

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 18/1026 CoA/CIVA

BETWEEN: GEORGE REUBEN PAKOA, FRED REUBEN
PAKOA and JOEL JACK
Appellants

AND: REPUBLIC OF VANUATU
Respondent

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice Bruce Robertson
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru

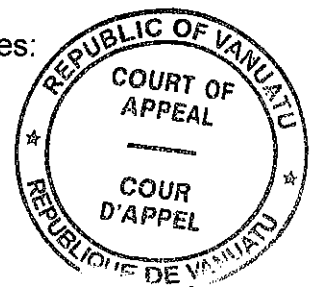
Counsel: Mr C. Leo for the Appellants
Mr S. Kalsakau for the Respondent

Date of Hearing: 13th July 2018

Date of Decision: 20th July 2018

JUDGMENT

1. This is an appeal against the judgment of the Supreme Court dismissing the appellant's claim for damages for unlawful arrest and detention for approximately 24 hours by the Police in Port Vila on 18 December 2012.
2. The appellants claim that despite their protestations of innocence, they were arrested by police officers from their work places without an arrest warrant on 18 December 2012 and escorted to the Police Station where they were stripped and locked in a cell for 24 hours before being released on 19 December 2012 after each was interviewed under caution. No charges were ever laid against them and the appellants sought damages for Trespass and Unlawful Imprisonment.
3. The respondent's case is that on 18 December 2012 a complaint of Intentional Assault was received against the appellants which caused the respondent police officers to suspect that a cognizable offence had been committed by the appellants on the complainant 4 days earlier on 14 December 2012. The respondents rely on the provisions of Sections 12(1) and 18 of the Criminal Procedure Code to justify the arrest of the appellants.
4. Section 12(1) of the Criminal Procedure Code [CAP. 136] provides:



"Any police officer may without an order from a judicial officer, or warrant, arrest any person whom he suspects upon reasonable grounds of having committed a cognizable offence".

5. It is plain that the power to arrest a suspect without a warrant can only be exercised when 2 pre-conditions are satisfied or established namely:

- (1) The arresting officer must entertain a suspicion that the person being arrested has committed a "*cognizable offence*"; and
- (2) "*Reasonable grounds*" must exist to support the arresting officer's suspicion.

see: Republic of Vanuatu v Emil [2015] VUCA 16 especially at paras. 13 and 14 which provides:

"13. There can be no doubt that the Police on receipt of the complaint from Mrs Tasaruru had sufficient evidence to form the requisite opinion justifying arrest, **namely that there were "reasonable grounds to suspect" (in terms of section 12 of the Criminal Procedure Code) that an offence had been committed.** Mr Stephens appears to suggest that on receipt of a complaint the Police had to treat it with scepticism and investigate it thoroughly before any arrest could be made. While that may be the ideal, in our view it is a counsel of perfection and overstates by a considerable margin the standard which the police must attain.

14. **The well-established process in Vanuatu, and a large number of other countries around the world, is that to arrest a suspect the Police must have reasonable grounds to suspect an offence has been committed. The determination of whether or not that is correct is ultimately for the Court.** Of course the defendant has the right to defend the charge including by giving evidence if he chooses.

(our highlighting)

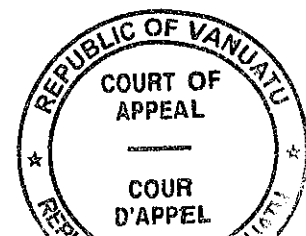
6. A "*cognizable offence*" is defined in the Criminal Procedure Code as:

"any offence for which a police officer may in accordance with the Schedule or under any law for the time being in force, arrest without warrant".

7. The relevant entry in the Schedule reads:

<u>Section</u>	<u>Offence</u>	<u>Whether the Police may arrest without warrant or not</u>
107	Intentional Assault	If penalty (a) applies, shall not arrest without warrant; if penalty (b) (c) or (d) applies may arrest without warrant".

On that entry alone, it is clear that an offence of Intentional Assault may or may not be arrestable without a warrant depending on which "*penalty*" applies. This latter expression, in turn, necessitates a consideration of the provisions of Section 107 of the Penal Code which reads:



"107. Intentional assault

No person shall commit intentional assault on the body of another person.

Penalty:

(a) if no physical damage is caused, imprisonment for 3 months;

(b) if damage of a temporary nature is caused, imprisonment for 1 year;

(c) if damage of a permanent nature is caused, imprisonment for 5 years;

(d) if the damage caused results in death, although the offender did not intend to cause such death, imprisonment for 10 years."

8. It is immediately apparent from a perusal of the section that the "penalty" referred to in the above mentioned entry correlates to the absence or presence of any "physical damage" or injuries caused in the commission of the offence of Intentional Assault.
9. In the absence of any "physical damage" or injury [**penalty (a)**], the offence is not-cognizable and the suspect may not be arrested without a warrant. Accordingly, in order to justify an arrest without a warrant which is what occurred in the present case, it would be necessary for the arresting officer to have some evidence that the complainant or victim of the intentional assault had sustained "physical damage" or injury to his body.
10. Although the trial judge did not deal in any detail with the above provisions concerning a "cognizable offence", he accepted that a complaint of intentional assault was recorded in the Daily Occurrence Book maintained at the Police Station and was the record of complaint acted upon by the police in the absence of a detailed statement from the complainant.
11. The relevant handwritten entry in the Daily Occurrence Book recorded by Constable Pakoa Saling reads (in English):

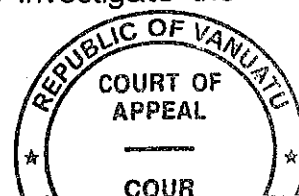
*"John Mark Bell
N/O Tongoa,
Teouma, Efate*

Intentional Assault

This man has reported the following: Pakoa Amos Toby, Joel Jack, Fred Reuben, George Reuben and Pakoa Henry, native of Tongoa, said they have committed the above offence against him on 14 December 2012."

12. The trial judge correctly noted that the above entry "... provides no details of the assault, of the part the claimant played in it and whether or not there was any weapon involved". We would also add, the entry also lacked crucial details of any "physical damage" or injury that the complainant might have sustained from the alleged intentional assault.

13. In this latter regard in the absence of a medical certificate or doctor's report confirming and detailing the nature of any physical damage to the complainant's body and despite noting that "... *it is very unfortunate that neither Constable Pakoa Salings nor Corporal John Hendry Tawii were present for cross-examination*", nevertheless, the trial judge accepted and relied upon their untested sworn statements.
14. Although we agree with the trial judge's criticism of the deponent's non-appearance for cross-examination, we cannot accept that the weight to be attached to their sworn statement depends on whether or not the evidence contained in the sworn statement is "... *non-contraversial*". In the present case, the claim for trespass and unlawful imprisonment was based upon an averment that the claimants' arrest and detention by the police was unlawful in the absence of a warrant. This is reinforced by the agreed issues and the "*one-issue*" identified by the trial judge "*whether or not the arrests were lawful?*"
15. In the absence of a warrant of arrest which is common ground, the issue may be paraphrased to a question as to whether or not the police have correctly and properly exercised their power of arrest under Section 12(1) of the Criminal Procedure Code?
16. The above explanation is necessary to show that the evidence of Cpl Tawii and Constable Saling was critical to the success or failure of the claim and could not, by any stretch, be described as: "... *non-controversial*".
17. Be that as it may, the trial judge's approach is clearly set out in his judgment commencing at paras 29 with the setting out of 3 paras. of Cpl Tawii's sworn statement where he deposed that: "... *the complainant appeared at the police station with injuries*". The Cpl "... *then instructed Constable Pakoa Saling to proceed with the investigation of the complaint*" (not we observe, to arrest the suspected assailants) and "... (unspecified) *inquiries has been carried out ...*" presumably into the recorded complaint.
18. Nowhere in his sworn statement however, does Cpl Tawii categorically state that he personally saw, met and spoke to the complainant nor does he depose to the nature and location of the complainant's apparent "*injuries*" or, indeed, asking the complainant if he had received any medical treatment. More particularly, Cpl Tawii does not depose to specifically directing Constable Pakoa to ascertain the nature, location and cause of the complainant's injuries and/or to have him medically examined.
19. In similar vein, the sworn statement of the Investigating Officer (Constable Pakoa Saling) is completely lacking in any detail as to the type and nature of inquiries he conducted after being specifically directed by Cpl Tawii to investigate the



complaint and, more particularly, on what basis he had "assessed that the complaint justified action to arrest and detain the suspects (without warrant) as the allegation may be (not was) serious". Nowhere in his sworn statement does Constable Pakoa Saling depose to asking or being told or personally seeing any injuries on the complainant when he recorded his complaint in the station Daily Occurrence Book.

20. Against that background of unsatisfactory and non-specific generalizations, the trial judge said:

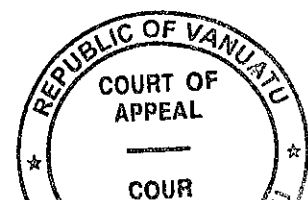
*"What cross-examination of Corporal Tawii may or may not have established was whether or not he had seen the injuries of the complainant, whether that he had spoken to the complainant or whether he was simply acting on other information received. Even if Corporal Tawii had not seen Mr Bell personally however information received that Mr Bell had been injured is something which Corporal Tawii would be entitled to take into account in formulating a view as to the seriousness of the offending and further action which might need to be taken. **Constable Malapa had also given evidence that he recalled that the officer in charge had said that the complainant was cut in the head with an axe following a dispute over chiefly title. Constable Malapa's evidence may accordingly be relied upon to establish that there was reason to believe that the complainant head suffered head injury in the assault and that a weapon had been involved.***

*I am satisfied therefore that what the evidence establishes is that prior to the arrest being made the complainant had attended the Police Station and had laid a formal complaint of intentional assault. **I am satisfied that the police were aware prior to effecting the arrest of the claimants that the complainant had been injured in the assault and that the assault was one which involved the use of an axe and related to a dispute over a chiefly title.** While the Daily Occurrence Book does not record that detail the evidence of other officers establishes this knowledge. In particular I refer to the evidence of Constable Malapa. It is clear also that the complainant specifically identified the claimants as, along with one other, the persons responsible for the assault".*

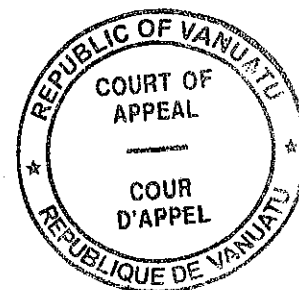
And later at para. 25 the trial judge said in dismissing the claim:

*"While it may well have been appropriate for a full written statement to be made by the complainant setting out the circumstances in which the assault occurred and the part which each claimant allegedly played in the assault and while I would recommend to the Vanuatu Police Force that that would be an appropriate way in which to commence an investigation, the fact that such a full statement was not taken does not make the arrest unlawful. **The evidence establishes that the complainant himself attended the police station showing signs that he has been assaulted and complaining of an assault. He was able to state the date of the assault and he was able to state who was allegedly engaged in that assault.** The fact that the claimants were not ultimately charged is neither here nor there. **I consider that those facts gave the police a basis upon which to reasonably suspect that the claimants have been involved in a commission of a cognizable offence and therefore liable to arrest.** Accordingly their arrest and subsequent detention as lawful. The evidence establishing these matters is able to be drawn from the evidence of the officers available for cross-examination at trial and without reference to the sworn statements of officers Saling and Tawii although their statements do serve to corroborate the evidence of the others."*

(our highlighting)



21. The above extracts demonstrate the lengths to which the trial judge had to go to find some evidence of injury. In our view the reference to Constable Malapa's inadmissible hearsay statement of what Constable Pakoa Saling allegedly said to him about the complainant's head injury being caused by an axe was, both unfortunate and circular and, in an event, is not supported by Constable Pakoa Saling's own sworn statement. Similarly, the suggestion that Cpl Tawii would be entitled to take into account some unattributed and non-particularized "... *information received that Mr Bell had been injured ...*" is inconsistent with his deposed instruction to Constable Pakoa Saling to proceed with the investigation of the complaint.
22. In similar vein, we do not accept that the trial judge, without clearly identifying the source(s) and/or naming the relevant police officers involved, could be as he writes: "... *satisfied that the (unidentified) police were aware (how? and from who?) prior to effecting the arrest of the claimants that the complainant had been injured in the assault and that the assault was one which involved the use of an axe and related to a dispute over a chiefly title*". In this regard the two arresting officers namely, Constables Terry Malapa and Edmon Williams who acted on the directions of Constable Pakoa Saling, both deposed in identical terms:
- "I recall that IC said that the complainant was cut in the head with an axe following a dispute over chiefly title."*
- The 'IC' referred to is Constable Pakoa Salings. Unfortunately, Constable Pakoa Saling's sworn statement makes no mention at all of (1) the complainant sustaining any injury, let alone, a "*cut to the head*" or (2) of an "*axe*" being used to cause the complainant's head injury or (3) that the underlying problem or background to the incident was "*... a dispute over chiefly title*"
23. Neither does the sworn statement of Constable Pakoa Saling identify with any precision what investigation or enquiries (if any) were made by him to support his assessment that "*the allegation made was serious*" and justified the arrest of the alleged assailants without a warrant 4 days after the event, or that "*a dangerous weapon*" was used in the assault.
24. The appellants appealed the decision urging several grounds which we say, in agreement with the respondents' submission, raises a single issue, namely, did the trial judge err in law and in fact in concluding that the arrest of the appellants was lawful?
25. In considering the sole issue in this appeal we affirm the earlier decision of this Court in Republic of Vanuatu v Emil [2015 VUCA 16 which was referred to and purportedly applied by the trial judge.

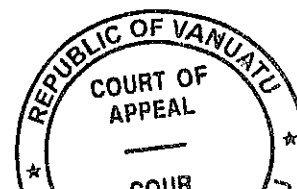


26. We say “purportedly” advisedly because Emil’s case has been explained and clarified in the later decision of this Court in Republic of Vanuatu v Togagi [2016] VUCA 45 (not referred to by the trial judge) where the Court observed of the two passages from the Emil case set out in the trial judge’s judgment (op. cit at para 5 above):

*“These brief references to the law in **Emil** must be understood in the context of the facts of that case. The police had received a complaint alleging a very serious offence, and the complaint was very specific in its terms. The complaint was that Emil had had sexual relations with his biological daughter on numerous occasions in 2007 which resulted in her pregnancy and her giving birth to a son. In the circumstances of that case the complaint was held to be sufficient in itself to give rise to a suspicion on reasonable grounds that a cognizable offence had occurred. That conclusion was so readily apparent on the facts of that case that the Court of Appeal found it unnecessary to analyze the considerations that could arise in less obvious situations. It is important to note that the Court of Appeal nevertheless recognized that the determination of whether or not a reasonable ground to suspect an offence exists is ultimately for the Court. In short, the test is an objective one. It is not the subjective opinion of the arresting police officer that is determinative, but the objective assessment of all the facts of the particular case by the Court.*

(our underlining)

27. Plainly Emil’s case is distinguishable from the present case on various fronts – “*the complaint was very specific*” and alleged the incestuous sexual relations complained of had resulted in the daughter’s pregnancy and her giving birth to a son. In the present case, the recorded complaint of intentional assault merely identified the alleged assailants with their island/origin (Tongoa) and the date when the incident occurred and nothing else. There was no mention of any injuries being sustained by the complainant or of a weapon being used in the assault or indeed, what the underlying dispute or context was about. Furthermore, in Emil’s case the suspect was arrested on the strength of the detailed complaint whereas, in the present case, Cpl Tawii merely instructed Constable Pakoa Salings “*to proceed with the investigation of the complaint.*”
28. In our view, such an instruction is some indication that Cpl Tawii did not consider the brief complaint, as recorded by Constable Salings provided reasonable grounds of suspicious to immediately arrest the alleged assailants, without the need to carrying out some investigation. In this regard, it would not have gone unnoticed that the incident had occurred 4 days before the complaint was lodged and therefore there was no urgency demonstrated on the part of the complainant. Additionally no medical report was produced.
29. In light of the foregoing we are not satisfied that the facts in the present case are “*so readily apparent*” from the brief entry in the Daily Occurrence Book as to provide reasonable grounds to suspect that a cognizable offence had been committed against the complainant sufficient to justify the arrest of the alleged perpetrators without a warrant or without the need to conduct an investigation.



30. As was said by this Court in Public Prosecutor v Simon [2003] VUCA 1

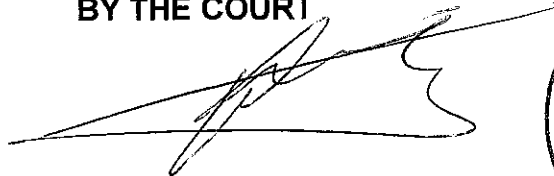
"... Investigation meant carrying out well-regulated police processes. It means collecting material so that there is a proper evidential basis for the apprehension of citizens of any rank or station. The rule of law in a civilized community means that nobody's liberty is interfered with unless and until there is a proper foundation. The fact that some potential offences are so serious an arrest without warrant can be justified, merely underlies the increased responsibility to ensure that such extraordinary power is not exercised except where there is available an unequivocal and cogent evidential justification."

31. In light of the foregoing we are satisfied that the trial judge erred in assessing the nature, weight, and admissibility of the evidence before him and in dismissing the claim. In short, there was no unequivocal and cogent evidential foundation or justification in this case for the arrest of the appellants without a warrant or court order.

32. The appeal is allowed, judgment on liability is entered against the respondent and the case is returned to the Supreme Court for assessment of damages. The appellants having succeeded in this appeal are awarded standard costs both in the Supreme Court and on the appeal.

DATED at Port Vila, this 20th day of July, 2018.

BY THE COURT



Hon. Vincent LUNABEK
Chief Justice.

