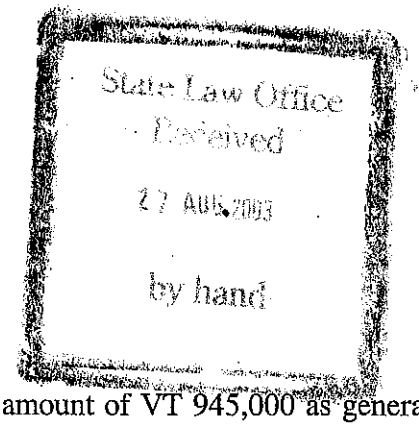
IN THE MAGISTRATE'S COURT
OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 67 of 2002.

BETWEEN: SAUL PETER
Plaintiff

AND: JACK NOKA
First Defendant

AND: THE VANUATU POLICE FORCE
Second Defendant



Coram: *Magistrate MACREVETH*

Mr. JOEL for the plaintiff
Mr. JOE for the defendants

JUDGMENT

The plaintiff in this action is seeking judgment for an amount of VT 945,000 as general damages for pain and suffering sustained as a result of an assault alleged to have been caused by Police Constable, Jack Noka the first defendant.

The core issue in contention for determination is whether the defendant did caused the injuries on the plaintiff. Once identification is ascertained the next issue is to measure the quantum of damages.

The plaintiff called 2 witnesses to testify in his favour. Amongst other things the defendant has wholly denied the allegation of causing injury upon the plaintiff. From the evidence gathered pertaining the identify of the defendant my findings are in the following:

The plaintiff testified that while calling out with intention to relieve himself of the call of nature he was wrongfully assaulted by Jack Noka. Evidence shows that the victim was roughly dragged out of cell no. 6 and as they proceed to towards the way to the toilet , the defendant lashed out at him at which was avoided . This brought the defendant

aggressiveness with which he applied a second attempt that sent the plaintiff to escape such physical contact and hide behind the police station in a ruined inhabited block . Upon discovering the defendant, with clenched fist he eventually punched the victim at his left eye causing swollen injuries .

The facts illustrated that such incident happened sometimes in the early hours of April 23rd, 2000 while he was in custody with two other inmates namely, Robert Galibert (PW2) and Jacki Luke (PW3).

In support of the plaintiff's statement, PW2 and PW3 both gave direct and circumstantial evidence of similar facts. They both stated while the plaintiff was calling out for help, they saw Jack Noka opened the door, grabbed the plaintiff, scolding in an hostile or rough manner, pushed him out of cell no.6 and slummed the door before them. Seconds after they heard the plaintiff calling words such as "awe" and noises resembling that of punches behind closed door. Minutes thereafter, the plaintiff returned to the cell with a cut and swollen injury at his left eye covered with blood stains .Upon immediate questioning at their curiosity, the plaintiff told them that he has been assaulted by the defendant.

The defendant called two witnesses to assist its case. It transpired from Jack Noka's evidence that he has no vivid recall of the incident dated back in 2000. He has repeatedly denied opening the door of cell no. 6 to the plaintiff and physically assaulting the plaintiff.

However, upon cross examination I recorded the following words from his mouth:

Q: Hemi possibol se yu nao yu openem doa, mo faetem Peter after we yu pulum hem aot long cell no. 6?

A: (I noted the first defendant with hesitation) mbae mi no save talem stret Mbe, I possibol from mi foget. Sipos oli se mi nao mi openem doa then, I true from mi forget.

It is arguable that such statement seems obscure however, in my view, this is a direct confession of the first defendant accepting the plaintiff's story. It is circumstantial that he was the person who caused the injury because he has forgotten the circumstances surrounding the incident.

On the other hand, DW2 Constable Jeffrey Samuel and DW3 Constable Morris Seule and the first defendant contended that the plaintiff has sustained the injury prior to his arrest and detention. However, they could not advance substantial evidence proving their version.

DW2 for instance, was not at the night shift from 11pm - 7am on the 22nd to 23rd April, 2000. He has only confirmed that he has noticed the injury on the plaintiff's face upon their release that very day around 3 o clock in the afternoon.

In contrast, DW3 in my view has no clear recollection of the event. His statement dated August, 2002 states that he was in morning shift from 7am - 3pm. Additionally, in court he gave contradictory evidence that he was in the afternoon shift from 11pm - 7am. His statement is not credit worthy and offer no assistance towards the defendant's case.

Furthermore, despite the denial of the first defendant's action all the defence witnesses and Jack Noka were not present during the arrest of the plaintiff and his 2 friends. Therefore, coupled with the totality of the evidence adduced before the Court by the claimant and his supporting witnesses, it is clear that Jack Noka is the identified person who has caused the injury on the plaintiff. He therefore, will not escape the responsibility but to bear the cause of his action as found.

Having proven the defendant's guilt I will now move on to measure the damages sustained. The nature of the injury are generally catalogued in the particulars of the claim but more specifically accompanied with medical reports.

They are found in these words:

1. Big haematoma left eye
2. Slight tenderness on left eye 7^{th} - 8^{th} ics
3. Bruised and swollen left eye lids due to issue bleeding

The referred injuries are materially evidenced by Dr.Paul Brooks medical report dated 25/06/00 as exhibit 'P2'. To reduce pain the plaintiff was advised to take Aspirin tablets and apply ice to the affected areas.

A photograph tendered at "P1" is consistent with the injury sustained. In addition, a subsequent medical report from Dr. John Szeto dated 5^{th} February,2002 as exhibit 'P4' was also produced to the court. Its finding is that the plaintiff had no visual impairment and ocular abnormalities. Despite of that though, it re affirmed that the plaintiff had blunt trauma to his left eye according to Dr. Paul's medical examination and that such trauma could manifest years later. He was not hospitalised for treatment of the injuries but advised to take pain reliever tablets and plaster applied onto the affected area. However, the complainant has also testified that he has endured uncomfortable experiences in seeing spots and flashes of light in his vision during and at occasions after the trauma.

Apart from such medical reports, I found no recent medical report calculating any current or future persisting symptoms. It is further noted that the particulars of the injuries and the medical reports have not been challenged. As such, I have accepted them as admissible evidence. In weighing the material evidence pertaining the severity of the injuries, I noted that the said injury has completely been cured with no disfigurement or abnormalities on the affected eye. In that circumstance, I have classified the injuries as minor and temporary in nature.

The next issue I wish to address is that of misconduct which saw the injury emanating from the defendant's action.

For ease of clarity, by law a detainee upon his arrest should be released within a reasonable time by virtue of sections 15 & 18 of the Criminal Procedure Code, Cap 135. In our case the arrest was executed on grounds of Idle and disorderly. According to the police witnesses, the plaintiff's custody was formally and or procedurally to keep him safe and if possible charge him of the same and be released when he is sober. However, this was not undertaken by the subject police officers on general duty that time. The complainant was not charged for an offence.

Further to the above gathered the evidence reveals that the plaintiff and his friends were arrested in the course of being disorderly at Anamburu. He was detained at around 11pm at night and released at around 3 o clock in the afternoon. He was not been given food and even at the request to go to the toilet the plaintiff was bashed up. In addition, the plaintiff was not allowed to receive any medical treatment after sustaining the injury on the face in the early morning hours until his release late that afternoon around 3 o clock. This is negligent played on the part of all officers who are on duty.

Moreover, compelling evidence has influenced this court in no doubt that there is no justification behind the use of force over the plaintiff. Although the act or use of force in my view could be classified as an authorised act applied in the performance of discharging his duty. However, I am not in favour of the level or degree of force used over the plaintiff in the circumstance. I consider such force to be excessive and was not necessary in the process of recapturing the detainee. It is therefore concluded that the act of punching the plaintiff is a negligent method of conducting his duty.

It is evidenced that there is a clear violation of individual's right as enshrined in the constitution under Article 5. Such action could create a real perception that a person is being disadvantaged in what for many people in the community would be a very alien situation. It would also manifestly develop fear for the public at large and to some extent jeopardize the trust vested in the Police Force to guarantee security, peace and order. Given the nature of the defendant's case, it would inevitably subject to some form of damages in favour of the victim. Such relief would serve to deter any similar conduct in the near future.

Another question posed for determination is whether the government be vicariously liable for the tort committed by the police officers. The general rule is that the government is liable for torts committed by its servant. It is apparent from the evidence above that there is clear lack of supervision by the Police officers who are on general duty during that period of the event. None of these police officers had taken the initiative to check out the detainees and find if they needed assistance. It is obvious, that the police officers who are on general duty during the period of event have failed to comply with the Vanuatu Police General Order (January 1993) in particular , section 101 (1) . As such, I find no immunity vested in the Second defendant relieving it from any liability. For this reason, the employer must bear the responsibility as highlighted in the classical case of *Century Insurance Co Ltd v Northern Ireland Road Transport Board [1942] AC 509* .

In ascertaining the quantum of damage, a number of local and regional cases have been consulted. This included other cases to be found in brief most helpfully published by Sweet & Maxwell. I do not propose to re iterate their facts here.

In light of the foregoing evidences , and the application of law, the defendants are hereby severally and jointly ordered to make payment in the following:

a. Special damages

The defendants pay VT 2800 for out of pocket expenses necessitated by the injuries.

b.General damages

The defendants pay VT 40,000 for pain and suffering attributed by the injuries and compensatory damages of VT 60,000 for being morally affected and or disadvantaged by the negligent conduct of the police officers.

c. Interests.

Interest at 5% for general and compensatory damages from the date of judgment until settlement.

d. Costs

Pursuant to Rule 13.2(3) of the CPR the defendants are also ordered to pay costs calculated under the Medium Scale in Schedule 2 (Rule 15.10) certified at VT 40,000.

The defendants have 3 months to settle these payments as from today.

Dated at PORT VILA, this 26th day of August 2003.

BY THE COURT

.....

EDWIN MACREVETH
Magistrate

REPUBLIC OF VANUATU
TRIBUNAL DE PREMIERE INSTANCE
MAGISTRATES' COURT
REPUBLIQUE DE VANUATU