

In the High Court of Fiji
At Labasa
Civil Jurisdiction

Civil Action No. HBC 58 of 2019

Atish Atendra Prasad
First plaintiff

Maheshwar Prasad
Second plaintiff

Simione Nadurutaloa
Third plaintiff

v

DC 2969 Rup Narayan
First defendant

Tuaci Taso Qosoqo
Second defendant

Commissioner of Police
Third defendant

Attorney General of Fiji
Fourth defendant

Counsel: Mr A. Sen for the plaintiffs
Mr A. Prakash for the defendants
Date of Judgment: 23rd August, 2023

Judgment

1. The plaintiffs, in their amended statement of claim state that the first and second defendants arrested them without a warrant and maliciously charged them for damaging the vehicle of the first plaintiff without reasonable and probable cause, when no complaint was lodged against them and no offence was committed. The first defendant was Police Officer, (PO) at Taveuni Police Station, (TPS). The second defendant was Station Officer. The plaintiffs allege that they were assaulted by the first defendant. Their constitutional rights were breached. They were unlawfully detained at TPS and imprisoned at Vaturekuka prison for 7 days. They were acquitted at the hearing, as the Police did not provide any evidence.
2. The plaintiffs claim damages for assault, false imprisonment and malicious prosecution. They also seek declarations that their arrests were unlawful; the defendants breached the Constitution; and, the first and second defendants are unfit and improper persons to carry out duties as POs and be investigated for abuse of office and human rights. The conduct of the first and second defendants entitles them to exemplary damages in a sum of \$50,000.00 each.
3. The defendants, in their statement of defence deny the claim.
4. The plaintiffs, in their reply state that the statement of defence lacks particulars and should be struck off.

5. *The hearing*

(i) PW1, *(the first plaintiff)*

In evidence in chief, PW1 said that he was charged for damaging his motor vehicle LT 493. He did not damage the vehicle. The vehicle did not belong to him. It was parked in his premises. On 8th June, 2018, at 7 pm he went to TPS to ask the reason the second plaintiff, (his father in law) and the third plaintiff, (his worker) were locked up. The first defendant growled at him and handcuffed his hands. He handcuffed his left hand to a louvre frame. He could not sit and stood from 7 pm till midnight. The first defendant told him that if he accepted he burnt the car, he would be released or he would be handcuffed till the next day. He was not allowed to talk to the second and third plaintiffs. No sleeping material nor sleeping facilities were given. He was not given a change of clothes nor allowed to have a shower. The next morning the handcuffs were removed. Breakfast was not given. He was interviewed by a PO for two to three hours. He was not given his constitutional rights. He was not informed he had a right to contact his lawyer and that he was not obliged to say anything. The second defendant told him that the plaintiffs must be taught good lesson. His wife brought breakfast and dinner. The plaintiffs were taken in handcuffs to Savusavu by ferry. The drive from Natuvu to Savusavu ordinarily takes one hour, but their journey took two and a half hours, as the first defendant drove slowly and stopped for refreshments. The plaintiffs were given none.

The cell in Savusavu was dirty. There were three already in the cell. No refreshments were given before they were put in the cell. Neither he nor the second defendant ate the chicken fried rice given. They informed the defendants that they were both vegetarian. Bread and milk tea in a coca cola bottle were given for breakfast. They could not eat the dry bread nor drink the tea, as it was in one bottle. They were taken to Labasa Police Station, locked up and taken to the Magistrates' Court. The Police objected to bail. They were taken to Vaturekuka prison. They were provided lunch, given prison uniforms and taken to the remand room, which was the size of the witness box in Court. Nine were in that room. It had a toilet.

The plaintiffs spent three nights, (Friday, Saturday and Sunday) in the remand room of TPS. They were taken to Court and granted bail on strict conditions. On 22nd August, 2018, (the hearing date) the prosecution said that there was no evidence. The allegation in the charge was that the witnesses' vehicle was damaged to the value of \$22,000.00. The disclosures did not contain a report that the vehicle was damaged. His left hand was swollen and very painful. His business was closed during the 7 days he was in Vaturekuka Prison. When he went back to his community, customers stopped coming to his shop. People said that he may burn their car.

In cross examination, he said that he did not own the vehicle, (a taxi). He did not say that the vehicle belongs to him. It was parked in his premises. It was put to him that he was lying that he was handcuffed to a louvre and he broke the metal louvre blade. Mr Prakash, counsel for the defendants referred the witness to his caution interview notes. It was put to him that the notes provide he had signed that he understood his constitutional rights as explained. He said that his constitutional rights were not given. His wife was allowed to come inside the charge room to meet him. She brought food to TPS. He was granted bail on 21st June. He went to a Doctor after he was bailed out 7 days later. At TPS, he got food from home He was given food at SPS. On 22nd August, 2020, the Police Prosecutor told Court that he did not want to withdraw the charge against him. He said that there was no evidence against him. He did not say that he wants to amend the charge.

In re examination, PW1 reiterated that his constitutional rights were not given to him. The first defendant told him to sign the caution interview notes and he would be released. He was not allowed to read the caution interview notes. He did not answer questions at the interview voluntarily.

(ii) PW2,(*the second plaintiff*)

PW2, in evidence in chief states that on 8th June, 2018, he went to Nalele, Taveuni to open PW1's shop, as he was in Labasa. After a while, the first defendant and another PO came in a twin cab to the shop. The first defendant and the PO hit the third plaintiff in the rear of the shop. He was crying and groaning in pain. The POs told him that he and the third plaintiff have to go to the Police Station. The first defendant slapped him and asked him to sit at the back of the vehicle on the tray.

The first defendant told him that he would drive slowly at a speed of 20 kmph, (as he did) in order that everybody can see a Pundit being taken by the Police. People took pictures of him. It took 10 mts to go to TPS, though ordinarily it would take 3 to 4 mts. At TPS, the first defendant beat him. He was beaten 10 to 15 times with great force for 15 mts. He was punched in his stomach and hit in his ears. He was suffering in pain. He was locked in the cell at 5pm. He was not given lunch. The cell was small, dirty and dark. There were 12 people in the cell. He was locked for the whole night. He could not sleep. No bedding nor blanket was given. The third defendant was in a separate cell. He was interviewed by the first defendant. He did not agree to be interviewed in English, as he had very little understanding of English. He was not allowed to give his answers freely. He answered under pressure. The witness said that he signed, as he was frightened he would be assaulted.

On Monday, 11th June,2018, he was taken out at approximately 7.30 am. He was not allowed to shower. PW1 and he were handcuffed together. They were taken to Labasa in a boat. A number of people were travelling .No refreshments were provided. Other passengers recognized him. It took two and a half hours to travel from Buca Bay jetty to Savusavu town. The plaintiffs were taken to the cell at SPS. In the evening they were given non vegetarian food. No shower facilities nor change of clothes were provided. In the morning, they were given bread and milk tea in a bottle. He was a Hindu priest and could not drink tea from one bottle together with others.

He was taken to the Labasa Magistrates' Court. The charge was read. The Prosecutor objected to bail. He was kept in Vaturekuka Prison till 15th June, 2018. On the first night they were given a change of clothes, small bed sheet and a pillow, but they could not shower. They were bailed out on 15th June, 2018. When he returned to Taveuni, people said a Hindu Priest, who burnt a car, cannot perform rituals. He was looked upon as a convicted person. He earned \$ 600.00 a month as a Pundit. After the arrest, he did not earn anything. He has breathing problems, due to the injuries he suffered. His son in law has not lodged any complaints against him for burning his vehicle

In cross examination, it was put to PW2 that first defendant did not assault him and he did not see the first defendant hitting the third plaintiff. It was also put to him that he was seated in front with the first defendant and not on the tray of the double cab. The first defendant asked all the questions recorded in the caution interview notes. His rights were not explained to him at the. He signed the interview notes, as he was asked to. He thought it was a "*small charge*" and there would be no need for a lawyer. He was told that he can seek Legal Aid and engage a lawyer. He was told to sit quietly and sign whatever was written. The first defendant assaulted him before the caution interview on Friday 8th June, 2018. He was not given bedding nor a pillow. It was put to him that he slept at TPS, as he did not complain to the Police that he could not sleep nor that he was suffering from pain due to injuries.

On Sunday, he was charged with the offence of damaging property. The ferry ride from Taveuni to Buca Bay jetty in Savusavu took one and a half hour to two hours. The plaintiffs were taken to SPS in a dual cab. They were not given refreshments. The witness was told that he was kept in custody for more than 84 hours, as there was no permanent Magistrate in Savusavu. He was given non vegetarian food, which he declined. Tea was given in a dirty bottle. He could not drink tea from the same bottle given to others as he was a Hindu Priest. He did not ask for water. He did not see the first or second defendant at Labasa MC. He was bailed out on 15th June, 2018. There was no tap in the cell.

In re-examination, PW2 said that he was not given an opportunity to talk to the Magistrate nor did he know that he could complain to the Magistrate.

(iii) PW3, (*the third plaintiff*).

PW3 said that on the morning of 8th June,2018, at 8 am, the first defendant and another PO questioned him at the first plaintiff's Tyre Centre regarding the burning of a vehicle. They slapped him and punched his stomach and head for half an hour. Pundit, (PW2) and he were told to get into a Police vehicle. The vehicle travelled to TPS slowly. At TPS, the first defendant told him to admit the allegation. He was put in the cell. There were 12 people in the cell. The cell smelt of urine and stools. There was no bedding. All were seated. He slept for an hour. On Saturday morning, (9^h June,2018,) at 9 am, he was taken out of the cell. He was given bread and lemon leaf tea.

He was interviewed by PO Veresa. He was not given time to have a shower nor change of clothes before the interview nor till Monday. He was not told that he had a right to consult a lawyer nor that he was not obliged to say anything. At the end of the interview of half an hour, he signed the interview notes as he was afraid. He was taken back to the cell and locked from Saturday to Monday. He could not sleep, as there were mosquitos and it was cold inside the cell. The second defendant and he were handcuffed and taken by boat to Labasa. No refreshments were given on the way nor on the boat. They reached Savusavu after 12pm. There were 6 people in the cell at SPS. No lunch was given. Dinner and breakfast were given. Tea was given in a dirty bottle. At Labasa Police Station, all three plaintiffs were locked in a cell. They were bailed out. On 22nd August, 2018, they were acquitted by the Magistrates' Court.

The witness said that he did not damage PW1's vehicle. It was put to him that the first defendant did not assault him. He maintained that the third defendant sat on the tray of the Police vehicle and he was seated alone in the back seat. The toilet inside the cell was dirty, but he did not complain to the Police. He denied that he was informed of his constitutional rights. He signed the caution interview notes on his own free will. He did not tell the POs at SPS nor the Magistrate at Labasa that he was assaulted at TPS nor that he wanted to see a Doctor. He never went to a Doctor after he was acquitted. On 15th June,2018, Mr Kohli, Solicitor appeared for him.

In re-examination, he said that he was afraid to speak to the Magistrate. He signed the caution interview notes, as he was afraid.

(iv) PW4, (*Aminiasi, farmer*)

PW4 in evidence in chief said that he was in the TPS cell on 8th June, 2018. There were more than 10 people in the cell. He was given breakfast on the 8th and 9th. He saw the first defendant and another PO Veresa assaulting Pundit, (PW2) and PW3 outside the cell. They slapped and punched them in his stomach. PW2 was yelling. This witness said that he saw PW1 being handcuffed to a louver frame by the first defendant. He could not sit down. He was still standing when he went to sleep. He could not free himself. PW2 slept in a small space. The people in the cell took turns to sleep

There was a toilet inside the cell. It was smelling. The flush was not working. The shower was working. He was given change of clothes and soap. There was no space for the people in the cell to sleep. They took turns to sleep,

In cross examination, PW4 said that he was given meals. The cell had a number of people. PW3 was assaulted in another room, not in the cell. It was put to him that he did not see the first plaintiff being handcuffed to the louvre blade and there were less than 10 people in the cell. He was brought to TPS on 7th June, 2018. The people in the cell complained that the toilet was dirty. They were told to use the outside toilet.

(v) PW5, (*Isimeli Basaga, farmer*)

PW5 in evidence in chief said that he was brought to the TPS cell on 8th June, 2018. There were more than 10 people in the cell. He saw PW2 and PW3 being assaulted by the first defendant. PW2 was assaulted for 45 mts. He was screaming. The POs were swearing at him. His ears were beaten. He was punched on both sides of his ribs. PW1's hand was handcuffed on a louvre frame. He was standing beside the frame.

In cross examination, he said that the cell was small and dirty. Pundit was assaulted in the opposite room. It was put to him that he did not see either PW1 being handcuffed to a louver blade nor PW3 being assaulted. He said that he did.

(vi) I will consider the evidence led for the defence in my determination.

The determination

6. It is an agreed fact that the first defendant and another PO arrested the second and third plaintiffs at their work place on 8th June,2018.

7. Issues

- a) **WERE** the plaintiffs assaulted by the 1st defendant in the storeroom of the 1st plaintiff and at Taveuni Police Station?
- b) **IF SO**, what was the extent of such injuries?
- c) **DID** the first Defendant allegedly demand the 2nd and 3rd plaintiffs to confess to the burning of the vehicle belonging to the 1st plaintiff?
- d) **DID** the 3rd plaintiff allegedly sustain abrasions and lacerations on his stomach and chest inside the 1st plaintiff storeroom?
- e) **WHETHER** the 2nd plaintiff was accorded his Constitutional Rights before his interview commenced at 1750 hrs on the 9th of June 2018?
- f) **WERE** the alleged acts of the 1st and 2nd defendants unlawful?
- g) **DID** the defendants conduct proper investigation before charging the plaintiffs?
- h) **ON** the basis of the material evidence before the 1st and 2nd defendants, was the action taken by them to charge the plaintiffs for a criminal offence proper and lawful in the circumstances?
- i) **DOES** the alleged acts of the defendants amount to malicious prosecution?
- j) **DID** the defendant allegedly breach the plaintiffs Constitutional Rights?
- k) **ARE** the plaintiffs entitled for the following reliefs as prayed:-
 - i. General damages.
 - ii. Damages for false imprisonment, assault and battery in the sum of \$500,000.00 each.
 - iii. Special damages in the sum of \$11,500.00 (being the solicitors fees).
 - iv. Interests.
 - v. Exemplary damages in the sum of \$50,000.00 each.

Arrest

8. The plaintiffs contend that they were unlawfully arrested without a warrant.
9. DW1,(Fredrick Bull, Acting Sergeant, Crime Officer at TPS) in his evidence stated that a complaint was made by an unknown caller to the TPS that a white Probox bearing registration LT 493 was burning at the first plaintiff's Tyre Centre. DW2, (the first defendant) informed him that the complaint was recorded. DW1 said that he appointed DW2, as Investigation Officer. DW1 and DW2 went to the scene and saw smoke coming out of the vehicle. They found it suspicious and immediately cordoned the area.

10. DW2 said that the caution interviews, statements, summary of facts and investigation diary of the Investigation Officer constituted sufficient evidence to arrest the plaintiffs. He referred to the “*Summary of Facts*” concerning PW1, which provides that during the investigation, it was revealed that LT 403 was insured with LICI Company and PW1 was making payment for the vehicle. The interior of the vehicle, (taxi) was partially burnt. On 28th July,2018, he found that Chandra Wati was the owner of the vehicle.
11. PW1, in his evidence said that the vehicle was parked in his business premises. PW2 and PW3 said that they were both in the premises when DW1 and DW 2 came there on 8th June,2018.
12. On a review of the evidence of the plaintiffs and the defence, I accept the evidence of DW1 and DW2 that the vehicle was burning when they visited the scene.
13. Section 18 of the Criminal Procedure Act provides that a PO may arrest a person without a warrant in certain circumstances.
14. Sub-section (b) states that a “*police officer may, without an order from a Magistrate and without a warrant, arrest any person –... who commits any offence in the presence of the officer*”. (emphasis added)
15. In my view, the offence was continuing when DW1 and DW2 visited PW1’s premises. Smoke was emanating from the vehicle.
16. In my judgment, there was reasonable suspicion for the Police to arrest the plaintiffs. The arrest was lawful.

Constitutional rights

17. The plaintiffs complain that they were denied their constitutional rights at the caution interviews. The Police demanded that they confess to burning the PW1's vehicle.
18. The defendants dispute the allegation. They state that the plaintiffs were given the right to remain silent and retain a lawyer. They were not forced to sign their caution interview notes.
19. In view of the disputed evidence, the Court is not in a position to make a finding with respect to the caution interviews of PW1 and PW2. I refer to the interview of PW3 below.
20. The plaintiffs state that they were brought before the Magistrates' Court in Labasa after 48 hrs, in breach of section 13(f) of the Constitution.
21. The plaintiffs were arrested on Friday, 8th June, 2018, in Taveuni. They were produced in Labasa Magistrate Court on 12th June, 2018.
22. Section 13(1) (f) of the Constitution provides as follows:

*Every person who is arrested or detained has the right—
to be brought before a court as soon as reasonably possible, but in any
case not later than 48 hours after the time of arrest, or if that is not
reasonably possible, as soon as possible thereafter;*
23. The plaintiffs were arrested on a Friday. They had to be transported from Taveuni to Savusavu and then to Labasa, as there is no permanent Magistrate neither in Taveuni nor Savusavu.
24. In my judgment, it was reasonably not possible to produce the plaintiffs before 12th June, 2018, for the reasons set out in the preceding paragraph.
25. The plaintiffs also complain that they were unable to sleep in the cell at TPS, as there were more than 10 people in the cell. The cell in SPS was dirty.

26. PW4 and PW5 said that there were more than 10 people in the cell. They took turns to sleep. They were given change of clothing and soap.
27. DW1 said that the cell block can accommodate 2 persons at a time. There were 7 in the cell at the relevant time.
28. PW1, PW2 and PW3 were remanded and detained in the cells as a temporary measure in what was available in TPS and SPS until they were taken to Labasa Magistrates' Court.
29. In my judgment, no liability can be imposed on the defendants in that regard.

Assault

30. Next, the plaintiffs allege that they were assaulted by DW2. DW2 denied the allegation.
31. PW1, (*the first plaintiff*) said that on the evening of 8th June, 2018, when he went to TPS to ask the reason PW2, (the second plaintiff) and PW3, (the third plaintiff) were locked up, DW2 handcuffed his left hand to a louvre frame leaving him in a standing position. After midnight, he broke the frame and went to the washroom, as DW2 refused to bring the key of the handcuff. Next morning, the handcuff was removed by a PO. He said that the handcuff touched his bone. His left wrist was swollen for two to three days. He had no injuries after he was bailed out. He went to a Doctor. The Doctor gave him pain killers.
32. PW1, in cross examination said that he was not lying that he was handcuffed and broke free his hand from a metallic louvre blade.
33. PW4 said that DW2 handcuffed PW1 to a louvre frame. PW4 and PW5 said that PW1 could not sit and remained standing until they went to sleep.
34. PW2 and PW3 stated that on 8th June, 2018, they was beaten 10 to 15 times by DW2 with great force.

35. PW2 said that he was punched in his stomach and ears for 15 mts. He was in pain. In cross examination, he said that he did not inform the POs of SPS that he was assaulted by officers at TPS, as he was frightened those POs would also assault him. Nor did he tell them that he suffered injuries and wanted to see a Doctor. On 22nd August, 2018, he did not tell the Magistrate that he was ill treated at TPS and SPS by POs. He did not produce a medical report that he developed asthma, as contended.
36. PW4, in evidence in chief and cross examination said that he saw DW2 and a PO named Veresa punching and smacking the ears of Pundit, (PW2).
37. PW5 said that he too saw PW2 being assaulted. He was punched on both sides of his ribs and his ears were smacked for approximately 45 mts. He was screaming. The POs swore at him.
38. PW4 and PW5 testified that PW3 was assaulted by DW2 and another PO.
39. I view the evidence of PW4 and PW5 with skepticism, as they have a grievance with the Police. They too were arrested and locked up in the cell with the plaintiffs. Neither are reliable or independent witnesses.
40. PW1, in cross examination said that his hand was swollen, severely paining and had not healed when he was produced in Court. It transpired that neither he nor PW2 or PW3 had complained to the Magistrate at the stage they sought bail nor subsequently when they were acquitted of the alleged assault. The plaintiffs were represented by counsel. No medical evidence was produced of their injuries.
41. In the circumstances, I do not accept the contentions that PW1 was handcuffed to a louvre frame and broke the metallic frame nor that PW2 and PW3 were assaulted.
42. I decline the claim of the plaintiffs for damages for assault.

Malicious Prosecution

43. I now move on to the contention of malicious prosecution.

44. The four requirements a plaintiff has to establish to succeed in an action for malicious prosecution were stated by Gleeson CJ, Gummow, Kirby, Hayne, Haydon and Crennan JJ in *A v New South Wales*, [2007]HCA 10 as follows:

- i. *that proceedings of the kind to which the tort applies (generally, as in this case, criminal proceedings) were initiated against the plaintiff by the defendant;*
- ii. *that the proceedings terminated in favour of the plaintiff;*
- iii. *that the defendant, in initiating or maintaining proceedings acted maliciously; and*
- iv. *that the defendant acted without reasonable and probable cause.*

45. In the present case, it is not in debate that the plaintiffs were acquitted in the Magistrates Court. The controversy arise on the third and fourth essentials.

46. Lord Denning M.R. in *Stapely v Annetts & Another*, 1970 (1) WLR 20 at pg 22 stated:

In an action for malicious prosecution the burden is on the plaintiff to prove malice and absence of real and probable cause. If the defendant denies it, it is not the practice to require the defendant to give particulars of his denial. It is only if he puts forward a positive allegation that he should be required to give particulars of it. (emphasis added)

47. *Clerk & Lindsell on Torts*, (21st Ed), para 16-30 provides:

Reasonable and probable cause.. The claimant has, in the first place to give some evidence tending to establish an absence of reasonable and probable cause which is operating in the mind of the defendant. To do this, the claimant must identify the circumstances in which the prosecution was instituted. It is not enough to prove that the real facts established no criminal liability against him, unless it also appears that those facts were within the personal knowledge of the defendant. (footnotes omitted, emphasis added)

48. PW3 gave contradictory evidence on his caution interview notes. In cross examination said that he signed the caution interview notes on his own free will. In re-examination, he said that he signed the notes, as he was afraid.

49. I reproduce an extract from the “*Record of Interview of Simone Nadurataloa*”:

Q.52: Whilst doing your work at the tyre centre, do you have conversations with Pundit (Maheshwar Prasad)?

Ans.: Yes.

Q.53: What conversations you have with Pundit (Maheshwar Prasad)?

Ans.: He told me that the boss told him for something for me to do.

Q.54: What did you have to do?

Ans.: Pundit (Maheshwar Prasad) told me that they have planned with Atish for me to burn his vehicle.

Q.55: By the time you hear what Pundit (Maheshwar Prasad) told you, how do you feel?

Ans.: I was afraid and feel duress and I told him that this thing will bounce back to me.

Q.56: What happened after that?

Ans.: Pundit (Maheshwar Prasad) told me don't worry because Atish have told him for us to do this thing.

Q.60: What is Pundit (Maheshwar Prasad) during the lunch hour?

Ans.: He went towards Naqara to buy the benzene and came back and went to his home to have lunch.

Q.61: Where Pundit (Maheshwar Prasad) did purchased benzene from?

Ans.: At Taveuni Hardware Store.

Q.62: How many litres of benzene did Pundit (Maheshwar Prasad) purchased from Taveuni Hardware Store?

Ans.: About four (4) litres of benzene.

Q.63: What kind of fuel did Pundit (Maheshwar Prasad) purchased from Taveuni Hardware Store?

Ans.: The Premix fuel....

Q.89: Where was the vehicle parked?

Ans.: Just beside the car wash....

Q.92: What happened when you came towards the vehicle?

Ans.: I came outside then I look around and I didn't saw anyone and then I opened the vehicle door....

Q.96: How come did you know that the driver's door side was open?

Ans.: Because Pundit (Maheshwar Prasad) already told me that the driver's door side will be open.

Q.97: What happened after that?

Ans.: I opened the driver's door side and went inside the vehicle and then I poured the premix on to the front seat passenger side and then I came out again.

Q.98: *What happened after that?*
Ans.: *Then I came out again closed the driver's door side and looked around again and I didn't saw anyone then I lit the piece of cardboard with a match stick and then I opened the driver's door side again and then I throw the piece of cardboard inside the vehicle.*

Q.99: *What amount of premix did you poured inside the vehicle?*
Ans.: *About half cup of premix.....*

Q.101: *Where is the leftover of that premix?*
Ans.: *At home...*

Q.103: *Can we go and bring the premix and the cardboard from your house?*
Ans.: *Yes.*

Q.104: *Is this the gallon of premix you used to set fire on the vehicle (showed to him)?*
Ans.: *Yes, that's the one I used.(emphasis added)*

50. I am inclined to the view that the detailed sequence of events as narrated by PW3 are a true account and could not have been concocted by DW1 and DW2.
51. The plaintiffs were arrested and charged for damaging the property of PW1 contrary to section 369(1) of the Crimes Act.
52. Section 369(1) states that a “ *person commits a summary offence if he willfully and unlawfully destroys or **damages any property***”.(emphasis added)
53. The section provides that a person commits a summary offence if he damages any property. Ownership is irrelevant.
54. The case for the plaintiffs is that the Police should have investigated as to who was the owner of the vehicle before charging the plaintiffs.
55. In my view, at the stage the plaintiffs were charged, “*the police are not delicately trying to assess whether there is proof beyond doubt. The police need to have a reasonable suspicion that a crime has been committed*”, (emphasis added) as Singh J stated in *Bachu v Commissioner of Prisons*, HBC 369 of 2003,(27th April,2007).

56. His Lordship said :

..all the police needed was honest belief in the guilt of the accused based on reasonable ground. In preventing and investigating crime, quick decisions have to be made. (emphasis added)

57. In order to determine whether “*a prosecution was commenced or maintained without reasonable and probable cause attention* (must be directed) *to the state of affairs when the prosecution was commenced, or when the prosecutor (the defendant in the subsequent civil claim) is alleged to have maintained the prosecution or when the prosecutor (the defendant in the subsequent civil claim) is alleged to have maintained the prosecution. Moreover, it necessarily directs attention to what material the prosecutor had available for consideration when deciding whether to commence or maintain the prosecution, not whatever material may later have come to light*””, (emphasis added) as stated in *A v New South Wales*, and quoted by Dayaratne, JA in *Naisoro v Commissioner of Police*, [2019] FJCA 82; ABU0018.2017 (7 June, 2019) upholding my judgment in *Naisoro v Commissioner of Police*, [2016] FJHC 989; HBC 278B.2012 (27 October, 2016).

58. Dayaratne, JA quoted extensively from the judgment of *A v New South Wales*, (*supra*) as follows. At paragraph 39 :

*The element of ‘absence of reasonable and probable cause’ cannot be adjudged by a single yardstick and has to be determined on the facts and circumstances of each case. I am once again inclined to rely on A v New South Wales (*supra*), where it was said that an action for malicious prosecution will not lie “where the material before the prosecutor at the time of initiating or maintaining the charge both persuaded the prosecutor that laying a charge was proper, and would have been objectively assessed as warranting the laying of a charge”.* (emphasis added, underlining mine)

59. In *A v New South Wales*, (*supra*) it was stated:

In cases where the prosecutor acted on material provided by third parties, a relevant question in an action for malicious prosecution will be whether the prosecutor is shown not to have honestly concluded that the material was such as to warrant setting the processes of the criminal law in motion. .. In particular, if the prosecutor was shown to be of the view that the charge would likely fail at committal, or would likely be abandoned by the Director of Public Prosecutions, if or when that officer became involved in the prosecution, absence of reasonable and probable cause would be demonstrated. But unless the prosecutor is shown either not to have honestly formed the view that there was a proper case for prosecution, or to have formed that view on an insufficient basis, the element of absence of reasonable and probable cause is not established. (emphasis added)

60. In my judgment, there was reasonable suspicion and sufficient evidence before the Police to initiate the charge against the plaintiffs for damaging the vehicle.

61. The plaintiffs were also required to prove the existence of malice on the part of the DW1 and DW2.

62. *Clerk & Lindsell on Torts*, (*op.cit*), para 16-52 states:

The proper motive for a prosecution is, of course, a desire to secure the ends of justice. If a claimant satisfies a jury, either negatively that this was not the true or predominant motive of the defendant or affirmatively that something else was, he proves his case on the point. ...A claimant may sometimes be able to show what the exact motive was, as by proving expressions of spite or ill-will on the defendant's part; or by showing that he had some collateral object to secure. (emphasis added)

63. In *Naisoro*, (*supra*) Dayaratne, JA cited *A v New South Wales*, (*supra*) further on the twofold requirements of absence of reasonable and probable cause and malice as follows:

At paragraph 35:

...It is sometimes thought that proving either of these two elements would suffice. However, this is not so and proving malice would not by itself establish the absence of reasonable or probable cause or vice versa. It was pointed out in the above case that "... the positive requirement of malice, and the negative requirement of absence of reasonable and probable cause, each have a role to play in the tort. A conclusion about malice does not render irrelevant the inquiries about what the prosecutor did make, and should have made, of the material available when deciding whether to initiate or maintain the prosecution".

On the element of malice, His Lordship at paragraphs 37 to 38 said :

..malice would mean "... acting for purposes other than a proper purpose of instituting criminal proceedings. Purposes other than a proper purpose include, but are not limited to, purposes of personal animus of the kind encompassed in ordinary parlance by the word 'malice' ". It would be necessary that 'the defendant must have had malicious intent in the sense of improper purpose'. Accordingly, 'malice' would constitute "... an element that focuses upon the dominant purpose of the prosecutor and requires the identification of a purpose other than the proper invocation of the criminal law".

.."Two further observations should be made about the element of malice. First, **its proof will often be a matter of inference. But it is proof that is required, not conjecture or suspicion.** Secondly, the reference to "purposes other than a proper purpose" might be thought to bring into this realm of discourse principles applied in the law of defamation or in judicial review of administrative action. No doubt some parallels could be drawn with principles applied in those areas. But drawing those parallels should not be permitted to obscure the distinctive character of the element of malice in this tort. **It is an element that focuses upon the dominant purpose of the prosecutor and requires the identification of a purpose other than the proper invocation of the criminal law "** (*emphasis added*).

64. The plaintiffs have not established that the action taken by DW1 and DW2 to charge them was for any other purpose apart from bringing them to justice.

False imprisonment

65. Finally on the claim of false imprisonment.

66. The plaintiffs were imprisoned at Vaturekuka Prison by an Order of the Magistrate acting within his jurisdiction. Section 3(5) of the State Proceedings Act applies.

67. *Clerk & Lindsell on Torts*, (*op.cit*), para 15-23 states:

False imprisonment is “the unlawful imposition of constraint on another’s freedom of movement from a particular place”. The tort is established on proof of: (1) the fact of imprisonment and (2) the absence of lawful authority to justify that imprisonment..(emphasis added)

68. Lord Diplock in *Maharaj v Attorney General of Trinidad and Tobago* (No. 2), [1978] All ER 670 at 679 said

..... no human right or fundamental freedom..... is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person’s serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to, then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. emphasis added)

69. In my judgment, the claims for damages for false imprisonment and a declaration that the first and second defendants are unfit and improper persons to carry out duties as POs and be investigated for abuse of office and human rights are misconceived.

70. **Orders.**

- a. The action of the plaintiffs is declined.
- b. The first, second and third plaintiffs shall pay costs summarily assessed in a sum of \$ 4500.00 to the first, second and third defendants



A.L.B. Brito-Mutunayagam
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JUDGE
23rd August, 2023