

**JAMES SATISH BACHU v COMMISSIONER OF PRISONS and 2 Ors  
(HBC369 of 2003)**

HIGH COURT — CIVIL JURISDICTION

5

SINGH J

23 March, 27 April 2007

10 **Tort — false imprisonment — whether person remanded in custody by magistrate in criminal proceedings later declared null by High Court entitled to damages — whether initial arrest of Plaintiff was lawful — whether remand of Plaintiff amounted to malicious prosecution — Criminal Procedure Code (Cap 21) s 21 — High Court Rules O 18 rr 11, 12(1) — Penal Code ss 116, 196.**

15

The Plaintiff, founder and President of Fiji Citizens Freedom Movement, issued a media release to warn people to keep away from government buildings, police stations, prisons and military camps. His organisation received information that some terrorist elements were planning to disrupt the government and various departments. The Plaintiff was arrested by the police, his house was searched and some banners were seized. He was charged under s 116 of the Penal Code for holding out threats to persons employed in public service after being kept in custody for 2 days. He was taken to the Magistrates Court which remanded him in custody. The offence for which he was charged required the sanction of the Director of the Public Prosecutions. The sanction was not obtained, hence he was released on the grounds that the proceedings before the Magistrates Court were a nullity. The Plaintiff sought damages for wrongful confinement.

20

25

**Held** — (1) The grounds for the arrest of the Plaintiff may be reasonable but without a warrant of arrest, accordingly, the Plaintiff's initial arrest and detention for a period of 2 days was unlawful.

30

(2) The proper remedy of the Plaintiff was false imprisonment. However, there was no liability for the period of confinement subsequent to the remand unless it amounted to malicious prosecution.

(3) The Plaintiff's claim for malicious prosecution failed. The Plaintiff failed to prove the absence of reasonable and probable cause and malice on the part of the police in making the arrest.

35

(4) The Plaintiff succeeded in proving false imprisonment while being detained by police. Accordingly, the Plaintiff was entitled to total damages in the sum of \$3450 plus costs in the sum of \$2250.

Application granted.

**Cases referred to**

40

*Alikisio Nainima v Commissioner of Police and Anor* HBC 306/1998; [2004] FJHC 505; *Diamond v Minter* (1941) 39 LGR 159; [1941] 1 All ER 390; (1941) 105 JP 181; [1941] 1 KB 656; *Hill v Chief Constable of West Yorkshire* [1989] AC 53; [1988] 2 All ER 238; [1988] 2 WLR 1049; *R v Governor of Brookhill Prison* [2001] 2 AC 19; [2000] 4 All ER 15; [2000] 3 WLR 843; [2000] UKHL 48; *Raza v Ilansinghe* (2000) 1 FLR 160; [2000] FJHC 208; *Samuela Tuilole v Attorney-General of Fiji* HBC 0229D/2002S; [2003] FJHC 321, cited.

45

*Eshugbayi Eleko v Officer Administering the Government of Nigeria* [1928] AC 459; [1928] All ER Rep 598; *Rookes v Barnard* [1964] AC 1129; [1964] 1 All ER 367; [1964] 2 WLR 269; *Uren v John Fairfax & Co Ltd* (1966) 117 CLR 118; [1967] ALR 25; (1966) 40 ALJR 124, considered.

50

*P. Knight* for the Plaintiff

*S. Sharma with S. Serulagilagi for the Defendants*

**Singh J.**

### **Background**

5 [1] The tort of false imprisonment often raises intriguing issues. This is one such case. The issue is whether a person remanded in custody by a magistrate in criminal proceedings which are later declared a nullity by the High Court because the statutory sanction of the Director of Public Prosecutions necessary for the charge was not obtained, is entitled to damages for false imprisonment or  
10 malicious prosecution.

[2] James Bachu in 2002 was a market vendor and operated a stall at RB Patel Centerpoint, Nasinu. He is also the founder and President of Fiji Citizens Freedom Movement. The aim of this movement is protection of human rights and rights guaranteed by the Constitution of Fiji.

15 [3] On 8 January 2002, he caused a media release to be issued warning people to keep away from the government buildings, police stations, prisons and military camps. He said that his organisation had received information that some terrorist elements were going to disrupt the government and various departments. He was by this media release trying to warn the public of danger and also trying to let the terrorist elements know that they were aware of the plot. As a result of the media  
20 release and a fax received by police he was arrested, his house was searched and some banners and placards seized. He was kept in custody for 2 days. He was charged under s 116 of the Penal Code for holding out threats to persons employed in Public Service. He was then taken to Magistrate Court.

25 [4] The court remanded him in custody and he remained remanded from 10 January to 15 February. On 15 February 2005 he was set free by the High Court on the grounds that the proceedings were a nullity as the offence for which Bachu was charged required the sanction of the Director of Public  
30 Prosecutions. This sanction it held was not obtained.

[5] Mr Bachu is seeking damages for wrongful confinement for the period of 2 days while he was in police custody and for the remainder 36 days while he was in remand in prison by order of a magistrate.

### 35 **Defence**

[6] The Defendants' defence is that the Plaintiff's arrest was lawfully done. They also allege that the sanction of the Director of Public Prosecutions had been obtained even though the DPP had not signed a certificate as evidence of such  
40 sanction.

### 40 **Issues**

[7] The issues which confront the court are:

- (a) whether the initial arrest of the Plaintiff was lawful;
- 45 (b) whether the remand of the Plaintiff from 10 January to 15 February 2002 amounted to malicious prosecution;
- (c) how much if any damages ought to be awarded to the Plaintiff.

### **Was the plaintiff lawfully arrested?**

50 [8] At common law a police officer like an ordinary citizen is liable in tort to a person who is injured as a direct result of his acts or omissions. So he may be liable in damages for assault, unlawful arrest, wrongful imprisonment and

malicious prosecution, and also for negligence: *Hill v Chief Constable of West Yorkshire* [1989] AC 53 at 59; (1988) 2 All ER 238 at 241; [1988] 2 WLR 1049.

[9] The tort of false imprisonment involves the infliction of bodily restraint which is not expressly or impliedly authorised by law. The plaintiff does not have to prove fault on part of the defendant. It is a tort of strict liability: *R v Governor of Brookhill Prison* [2001] 2 AC 19 at 27; (2000) 4 All ER 15 at 20d; [2000] 3 WLR 843; [2000] UKHL 48.

[10] The burden of proof of lawfulness of the arrest is upon the defendant. In *Eshugbayi Eleko v Officer Administering the Government of Nigeria* [1931] AC 662 at 670; [1931] All ER Rep 44 at 49 Lord Atkin stated that “no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice”. Therefore it is for the defendant to justify the arrest. *Bullen & Leake on Pleadings & Precedents*, 15th ed, p 42, at [2-07.1] state “where a claimant makes a claim for false imprisonment, the burden of proof is on the defendant to justify that imprisonment. For the burden of proof is on the defendant to justify the claimant’s arrest or subsequent detention as lawful”.

[11] The Plaintiff in the final submissions submitted that he was charged under s 116 of the Penal Code which is a misdemeanour. Therefore the police officer should not have arrested the Plaintiff without a warrant. The offences for which a police officer may arrest without a warrant are set out in s 21 of the Criminal Procedure Code (Cap 21). The Code in the first schedule provides offences for which an officer may arrest a person without a warrant. The schedule provides that a police officer shall not arrest a person without a warrant for s 116 offence. Clearly the police were not entitled to arrest the Plaintiff without a warrant.

[12] Mr Sharma submitted that this issue of arrest without warrant was not raised in the pleadings and it is addressed for the first time in the addresses.

[13] The statement of claim was prepared by the Plaintiff in person so it may lack some clarity. However in para 10 of his claim the Plaintiff asserts he was “wrongfully charged under Section 196 of the Penal Code” and “wrongfully arrested and detained in custody at the Suva Police Station”. While it would have been desirable for the Plaintiff to give some particulars of wrongfulness of arrest, it nevertheless did not prevent the Defendants if they wished, to seek those particulars. Order 18 r 11 of the High Court Rules requires that pleadings provide necessary particulars in certain instances if allegation of misrepresentation, fraud or breach of trust are made. Wrongful arrest and custody are not included in that list.

[14] The Defendants’ defence in para 6 only addresses the issue of Plaintiff being “wrongfully charged”. It does not address unlawful arrest and detention. The defence does not deny that the arrest was unlawful and therefore the Plaintiff could deem that wrongful arrest was admitted — see O 18 r 12(1).

[15] There is no dispute that the Plaintiff was arrested by police on 8 January 2002 sometime after 4 pm and remained in police custody until 10 January 2002 that is for a period of 2 days. He slept in the police cell for 2 nights. There was total restraint of his liberty by police for 2 days until he was taken to court.

[16] The police officer may have had reasonable grounds to arrest the Plaintiff. However, that arrest could only be made if a warrant for arrest was first obtained in terms of s 21 of the Criminal Procedure Code.

[17] Accordingly I find that the Plaintiff’s initial arrest and his detention by the police for the period of 2 days was unlawful.

**Period in remand — Did it amount to malicious prosecution?**

[18] Different considerations apply where the opinion or judgment or order of a judicial officer is interposed between the charge and imprisonment or remand. A judicial officer namely a magistrate acts according to his own judgment; he is not the agent of the prosecuting authority or the police. The Commissioner of Police or Prisons cannot be made liable for acts of the magistrate.

[19] The law is clear. If a Plaintiff is wrongfully arrested without a warrant and is taken before a court which remands him in custody, the proper remedy for the initial arrest is false imprisonment but there is no liability for the period of confinement subsequent to the remand unless it is for malicious prosecution — *Diamond v Minter* (1941) 39 LGR 159; [1941] 1 All ER 390 at 397; (1941) 105 JP 181; (1941) 1 KB 656 at 663.

**Elements of malicious prosecution**

[20] To succeed in a claim for damages for malicious prosecution the Plaintiff must plead and establish that —

- (1) he was prosecuted by the Defendant in that proceedings on a criminal charge were pressed and continued against him;
- (2) that the proceedings were terminated in his favour;
- (3) that the proceedings were instituted without reasonable and probable cause;
- (4) the Defendant instituted the proceedings maliciously;
- (5) that he suffered loss and damages as a result of such action: *Alikisio Nainima v Commissioner of Police and Anor* HBC 306/1998; [2004] FJHC 505.

It is for the Plaintiff to prove each of the above elements on balance of probability.

[21] The first two elements pose no difficulty.

[22] There is no doubt that charges were pressed against the Plaintiff and that the proceedings were terminated by the High Court as the sanction of the Director Public Prosecutions was not obtained. The Defendants admit this.

**Probable cause**

[23] It is in respect of element 3 and 4 that the Plaintiff runs into difficulty. The evidence shows that the Plaintiff had by press releases warned people not to go near certain government buildings and installation. The press release was expressed in very strong terms. In cross-examination the Plaintiff agreed that his press release included the words “I have given orders to my second in command to carry out planned strategies to finish off each and every terrorist who took part in the overthrow of government and for assisting in the attempted coup of 2000 to abrogate the constitution”.

[24] Anyone reading this would probably suspect that there was an organised vigilante group who had plans to kill terrorists. This is serious threat. It meant some people were prepared to take law into their own hands. Naturally the police had to track the author of the release. The police did track the Plaintiff down and interviewed him.

[25] 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. At this stage of investigation, 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. Reasonable suspicion can even be based upon evidence which later may be found inadmissible in a court of law.

[26] I find that the police had reasonable and probable cause in laying the charge. The Plaintiff has failed to prove this element.

### Malice

[27] The Plaintiff in addition to lack of reasonable and proper cause must also show malice. Malice in a malicious prosecution is not used in the sense of hatred or spite but rather prosecution driven by improper or ulterior motives.

[28] The pleadings make no reference to malice or any improper motives. The police after investigating the offence handed the file over to the Director of Public Prosecutions. The Magistrates Court records show it was an officer from the Director of Public Prosecutions who prosecuted.

[29] I am of the firm belief that the sanction of the Director of Public Prosecutions was not obtained. The prosecution was unable to show it to the High Court in the bail application. Except for a statement that there was a paper on the file, nothing else was presented. This would be a very material paper and one would have expected the Defendants to keep it. It is neither listed in the list of documents nor was it tendered. The failure to get sanction of the Director of Public Prosecutions occurred at the office of the DPP. It was an act of oversight or may be negligence. Negligence cannot be equated with malice.

[30] In the case of *Samuela Tuilole v Attorney-General of Fiji* HBC 0229D/2002S; [2003] FJHC 321 — the plaintiff had been charged for offence under the Prevention of Fires Act which statute had been repealed. The court struck out the action on the ground that the plaintiff failed to show absence of reasonable and probable ground. In *Percy v Hail* [1997] QB 924; (1996) 4 All ER 523 the English Court of Appeal held that in an action for false imprisonment or wrongful arrest, the defendant can rely on the defence of lawful authority even though the by-law under which he acted is declared invalid.

[31] The plaintiff in a malicious prosecution action has to prove both absence of reasonable and probable cause and malice: *Raza v Ilansinghe* (2000) 1 FLR 160; [2000] FJHC 208. The Plaintiff has failed to show both.

### 35 Statutory provisions — State Proceedings Act — Section 3

[32] This section was not pleaded nor raised at the pre-trial conference minutes. It was considered in Defendant's submission. Section 3(5) of the above Act provides:

(5) No proceedings shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connexion with the execution of judicial process.

The remand was done by a magistrate acting in his judicial capacity. The magistrate was acting within his jurisdiction. This section obviously applies.

[33] Accordingly I conclude the claim for malicious prosecution fails both on basis of common law because the Plaintiff has failed to show absence of reasonable and probable cause and also malice. Further s 3(5) of State Proceedings Act provides the state immunity where the act is of a judicial officer. The Plaintiff however has succeeded in showing wrongful imprisonment while being detained by police for which he is entitled to damages.

### Damages

[34] The Plaintiff was taken by police from his vegetable stall at Centerpoint. This would have been done in view of other vendors and public and perhaps subject of some gossip by those who witnessed it. He was detained for 2 days and he remained in a police cell for 2 nights which must have been an unpleasant if not a shocking experience for him.

[35] However there is no evidence that he was ill-treated by police in any way. He used to earn \$500 per week whether over a 7-day period or a shorter week I am not told. He probably bought vegetables and sold them. I calculate his profit at \$50 per day that is \$100 for 2 days. He also lost placards and a banner all valued at \$350. So his special damages are \$450.

[36] The circumstances of false imprisonment can vary enormously from case to case. The awards for exemplary damages are awarded where the defendants behave outrageously and compensatory damages are insufficient to punish the defendants: *Josaia Vakaco v Commissioner of Police and Attorney-General* — HBC 145 of 1998; *Sivarosi Raikali v Attorney-General and Commissioner of Police* (1999) 45 FLR 313.

### Exemplary damages

[37] The primary object of damages is to compensate the plaintiff for injuries caused or harm done. A secondary aspect (incidental) is to punish the defendant. This is achieved by topping up the compensatory damages with what are called exemplary damages or punitive damages.

[37] The starting point for consideration is *Rookes v Barnard* [1964] AC 1129; 1 All ER 36; [1964] 2 WLR 269 — House of Lords decision where Devlin J described three situations which call for award of such damages:

- (1) For oppressive, arbitrary or unconstitutional action by the servants of the government as where police assault a suspect.
- (2) Where a Defendant's conduct is aimed at making a profit for himself for example newspapers trying to make a profit belittle a public figure. It would give greater circulation.
- (3) Where a statute provides for exemplary damages.

The High Court of Australia in *Uren v John Fairfax & Co Ltd* (1966) 117 CLR 118; [1967] ALR 25; (1966) 40 ALJR 124 expressed disagreement with the House of Lords and considered that such damages can be extended to other torts in proper cases. It stated that such damages should be as a matter of discretion for the court where it appears that the defendant's conduct in committing the tort showed a contumelious disregard for plaintiff's rights:

damages of that character might be awarded if it appeared that, in the commission of the tort complained of, the conduct of the defendant had been high handed, insolent, vindictive, malicious or had in some other way exhibited a contumelious disregard of the plaintiff's rights.

[38] Regardless of whether one follows the House of Lords or the Australian test, the conduct of the police in this case was neither outrageous nor vindictive nor oppressive nor designed to make a profit. I very much suspect that the public safety was uppermost in the mind of the police when they went to arrest the Plaintiff. This case does not warrant a grant of exemplary damages.

[39] I consider a sum of \$1500 per day as adequate compensation that is a total of \$3000 for false imprisonment.

**Final orders**

[40] Accordingly I award a sum of \$450 special damage, \$3000 compensatory damages together with costs which I summarily fix in the sum of \$2250. There is therefore judgment for Plaintiff in the sum of \$3450 together with costs in the  
5 sum of \$2250.

*Application granted.*

10

15

20

25

30

35

40

45

50