

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 80 of 2015

BETWEEN: TITUS TOGAGI
Claimant

AND: REPUBLIC OF VANUATU
Defendant

Hearing: Monday May 9th and Wednesday 1 June 2016 at 9:00 am

Submissions: Friday June 3rd and Friday June 10th, 2016

Before: Justice JP Geoghegan

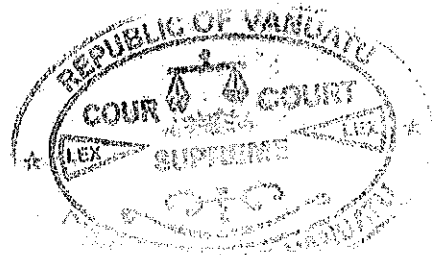
Appearances: Justin Ngwele for the Claimant
Hardison Tabi (SLO) for the Defendant

JUDGMENT

1. Mr Togagi seeks a declaration that his arrest on March 3rd 2015 constitutes false imprisonment and that he should be awarded general damages of Vt 3.5 million and exemplary damages of Vt 1.5 million.

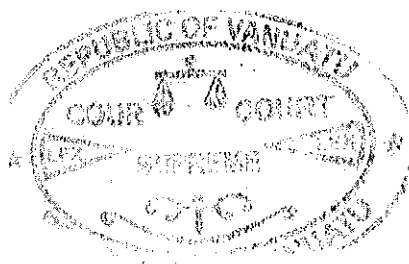
Background

2. There is no dispute that on March 3rd 2015, Mr Togagi was arrested by Sergeant Corporal Dwight Willie of the Vanuatu Police. That arrest having taken place at Saratamata Police station on Ambae.
3. The trigger for these events was the receipt by Sergeant Willie on March 2nd 2015 of a complaint from a Rodney Tari that on February 16th and February 21st 2015, Mr Togagi trespassed onto his land and had damaged his property and that in addition he had put up a



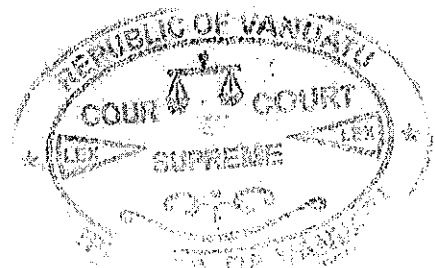
notice that no one was allowed to enter Mr Tari's property and had put up two pieces of wood forming an "x" blocking the pathway to the property. Mr Tari made a written statement. That statement was produced to the Court. The written statement (in bislama) referred to a complaint that Mr Togagi had caused damage to crops on February 16th and February 21st 2015 consisting of his taking 250 head of kava and cutting 28 banana plants. The statement also referred to an alleged previous incident of damages to the crops of Mr Tari which had not gone to Court. The statement was not accompanied by any photographs of the damage and the statement did not set out any details in relation to the alleged damage caused by Mr Togagi or even whether Mr Tari had seen Mr Togagi causing the alleged damage.

4. Sergeant Willie sent a letter to Mr Togagi inviting him to attend the police station on March 3rd at 10 am. My translation of the document is that it requested Mr Togagi to give his side of the story about the damage which he had caused again to a garden in a damage case which the police had dealt with and which was marked with "x" on the road.
5. Both the complaint and the letter of invitation from the police referred to a past incident or incidents and that was acknowledged by Mr Togagi in his evidence when he stated that it had been alleged that the damage to property was a result of an ongoing land dispute over custom land known as Valu Vatu Kapani on South East Ambae, that dispute being between Mr Togagi's family and Family Sau.
6. Mr Togagi duly attended the police station on March 3rd at 7 am. He was accompanied by his nephew Francis Tari. Mr Togagi said that when he initially saw Sergeant Willie he asked Sergeant Willie about the damage to the crops which he was accused of causing. He asked who had verified the damage to crops and was advised by Sergeant Willie that it was George Tari the Agricultural Field Officer who had verified damage to the crops. Sergeant Willie then sent both Mr Togagi and Francis Tari to see George Tari regarding the matter. They went to his office but he was not there. They were told that Mr Tari was at Lolowai Beach and accordingly they went to see him at the beach to enquire as to whether he had verified the damage to the crops. Mr George Tari denied that he had done so. They were invited by

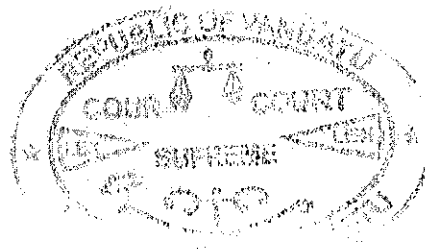


Mr Tari to see his colleague Edward Tavue of the Agriculture Field Office to assist them in attending the scene where the damage to the crops had been done and to assess the damage.

7. Both Mr Togagi and Mr Francis Tari, returned to the police station and advised Sergeant Willie of what Mr George Tari had told them. Both Mr Togagi and Mr Francis Tari said that it was clear that Sergeant Willie was not happy with what he was told by them and Sergeant Willie advised Mr Francis Tari to wait outside the police station while he spoke with Mr Togagi.
8. Mr Togagi was then questioned by Sergeant Willie in the presence of another police officer Mary Aga. No evidence was given by Ms.Aga. During the course of this subsequent interrogation Mr Togagi was unsure about the answers to some of the questions being asked and was told by Sergeant Willie that if he did not answer the questions he would be arrested. Mr Togagi said that Sergeant Willie became frustrated and angry at him and that *"the tone of his voice began to increase and he was making hand gestures as if to punch me"*. Sergeant Willie then instructed Mr Togagi to remove his shirt and was told that he was being arrested. He was placed in jail cell and remained there for approximately two hours. In fact, it seems clear that on Mr Togagi's own evidence the detention was for no more than one hour and thirteen minutes. Not surprisingly Mr Togagi was distressed by his arrest and detention. He stated that he was not informed as to why he was being arrested and that he felt embarrassment over his arrest particularly given that he was a church pastor.
9. Mr Togagi completely denies having damaged Mr Tari's crops and has never been charged with any offences despite his arrest.
10. In response to Sergeant Willie's assertion in his evidence that Mr Togagi had refused to respond to the complaint Mr Togagi says that he had always wanted to cooperate with Sergeant Willie in clearing his name of the allegations made against him, but that when he tried to speak and provide his response to the allegations he would be yelled at by the police officer who referred to Mr Togagi's role as a pastor and told Mr Togagi that he was making things up. Mr Togagi stated that when he was arrested he was not cautioned or provided with an opportunity to call a lawyer. He was simply told to "go in to the cell and stay there."



11. Mr Tari's evidence supported that of his uncle. Mr Tari stated in addition that when he saw Mr Togagi in a jail cell with no shirt on he enquired of "*the police officer*" (the name of the officer is not referred to) why Mr Togagi was in a cell and was advised that Mr Togagi was "*just relaxing*" in the cell because he "*could not answer the questions properly.*"
12. Under cross examination Sergeant Willie stated that previous damage had been done to Mr Tari's garden before February 16th. He was unaware however of the details of that damage because Mr Tari had not made the complaint to him but to another officer and Sergeant Willie did not have access to that file. He acknowledged that Mr Tari did not provide photos of damaged crops or property but stated that that task fell to an Agriculture Field Officer. A police officer will normally task an Agriculture Field Officer to take photos of damaged crops, presumably to verify and assess that damage. Sergeant Willie stated that an Agriculture Field Officer had been requested to take photographs of the crops in question but that because of Mr Togagi's claim being filed it had obstructed the police from carrying out further investigation. Quite how Mr Togagi's claim had that effect when Mr Togagi's claim was not served on the State Law Office until June 4th 2015 was not explained.
13. Sergeant Willie acknowledged that he did not speak to any other witnesses prior to Mr Togagi's arrest. He stated that he has spoken to witnesses after Mr Togagi's release and that they wrote out witness statements but that those witness statements had not been disclosed "*because it might complicate this case*".
14. Under cross examination Sergeant Willie referred to there having been approximately 9 or 10 previous cases involving damage to crops in Lovoli village since 1980 but conceded that there was no evidence that Mr Togagi had damaged those crops. Sergeant Willie acknowledged that he had never attended the scene of the incident. Sergeant Willie acknowledged that Mr Togagi had told him that he did not know the answers to some of his questions and when it was put to Sergeant Willie that the only reason he arrested Mr Togagi was that he did not answer Sergeant Willie's questions, Sergeant Willie stated that they had spent a long time in the interview and that they could not release Mr Togagi outside because the investigation was "*ongoing*" and because the complainant's were outside and they were



required to detain Mr Togagi for his own safety. This was something which was never mentioned in Sergeant Willie's filed sworn statements. When it was put to Sergeant Willie again by Mr Ngwele that he had arrested Mr Togagi because he would not answer his questions in the way Sergeant Willie wanted, Sergeant Willie stated that the interview had taken a long time and Mr Togagi was "tired" and could not be released outside.

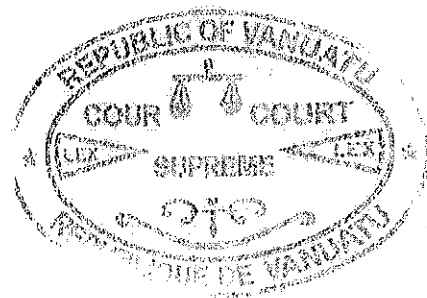
15. What is clear from Sergeant Willie's evidence is that his arrest was based solely on the complainant's unverified complaint of damage to crops.

Discussion

16. As I have already observed there was no dispute in this case that Mr Togagi was arrested.
17. The power of arrest without warrant is set out in section 12 of the Criminal Procedure Code [Cap. 136] which provides in section 12 (1) that:

"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".
18. There is no dispute in this case that the alleged offences which form the basis for Mr Togagi's arrest namely criminal trespass, damage to property and threatening gestures constitute cognisable offences.
19. Both counsel referred to the definition of "suspicion" adopted by Lord Devlin in Hussein v. Chong Fook Kan [1970] AC942 where he stated that:

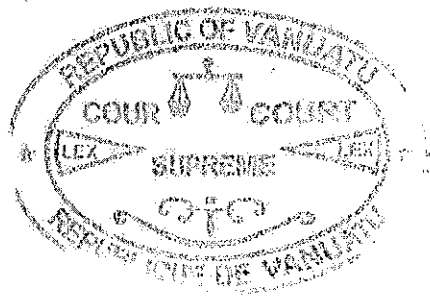
"Suspicion in its ordinary meaning is a stated conjecture or surmise where proof is lacking: "I suspect but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end".
20. For Mr Togagi Mr Ngwele conceded that the threshold for the foundation of a suspicion is a low one. He relied upon the test as set out by Lord Woolf in Castorina v. Chief Constable of Zori [1988] LGREV R 241 which involves a 3 step process:



- a) Does the arresting officer suspect that the person who was arrested was guilty of the offence? The answer to this question depends entirely on the findings of fact as to the officer's state of mind.
- b) Assuming the officer had the necessary suspicion was there reasonable cause for that suspicion? This is an objective requirement to be determined by the Judge.
- c) If the answer to both a) and b) is in the affirmative, then the officer has a discretion which entitles him to make an arrest and in relation to that discretion has been exercised in accordance with the principles laid down by Lord Greene MR in associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1KB223.

21. In Hyder v Commonwealth of Australia [2012] NSWCA 336, the New South Wales Court of Appeal set out a number of propositions which could be extracted from decisions considering how a person required to have reasonable grounds either to suspect or believe certain matters for the purposes of arresting a person might properly form that state of mind. Those propositions were as follows:-

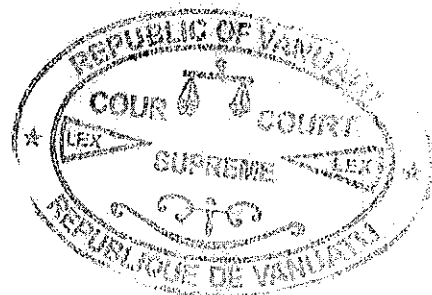
- a) When a statute prescribes that there must be "*reasonable grounds*" for a belief, it requires facts which are sufficient to induce that state of mind in a reasonable person: George v. Rockett [190] HCA26.
- b) That state of mind that the reasonable grounds for the relevant suspicion or belief exist, must be formed by the arresting officer. The arresting officer may not "*discharge the duty [of forming the relevant opinion] parrot-like, upon the bold assertion of the informant*".
- c) The proposition that it must be the arresting officer who has reasonable grounds to suspect the alleged suspect to be guilty of an arrestable offence is intended to ensure that "*the arresting officer is held accountable....[and] is the compromise between the values of individual liberty and public orders*"; O' Hara v. Chief Constable of Royal Ulster Constabulary [1996] UKHL6.
- d) There must be some factual basis for either the suspicion or the belief. The state of mind may be based on hearsay material or materials which may be inadmissible in evidence.



- e) The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof.
- f) What constitutes reasonable grounds for forming a suspicion or a belief must be judged against "*what was known or reasonably capable of being known at the relevant time*": Ruddock v. Taylor [2005] HCA48. Whether the relevant person had reasonable grounds for forming a suspicion or a belief must be determined not according to the subjective beliefs of the police at that time but according to an objective criteria: Anderson v. Judges of the District Court of New South Wales [1992] 27NSWLR 701.
- g) The information acted on by the arresting officer need not be based on his own observations: He or she is entitled to form a belief based on what they have been told.
- h) The identification of a particular source, who is reasonably likely to have knowledge of the relevant fact, will ordinarily be sufficient to permit the Court to assess the weight to be given to the basis of the expressed state of mind and, therefore, to determine that reasonable grounds for it exist.

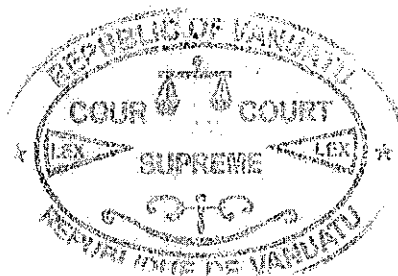
22. In this case what is clear is that Sergeant Willie relied upon Mr Tari's complaint for any reasonable grounds for suspicion. While it is clear that the complaint refers to Mr Togagi, it lacks any detail as to whether Mr Tari observed the alleged offences himself and if so what he observed or whether the damage that has alleged to have being caused by Mr Togagi occurred on the dates referred to in Mr Tari's statement of some other date. While Sergeant Willie also referred to past incidents, he conceded that there was no evidence that Mr Togagi was responsible for that. All that Sergeant Willie relied on was the bare assertion that Mr Togagi was responsible.

23. Moreover, the fact that Sergeant Willie referred in his evidence to arresting Mr Togagi for his own safety, raises very significant doubts as to whether or not Mr Togagi was arrested



because of Sergeant Willie's suspicion based on reasonable grounds that he had committed the offences or whether it was for Mr Togagi's own safety.

24. In such circumstances, it cannot be said that the suspicion allegedly held by Sergeant Willie was based on reasonable grounds. Even given the low threshold for suspicion, the evidence, such as it is does not meet that threshold. Put bluntly, Sergeant Willie has acted "parrot-like" in the manner referred to in Hyder.
25. I accordingly find that the claimant's arrest and detention was unlawful.
26. As to quantum both counsel have referred me to the Court of Appeal decision in Warde v. Republic of Vanuatu [2013] VUCA 10 where the Court stated at paragraphs 31 and 32 that:
- "31. In our view the appellants were arrested and imprisoned without cause in circumstances where the arresting police officers were well aware that the arrests were not justified. Mrs Dornic was assaulted during the course of her arrest. Mr McNicol was 67 years of age and in poor health. The appellants were also detained in custody for a relatively short period of some 3 hours. However, neither appellants suffered serious or permanent injuries.*
- 32. The respondents suggests an award of between Vt 400,000 to Vt 600,000 for each appellant. We agree this is an appropriate range. Mrs Dornic is entitled however to a somewhat higher award given the assault on her. Accordingly we award Mrs Dornic Vt 600,000 and Mr McNicol Vt 400,000 damages under this head."*
27. As to exemplary damages Mr Tabi referred to the Court of Appeal decision in Republic of Vanuatu v. Emil [2015] VUCA 16 where the Court stated at paragraph 30 that:
- "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 extra ordinary 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 in disregarding every principal which actuates the conduct of common decency".

28. Although I have determined that the arrest in this case was unlawful, there was no violence involved in the arrest and Mr Togagi's period of detention was very brief. While I am of the view that an award of damages is appropriate, when one considers the circumstances here with those that existed in Warde, any remedy should be modest and certainly nowhere near the Vt 3.5 million which Mr Togagi seeks. I consider that an appropriate award would be one of Vt 250,000 and Mr Togagi is awarded general damages in that sum.
29. As to exemplary damages, it could not be said that the actions of Sergeant Willie fall within the type and range of conduct described in Emil. While Sergeant Willie was clearly mistaken in his perceived right to arrest Mr Togagi that does not elevate his conduct to the type worthy of sanction by the awarding of exemplary damages. Accordingly Mr Togagi's claim for exemplary damages fails.
30. Given that the claimant has been largely successful in this case, he is entitled to costs in these proceedings and costs are awarded in favour of the claimant to be as agreed within 14 days or failing that, costs as taxed.

Dated at Port Vila, this 30th day of June, 2016

BY THE COURT


JP GEOGHEGAN
Judge

