IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU Civil Case No. 38 of 2010
(Civil Jurisdiction)

BETWEEN: MICHAEL EMIL
Claimant

AND: THE REPUBLIC OF VANUATU
Defendant

Coram: ***Mr. Justice Oliver A. Saksak***

Counsel: ***Saling Stephens for the Claimant***
Jane Bulesa for the Defendant

Date of Hearing: ***17th September 2014***
Date of Judgment: ***24th October 2014***

JUDGMENT

Introduction And Background Facts

1. This is a claim for damages and losses incurred as a result of alleged battery, unlawful arrest and unlawful imprisonment and for exemplary damages in the total sum of VT 189.450.000.

2. The Claimant is a very senior member of the Vanuatu Mobile Force with the rank of Lieutenant, currently serving as officer In-charge of the Fire Services in Luganville, Santo.

3. At 10:53 am on 23rd February 2008 Senior Inspector Ron Tamtam received a formal complaint from Mrs Maria Tasaruru that the Claimant had had sexual relations with their biological daughter, Leinoas Emil on numberous occasions in 2007 which resulted in her pregnancy and her giving birth to a son. The complainant requested a thorough investigation into the matter.

4. At 1930 hours on 23rd February 2008 three police officers arrived at Tagabe and asked the Claimant to accompany them to the Police Station, which he did.

5. At the Police Station the Claimant was told and shown the complaint of Mrs Maria Tasaruru, which he denied. Senior Inspector Ron Tamtam then touched him on the shoulder and told him that he was under arrest. He was searched and his clothes were removed with a mobile phone and wallet, and the Claimant was detained in a holding cell at the Police Station at 2000 hours.

6. Next day being 24th February 2008 Sgt Davis Saravanu accompanied the Claimant to the Magistrate Court for the hearing of a bail application made by the Public Solicitor. The Claimant was granted bail with conditions which included conditions that he

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would not leave Port Vila and that he would report to the Public Prosecutor's office every morning and afternoon.

7. On 27th February 2008 Leinoas Emil made a statement with the Police stating that her father, the Claimant had had sexual intercourse with her on numerous occasions beginning on 8th June 2006 until December 2006. She further stated that her father had assaulted her on 31st December 2006 resulting in her admission to hospital for one night.

8. On 6th May 2008 the Claimant was formally charged with five counts of Rape contrary to section 90, three counts of Incest contrary to section 95(1) and Intentional assault contrary to section 107 (b) all of the Penal Code Act Cap.135.

9. On 4th June 2008 the Claimant was arraigned and he pleaded not-guilty to all the charges. The matter was called on 8th September 2008 but was adjourned to 1st October 2008 because of Mr Stephen's absence. There were further adjournments.

10. On 13th February 2009 the Claimant appeared before Dawson J for trial. A voir dire hearing was held to determine whether the complainant's statement made to the Police on 27th February 2012 was made voluntarily. The Court ruled that the Complainant had given her statement to the Police voluntarily and without pressure. The Court also found and held that the Police had followed through on a complaint of criminal behaviour in the normal and proper fashion. The matter was then adjourned to 12th May 2009 for trial.

11. On 12th May 2009 the Complainant failed to appear despite having been served with a summons. The Court therefore issued a warrant for her arrest. Mr Stephens then made an application for adjournment because one of the defence witnesses was not in Court that day. The Court granted the adjournment and vacated the trial to 3rd August 2009. The Complainant was released from custody and served with a further summons requiring her attendance on 3rd August 2009.

12. On 3rd August 2009 the Complainant failed again to appear. The case was called and after discussions, the prosecution entered nolle prosequi. The Court therefore discharged the Claimant.

13. As a result the Claimant filed his initial claims on 15th September 2010. The Attorney General filed a strike out application on 15th October 2010. On 16th November 2010 Mr Stephens indicated he would file an application seeking leave to file an amended claim. The Court granted the adjournment with costs in the sum of VT 20.000. The Claimant was directed to file his application within 14 days.

14. On 3rd December 2010 Mr Stephens filed the application for leave. The hearing was adjourned on that date to 31st January 2011. The hearing did not take place and the matter was called on 1st February 2011. It was adjourned again to 1st March 2011 as the defendant's Counsel was not present.

15. On 1st March 2011 the defendant sought an adjournment and extension of Orders. the Court allowed the adjournment but awarded wasted costs at VT 5.000 against the Republic. The matter was adjourned to 8th April 2011.

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16. On 8th April 2011 the defendant did not oppose the application. Leave was granted and directions were issued that the Claimant file and serve his amended claims within 7 days.

17. On 21st April 2011 the Claimant filed his amended claims. And the defendant filed a defence to the amended claims on 20th May 2011.

18. On 3rd June 2010 the Claimant appeared before the Police Service Commission charged with two disciplinary offences. However the Commission found him not guilty of the two counts.

Complaints and Claims

19. The Claimant complained that-

a) The touching by the Police on his shoulder amounted to battery
b) His subsequent arrest by the Police was unlawful.
c) His subsequent detention in custody was unlawful imprisonment.

d) His remand on bail for 527 days had caused him loss of VT 350.000 per 24 hours. Therefore for battery he claims the sum of VT 2.000.000, for unlawful arrest he claims VT 2.000.000, for unlawful imprisonment he claims the sum of VT 184.450.000 and for exemplary damage, he claims the sum of VT 5.000.000. In total he claims the sum of VT 189.450.000.

Burden of Proof

20. The Claimant had the onus of proof on the balance of probabilities all of his claims.

21. Evidence

The Claimant gave evidence orally and by sworn statements which he identified and tendered into evidence as exhibits C1 and C2. These are sworn statements dated 15th September 2010 respectively. Defence Counsel cross-examined the Claimant on his evidence.

22. The Defendant called evidence from Sgt Davies Saravanu who confirmed his sworn statement dated 2nd August 2013 tendered as exhibit D1. He was cross-examined by Mr Stephens. The Second witness Joshua Bong wrote to the Attorney General on 16th September 2014 giving notice that he had withdrawn his sworn statements. His position was noted and recorded by the Court. He was no longer required to be a witness to give evidence for the State.

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The Issues

23. There are four issues for the Court to consider namely-

    a) Whether the touching by a Police Officer on the Claimant's shoulder amounted to battery?
    b) Whether the arrest made by the Police without a warrant on 23rd February 2008 was unlawful?
    c) Whether the subsequent detention of the Claimant by the Police on 23rd February 2008 was unlawful?
    d) Whether the Claimant is entitled to all the damages he claims?

Discussions

24. From the point of view of the Court the facts of the case are not in dispute. The issues for consideration are legal issues which are to be determined by having regard to relevant legal provisions. I deal with each legal issue in the following manner-

    a) Whether the touching of the Claimant's shoulder by a Police Officer amounted to battery? The undisputed facts as shown from the evidence was that it was Senior Inspector Ron Tamtam who touched the Claimant on the shoulder and told him " You are under arrest". The defendant submits that is standard procedure of arrests. That submission is accepted. Section 4(1) of the Criminal Procedure Code Act [Cap.136] (the Act) states-

    > " ***Arrest how made***
    > (1) *The Police Officer or other person making an arrest shall actually touch or confine the person to be arrested, unless there be a submission to custody by word or action".* (My underlining for emphasis).

The relevant evidence is found in the sworn evidence of the Claimant (Exhibit C1). It starts at paragraph 19 and ends with paragraph 25. He states-

"

19. Tufala I openem Occurrence Book mo mi read tru report ia. During taem ia mi stap readim report ia Inspector R. Tamtam i talem long mi se "boss ise mbae mifala I sarem yu long cell."

20. Taem ia, mi askem se " Who ia boss ia"? Inspector Ron Tamtam I answer se Superintendant Mahlon Taleo. Taem ia mi talem long tufala se report ino tru mo Mrs Maria Tasaruru ino woman blong mi. Mi talem long tufala se, woman blong mi emi Mrs Leisei Emil mo emi stap long Santo mo stap wok long ANZ Bank long Santo.

21. Mi talem long tufala se " Mi no save wanem yufala istap talem abaot trabol wetem girl blong mi Ms Leinoas Emile".

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22. Mi talem long tufala se oli producim wan Order we istap long paper or formal Order mo instructem mbe tufala se Order hemi verbal.

23. Mi talem long tufalal officer ia se, " Yumi Police Officers everyone mo wok under long wan law. Yufala ino sarem mi long cell but yufala ko tekem statemen blong girl blong mi fastaem mo sapos report hemi tru then yufala isave putum mi long cell. Mi no save run away mi stap long Tagabe. Mi luk se report ia hemi wan false wan mo mi no save mekem olsem".

24. Tufala officer, R. Tamtam mo Sgt Davis Saravanu iaot mo go luk Supt. Mahlon Taleo abaot issue ia while mi stap wait mi wan long Police Station.

25. Taem tufala I kambak, Insp. R. Tamtam I walk toward mi mo talem long mi se Supt. M. Taleo emi se sapos mitufala ino sarem you long cell bambae mitufala I answerem hem long Monday morning 25th mo givim reason. Long taem ia mi traem argue mbe Insp. R. Tamtam I touchim shoulder blong mi mo talem se mi stap UNDER ARREST".

25. It is clear from the Claimant's own evidence (paragraphs 20-23) that the Claimant's words indicate he was resisting the idea of confinement. Subsequently and as a direct result, Insp. Ron Tamtam touched the Claimant on his shoulder and informed him that he was under arrest (paragraph 25).

26. Applying the law as stated in section 4 (1) of the CPC Act to those facts, the touching of the Claimant by a Police Officer was lawful and it could not amount to battery to entitle the Claimant to institute his claim for damages.

27. The Second issue is whether the arrest made by the Police was unlawful? The relevant evidence is paragraph 25 of the Claimant's sworn statement. Again applying those facts to section 4 (1) of the Criminal Procedure Code Act, the arrest made by the Police was not unlawful. Despite the Police had no warrant of arrest, the Police had the power to arrest the Claimant without a warrant of arrest. The reason is simple. The offences complained of were incest and sexual intercourse without consent under sections 91 and 95 of the Penal Code Act [Cap.135]. These are cognisable offences which are included in the Schedule for which the Police are empowered to arrest offenders whom they suspect on reasonable grounds have committed a cognisable offence. Section 12(1) of the Criminal Procedure Code Act provides-

> *" **Arrest by Police Officer without warrant.***
> *(1) 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 cognisable offence:"*
> (My underlining for emphasis).

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28. The Occurrence Book annexed as "DS1" to the sworn statement of Sgt Davis Saravanu shows a Complaint of incest. It was that complaint that the Police suspected the Claimant had committed incest, which is a cognisable offence. The complaint named the claimant's daughter Leinoas Emil as the victim. It indicates that the Complainant was the legitimate wife of the Claimant. The maker of the complaint was Maria Tasaruru.

29. The Claimant denied that Maria was his wife and that his wife was Leisei Emil (See paragraph 20 of the Claimant's sworn statement- Exhibit C1). That is fine. It did not necessarily mean that Maria Tasaruru could not by law be entitled to have made that complaint. Section 35 (1) of the CPC Act [Cap.136] states-

> "*(1) Any person who believes from reasonable and probable cause that an offence has been committed by any person may make a complaint thereof to a judicial officer.*"

Mrs Tasaruru's complaint was made in the first instance to the Police and subsequently upon further investigations, the complaint transformed into formal charges preferred against the Claimant for which the Claimant was committed and he denied.

30. For those reasons the arrest of the Claimant by the Police without a warrant on 23rd February 2008 was not unlawful.

31. The third issue is whether the subsequent detention of the Claimant by the Police was unlawful?
The Claimant's evidence by sworn statement (exhibit C1) shows from paragraphs 27 to 33 that he was detained from 2000 hrs on 23rd February 2008 until 1600 hours on 24th February 2008 when he appeared before the Magistrate's Court and was released on bail. That is a duration of 20 hours.

32. Section 18(1) of the CPC Act [Cap.136] states-

"(1) Subject to subsection (2) when a person has been taken into custody without a warrant for an offence other than intentional homicide or any offence against the external security of the State, the officer in charge of the Police station to which such person shall be brought may in any case and shall, if it does not appear predicable to bring such person before an appropriate Court within 24 hours after he has been so taken into custody, inquire into the case...." (My underlining for emphasis).

33. Applying the law to the facts, it is clear that the defendant was brought to the Magistrate Court and bailed within 24 hours as required by section 18(1) of the CPC Act. Therefore his detention was not unlawful.

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34. Mr Stephens placed reliance on the case of Songi George and Others V. Commissioner of Police and Republic CC 242 of 2012 to argue and submit that because the arrest was made on the direction of the superior officer, it was unlawful. That argument is rejected. The case of Songi and Others is distinguished in two respects namely, (a) the State readily accepted in that case that the arrests made were unlawful ab initio, and (b) no formal complaints had been made prior to arrests. In the present case it is exactly the reverse. Spear J recorded in paragraph 11 of his judgment this distinctive feature as follows-

"..... To accuse a person of an offence generally requires the initiation of a formal process for the laying of a complaint or at least a formal accusation being made and recorded. There is no evidence that such a complaint was laid or even that an accusation was made. Instead, there was just a direction that the Claimant be arrested and held for questioning about their involvement...." (my underlining for emphasis)

The evidence of Sgt Saravanu shows this was not the position in this case.

35. The Claimant claims in his pleading that his unlawful arrest and imprisonment began on 23rd February 2008 and included the periods he was made to report to the Public Prosecutor's office every day until 3rd June 2010. He alleges the reporting condition affected his freedom of movement. He further alleges that his disciplinary charges for which he appeared before the Police Service Commission were the same charges he appeared in Court for on 9th August 2009 and was cleared by the Court.

36. Those periods could be separated into three as follows:-

a) From 2000 hours on 23rd February 2008 until 1600 hours on 24th February 2008. This is the period of actual arrest and detention. That arrest and detention were lawful.

b) From 25th February 2008 until 9th August 2009. This was a period of remand on bail on conditions which included a reporting condition. This was for a period of about some 17 months. The Claimant was not in prison. He was on remand on bail. His movement was limited but it was a limitation necessitated by law. The Claimant was arrested pursuant to the powers vested in Criminal Procedure Code Act [Cap 136]. He was charged with cognisable offences under the Penal Code Act [Cap 135]. His right to movement had to be balanced with the right of his victim and her possible witnesses and the legitimate public interest in defence and safety. The Claimant is a Lieutenant in the Vanuatu Mobile Force. He is the Officer in charge of the Fire Service in Luganville, Santo which is an essential service. Risks of abuse of power were a danger to the public safety and defence of the State necessitating the limitations of movement of the Claimant by the Court and the time. There was no unlawfulness in those restrictions imposed.

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c) From 10th August, 2009 to 3rd June 2010. This could be called the interdiction period. This was a period of 2008 to 3rd August 2009, some 10 months. Indeed it could be extended to cover the period from 28 February 2008. Again the Claimant was not placed under arrest or detained in prison during this time. He was on remand on bail. He was on suspension and on half salaries. But he makes no complaints about the interdiction period. All he complains about is that he was charged twice for the same offences for which he was cleared by the Court on 3rd August 2009. And he claims damages in the sum of VT 184.450.000 for this head of damage.

37. So before the Court considers the issue of entitlement to the damages claimed, the Court needs to consider the side issue of double charging.

38. The Claimant was charged with 5 counts of rape (x 1 count), Incest (x 3 counts) and Intentional Assault (x 1 count). When he appeared before the Police Service commission on 3rd June 2010 he was charged with 2 counts which related to doing acts likely to bring discredit to the Police Force. In his evidence by sworn statement (exhibit C2) the Claimant annexed the letter by the Chairman of the Police Service Commission dated 16th June 2010. However the Claimant failed to produce any evidence of the 2 charges he alleges were laid against him. He had the onus to produce that evidence to assist the Court decide whether or not he was double charged with the same 2 offences that he faced in the Supreme Court on 9th August 2009.

39. On 3rd August 2009 the Court entered nolle prosequi on request by the prosecutions at the time not because there was no evidence but on the basis the Complainant had recanted from her statements. The Claimant annexed as "A" a copy of the Court's ruling dated 29th July 2009 to his sworn statement (exhibit C1) Nolle Prosequi was entered pursuant to section 29(1) of the CPC Act [Cap. 136]. It states-

> *"(1) In any criminal case and at any stage thereof before verdict or judgment, the Public Prosecutor may enter a nolle prosequi by informing the Court that he intends that the proceedings shall not continue, and there upon the accused shall be at once discharged in respect of the charge for which the nolle prosequi is entered, and if he has been committed to prison shall be released, such discharge of an accused person shall operate as a bar to any subsequent proceedings against him on account of the same facts and he shall be treated in all respects as through he had been acquitted".*
> (My underlining for emphasis).

40. On 3rd August 2009 the Court had not reached any verdict or entered any judgment as to guilt. It had simply entered nolle prosequi on application by the Public Prosecutor. That in effect means that the Prosecutions could not continue to proceed against the Claimant under the circumstances they were faced with. That is because the Complainant had had not turn up for trial the second time to give evidence in support of her complaints against the Claimant. That resulted in a discharge by operation of law. And that discharge became a bar to any "subsequent proceedings" against the Claimant on the same set of facts.

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41. The Claimant was never recharged with the same counts of offences and he never reappeared to answer those charges again subsequently. There is simply no evidence of any "subsequent proceedings" against him in this court on the same facts and for the same offences he was discharged of on 3rd August 2009. Section 29 of the CPC Act envisages double charging for the same offences with the same facts before the same Court. The Claimant did not go through that situation.

42. What occurred was that he appeared before the Police Service Commission on a disciplinary charge or charges for which the Claimant has not produced any evidence to satisfy the Court that they were two of the charges he was charged with and discharged of on 3rd August 2009.

43. What appeared form the Claimant's own evidence is that he applied for retirement on 28th February 2008. It appears that application was rejected. Instead he was suspended on half salaries pending the outcome of the criminal charges. Presumably his suspension from duty was made pursuant to section 70 of the Police Act. I have indicated earlier in this judgment that the Claimant has not and is not challenging his suspension.

44. What therefore appeared in reality is that-

    a) There was a criminal proceeding against the claimant, and
    b) Simultaneously, also there was a disciplinary action.

45. Therefore that being the position, it transpired that the criminal proceedings was ended on 3rd August 2009 through a nolle prosequi being entered. What remained was his disciplinary case that had to be heard and determined by the Police Service Commission in order to bring the matter to an end.

46. The Police Service Commission ultimately sat on 3rd June 2010 to hear the Claimant's case. The Commission found the Claimant not guilty. That action was lawful under the provisions of the Police Act.

47. There was a delay of about 10 months from 3rd August 2009 to 3rd June 2010. And that is the period of concern to the Court. The Defendant has not produced any evidence to show or explain the reasons for such a long delay. In a case involving a senior police officer who was in charge of an essential service ie, the Fire service in Luganville, with a wife and children, immediate steps should have been taken to have his disciplinary case heard and determined. Sadly that step was not taken in the Claimant's case. The result was that the Claimant suffered some losses and went through some difficulties. The Claimant testified to these under paragraphs 39 to 43 of his sworn statement (exhibit C1). Those evidence have not been challenged by the Defendant. And the Claimant has claimed exemplary damages in the sum of VT 5.000.000.

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48. The issue is whether he is entitled to exemplary damages? For the delay of 10 months, it is the Court's view that the delay was unnecessary and uncalled for. Therefore the defendant must be liable to make good any losses incurred during those 10 months. And this is the only head of damages on which the Claimant is successful. The other claims for battery, unlawful arrest, and unlawful imprisonment fail and are hereby dismissed.

49. The only issue is the amount to be awarded against the Defendant as exemplary damages. The Claimant claims VT 5.000.000. This amount is on the high side. And he has not particularised his losses. The Court accepts the amount the Claimant states in his sworn statement as a more realistic sum and that amount is VT 2.000.000.

Conclusion

50. The Claimant is partly successful only in his claims and judgment is entered in his favour for exemplary damages in the sum of VT 2.000.000. I will hear Counsel separately as to costs.

DATED at Port Vila this 24th day of October, 2014
BY THE COURT

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OLIVER.A.SAKSAK
Judge