to subject him to constant rigorous observation or special precautions and it was reasonable for him to be included in a working party under routine conditions and supervision. There was likewise no reason for the authorities to suspect that Mallette would arm himself to perpetrate an act of violence.

3. That the Petition is dismissed.

PETITION OF RIGHT by a convict for compensation for injuries sustained while in prison.

The action was tried before the Honourable Mr. Justice Cattanach at Toronto.

Eric E. Scott for suppliant.

J. D. Lambert for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CATTANACH J. now (August 10, 1964) delivered the following judgment:

In this petition the suppliant, who was an inmate of a Federal Penitentiary at Kingston, Ontario, serving a sentence for an offence for which he had been convicted, sustained personal injuries, under circumstances to be related, for which he seeks compensation.

On September 26, 1961 the suppliant, in the company of other inmates, was ordered to board a truck to be transported some distance to work in a quarry beyond the prison walls. The truck was one ordinarily used in the work at the quarry, the deck of which was open, surrounded by metal sides approximately 18 inches in height and was ten feet in length by six feet in width, but contained no seating accommodation other than that in the cab for the driver. There were ten prisoners in the working party in addition to the driver and Mr. Corrigan, a guard. The cab was occupied by the driver and a prisoner who was to act as a relief driver so that there were nine prisoners and guard riding in the back of the truck. There were no designated positions in which the inmates were to ride, but they were allowed to select any position they wished. The guard stationed himself in a standing position immediately behind the cab as did two of the inmates. The remaining seven persons comprising the working gang distributed themselves as best suited their individual wishes, the majority of whom appeared to have stood upright in the body of the truck.

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The suppliant sat on the left side of the truck with his feet resting on the floor of the deck.

The first allegation of negligence put forward by the suppliant was that he was required to ride on the truck in circumstances which the servants of the Crown should have realized to have been dangerous. There was no allegation of careless driving. The truck was driven carefully and at a moderate rate of speed. A short distance along a road outside the confines of the prison, the driver came to a complete stop at a crossroad. When it was clear to proceed the driver shifted into forward gear and drove across the intersecting road. When the truck was some two hundred yards beyond that road the suppliant fell from the truck.

The cause of the suppliant's fall was the subject of conjecture. The suppliant testified that he received a jolt, caused by a movement of the truck, by reason of which he fell to the paved roadway thereby receiving the injuries of which he complains.

However, the respondent called as a witness another prisoner, Mallette who was also a member of the working gang and a passenger in the back of the truck who testified, under the protection of the *Canada Evidence Act*, that he struck the suppliant a severe blow on the head with a length of solid iron bar which he had taken for this purpose from a pile of scrap iron and which he had secreted in the waist of his trousers until an opportunity presented itself for him to strike the suppliant with this iron bar.

The suppliant denied being struck by Mallette and persisted in his explanation that his fall was caused by a jolting motion of the truck.

Mallette stated that about a week previously the suppliant threatened to get him and that being activated by motives of self-preservation he decided to get the suppliant first. The suppliant denied having so threatened Mallette and professed to be unaware of any animosity between them. Mallette also stated that during the ride he bided his time until he could make his way to close proximity to the suppliant, with some prisoners between them and the guard and while the guard's attention was directed elsewhere he delivered the blow to the suppliant's head. He apologized for having struck the suppliant on the head thereby injuring him because his intention had been to merely maim the suppliant by breaking his collar bone to which area he had

aimed his blow. After the blow was delivered Mallette promptly disposed of the iron bar by throwing it away.

I accept Mallette's version of the incident as being the correct one for a number of reasons. It was not to Mallette's interest to say he had struck the suppliant if he had not done so. He did not come forward with his story voluntarily and forthwith, but only after some investigation of the incident and after he had been permitted to obtain advice from his solicitor. On the other hand, the suppliant may have considered it to have been in his interest to disguise the fact that he had been struck by Mallette.

Further, if Mallette struck the suppliant he would know, whereas, the blow being delivered unexpectedly and by stealth, the suppliant would not know what struck him. In all likelihood he would have been rendered unconscious thereby causing him to topple from the truck.

There were two lacerations in the suppliant's scalp about an inch and one half apart, one more severe than the other and which required eighteen stitches to close. The more severe injury was consistent with being caused by striking with a weapon such as Mallette said he possessed and the second laceration was consistent with the suppliant's head striking the paved roadway.

The truck was being driven carefully. It had come to a complete stop at an intersecting roadway and had been put in motion again. The suppliant fell from the truck when it was a short distance beyond the intersection at a time when the truck would be moving slowly over a smooth surface. There was evidence that no one had fallen from the truck previously. To me, it is inconceivable that, with the truck being so driven, there would have been any movement of sufficient violence to cause the suppliant to lose his balance and fall. Therefore, it is more logical to infer that the suppliant would not have fallen had he not been struck a blow by Mallette.

Further, I had the opportunity of observing the witness Mallette. He impressed me as being the sort of person who, having been threatened or who thought he had been threatened, would instinctively resort to the course of action which I conclude and find he did in this instance.

Having so found, it is unnecessary to consider the first allegation of negligence, namely, that the servants of the

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Crown were negligent in causing the suppliant to ride on the truck in circumstances that they should have realized were dangerous and the defences put forward to such allegation.

The respondent, upon becoming aware of the substance of the testimony to be given by Mallette, applied for and obtained leave to amend the statement of defence by pleading the unforeseeable independent act of Mallette as being the cause of the suppliant's injury.

At trial, I allowed the suppliant to amend his petition to include an allegation of negligence in that the servants of the Crown did not provide adequate supervision during the journey to the quarry and failed to preclude access to the scrap pile from which Mallette obtained the iron bar with which he struck the suppliant.

Section 3(1)(*a*) of the *Crown Liability Act* S.C. 1952-53, c. 30 provides as follows:

> 3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable
>
> (*a*) in respect of a tort committed by a servant of the Crown, . . .

and section 4(2) provides,

> 4. (2) No proceedings lie against the Crown by virtue of paragraph (*a*) of subsection (1) of section 3 in respect of any act or omission of a servant of the Crown unless the act or omission would apart from the provisions of this Act have given risen to a cause of action in tort against that servant or his personal representative.

The liability imposed upon the Crown under this Act is vicarious. *Vide The King v. Anthony and Thompson*[1]. For the Crown to be liable the suppliant must establish that an officer of the penitentiary, acting in the course of his employment, as I find the guard in this instance was acting, did something which a reasonable man in his position would not have done thereby creating a foreseeable risk of harm to an inmate and drew upon himself a personal liability to the suppliant.

The duty that the prison authorities owe to the suppliant is to take reasonable care for his safety as a person in their custody and it is only if the prison employees failed to do so that the Crown may be held liable, *vide Ellis v. Home Office*[2].

While the prisoner, Mallette, had a long record of convictions for crimes, including robbery with violence, his conduct in the penitentiary was not such that the prison

[1] [1946] S.C.R. 569. [2] [1953] 2 All.E.R. 149.

authorities would have had any reason to believe that he had extraordinarily violent propensities over and above those of ordinary prison inmates and, therefore, that he might strike the suppliant. Accordingly there was no reason for the prison authorities to segregate Mallette or to subject him to constant rigorous observation or special precautions and it was reasonable that he should be included in a working party under routine conditions and supervision.

Further, since the prison authorities had no reason to suspect violent conduct on the part of Mallette, it also follows that they would have no reason to suspect that he would arm himself to perpetrate an act of violence.

Therefore, I am unable to find negligence on the part of the Crown's servants in the circumstances outlined.

It follows that the suppliant is not entitled to the relief sought by his Petition of Right herein and the respondent is entitled to costs.

Since I have found the respondent not liable, it is not necessary for me to consider the quantum of damages, but if it were obligatory for me to do so I would have fixed an amount of $2,500 as appropriate compensation.

Judgment accordingly.