

**IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU**
(Other Jurisdiction)

Civil Appeal
Case No. 17/2429 CoA/CIVA

BETWEEN: Steve Tinning Tete
Appellant

AND: The Republic of Vanuatu
Respondent

Date of Hearing: *Tuesday, February 13th 2018 at 2 pm*

Date of Judgment: *Friday, February, 23rd 2018 at 4 pm*

Before: *Chief Justice Vincent Lunabek*

Justice John von Doussa

Justice Ronald Young

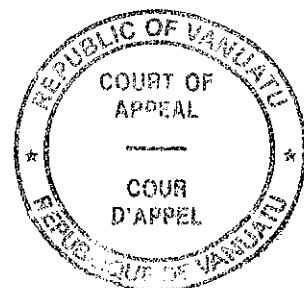
Justice Paul Geoghegan

Appearances: *Counsel – Mr Justine Ngwele for the Appellant*

Counsel – Mr Sammy Aron (SLO) for the Respondent

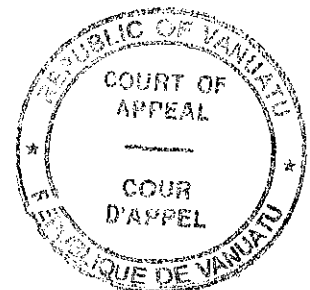
JUDGMENT

1. Mr Tete appeals a Supreme Court judgment issued on July 5th 2017 which dismissed his claim against the State for damages, firstly in respect to damage to a motor



vehicle owned by him and secondly in respect of a claim of unlawful arrest and detention.

2. The appeal was filed on September 7th 2017 and accordingly an application for leave to appeal out of time was necessary. That was not opposed by the State and in view of the relatively short time between the time for the filing of the appeal and the date of the actual filing of the appeal, leave to appeal was granted.
3. The brief facts are that in the afternoon of December 5th 2009, Mr Tete was involved in a motor vehicle accident in Port Vila when Mr Tete's Mitsubishi motor vehicle collided with a Hyundai bus. Mr Tete's vehicle sustained damage. The police were alerted and arrived at the scene where he was spoken to by them and then arrested on suspicion that he had driven his vehicle while under the influence of alcohol.
4. The police attending the scene determined that Mr Tete's vehicle needed to be removed from its location and decided to drive it to the Central Police Station. On route to the Police Station the right front wheel of the vehicle separated from the vehicle causing the vehicle to travel into the opposite lane of the road where it collided with a Toyota bus. The vehicle sustained serious damage.
5. In his statement of claim Mr Tete contended that the police were responsible for the damage to the vehicle and claimed the sum of Vt 1,050,000 being the alleged cost of repairs. Mr Tete also alleged that he had been unlawfully arrested by the police and detained for a period of 24 hours, in respect of which he sought an order for compensatory damages for unlawful arrest and false imprisonment in the sum of Vt 9,600,000. Mr Tete also sought punitive damages in the sum of Vt 1,000,000.
6. In his judgment the trial Judge referred to a "*central issue*" as being whether Mr Tete had standing to bring his claim for damage to the vehicle. The Judge considered that it was necessary to determine whether or not Mr Tete was the legal owner of the vehicle.

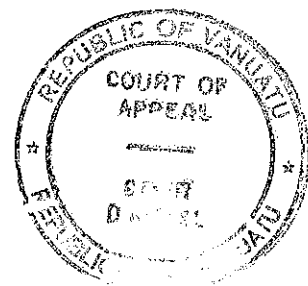


7. The second issue identified by the Judge was whether or not Mr Tete's arrest and subsequent detention were unlawful. The Judge correctly identified that Mr Tete's central complaint in this regard was that his arrest was unlawful because he has not committed any cognizable offence.
8. As to the first issue, the Judge concluded that he was not satisfied that Mr Tete was the legal owner of the vehicle and as such he had no standing to claim for the damages sustained by it. It is clear that the Judge's decision was based on the fact that there had been no change of ownership registered in respect of the vehicle, that there had been no notification of such a change as required by the Traffic Act and that there had been no transfer fees paid. That conclusion was based on the Judge's interpretation of section 40 of the Traffic Act which provides:-

"Notification of change of ownership

When the ownership of a motor vehicle changes the last owner and the new owner shall, within 7 days of such change of ownership, give notice thereof to the licensing authority as stating the named address of the new owner. The latter shall, within the same period, furnish the licensing authority with the registration book for registration of the change of ownership and shall pay the transfer fee prescribed by the Minister by order".

9. The Judge determined also that pursuant to section 54 (2) of the Traffic Act the police were given a discretionary power to remove and detain Mr Tete's vehicle. The Judge determined that he was not satisfied that the Police had, by their actions cause damage to the vehicle.
10. With reference to the second issue the Judge determined that he was satisfied that there had been a breach of the peace which authorized the police to arrest the claimant pursuant to section 12 (2) (a) of the Criminal Procedure Code Act which provides that a police officer may, without warrant, arrest any person who commits



a breach of the peace in his presence. Accordingly, he determined that neither the arrest nor the subsequent detention of Mr Tete were unlawful.

11. Mr Tete raised three grounds of appeal:-

- a) That a ruling made by the Judge that the sworn statement of Mr Kalo Marango who deposed that he had sold the car to Mr Tete, was inadmissible due to the unavailability of the witness for cross-examination.
- b) The Judge was wrong to conclude that Mr Tete had no standing to claim for damages because he was not the legal owner of the vehicle.
- c) The Judge was wrong to conclude that the arrest and detention of the appellant was lawful.

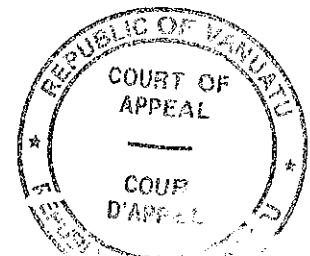
12. As to the first ground of appeal, Mr Tete had filed in support of his claim in the Supreme Court a sworn statement by Mr Marango who had deposed that his father was the registered owner of the Mitsubishi motor vehicle but that he had instructed Mr Marango to sell the vehicle and that Mr Marango had subsequently sold the vehicle to Mr Tete for Vt 300,000.

13. While it is clear that the Judge had ruled that the statement of Mr Marango was inadmissible, Mr Ngwele conceded that he had proposed to the Judge that the statement of Mr Marango be introduced into evidence but that no weight be attached to it. The trial notes also clearly show that Mr Ngwele invited the Judge to declare the statement as inadmissible in view of Mr Marango's unavailability. Clearly this was an error on the part of the counsel. However we are satisfied that the statement should not have been declared as inadmissible.

14. Rule 11.7 of the Civil Procedure Rules No. 49 of 2002 provides that:-

"Use of sworn statement in proceedings

11.7 (1) A sworn statement that is filed and served becomes evidence in the proceeding unless the court has ruled inadmissible.



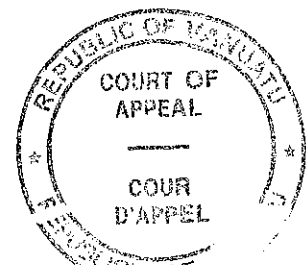
(2) The sworn statement need not be read aloud during the trial unless the court orders.

(3) A witness may be cross-examined and re-examined on the contents of the witness's sworn statement.

(4) A party who wishes to cross-examine a witness must give the other party notice of this:

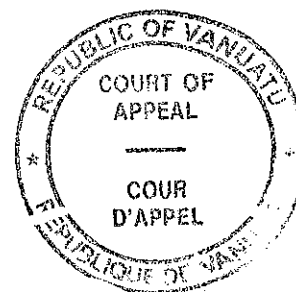
*(a) at least 14 days before the trial; or
(b) within another period ordered by the court."*

15. There was simply no basis upon which the statement of Mr Marango could have been ruled as inadmissible. The statement provided direct evidence regarding the sale of the vehicle and was accordingly relevant and therefore admissible. In these circumstances, where the maker of the statement has been required for cross examination but is unavailable for such a purpose then, in the absence of any proper grounds to rule a statement as inadmissible, the issue becomes a matter of the weight to be attached to the evidence by the trial Judge. That is a matter for the trial Judge's discretion. We are satisfied therefore that the statement is one which should have been taken into account by the Judge.
16. We are satisfied also that the trial Judge was wrong in determining ownership of the vehicle on the basis of the provisions of section 40 of the Traffic Act.
17. Section 40 is not a legislative provision which determines ownership of vehicle. It is simply a legislative provision which places a statutory obligation on the past and present owners of a vehicle to give notice of the change of ownership and to pay the necessary fees within 7 days. While compliance with section 40 may provide additional evidence of ownership, non-compliance with section 40 does not, in itself, determine ownership. Section 40 itself acknowledges the change of ownership may occur in the absence of giving the notice required by the section by virtue of its reference to "last owner" and "new owner".



18. The Judge was wrong to base determination of ownership on section 40. Mr Tete's own evidence and that of Mr Marango provide ample evidence that the vehicle was owned by Mr Tete despite the non-compliance with section 40.
19. We are satisfied also however that even if Mr Tete was not the owner of the vehicle he would have had the right to sue damages for repair to the vehicle as a bailee. Until the late 19th century the common law position had been that if a bailee was not liable over to the bailor he was barred from recovering damages against a wrong doer. That position was changed by the English Court of Appeal in The Winkfield¹. Accordingly the driver of a vehicle (a bailee in possession) is able to recover the damage to the motor vehicle caused by the negligence of a third party, despite the fact that he may have no liability to the bailor (the owner of the vehicle).
20. Despite this conclusion, Mr Tete is not entitled to damages. The statement of claim filed on his behalf does not allege negligence against the police officers driving the vehicle and merely appears to assert that as the police officers were driving the vehicle at that time it was involved in a collision then the State must be responsible for the cost of repairs. While Mr Ngwele submitted that he had pleaded "damage to the car" that is not a cause of action. The cause of action in these proceedings was negligence. We are satisfied that pursuant to section 54 (2) of the Traffic Act the police had the specific power to detain Mr Tete's vehicle and in the absence of any stated cause of action of negligence together with proof of that negligence, no claim for damages in respect of the damage to the vehicle could be sustained. Accordingly Mr Tete's claim was doomed to failure.
21. With reference to the third ground of appeal, we are completely satisfied that the police had power to arrest Mr Tete without warrant.

¹ [1902] P.42 (C.A.).



22. The evidence of the arresting officer, Officer Bong was that on the morning of December 15th 2009, he attended an incident at the Anamburu Area where information was received that Mr Tete had been involved in a scuffle with a number of young men. Officer Bong observed that Mr Tete was drunk and, after dispersing the crowd that had gathered told Mr Tete to go home. At approximately 1 pm that day he received a further report of a motor vehicle accident in the same area. He and three other officers attended the scene where they establish that it was Mr Tete's vehicle that had been involved in the accident. Officer Bong observed that Mr Tete was drunk and belligerent, as a result of which he was arrested on suspicion of driving his vehicle under the influence of alcohol. Officer Bong's evidence was supported by the evidence of other police officer, Officer Seru.

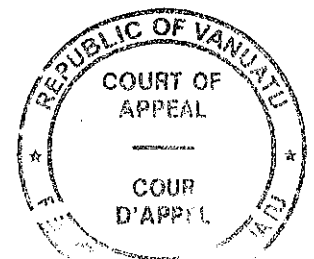
23. Section 16 of the Road Traffic (Control) Act [Cap. 29] provides:-

"Driving under influence of drink or drugs

It is an influence for any person to drive on the public road when under the influence of alcoholic liquor or a drug to such an extent that the driver is incapable of properly controlling his vehicle. A police officer shall be empowered without warrant to arrest any person contravening this section".

24. While the trial Judge referred to the right of the Police to arrest without warrant under section 12 (2) (a) of the Criminal Procedure Code Act. Section 16 of the Road Traffic (Control) Act confers a specific power of arrest without warrant on a police officer in circumstances where that police officer has reasonable cause to suspect that an offence under that section has been committed. That was the proper test to be satisfied. The evidence of the police officers in this case provided a clear basis for the right to arrest Mr Tete without warrant.

25. While Mr Ngwele focused on section 12 of the Criminal Procedure Code Act which refers to the right of a police officer to arrest without warrant any person suspected upon reasonable grounds of having committed a "cognisable offence" and submitted that the offence of driving while under the influence of drink or drugs is not a



cognizable offence, there is simply no correlation between section 12 and section 16 of the Road Traffic (Control) Act. Section 16 conferred upon officer Bong a specific power of arrest without warrant which he exercised. The fact that the Judge referred to the Commission of a breach of the peace is irrelevant.

26. While Mr Ngwele endeavored to persuade the Court that there were insufficient grounds upon which the officer could have exercised his power we consider Mr Ngwele to have confused the issue of what evidence might be required to substantiate a conviction for an offence of driving while under the influence of drugs or alcohol and what evidence is sufficient to provide a police officer with reasonable cause to suspect that such an offence has been committed. There was ample evidence to provide the police officer with reasonable cause to believe that Mr Tete may have committed an offence under section 16.

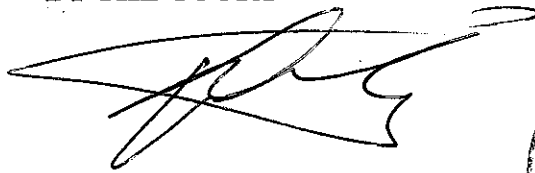
27. We are satisfied that the arrest and subsequent detention of Mr Tete was lawful.

28. For these reasons the appeal is dismissed.

29. The State is entitled to costs with those costs to be fixed on a standard basis.

DATED at Port Vila this 23rd day of February 2018

BY THE COURT



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Vincent Lunabek

Chief Justice

