IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION
Action No. HBC 0229 of 1997L

No. 22/2007

BETWEEN: **FRED WEHRENBERG** of Nananu-I-Ra Island.

Plaintiff

AND: **THE ATTORNEY-GENERAL & MINISTER FOR JUSTICE OF THE GOVERNMENT OF FIJI SUVA.**

Defendant

Plaintiff in Person
Counsel for Defendants: Mr S D Turaga and Mr S. Tuwaqa

Dates of Hearing:24, 25 and 26 January 2007
Date of Judgment: 9 February 2007

JUDGMENT OF FINNIGAN J

[1] The Plaintiff seeks damages from the Defendant for the torts of malicious prosecution by police officers, and false imprisonment.

[2] This is his claim:

> 3. *That the Police Prosecution in Rakiraki maliciously and without reasonable or probable cause laid before the Rakiraki Magistrate's Court four charges against the Plaintiff and thereby secured the issue by the said Rakiraki Court of four*

Summons directed to the Plaintiff to appear before the Rakiraki Magistrate's Court.

The four charges laid against the Plaintiff are then clearly set out. In brief they are:

(a) *A charge of common assault laid on 23 June 1992,*
(b) *A charge of assault causing actual bodily harm laid on 20 July 1993,*
(c) *A charge of Affray laid on 18 June 1994, and*
(d) *A charge of obstructing surveyors laid on 7 August 1996.*

[I was informed that these four charges were withdrawn in March 1997 when the Director of Public Prosecutions filed a *nolle prosequi*] .

12. The Plaintiff charges and the fact is that the Police Prosecution is guilty of the following acts of malice:

Particulars of Malice:

(a) *Prosecuting the Plaintiff despite the knowledge that he was the innocent victim of a gang which was constantly criminally intimidating and attacking him on his own freehold property since years and then deliberately using these attackers against the Plaintiff by presenting them as complainants and witnesses in Court to be able to:*

(i) *make the Plaintiff compliant to follow the gangs rediculars demands*

(ii) *convict the innocent Plaintiff and then deport him.*

(b) Refusing to stop the prosecution at the time when other Departments and Organisations recommended the withdrawal of the charges against the Plaintiff.

(c) *Refusing to stop the prosecution at the time when the Plaintiff himself submitted new evidence and applied for a withdrawal of the charges.*

[3] The claim for alleged false imprisonment is buried in his statement of claim as a separate cause of action, which he identifies by filing a separate affidavit sworn on 30 March 1998.

[4] The facts for this false imprisonment claim are pleaded in paras 5, 6 and 13 of this statement of claim but the claims not otherwise made or apparent. It appeared to me to be only a further pleading in support of the malicious prosecution claim. However, Counsel for the Defendant accepted this second cause of action and answered it in submissions.

[5] There were two incidents of alleged false imprisonment. Briefly the first of these two claims (para. 5) is that he was arrested on 13 May 1993 in Suva on a bench warrant issued in Rakiraki

Magistrates' Court and remained in custody suffering distress and indignity for 24hours.

[6] Briefly the second claim (para 6) is that on 28 September 1995 he was taken into custody on a bench warrant while he was recovering from an illness and was deprived of his liberty for 22 hours.

[7] All these claims in both causes of action arise out of a long and turbulent history of dealings between the Plaintiff and the Rakiraki police. Two of the charges, 3(b) and (c) above are causes of action in a related case (HBC 227/1996L, judgment delivered today). There the Plaintiff and his wife have sued the Attorney General, the Commissioner of Police and three police officers from Rakiraki in respect of a course of events that ran from 1990 until 2004. The cause of action went past the date of filing and terminated in 1999 pursuant to an Amended Statement of Claim filed in January 2000. As the two cases developed, evidence was given by both parties covering the whole period until 2004. The two cases were consolidated in all but name.

[8] The commitment of the Plaintiff and his wife to these proceedings has, as he said in final submissions, been total. The detailed records kept by them of all incidents, reports by them to the police of offences committed against them, statements made by them to the police in cases where allegations were made against them by others, and the calculations made from these records are unprecedented in my experience. They have as well kept all

correspondence and obtained correspondence relative to their dispute with the police between government agencies, non-government agencies, and other persons. They have involved successive Commissioners of Police, the Ombudsman, the Fiji Human Right Commission and the United Nations in Geneva.

[9] Several police officers gave evidence and supported the evidence by documents made recently, that the Plaintiff and his wife not only were treated fairly, but consumed a lot more police time and resource than any other individuals. This defence was not pleaded. Those documents were prepared well before the hearing. Nonetheless, the Defendant in this case as in the other case put the Plaintiff at a distinct disadvantage by failing and/or neglecting to discover to the Plaintiff before trial any documents at all. Counsel for the Defendant at trial produced several documents and relied upon them without prior notice to the Plaintiff. The Plaintiff has asked me to take that into account, and I do.

[10] Also, the Defendant raised at the hearing a defence in law that he had not pleaded. It was based on a 1988 case of which he should have been aware when the Defence was filed. He gave no prior notice. This must be reflected in costs.

General Introduction:

[11] In setting out the history of this claim generally I intend to be as economical and as neutral as I can be and to give only as much detail as is necessary. Apart from the detailed pleadings in the Statement of Claim the Plaintiff has asked me to take into account

over 300 letters and the detailed records he kept, including detailed records of e.g. all the journeys he made to Suva to see officials. The latter list records exactly 100 such journeys. Another record kept by the Plaintiff and his wife (Exh.M1) details 1,767 incident reports made to the police, which include 1,927 allegations of separate criminal offences against them of which they were laying complaint with the police. The period of this record is 17 November 1990 until 17 November 2004.

[12] In presenting his case the Plaintiff showed a power of recall of detail and ability to marshal fact and argument which would be the envy of any lawyer. His presentation, though at times a little uncertain, was always controlled and courteous. Courtesy also was evident at all times in the presentation by Counsel for the defence. This command of a great body of detail enabled thePlaintiff to put before the court rather more fact than was helpful in getting to the heart of the matter, which sometimes obscured the major veins of incident and the fundamental simplicity of what actually had occurred. The claims themselves while concisely set out in the Statement of Claim, tended to become obscured by the network of incident upon which the Plaintiff relies to prove his claim of malice.

[13] Throughout both cases there was a thread of claims of criminal intimidation and "framing" of the Plaintiff by a "gang". This attracted additional claims of conspiracy against him and his wife by persons on the island which were peripheral only, not pursued and not claimed in the proceedings. An example is his affidavit sworn on 30 March 1998, para. 10 and some of the annexures.

These detailed narratives range over both of these two cases and the cases are factually interwoven.

The Defence Claim of Psychiatric Illness:

[14] During this case Counsel for the Defendant attempted to show that the Plaintiff suffers, or did suffer in September, October and November 1996, from a psychiatric illness. All the claims herein are before those dates. He had no witness to give primary evidence. He relied upon photocopies of two documents, which were said to be medical certificates, both unsigned by a person unknown to me (Exh. D2). Some documents, perhaps the originals of these, had been produced to my Brother Byrne at a hearing before him on 12 September 1996 (**Wehrenberg-v- The State** [1996] FJHB 48, HAA0061j of 1996S, judgment 12 September 1996). That was a hearing of an appeal from a decision of the Chief Magistrate made on 22 November 1994 in which transfer of three charges of common assault, assault occasioning bodily harm and Affray against the Plaintiff and one charge of Affray against his wife out of the Rakiraki Magistrates Court was declined. In his written judgment Byrne J noted that Mrs Wehrenberg had stated the Plaintiff was attending at St.Giles hospital that day for examination by a psychiatrist and later in his judgment he called this "psychiatric treatment". He adjourned the matter for one week and allowed that the doctor may be of the opinion that Mr Wehrenberg was not fit to give evidence. What actually was said to him I do not know and there is little probative value in either the photocopy document tendered to me or the remarks of Byrne J. The Plaintiff himself had already put in as evidence another photocopied medical certificate stating that in August 1993 he suffered from acute depressive illness. (Annexure A4).

[15] Counsel for the defence in my opinion made absolutely no ground with this allegation. Certainly there is nothing proved upon which I could rely to draw any conclusions. In any event it is the Plaintiff's claim of malice by the police which must be proved. The fact that, by his own evidence the Plaintiff admits that in 1993 he suffered from acute depressive illness, I am prepared to take into account, but little or nothing turns on it.

The Evidence:

[16] The Plaintiff made himself available and was cross-examined. He called his wife (PW1).

[17] For the Defendant there were five witnesses. These were Harry Pene (DW1), Sekaia Sekula (PW2), Taniela Qutoniloma (DW3), Aminiasi Tuvura(DW4) and Sitiveni Waqa(DW5).

[18] The main evidence of the Plaintiff is contained in an affidavit which he swore on 30 March 1998 and filed on 1 June 1999. He annexed to it a large number of documents. As affidavits filed in this court go, it is of a very high standard. It is largely factual and sets out a detailed history of his dealings with the Rakiraki police officers and with others further afield about a campaign of criminal intimidation against himself and his wife, by a gang of intimidators, which he says commenced in 1990. By June 1992 (para. 5) he and his wife had reported to the police 15 offences which he said had been committed against them (detailed). He states that he never retaliated to any of these attacks. No attempt was made by the Defendant to disprove that claim during either

hearing, other than to point to charges of assault laid against the Plaintiff, which were all withdrawn.

[19] He states that the police took no action on those complaints (para.6). Instead on 23 June 1992 (the first malicious charge in the first cause of action) he was interviewed and charged with common assault by police officer Harry Pene.

[20] By July 1993 he had reported 39 criminal offences which he said had been committed against him by the campaign of criminal intimidation (para 11). The police he says took no action against the offenders. Instead on 20 July 1993 he was arrested by police officers Tuvura and Sekaia (his second malicious charge claim). This is in para 12).

[21] At para 14 he sets out precisely the facts upon which he relies to show that the police acted maliciously and without reasonable or probable cause when they charged him with assault causing actual bodily harm on 20 July 1993.

[22] I pause and record again that the events of July 20 1993 are the basis of another cause of action (a claim of torture) in HBC227/1996.

[23] By June 1994 the Plaintiff had reported 79 criminal offences committed against him (detailed in para. 18). He says that the police did not stop the criminal intimidation but on 18 June 1994

he was arrested and charged by officers Deo and Waqa with the offence of Affray (para 19). This incident founds his third malicious charge claim, and is also the foundation for a cause of action (a claim of torture) in the other case. Thereafter (para 20) the Plaintiff sets out precise statements of fact which in his opinion prove malice.

[24] Later (at paras 29 and following) he sets out the facts relating the charge of obstructing a surveyor which was laid on 7 August 1996, his fourth malice claim herein.

[25] The Plaintiff had also sworn on 30 March 1998 and filed on 1 June 1999 another detailed affidavit in support of his claim that he was falsely imprisoned. He was cross-examined on both affidavits.

[26] I think it a fair summary of his cross-examination to say that he reaffirmed, usually without reference to his affidavits, every fact stated therein, only more fully.

[27] His only witness, his wife PW1, swore two affidavits and was cross-examined. I also think it fair to say that in both the affidavits and her cross-examination she showed and adhered to a firm grasp of the body of facts that had been deposed by the Plaintiff.

[28] The defence witnesses of course covered the same ground. It was necessary that I hear and observe closely these five witnesses because they were directly involved in the events complained of.

[29] DW1 was Sgt. Harry Pene. His evidence relates to the first incident in the first cause of action, the charge laid on 23 June 1992. Under instructions from the station officer he conducted the interview of the Plaintiff for a charge of common assault. He said the interview took about or under an hour and the Plaintiff cooperated with him. He said this was the only part he took in the matter. He had no part to play in any cross-charges laid by the Plaintiff against the complainant who was Matilda McCreadie. He gave evidence that if there was a cross-report then under the Police Act the police officers must not refuse any report and must investigate. If there is sufficient evidence they must charge and if there is insufficient they have to release the suspect. He said this was the procedure he had in mind in this particular case. In cross-examination he said that the evidence available to him before the interview was "the presence of Matilda's daughter that you pushed her away from your compound". He seemed to have a limited memory of this interview. However when asked by the court about who decided to lay the charge he replied it was the station officer on the evidence, which was the presence of the complainant's daughter "plus it was a situation in which I would not have retaliated but I would have run away, it was open space". He said that the only other person he had spoken to was the complainant's daughter. It was put to him that his collection of evidence had been based on bias and was not thorough; it was suggested further that when on the island he was very close to the

complainant and that he had misinformed the station officer about the case. He replied, "it was because of the evidence that Mr Fred was charged".

[30] DW4 Tuvura also gave evidence about the same events on 23 June 1992. He also was acting under a superior officer and was directed to interview the complainant Matilda. He reported back to their officer and was given directions to see that the Plaintiff was interviewed and charged. Asked if he took a statement from the Plaintiff he replied "yes I did the interview of Fred Wehrenberg. He refused to give any answer in the course of the interview. He was charged for assault and bailed to appear in the Rakiraki Magistrates Court". So it seems each claims to have interviewed the Plaintiff.

[31] Although this officer was named in the Statement of Claim in respect of the second alleged malicious charge on 20 July 1993 he was asked no questions about that in evidence in chief and he had no comment to make about it when this was pointed out to him in cross-examination. He did however repeat at length in what I noted as parrot-fashion the account he had given of being interviewing officer in the interview on 23 June 1992, above. There were questions put to him about the medical examination done of the complainant Matilda and about the delay of four days between the alleged assault on her and the medical examination. He was asked why Matilda was not charged on the basis of the evidence available about her actions. He was asked about the details of her complaint against the Plaintiff. To all of these questions he replied he could not remember and he stated his instructions were from

his superior officer who was the station officer, Saula Lasaganibau. As the questions continued he gave answers such as "I have got no idea" "no" I wrote in my notes at this time "has lost credibility by now". His evidence was in respect of the first two arrest claims and I gained very little from it.

[32] The third malice claim on 18 June 1994 was addressed by DW5 Waqa. He was in a team with officer Basant Deo who was investigating officer in the alleged Affray incident. Officer Deo saw the Plaintiff in front of a shop at Rakiraki. Since the Plaintiff was wanted for questioning in respect of the alleged incident Deo asked him to come so they could take the Plaintiff to the police station. They took the Plaintiff to the station. I have made a finding about that in my related judgment delivered today. He said he was not the investigating officer in respect of the Affray and he had little other evidence to give. He did however set out the procedure, which he said all investigating officers must follow. At least one other witness did the same. This procedure is (1) take the complaint, (2) if there is injury there must be examination by a doctor and a report, (3) the police must go out and find independent witnesses, and (4) only then do their instructions allow them to proceed. For this witness and at least another (Sgt. Tuvura) "proceed" means "arrest, interview and charge". This procedure is **not** authorized by s.21 of the **Criminal Procedure Code** Cap 21.

[33] DW3 Qutoniloma gave evidence about the fourth malice claim dated 7 August 1996. He went as chainman with two different surveyors on two separate occasions to survey the Plaintiff's

residential lots. He said that for a survey all lines must be clear from branches, leaves, flowers and everything. He said the Plaintiff and his wife did not allow them to pick any leaf, flower, branch or anything they needed to move. They just stopped the job and came back. The reason he went there was something he was asked about only in cross-examination. He replied "we were sent to do a detailed survey of the area. Just depicting the area or anything that Mr Wehrenberg was complaining of". Asked whether survey pegs were already in the ground and other similar questions he replied to everything "I cannot remember". I wrote in my notes about this time "initially impressive, now has the same memory blanks as the police witnesses". He was strong on the matters, which he knew he was called to say, but had no reliable memory outside that.

[34] I am able to add to the above evidence the evidence given generally in the other case, but the above is the primary evidence. I am required first to conclude on the balance of probabilities whether or not the police acted with malice and without reasonable and probable cause in laying the four charges complained of.

Decision of the first four claims – the first cause of action:

[35] The Defendant put in as Exh. D1 some written submissions of the Director of Public Prosecutions to the Magistrate at Rakiraki. These had been required by the Court when the DPP sought to withdraw the four charges. In the submission the DPP describes the charges as "trivial" and "in the main reconcilable". The submission proceeds: "The State does not feel it to be in the public interest to proceed ....the State does not wish to see the criminal

courts in any way manipulated into becoming involved in civil disputes....". One must ask, why were these charges laid? Perhaps there is merit in the Plaintiff's claim.

[36] However, two fundamental factors militate against the Plaintiff, and both were emphasized by Defendant's Counsel in submissions.

[37] The first is that the Plaintiff involved himself to a high degree in what the law intends should be police activities on his behalf. Whatever his motivation, from an early stage he became critical of what he saw as police failure to protect him and his wife by proceeding proactively against the persons whom he saw as tormenting them. As his Statement of Claim makes clear, and his affidavits abundantly prove, he very soon went over the heads of the local police, first to the Commissioner of Police and eventually to the Director of Public Prosecutions, the High Court, The Court of Appeal, The Ombudsman, The Human Rights Commission and on one occasion to the United Nations in Geneva. It was he who was proactive.

[38] The second factor is abundantly clear from his evidence. He belaboured the police with his complaints and with his demands that action be taken on them. He has made it abundantly clear to the court that he would accept little less than prosecution of all persons whom he named for all offences which he claimed they had committed. This is exemplified in his complaints about illegal guest-house operations. Judicial notice of other proceedings in this

court enables me to say that the Plaintiff may well have been justified in making those complaints. Several of the documents he produced indicate that competent administrative authorities outside the police also thought he was justified. By him and them the police were urged to prosecute. The police evidence about this was given by one witness only, DW12 in HBC227/1996, Saimone Ratu. From his evidence one might be forced to conclude that the police investigation of these complaints was perfunctory. The fact is however that without evidence the prosecutions could not proceed and officer Ratu was at a loss to find evidence that money was changing hands between the people named as illegal operators and their guests. Informally, this is what I would expect from my restricted judicial experience of other legal disputes that arose on Nananu-I-Ra island during the 1990s. To the police, in my opinion, it should have been no more than a starting point for some serious investigations. The Plaintiff saw this as not only an unreasonable failure by the police (which in my view it was) but as evidence of their malice towards him. He diverted himself away from his proper remedy, which was to seek an order of mandamus.

[39] There is abundant evidence however that this concern about illegal guest-houses was not the main feature of the Nananu-I-Ra disturbance. The witnesses and the documents are unanimous. The main feature was the disharmony between certain residents and the Plaintiff. This was what was occupying police resources to an excessive degree. It was not so much the illegal guesthouse operations that occupied them. Had that been their preoccupation then the disturbances and the criminal offence complaints may have died down, but they focused on the complaints they were

getting, which were for penal code offences – from both sides of the argument.

[40] The police documents acknowledge far fewer criminal complaints than the Plaintiff says he laid. It is immaterial what numbers one may accept. The parties were battering each other with complaints to the police and expecting charges to be laid in each case. The police witnesses said they were bound (a) to seek evidence including a medical report where injurious assault was alleged and (b) lay a charge where warranted. Each case had to be examined.

[41] This clearly was a police situation, for the police to handle. They had to make judgments and choices, usually in the heat of the continuing events. This factor was important in the reasoning of, e.g. **Costello –v- Chief Constable** [1999] 1 All ER 550, (1999) 11 Admin LR 81. The police chose to charge the Plaintiff more than he thought reasonable and the other parties far less than he thought was warranted, but that, at law, was a decision for them to make.

[42] In law the police must, as a matter of public policy, be free from oversight in the Courts when making their decisions about operational matters, see **Hill –v- Chief Constable** etc (above). So my decision about whether they were even handed or efficient or not is immaterial.

[43] The Director of Public Prosecutions decided the four charges were trivial and a matter of civil dispute, and declined to prosecute them. The police officers who gave evidence about them did not justify them. However, after considering all of the evidence over a period of many days, I cannot enter a finding that in laying these four charges the police officers did not have reasonable or probable cause. Whether or not that finding is correct however, I am required by principle to dismiss these claims unless I find something in the police motivation that was outside the scope of their normal duties, i.e. a mischievous unprincipled use of police powers against an individual, motivated by ill will or hatred. I cannot go that far, and these claims must in principle as well as in fact be dismissed.

Decision of the False imprisonment claim: Second Cause of Action

[44] Legal principle is fatal to these two causes of action, also.

[45] On the first occasion, 13 May 1993, the Plaintiff is clear in his affidavit that he was arrested on a bench warrant issued by a Magistrate in Rakiraki. He does not challenge the validity of the warrant, nor can I see any grounds on which he could do so. I have read the Magistrate's record of the proceedings (Exh. P6 in HBC 227/96L). He was held in a police cell in Suva overnight and on his complaint of being ill was taken to CWM hospital the next morning than returned to the cell until about midday. He was transferred to Rakiraki by express bus with one police officer and at about 5.00pm was locked into the cell at the Rakiraki police station. He was released about an hour later by the Rakiraki Magistrate at about 6.00pm (affidavit sworn 30 March 1998 paras 6 to 9).

[46] It is difficult to see how the police could have treated him differently. Their duty was to execute the warrant at the earliest opportunity and hold the plaintiff in custody until he could be bailed. It was prudent at least to return him to Rakiraki from where the warrant had issued to that his liberty could be decided by the judicial officer who issued the warrant. Their general duty was to treat him humanely and he makes no claims that they did not.

[47] About the second occasion on 28 September 1995 the Plaintiff's evidence is in affidavit paras. 20 to 25. Six days previously he had received treatment and a medical certificate from a doctor therein. I note that this is the name on two unsigned documents purporting to be medical certificates issued three years later and produced by the Defendants in the related case. It is safe to assume that the treatment was for a depressive illness (annex A4 dated March or May 1993 and annex A7 dated 22 September 1993).

[48] Two police officers came to the island with a bench warrant and despite his and his wife's protestation about his being sick they handcuffed him and took him by boat to the Rakiraki police station. They arrested him about mid-day and put him in the cell at about 1.00pm. He was released the following day at about 11.00am.

[49] Here again it is difficult to see how the police could have treated him differently. They had a bench warrant and it was their duty to execute it. The Plaintiff does not claim that he was physically

incapacitated and even that would not necessarily have been a bar to execution of the warrant. Each case depends on its own circumstances. A warrant issued by a judicial officer authorizing arrest and detention of a member of the public is a document to be taken seriously by all parties.

[50] On the facts these two arrests were lawful, and not unreasonably executed. They carry none of the elements of false imprisonment. These claims may be dismissed on that ground alone. However, Counsel for the Defendant cited also legal authority. In my associated judgment I set out three Fijian cases upon which he relied. One of these is **Wartaj Seafood Products Ltd –v- Ministry of Home Affairs** [2000] FJHC 99: HBC0129j of 2000S, judgment 8 September 2000, Fatiaki J. This judgment gathers together and examines a number of authorities on this topic and is itself good authority. I note it was decided well after the Defence was filed in the present case. However, one earlier case cited therein is sufficient authority for present purposes; **Hill –v- Chief Constable of West Yorkshire** [1988] 2All ER 238; (1989) AC 53. A Civil Action for damages is not an appropriate way to investigate the efficiency of the Police Force. Also, as a matter of public policy the police are ordinarily immune from actions of negligence in respect of investigations and suppression of crime. They are surely immune from action for valid execution of a bench warrant.

[51] For these two reasons the fifth and sixth claims, i.e. the second cause of action, are dismissed.

Conclusion:

[52] All the claims herein are for the stated reasons dismissed.

Costs:

[53] The Defendants are entitled to costs that follow the event, HCR O.62 r. 3(3). However, taking account of the history of dealings between the parties, the history of the litigation in which the Defendant pleaded little more than mere denials and discovered no documents before the hearing, and succeeded on a defence at law that it did not plead, I refuse an award. As well no expense was incurred since the defence was conducted by in-house counsel. There is no order for costs.

D.D Finnigan

D.D Finnigan
JUDGE

HIGH COURT OF FIJI LAUTOKA

At Lautoka
9 February 2007