In re TAMASESE, A PRISONER

NEW ZEALAND SUPREME COURT (In Bance). Auckland. 1929. 9, 21, February. BLAIR J.

Habeas Corpus - Offence committed in Mandated Territory - Sentence to be served in Territory of Mandatory - Samoa Act, 1921, s. 210 - Validity of Section - Authority of Mandatory State considered.

The Government of the Dominion of New Zealand obtains its mandate in respect of Western Samoa direct from the Council of the League of Nations, and not indirectly or derivatively from His Majesty the King in Council; and, within the limit of subjects and area prescribed by such mandate, it enjoys the same plenary legislative powers as are possessed by the Legislature of a Sovereign State.

By s. 210 of an Act of Parliament of the Dominion of New Zealand intituled the Samoa Act, 1921, it is provided that "Every person sentenced to imprisonment, or committed to prison, for six months or more may, by warrant under the hand of the Administrator and the seal of Samoa, be transferred to some prison in New Zealand named or described in the warrant." One Tamasese, a Native of Samoa, having been sentenced in Samoa to a term of imprisonment for six months, and having been transferred to a prison in New Zealand pursuant to the powers conferred by the above-quoted section, applied for a writ of habeas corpus upon the grounds that the above-quoted section was ultra vires the Dominion Parliament and that his detention in New Zealand was illegal.

HELD (dismissing the application), That the Dominion of New Zealand, as the servant of the Council of the League of Nations, had full power to legislate in the manner indicated in s. 210, and that the order transferring the applicant to a prison in New Zealand was valid.

Tagaloa v. Inspector of Police /1927/ N.Z.L.R. 883 considered and applied.

APPLICATION for habeas corpus.

The prisoner, one Tamasese, a Native of Samoa, had been convicted in Samoa and sentenced to a term of six months' imprisonment. After his sentence had been pronounced, a warrant was issued directing that he be transferred to a prison in New Zealand to serve the balance of his sentence. In proceedings for habeas corpus instituted in a New Zealand Court it was alleged that in so far as the provisions of s. 210 of the Samoa Act, 1921, conflicted with the principles of the Habeas Corpus Acts of the Imperial Parliament they were ultra vires and void.

Hall Skelton for the applicant.
Meredith and Hubble for the gaoler.

Hall Skelton:-

Section 210 of the Samoa Act, 1921, is ultra vires. It conflicts with the principles established by the Habeas Corpus Acts of the Imperial Parliament. Those Acts are in force in Samoa. The authority to legislate for Samoa is derived by New Zealand from His Majesty the King in Council. The King in Council has only a limited legislative power: he cannot by legislation take away the liberties of the subject. What he cannot do himself he cannot delegate to others. The Imperial Parliament could repeal the Habeas Corpus Acts, but the New Zealand Parliament, acting so far as Samoa is concerned under authority from the King, cannot do so: See Broom's Constitutional Law 2nd ed. 50; Tarring, the Law relating to the Colonies p. 3, s. 1.

Meredith:-

New Zealand derives its power to legislate for Samoa from the mandate granted by the League of Nations. The mandatory State has been given the fullest legislative powers. New Zealand when legislating for Samoa is not

bound to apply New Zealand law, nor is the incorporation of English law into Samoan legislation complete or absolute: See Riel v. R. 10 A.C. 675; R. v. Crewe /1910/ 2 K.B. 576; Hodge v. R. 9 A.C. 117. Further powers of legislation were conferred by Order in Council under the Foreign Jurisdiction Act, and it has been decided that these powers are unfettered.

Cur. adv. vult.

BLAIR, J.:-

Lealofi Tamasese was on the 5th December, 1928, at Apia, Samoa, convicted "for that on the 27th day of November, 1928, at Vaimoso, he the said Tamasese did resist and wilfully obstruct Police Constables Moore, Hollis, Taylor, Paramore, and others in the execution of their duty." The certificate under the hand of a Judge of the High Court of Western Samoa and under the seal of that Court then goes on to state, "and on such conviction the said Tamasese was thereupon sentenced with hard labour for the term of six calendar months."

This conviction, it was stated to me, was made under s. 76(c) of the Samoa Act, 1921; but this statement is erroneous, as the conviction was obviously made under s. 7 of the Maintenance of Authority in Native Affairs (No. 2) Ordinance, 1928, a Western Samoan Ordinance. This provides for a fine not exceeding £100, or imprisonment for a term not exceeding one year.

On the 15th December, 1928, a warrant under the hand of the Administrator and the seal of Samoa was duly issued under s. 210(1) of the Samoa Act, 1921, transferring Tamasese to Auckland Prison. Subsection 5 of s. 210 provides that a prisoner so transferred is to be treated as if he had been sentenced in New Zealand for the residue of his original term of imprisonment. By subs. 6 provision is made as to the return to Samoa of any such prisoner on the expiration of his sentence.

Accompanying this warrant was a certificate in terms of s. 210(3). No suggestion has been made by counsel for the applicants against the form of these documents.

The original application comes before this Court on two grounds, the first being that there was no jurisdiction to impose imprisonment on Tamasese, because it was suggested that it was an attempt to enforce payment of a civil debt by means of imprisonment. In order to establish this ground it would be necessary to go behind the warrant and conviction, and (assuming it were possible for this Court so to do) it would be necessary to have before this Court full details of all steps prior to conviction, together with copies of all documents. None of these details have been supplied, and Mr Hall Skelton at the outset of his argument intimated that he did not propose to raise the first point; and he accordingly abandoned it. If after considering the facts anterior to conviction counsel for the applicant considers there is any justification for a further application to this Court based on such facts, it is open for him so to do: Eshugbayi Eleko v. Officer administering Nigeria 139 L.T. 527.

The basis of the present application is that s. 210 of the Samoa Act, 1921, is ultra vires the New Zealand Legislature. Subsection 1 of this section states: "Every person sentenced to imprisonment, or committed to prison, for six months or more may, by warrant under the hand of the Administrator and the seal of Samoa, be transferred to some prison in New Zealand named or described in the warrant."

It was claimed that to require a man to serve his sentence out of Samoa as provided by s. 210 conflicted with the principle of s. 12 of the Habeas Corpus Act, 1679, which Act is by the effect of s. 349 of the Samoa Act, 1921, made applicable to Samoa. Although admitted that the Imperial Parliament could, if it so desired, make the Habeas Corpus Act inapplicable to Samoa, it was contended such was not possible by the New Zealand Parliament, because it derived its power of legislation regarding Samoa not from the Imperial Parliament but from the prerogative powers of the King himself; and

it was further claimed that these prerogative powers were limited in that the King was incapable of depriving any dependency of the Crown of its rights under the Habeas Corpus Act. The contention advanced, therefore, was that, as the King himself could not do this, neither could the New Zealand Legislature, which has as regards Samoa only a derivative right to exercise the King's prerogative.

Before proceeding to discuss the legal aspect of the arguments addressed to the Court it appears to me not unfitting that I should refer to a certain phase of the case somewhat stressed by counsel for the applicant. Tamasese is a man of high rank in Samoa, and it was stated that he has many thousands of adherents who adopt his views and look to him for guidance. It was pressed in argument that when the mandate from the League of Nations was accepted by New Zealand the Samoans expected Samoa to obtain ready-made British institutions and British justice, and that it was instead treated as a country inhabited by savages and administered on this basis. In particular the enactment of s. 210 was pointed out as indicative of treatment meted out only to a nation of savages. This sort of argument may have been a mere indulgence in poetic licence, but Mr Hall Skelton made some point of it, and indicated that the judgment of the Court would have far-reaching effects on the minds of the Samoan followers of Tamasese. It would not befitting for me to attempt any examination of the soundness of the views of Tamasese on one side or the Administration on the other, but as there appears to be some misconception as to New Zealand's powers and duties as the Mandatory of Samoa, and a proper understanding of the ambits of New Zealand's powers and duties is necessary for the decision of this case. I will attempt shortly to indicate what these powers and duties are, with the view of endeavouring to remove what I believe to be certain misconceptions on the subject.

It is necessary first to note that prior to the war and Treaty of Peace Samoa was a German possession and administered by German officials. By the Treaty of Peace Germany renounced - not to Great Britain, but to the Allied Powers - all Germany's rights in Samoa. The Allied Powers in whose favour this renunciation was made have not handed over these rights and powers to Great Britain, but have retained them, and the dominant authority administering Samoa today is the Council of the League of Nations. It was necessary that somebody be appointed by the League of Nations to attend to the details of administering the affairs of Samoa, and accordingly His Britannic Majesty, on behalf of New Zealand, was asked to perform this duty, and agreed to do so through the Government of the Dominion of New Zealand. Thus it is that the Government of New Zealand becomes what may be called the Administrator of Samoa, not on its own behalf or on behalf of Great Britain, but for and on behalf of the League of Nations. The document which imposes this duty on New Zealand is called a mandate. The preamble of this mandate recites that His Britannic Majesty, for and on behalf of the Government of New Zealand, has agreed to accept the mandate and "has undertaken to exercise it on behalf of the League of Nations." Article 2 provides that "the Mandatory shall promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory." The mandate contains other instructions, such, for instance, as forbidding the supply of intoxicants to Natives, and prohibiting the establishment of military training. New Zealand in administering the affairs of Samoa is a mere servant bound to obey the directions of its master the Council of the League of Nations. By Article 6 of the mandate the Mandatory is required to make an annual report to the Council of the League of Nations detailing the measures taken to carry out the obligations undertaken. Thus it will be seen that so far as Samoa is concerned New Zealand is a mere servant or trustee which has undertaken to obey the League of Nations. It follows also that if New Zealand were to fail in its obligations to the Samoan people the League of Nations would no doubt take steps to have appointed another Mandatory who would better fulfil those obligations.

I have not overlooked the point referred to by Mr Hall Skelton that in the preamble of the Samoa Act it is recited that the mandate was conferred "upon His Majesty, to be exercised on his behalf by the Government of the Dominion of New Zealand." A similar recital appears in the mandate itself; but the Full Court in Tagaloa v. Inspector of Police /1927/ N.Z.L.R. 883;

G.L.R. 42, dealing with a contention that the Mandatory under the mandate was His Majesty the King and not New Zealand, said Ibid. 894; 51, "but this in our opinion is not so. The Government of New Zealand was intended to be the Mandatory. That is clear we think from the terms of the mandate; and there is also the fact that New Zealand has been treated by all concerned as the Mandatory, and has reported as such from year to year to the Council of the League, as required by Article 6 of the mandate."

What, then, are the duties of New Zealand as Mandatory of Samoa as laid down by its master the League of Nations? New Zealand is not administering Samoa for New Zealand's benefit. It is required by the mandate to "promote to the utmost the material and moral well-being and social progress of the inhabitants." In order to carry out this trust it is administering the affairs of Samoa in a certain way which it believes is designed to promote the material and moral well-being and social progress of the inhabitants. It may be that Tamasese and his adherents do not agree with the methods adopted by New Zealand, but he will admit that although these methods may not be the methods which he and his adherents advocate and would adopt if the duties under the mandate were in their hands, New Zealand in adopting the course it is adopting does so because it believes its methods to be the best for the attainment of the desired objects. Tamasese and his adherents, one must assume, desire "to promote to the utmost the material and moral well-being and social progress" of Samoa, and their ideal is thus the same as New Zealand's. The point of divergence appears to be as to the best methods to adopt. The position thus arises that Tamasese and his adherents, because of this divergence of opinion, would appear to seek to attain the moral and material well-being and social progress of Samoa by adopting an attitude antagonistic to New Zealand's attempts to attain the same end. It is the Council of the League of Nations which is the judge as to whether the methods adopted for promoting the material and moral well-being and social progress of Samoa are wise or unwise. Tamasese is not the judge of this, and neither is New Zealand.

Mr Hall Skelton submits that s. 210 is ultra vires the New Zealand Legislature. His whole argument is based on an erroneous assumption that His Majesty conferred the mandate on New Zealand. As already mentioned, the Court of Appeal decided in Tagaloa's case /1927/ N.Z.L.R. 883 that the mandate was not given to the King but to New Zealand. As previously explained, the mandate comes from the League of Nations. Mr Hall Skelton's argument postulates that because the mandate reaches New Zealand per medium of His Majesty this mediation of His Majesty derogates from the grant. In other words, his argument means that although the fullest plenary powers are conferred on the Mandatory by the giver of the mandate, yet because His Majesty becomes the nominal recipient on behalf of New Zealand the powers that reach New Zealand have lost some of their potency. If the fullest plenary powers left the League of Nations on their way to New Zealand, but in the process of transition some of these powers did not reach New Zealand, what then happened to them, and where are they now?

I cannot accept such a contention; but even were I inclined so to do I think that it is a necessary inference from Tagaloa's case /1927/ N.Z.L.R. 883 that New Zealand as regards Samoa possesses authority as plenary and ample as the Imperial Parliament. Were I to hold otherwise I should be ignoring a judgment which is binding upon me. The authority which controls Samoa - viz., the League of Nations - conferred upon the New Zealand Parliament "full powers of administration and legislation over the Territory, subject to the present mandate, as an integral portion of the Dominion of New Zealand." Mr Hall Skelton admits that the Imperial Parliament could abrogate the Habeas Corpus Act. It would seem to follow, therefore, that the only authority which is given legislative authority over Samoa can do the same.

This really disposes of the whole of applicant's submissions. But there are other points which I should notice. A considerable portion of Mr Hall Skelton's argument concerned the extent of the King's prerogative of legislating in British colonies. Such an inquiry does not profit us when the question concerns a country which is not a British colony and the authority comes to New Zealand from the League of Nations.

The passage in Broom's Constitutional Law 2nd ed. 50 cited to show the limits of His Majesty's prerogative rights in conquered or ceded countries has no application to a country neither conquered nor ceded to Great Britain.

Section 12 of the Habeas Corpus Act, which forms the whole basis of applicant's argument, provides that no resident of England, Wales, or Town of Berwick on Tweed shall be sent prisoner into Scotland, Ireland, or Jersey, Guernsey, Tangier, or islands or places beyond the seas. Read literally this has no bearing on the present application. Section 7 of the Foreign Jurisdiction Act, 1890 (53 and 54 Vict., c. 37) provides that where a person is convicted in a British Court in a foreign country and sentenced to imprisonment the sentence shall be carried into effect at such place as may be directed by Order in Council. Under that provision only an Order in Council is necessary to imprison out of the foreign territory.

The application is dismissed with costs against applicant, £15.15s., and disbursements.

Application dismissed.

Solicitors for the applicant: Skelton and Skelton (Auckland).
Solicitors for the gaoler: Meredith, Hubble, and Ward (Auckland).