

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 115 of 2019
[High Court Civil Case No. HBC 128 of 2005L]

BETWEEN : **MAHESH (Investigating Officer) of Nadi Police**
1st APPELLANT

ARVIN of Nadi Police Station
2nd APPELLANT

SUSHIL of Nadi Police Station
3rd APPELLANT

THE COMMISSIONER OF POLICE
4th APPELLANT

AND: **NARENDRA MICHAEL of Lautoka**
RESPONDENT

Coram : **Basnayake, JA**
Lecamwasam, JA
Jameel, JA

Counsel : **Ms M. Motofaga for the Appellants**
Mr M. Naivalu for the Respondent

Date of Hearing : **01 February 2023**

Date of Judgment : **24 February 2023**

JUDGMENT

Basnayake, JA

[1] I agree with reasoning and conclusions arrived at by Lecamwasam, JA.

Lecamwasam, JA

[2] This appeal is filed by the Appellants against the judgment of the learned High Court Judge dated 8th November 2019 on the following grounds of appeal:

1. *The Learned Judge erred in fact and in law in waiving the strict requirement for material facts to be pleaded in the Respondent's Amended Statement of Claim thereby causing prejudice to the Appellants right to a fair hearing, in particular:*
 - (a) *that the Respondent was punched;*
 - (b) *that the Respondent was kicked with the police boot; and*
 - (c) *that the assault occurred on 2 different occasions.*
2. *The Learned Judge erred in fact and in law in holding that the injuries on the Respondent are consistent with the actions of the Appellants when there was inconclusive medical evidence to prove that:*
 - (a) *the bruises on both buttocks of the Respondent are consistent with the Respondent being hit with a wooden duster on his buttocks repeatedly;*
 - (b) *the rib fracture is consistent with the Respondent being punched in the stomach by the First Appellant repeatedly with clenched fists;*
 - (c) *Injuries A (multiple bruises on chest wall), B (bruising left shoulder) and E (Contused Orbits) are consistent with the Respondent being punched and kicked with the police boot.*
3. *The Learned Judge erred in law and fact in misconstruing that new injuries A (multiple bruises on chest wall), E (contused orbits) and F (abrasion right temple) were not noted in Dr Nagan's report as he had not done a full and proper diagnosis because he did not have an x-ray machine and lacked the expertise, whereas:*
 - (a) *the Respondent had admitted to Dr Nagan conducting a full and thorough examination;*
 - (b) *Dr Nagan admitted to conducting a thorough examination and confirmed that the said injuries were not on the Respondent at the time of his examination;*

- (c) *an x-ray machine is not needed to note injuries A, E and F, and the correct inference to be drawn from the facts are that the injuries were sustained after the Respondent left Dr Nagan's office.*
4. *The Learned Judge erred in fact and in law in holding that the Respondent being forced to bath in cold water in the middle of the night after the alleged beating was an effort by the Appellants to wash away the evidence of inhumane treatment as the Respondent was drenched in blood, when there was no medical evidence of any open wound on the Respondent's body and that the correct inference to be drawn was that the Respondent had asked to have a shower as he was feeling uncomfortable.*
5. *The Learned Judge erred in law and in fact in accepting the evidence of the Respondent [and his witnesses] as credible without regard to the totality of evidence, in particular:*
- (a) the number of inconsistencies in the evidence of the Respondent [and his witnesses];*
 - (b) that Respondent witness Faizal Koya did not 'physically visualize' the injuries;*
 - (c) that the Respondent was taken for medical examination at the Nadi hospital on the morning of Tuesday 14 May 2002 after the alleged first beating and failed to provide any medical report to substantiate his claim;*
 - (d) the overwhelming conduct of the Respondent in not seeking immediate medical attention which is inconsistent with a person allegedly suffering from a broken rib and experiencing extreme pain.*

[3] The original action in the above appeal was filed by the Respondent-Plaintiff (hereinafter referred to as the Respondent) against the Police, seeking damages for injuries from when as a result of being subjected to assault when he was in police custody on 13th and 14th May 2002, until he was granted bail by the Magistrates Court of Nadi.

[4] The factual background to the matter is clearly set out in section (B) of the Statement of Claim of the Respondent. I will reproduce it in verbatim for the convenience of this court.

- a. THAT the Plaintiff a 42 year old male at all material times on the 13th day of May 2002 was taken into police custody by the 1st, 2nd and 3rd Defendants at the Nadi Police Station.*
- b. THAT the said 1st, 2nd, and 3rd Defendants were at all material times under the direction and control of the 4th Defendant in the performance or purported performance of their functions and duties.*
- c. THAT whilst in Police custody, the said 1st, 2nd and 3rd Defendants unlawfully assaulted and tortured the Plaintiff and subjected him to degrading and inhumane treatment at the Nadi Police Station thereby causing the Plaintiff serious injuries.*

- d. *THAT as a result of the said inhumane treatment the Plaintiff was admitted to Lautoka Hospital and an underwater seal drain was inserted in his chest and removed after 4 days. He was hospitalized for total of six (6) days and discharged.*
- e. *THAT the 1st, 2nd and 3rd Defendants further violated the Plaintiff's constitutional rights under Chapter 4 of the Constitution of the Republic of Fiji Islands (1997)*
- f. *THAT in the premises the Plaintiff has suffered loss and damages and still suffers mentally and physically from the unlawful conduct of the Defendants.*

[5] The Respondent has also listed the following acts as instances of ill-treatment in the said statement of claim:

- i. *Removal of clothing except for underwear.*
- ii. *Assaulting with a piece of wood.*
- iii. *Rubbing chillies on the private parts of the Plaintiff.*
- iv. *Squeezing the Plaintiff's testicles.*
- v. *Forcing the Plaintiff to take a cold shower at 2am in the morning.*
- vi. *Sleep deprivation.*

[6] Further, he has furnished the following list of injuries as having been sustained due to the alleged inhumane treatment of the Appellants:

- i. *Multiple bruises on the chest wall.*
- ii. *Bruising left shoulder.*
- iii. *Bruising on both buttocks.*
- iv. *X-ray of the chest pneumothorax and fractured 10th ribs on the left side.*
- v. *Contused orbits.*
- vi. *Abrasion right temple.*

[7] Due to the alleged treatment, the Respondent claimed the following from the Appellants:

- 1. *Exemplary and punitive damages for Inhumane Treatment.*
- 2. *General damages for pain and suffering.*
- 3. *Aggravated damages for humiliation and injured feelings.*
- 4. *Costs on a Solicitor/Client basis.*
- 5. *Further or other relief that this Honourable Court thinks fit.*

[8] In response, the Appellants, by way of an amended statement of defence pleaded *inter alia* thus;

- 1. *SAVE as to admitting that the Plaintiff surrendered himself to custody on 13th day of May 2002, the 1st, 2nd and 3rd Defendants (hereinafter referred to as "Defendants") deny the rest of the contents of paragraph 1 of the Plaintiff's Amended Statement of Claim (hereinafter referred to as the "Amended Claim") and put the Plaintiff to strict proof.*

2. *THAT the Defendants admit paragraph 2 of the Amended Claim and further state that the 3rd Defendant has migrated overseas.*
3. *THAT the Defendants vehemently deny paragraph 3 of the Amended Claim and put the Plaintiff to the strictest proof thereof.*
4. *SAVE as to admitting that the Plaintiff was admitted at the Lautoka hospital, the Defendants deny the rest of the contents of paragraph 4 of the Amended Claim.*
5. *THAT the Defendants deny the allegations contained in paragraph 5 of the Amended Claim and states further that they did not violate the Plaintiff's Constitutional rights under Chapter 4 of the Constitution or any clause whatsoever and will also put the Plaintiff to the strict proof of this allegation.*
6. *THAT the Defendants deny any knowledge of the Plaintiff's allegation under paragraph 6 of the Amended Claim. In particular the Defendants deny all particulars of inhumane treatment and all particulars of injuries and put the plaintiff to strict proof of all allegations. Furthermore the Defendants denies that all particulars of inhumane treatment and particulars of injuries were caused by the Defendants and put the Plaintiff to strict proof thereof.*
7. *WHEREFORE the Defendants pray:-*
 - a. *That the action be dismissed with costs.*
 - b. *Such further or other relief as this Honourable Court may deem fit and just.*

[9] Against the above background, the grounds of appeal raised by the Defendant-Appellants (hereinafter to be referred to as Appellants) pivot around the assertion that the Respondent had not pleaded certain matters in the High Court, which therefore should not have formed the basis of the judgment of the learned High Court Judge. The Appellants move this court to dismiss the Respondent's claim on the basis that the Respondent did not specify that he was hit, punched, or kicked, or hit with a duster, or was assaulted on two occasions (in his statement of claim).

[10] Contrary to the above assertion, I find that at paragraph 3 of the Amended Statement of Claim, the Respondent has plainly stated that the 1st, 2nd, and 3rd Defendants had unlawfully *assaulted and tortured* him. The precise details and further particulars of the assault were matters of evidence to have been led at the trial stage. A Plaintiff is not required to elaborate on every minute detail of an incident in a Statement of Claim of this nature. The lexical definition of an "assault" denotes any physical harm inflicted by another person, be it by hitting, punching, or kicking. Therefore, contending that the use of the word "assault" does

not cover the exact acts alleged to have been committed by the Appellants is fallacious. Any objection to this finding does not hold water. I will however endeavour to ascertain whether the learned High Court Judge has erred in holding in favour of the Respondent, based on the evidence that was available to him.

[11] In the minutes of the Pre-Trial Conference parties had admitted that on the 13th day of May 2002 the Respondent was taken into police custody by the 1st, 2nd, and 3rd defendants. In light of this agreed fact, it is a redundant exercise to determine the exact means by which the Respondent was taken in to police custody, i.e. whether he was arrested by the police involuntarily or whether he had surrendered to the police at which point he was taken into custody. There is no dispute that the Respondent was in police custody from 13th May 2002 up to 15th May 2002.

[12] I have carefully perused the judgment of the learned High Court Judge. I find that the learned Judge had lent his mind judiciously to all the relevant aspects of the matter, especially to the date the Respondent had been taken into custody, medical reports as to injuries sustained by the Respondent, evidence given by his de-facto and de-jure wives, and the physical condition of the Respondent after he was enlarged on bail, all of which were salient to his findings. It is important to note that the Appellants had only made a general denial of the alleged assaults by way of their Statement of Defence, and had put the Respondent to strict proof thereof.

[13] In response to the first Ground of Appeal i.e. the learned Judge erred in fact and in law in waiving the strict requirement for material facts to be pleaded in the amended Statement of Claim, I find that the Respondent had pleaded unlawful assault and torture at paragraph 3 of the amended Statement of Claim. This is an echo of the original Statement of Claim, which referred to assaults, torture, degrading and inhumane treatment etc. Allowing the Amended Statement of Claim of the Respondent has not caused any prejudice to the

Appellants, as the Respondent had not deviated from his original claim in any material respect, nor had he introduced any new material.

[14] Next, I advert attention to the grounds of appeal in relation to the injuries sustained by the Respondent. As Dr. Taoi had passed away and hence was unavailable at the time of trial, Dr. Akhtar Ali, the Consultant Surgeon has testified on the Medical Report of Dr. Taoi. His evidence confirms the content of the medical report which found injuries on the body of the Respondent, which were consistent with the alleged actions of the assault and torture on the part of the Appellants. The Appellants had not rebutted the above medico-legal evidence satisfactorily. In regard to the physical state of the Respondent prior to the arrest, the prosecution had called Tara Wati, wife of the Respondent and Amrita Kaur. Both of these witnesses had attested to the fact that the Respondent was fit and healthy at the time of being taken into police custody, which evidence was not refuted. The only inference which could be drawn from the observations in the Medical Report, together with the evidence of the above witnesses, is that the alleged injuries, namely bruises on the chest wall, left shoulder and buttocks, contused orbits, abrasion on right temple, and fractured tenth rib on the left side, were sustained during the Respondent's incarceration at the Police Station. Based on this evidence, the learned High Court Judge had arrived at the only reasonable conclusion as to the genesis of the above injuries.

[15] Further, the High Court Record also reveals that the Respondent had been in police custody up to the time until he was produced at the Magistrates Court, with visible injuries on his person. The learned magistrate had offered a chair to the Respondent upon seeing his physical condition. In addition, the evidence of Mr. Koya, the defence counsel also augmented the Respondent's narration as to the unfolding of events.

[16] Dr Michael Nagan's observations dated 17th May 2002 are these:

- *Bruise on his right shoulder posteriorly*

- *Bruise: approximately 10cm in diameter on left shoulder*
- *2cm diameter bruise anterior left shoulder*
- *Linear bruise on his abdomen approximately 10cm*
- *Patches and bruises on left upper quadrant*
- *4 linear bruises on his back*
- *Both buttocks were bruised.*

However, Dr. Nagan had not observed the fracture of the 10th rib, which the Respondent had already suffered at the time of the medical examination. This casts a reasonable doubt on the observations of Dr. Nagan, and renders his report incomplete. The Appellants contend that Dr. Nagan's report does not reveal the fracture because the Respondent had sustained it after leaving Dr. Nagan's office. They also contend that the learned Judge had failed to correctly evaluate the medical evidence, which was inconclusive on whether the Respondent had been assaulted while in police custody. However, the only conclusion I can arrive at is, that Dr. Nagan had not conducted a thorough examination and had only reported injuries visible externally, as the learned High Court Judge had correctly held.

[17] Hence, I cannot agree with the Appellants that the evidence does not disclose that the injuries occurred at the hands of the Appellants. On the contrary, the evidence unmistakably reveals that the Respondent had sustained injuries whilst he was in police custody and not in other circumstances. This shifts the burden of proof on to the police or the Appellants to prove otherwise, which they have failed to do on a balance of probabilities.

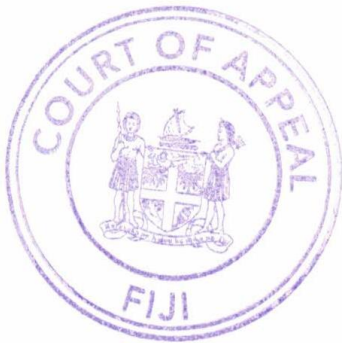
[18] In the absence of cogent evidence in support of the Appellants, I am satisfied that the learned High Court Judge had considered all salient aspects of this matter before holding against the Appellants. Therefore, I do not observe any reason to interfere with the judgment of the learned High Court Judge. I answer the grounds of appeal in the cumulative against the Appellants and dismiss the appeal.

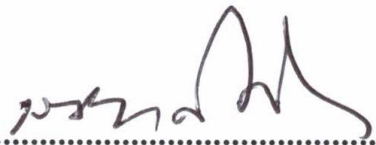
[19] **Jameel, JA**


I agree with the reasons and conclusions of Lecamwasam, JA.


[20] **Orders of the Court**

1. *Appeal dismissed.*
2. *Judgment of the learned High Court Judge is affirmed.*
3. *Appellants are ordered to pay to the Respondent, F\$10,000.00 (\$2,500.00x4) as costs within 28 days of this judgment.*




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Hon. Justice E. Basnayake
JUSTICE OF APPEAL


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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL


.....
Hon. Justice F. Jameel
JUSTICE OF APPEAL

Solicitors:

Ms M. Motofaga for the Appellants
Mr M. Naivalu for the Respondent