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

CIVIL APPEAL CASE No. 45 OF 2014

BETWEEN: **REPUBLIC OF VANUATU**
Appellant

AND **MICHAEL EMIL**
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice Mary Sey
Hon. Justice Stephen Harrop

Counsel: *Ms F Williams (SLO) for Appellant*
Mr S Stephens for the Respondent

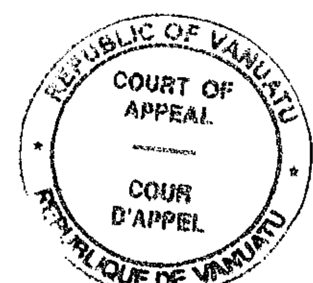
Date of Hearing: *Wednesday 29 April 2015*
Date of Judgment: *Friday 8 May 2015*

JUDGMENT

Introduction

1. In the Supreme Court Justice Saksak dismissed Mr Emil's claims for unlawful arrest and false imprisonment but awarded exemplary damages in his favour in the sum of Vt 2 million. The Republic appeals on the basis that the Supreme Court had no power to award exemplary damages once it had dismissed all of Mr Emil's causes of action. Mr Emil cross-appeals on the basis that his causes of action should not have been dismissed.

2. Leave to file the appeal and cross-appeal was required. In each case ultimately this was not opposed and was granted at the outset of the hearing.



3. In the Supreme Court the facts do not appear to have been in dispute. We therefore gratefully adopt Justice Saksak's summary in paragraphs 1-12 at the outset of his 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 numerous 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 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 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 adjourned to 1st October 2008 because of Mr Stephens' 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."

4. After the determination of the criminal charges on 3 August 2009, the Police Service Commission charged Mr Emil with two disciplinary offences both alleging that he had

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done an act likely to bring discredit upon the Vanuatu Police Force. After several appearances before the Commission in April and May 2010, the Commission found Mr Emil not guilty on those two counts at the hearing on 3 June 2010.

5. In order to assess the issues raised on this appeal it is helpful to set out in full the amended Supreme Court Claim filed on 21 April 2011:

   "(1) The claimant is a Ni-Vanuatu citizen and a Police Officer holding the rank of Lieutenant, temporarily residing in Port Vila.

   (2) The defendant is the Democratic and Independent State of the Republic of Vanuatu, a nation within the Pacific Island Nations which is vicariously liable for the actions and/or omissions of its agents and/or servants which includes that Department of Police.

   (3) The claimant claims that on or about 23rd February 2008 he was unlawfully arrested and imprisoned by the members of the Vanuatu Police Force who are servants of the defendant, namely:-

   <u>Particulars</u>

   i. At about 1930 hours three (3) Police Officers arrived at Tagabe area, where the claimant and his three (3) sons resided while waiting for their flights to Santo, and ordered him against his will to follow them to the Police Station.

   ii. At the Police Station the claimant was physically touched detained and searched, having his shirt, Mobil phone and wallet removed and was put under arrest.

   iii. At about 2000 hours, the claimant was locked in the Police Cell without being formerly charged.

   iv. On or about 24 February 2008 at about 1600 hours Sergeant Davis Saravanu took the claimant to the magistrates, represented by the Public Solicitor, and was granted bail with strict conditions to report to Public Prosecution's Office every morning and afternoon and not to leave Port Vila which in effect affects his freedom of movement.

   v. On or about 3 August 2009 the claimant was cleared off (sic) the charge as there was no evidence whatsoever to suggest the

claimant has committed an offence and was pronounced a free man by Justice N.R.Dawson of the Supreme Court of Port Vila.

vi. *On or about 3rd June, 2010, the claimant was again and for the second time cleared two (2) disciplinary charges laid against him by the Commissioner of Police inrespect of the same set of events already cleared of by Justice N.R.Dawson of the Supreme Court of Port Vila.*

(4) *The claimant claims that his arrest was merely orchestrated by certain police advisors and senior members of the Vanuatu Police Force as a form of revenge towards his leadership role as Acting Commander of VMF Detachment in Luganville, Santo when he placed restriction against the Advisors entry to the VMF Office premises.*

(5) *As a consequence of the matters aforesaid, the claimant has suffered loss and/or damages*

Particulars

(i)	*Battery*	-	*Vt 2,000,000*
(ii)	*Unlawful arrest*	-	*Vt 2,000,000*
(iii)	*Unlawful Imprisonment at Vt 350,000 per 24 hours x 527 days in custody based on Commissioner of Police v. Wilson Garae [2009] VUCA CAC No. 34 of 2008*	-	*Vt 184,450,000*
(iv)	*Exemplary damage*	-	*Vt 5,000,000*
		Grand Total	***Vt 189,450,000***

6. It is important to note what the claim was, and was not, alleging.

7. The claim alleges two particular torts were committed by members of the Police Force, namely those of unlawful arrest and false imprisonment. These occurred, as paragraph 3 pleads, on or about 23 February 2008. There is no allegation of battery nor is there an allegation of any improper conduct by the members of the Police Force at any other time. While there are particulars stated in support of the allegation in paragraph 3, only the first three have any temporal or other relevance to the two pleaded occasions of tortious conduct. Whatever may have happened during the subsequent Court and

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disciplinary proceedings could have no bearing on whether there was an unlawful arrest and false imprisonment on 23 February 2008.

8. There is no pleading of any Police impropriety so as to amount to a cause of action at any time after 23 February 2008. In paragraph 4 there is a vague and general allegation that the arrest on 23 February 2008 was orchestrated by certain members of the Police Force as a form of revenge towards Mr Emil who was a senior member of the Vanuatu Mobile Force.

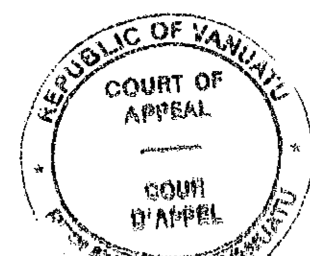
9. Although there is then factual reference to the outcome of the Court and disciplinary proceedings, there is no allegation of any improper conduct in relation to either set of proceedings so as to found a cause of action.

10. In our view then the only two causes of action, and therefore the only issues which the Supreme Court was being asked by the claimant to determine, were:
    1. Was Mr Emil unlawfully arrested on/or about 23 February 2008 by members of the Vanuatu Police Force? and
    2. Was Mr Emil falsely imprisoned on/or about 23 February 2008 by members of the Vanuatu Police Force?

The Cross-Appeal

11. It is convenient first to deal with the cross-appeal. As we understood Mr Stephens' notice and grounds of cross-appeal and his argument, he contends that Justice Saksak was influenced in his determination of the causes of action by the outcome of the voir dire held before Justice Dawson and by the outcome of the criminal proceedings. He appeared to us to be suggesting that because of the finding that the complainant's statement was voluntary and because Mr Emil had not actually been found not guilty after a Court hearing, that Justice Saksak wrongly decided the questions of whether there was unlawful arrest and imprisonment.

12. We are unable to follow the logic of this argument and do not accept it. The outcome of a criminal proceeding can have no bearing on whether an arrest made at the outset was lawful or not. With respect we see no error whatsoever in Justice Saksak's



discussion and determination of the lawfulness of the arrest at paragraphs 27-30 of his judgment.

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.

15. The particulars of how the arrest was unlawful in the amended claim were sparse. There was a vague assertion of improper motive in paragraph 4 but no particulars were pleaded. On the evidence given, Justice Saksak was in our view justified in concluding that the arrest was lawful, or at least that the respondent had failed to prove it was unlawful.

16. We record that we put to one side the finding made by Justice Saksak that there was no battery. Although we regard it as entirely correct on the evidence and in law, there was no pleading of a battery having been committed at the time of arrest, only that the arrest itself was unlawful. There was a prayer for relief which damages of Vt 2 million were claimed for battery but there was no antecedent pleading with appropriate particulars that a battery had occurred. It was therefore simply not raised in the requisite way by the respondent, so the appellant was not called on to defend it and there was no issue of battery for the Court to determine.

17. The only other issue which the claim did require Justice Saksak to determine was whether there was a false imprisonment on/or about 23 February 2008. Having found

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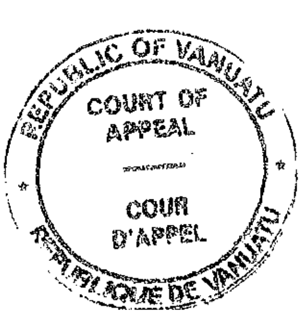
that the arrest was lawful, this contention necessarily fell away. In any event, as Justice Saksak found, the Police complied with section 18 (1) of the Criminal Procedure Code because Mr Emil was brought before the Magistrate's Court and bailed within 24 hours. The assertion by the respondent that the conclusion on the false imprisonment claim was improperly influenced by the outcome of the criminal proceedings is untenable and rejected. Mr Stephens referred to paragraphs 10 and 12 of the judgment in support of these contentions but in our view all the Judge was doing in those paragraphs was recounting in an uncontroversial way the history of events, none of which we understand was disputed.

18. The damages claim for the alleged unlawful imprisonment purported to derive from 527 days in custody at the rate of Vt 350,000 for each 24 hours. To the extent this went beyond the detention prior to appearance at the Magistrate's Court on 23 February 2008, as it clearly almost entirely did, this part of the prayer for relief was unattached to any antecedent pleading of conduct during the other 526 days which might have justified such an award. We repeat that the only pleaded claim for unlawful imprisonment was said to relate to *"on or about 23 February 2008"*.

19. In oral argument before us Mr Stephens contended that there was at least a de facto false imprisonment from the time of arrest until the determination of the disciplinary charges because Mr Emil's freedom of movement was restricted by bail conditions and by having the disciplinary charges, effectively a repetition of the criminal allegations, hanging over him until 3 June 2010. Though this was not pleaded and therefore did not need to be determined by the Supreme Court or by this Court, we observe that from the moment Mr Emil appeared before the Magistrate's Court on 24 February 2008, any restrictions on his liberty and freedom of movement were imposed by either the Magistrate's Court or the Supreme Court, not by the Police. Accordingly, there could be no claim for false imprisonment against the Police, or the Republic on behalf of the Police, in respect of the period after the appearance before the Magistrate's Court. Quite apart from that, we would not accept that Mr Emil was, once granted bail, *"imprisoned"*, whether unlawfully or not.



20. For these reasons we dismiss Mr Emil's cross-appeal and uphold Justice Saksak's dismissal of the (only) two causes of action which he pleaded, namely unlawful arrest and unlawful imprisonment on or about 23 February 2008.

The Appeal against the Award of Exemplary Damages

21. The appellant submits that Justice Saksak had no power to award any exemplary damages when all of the heads of claim to which such an award might have been attached had been dismissed. It further submits that the basis on which Justice Saksak awarded exemplary damages was the delay of about 10 months between the conclusion of the criminal proceedings on 3 August 2009 and the conclusion of the disciplinary proceedings on 3 June 2010, in respect of which there was no pleading or cause of action. Accordingly, there was also no pleading that exemplary damages should be awarded in respect of that delay, let alone a properly-particularised one, so no award could properly have been made.

22. Despite having dismissed all the causes of action, Justice Saksak went on to address what Mr Stephens in submissions asked the Court to consider (but which Mr Emil in his claim had not asked the Court to consider) namely the award of exemplary damages for periods of time *after* 23 February 2008.

23. His Lordship said at paragraph 47 of his judgment: *"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, i.e. 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......Those evidence* (sic) *have not been challenged by the defendant. And the Claimant has claimed exemplary damages in the sum of Vt 5 million."*

24. At paragraphs 48 and 49 his Lordship continued: *"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*

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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 failed and are hereby dismissed. …… The only issue is the amount to be awarded against the Defendant as exemplary damages. The Claimant claims Vt 5 million. The amount is on the high side. And he has not particularized 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 million."

Discussion

25. It is apparent from the above paragraphs that Justice Saksak treated exemplary damages as a *"head of damages"*. With respect, this is not correct. Damages of any kind may only be awarded once a cause of action, or liability, is established. A defendant must first be found liable for breach of some civil obligation, whether in contract, tort or otherwise, owed to the Claimant before the Claimant can be awarded anything. If he is, then, on proof of loss flowing from the wrong, an award of damages may follow.

26. What appears to have happened in the Supreme Court is that despite the Court having rejected all of the causes of action pleaded by the Claimant, it independently decided, notwithstanding that, to give tangible effect to its expression of "concern" about some of the conduct about which evidence was given at trial. But that conduct was irrelevant, because there was no pleading relating to it, let alone a properly-particularised one.

27. There was no pleading that the delay between 3 August 2009 and 3 June 2010 was the fault of any person or organisation for whom the Republic is responsible. While Justice Saksak criticized the appellant for not producing any evidence to explain the delay, there was no obligation for it to do so when there was no claim that it was responsible for such a delay. In any event it seems to us that once the Police (for whose conduct the Republic is clearly responsible) had initiated disciplinary proceedings then the proper defendant to any claim about the conduct of the disciplinary proceedings was the Police Service Commission, which of course is independent of the Police.

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28. At the very least there would have needed to be a clear pleading of how the Police Service Commission was at fault and service of such a claim on the Commission to require it to file a defence in the event liability was disputed. None of that occurred here and so the criticism of the absence of evidence (and more fundamentally, of pleading) ought to have been directed at the claimant not the defendant.

29. We entirely agree with the submission of the appellant on the exemplary damages question. There was simply no established cause of action to which any award of damages could be attached and the basis on which they were awarded (the delay between 3 August 2009 and 3 June 2010) was not the subject of any pleading that exemplary damages should be awarded in respect of that delay.

30. It is trite to say that exemplary damages may only be awarded where there are circumstances of aggravation or flagrancy making the conduct of the defendant extraordinary and deserving of punitive damages. As the Supreme Court said in Banga v. Waiwo [1996] VUSC 5, 14: "*…… in order to justify the award of exemplary damages, it is not sufficient to show merely that the defendant has committed a wrongful act. The conduct of the Defendant must be high-handed, insolent, vindictive or malicious, showing contempt of the plaintiff's right and disregarding every principle which actuates the conduct of common decency.*"

31. In this case there was no finding even that a wrongful act had been committed, never mind one particularised as having the significantly aggravating qualities required before exemplary damages could be considered, still less awarded. There was no pleading, nor any evidence, which even began to establish that the defendant's conduct was so egregious as to warrant any award of exemplary damages, let alone one at the level of Vt 2 million.

32. It is not open to a Court to make findings and awards of damages on issues that are not raised on the pleadings, no matter how much the Court may be "concerned" about evidence which emerges at trial. If it does that, a fundamental unfairness and breach of natural justice occurs because the defendant has had neither notice from the claimant in his pleadings, nor from the Court, of the matter being in issue. He therefore does not have a fair opportunity to file and be heard in support of his defence.

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Conclusion

33. The cross-appeal is dismissed and the appeal is allowed. In respect of both appeals the appellant is entitled to standard costs against the respondent, which are to be fixed if they cannot be agreed.

DATED at Port-Vila this 8th day of May, 2015

BY THE COURT

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Vincent LUNABEK
Chief Justice