

BETWEEN: Charlot Salwai
Claimant

AND: The Commissioner of Police
First Defendant

AND: The Republic of Vanuatu
Second Defendant

Coram: Justice Aru

Counsel: Mr. F. Laumae for the Claimant
Mr. S. Aron for the Defendant

JUDGMENT

Introduction

1. The claimant was at the relevant time an elected member of Parliament for the constituency of Pentecost. These proceedings were filed on 10 August 2015 but relate to events in 2013 where the claimant alleges that he was kidnapped, falsely imprisoned and maliciously prosecuted.

Background

2. On 12 August 2013, the Deputy Commissioner of Police (Operations) issued an Operations Order namely "Zero Tolerance Operations from 16 August to 14 September 2013" (the ZTO order) to the Vanuatu Police Force (VPF) for enforcement. It may have been discussed with the then Prime Minister, Moana Carcasses Kalosil but the undisputed fact is that the ZTO order was signed by the Deputy Commissioner, John Taleo.
3. Part of the ZTO order reads as follows:-

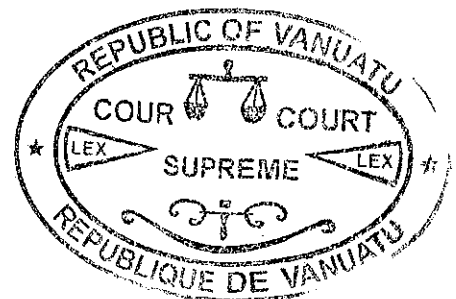
"OPERATION ORDERS

ZERO TOLERANCES- August 16 to September 14 2013

Time Used throughout the Order: Lima Hotel (local)

References

- a. Penal Code Act
- b. Public Order Act



- c. Police Act Cap 105
- d. Intent of Commissioner of Police
- e. DCP Ops meeting dated 9 July 2013
- f. Overall Ops Plan dated 10 July 2013
- g. Customs Act
- h. Liquor Licencing Act
- i. Business Licence Act
- j. Government Press Statement

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Situation

The nation of Vanuatu is facing a lot of murder cases just recently we had three murder cases one after another which raises alarm to our National Leaders and country as a whole so as the public at large are asking questions where are the Police and what are they doing. Related , the Prime Minister has met with the Commissioner on Tuesday 9 July concerning the same issue .

The causes of the increase of crime activities and murder cases is seen as the uses of marijuana , no controls of unemployed youth , late and illegal sale of alcohols .

.....

Threat forces

Our Intel report had shown no direct threat, but during weekends people get wired by using marijuana that we expect drunkards can take advantage to cause nuisance and disturbances .Therefore the VPF we are to prepare to provide maximum effort to control all areas of Port Vila.

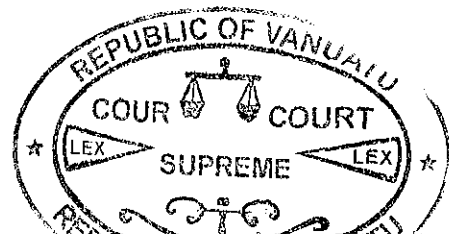
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Mission

The VPF is to conduct zero tolerance as from 16 August to 14 September 2013 through certain activities to ensure all nuisances are attended, addressed and dealt with by law in order that Port Vila and its suburb areas are cooperated to control measures by law for the safety of the people and properties.

.....”

4. The claimant owns a kava bar (nakamal) and a licenced liquor shop at Fres wota 1 area on his property lease title 11/OF33/203 (the Property). The Property is also known as the Green Light Nakamal.
5. On the evening of 13 September 2013 the claimant was at the Property. He had some kava and was then having a few beers with friends at the car park within the Property. That same evening, Corporal Terry Malapa, Inspector Jack Tallis and two Municipal wardens were in the Fres wota area checking liquor outlets to ensure they complied with their opening hours as part of the ZTO order.
6. When they stopped at the Green Light Nakamal, the two municipal wardens then entered the Property to check whether the liquor shop was closed. Liquor shops were required by law to close their operations by 11.00 pm. The claimant then complained to the two municipal wardens that the Municipal Council must do their work in



collecting rubbish at his property and referred them to where the uncollected rubbish was left. He told them to do their work fairly. At that point Corporal Malapa entered the Property and walked over to the shop then to where the claimant was berating the two wardens.

7. Corporal Malapa later arrested the claimant and told him to enter the Police vehicle parked at the entrance to the Property and was taken to the Police station. He was placed in holding Cell No 6 overnight and released the next day 14 September. The claimant was not charged or prosecuted.

Claim

8. The Claimant brings this action as a result of these events. The claim itself raises a number of causes of action: false imprisonment, kidnapping and malicious prosecution. False imprisonment is pleaded at paragraphs 5 to 8 as follows:-

.....
"5. On or about 13 September 2013 about four (4) police officers in full uniform under the command of the Deputy Commissioner of Police of Vanuatu went to the claimant's property at where he operates his kava bar and shop at Fres wota 1 area about 10.00pm and arrested the claimant and took him away to the Police station in Port Vila .

6. The claimant was locked up at the Police cell from 10.00pm on 13 September 2013 until 8.30am on the 14 September 2013 upon his release from the police cell pursuant to order obtained by his lawyer from the Supreme Court .

7. the actions of the defendants amount to false imprisonment .

8. the actions of the defendants in falsely imprisoning the claimant have caused the claimant damages ."

....

9. The allegations of kidnapping are pleaded at paragraphs 11 to 14 as follows:-

...
"11. Further, the actions of the defendants resulted in the kidnapping of the claimant to the Police station in Port Vila.

12. The claimant was unable to return to his residence at Cumberland street Port Vila until 14 September 2013 at 9.00am.

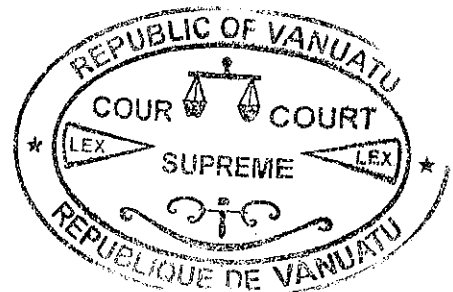
13. As a result of such kidnapping, the claimant has suffered damages."

....

10. And malicious prosecution is pleaded at paragraph 14 and 15 as follows:-

....
"14. Further the actions of the defendants also amounts to malicious prosecution because:

a) the defendant initiated criminal proceedings;



- b) the criminal proceedings were terminated ;
- c) there was no reasonable and probable cause for the prosecution;
- d) the defendants acted maliciously ; and
- e) the claimant suffered damages .

11. The relief claimed is as follows:-

A. An order for damages for false imprisonment:-

(i)	General Damages	VT 20,000,000
(ii)	Exemplary Damages	As just
(iii)	Punitive Damages	As just

B. An order for damages for kidnapping

General Damages	VT 3,000,000
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C. An order for damages for malicious prosecution

(i)	Damages to claimant's reputation	As just
(ii)	Detention	As just
(iii)	Unrecovered costs of defending the prosecution	VT 200,000

D. An order for costs incidental to this action.

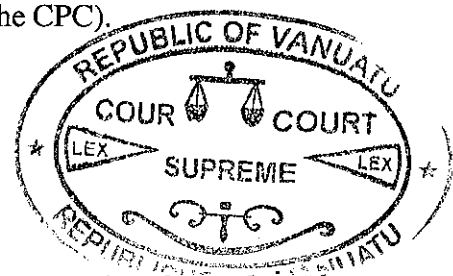
E. Interest

F. Such further order or other relief as the Court sees fit and just to award.

Defence

12. The defendants deny that the claimant was falsely imprisoned or that he was kidnapped or maliciously prosecuted. They also deny the damages claimed and say that :-

- a) The defendants issued the ZTO order to be in force from 16 August to 14 September 2013 to curb rising alcohol related crime in Port Vila;
- b) The Police under the ZTO order were monitoring compliance of liquor licence conditions by liquor outlets;
- c) The claimant acted aggressively and obstructed the Police carrying their duties and operation pursuant to the ZTO order and was arrested pursuant to s 12 (2) b) of the Criminal Procedure Code [CAP 136] (the CPC).



- d) The claimant was detained in Police custody and released the next day; and
- e) The claimant was not charged or prosecuted.

Evidence

13. The claimant filed and relies on the following sworn statement in support of the claim:-

- a) Sworn statement of Wilfred Makaba filed on 1 March 2017 [Exhibited "C1"]

14. The defendants filed and rely on the following sworn statements:-

- a) Sworn statement of Terry Malapa for the defendants [Exhibit "D1"]; and
- b) Further sworn statement of Terry Malapa for the defendants [Exhibit "D2"]

Issues

15. The central issue in this case is whether the claimant's arrest on 13 September 2013 was lawful. The answer to this question will determine whether or not there is a basis for the allegations of kidnapping, false imprisonment and malicious prosecution.

Law

16. Two pieces of legislation considered are the Liquor Licencing Act [CAP 52] and the Criminal Procedure Code [CAP 136]. First the Liquor Licencing Act. Section 18 (1), (2), (4) and section 21 provide:-

"18. Hours of opening

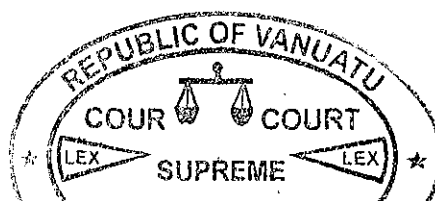
(1) No premises in respect of which there is a General On-Licence or Limited On-Licence obtained under the provisions of section 4 shall be open to the public before 7.30 in the morning and after 11 o'clock at night.

(2) No liquor shall be sold for consumption off the premises from premises in respect of which there is an Urban General Off-Licence, a Rural General Off-Licence, or a Limited Off-Licence obtained under the provisions of section 3(1) before 7.30 in the morning and after 9 o'clock at night:

Provided that no liquor shall be sold for consumption off the premises from premises in respect of which there is an Urban General Off-Licence, a Rural General Off-Licence, a Limited Off-Licence, a Combined General On- and Off-Licence between the hours of 11.30 in the morning of the Saturday of any week and 7.30 in the morning of the Monday of the succeeding week.

....

(4) No person shall be admitted to or remain upon any licensed premises for the purpose of consuming liquor after the hour fixed for closing.



....

21. Powers of entry of police

For the purpose of suppressing disorders, or in connection with the breach of the law, or for the purpose of testing the quality of the liquors sold, or for any purpose connected with the fulfilment of their duty members of the Vanuatu police force may enter into any licensed premises at any hour of the day or night if the premises are still open to the public:

Provided that in the case of disturbance or where the safety of those present is endangered members of the police force may at the request or summons of the occupiers enter upon any licensed premises at all material times.

....”

(emphasis added)

17. Section 12 of the Criminal Procedure Code provides:-

“12. 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.

(2) Without prejudice to the generality of subsection (1) a police officer may without a warrant arrest –

(a) any person who commits a breach of the peace in his presence;

(b) any person who wilfully obstructs a police officer while in the execution of his duty, or who has escaped or attempts to escape from lawful custody;

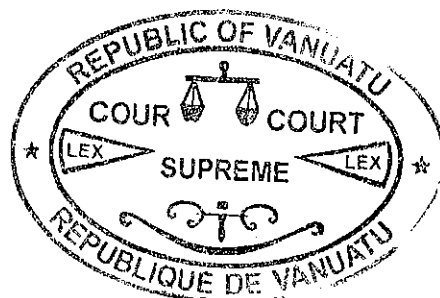
(c) any person whom he suspects upon reasonable grounds of being a deserter from the police or defence forces;

(d) any person whom he finds lying or loitering in any highway, yard or garden or other place during the night and whom he suspects upon reasonable grounds of having committed or being about to commit an offence or who has in his possession without lawful excuse any offensive weapon or housebreaking implement;

(e) any person for whom he has reasonable cause to believe a warrant of arrest has been issued.”

(emphasis added)

18. Relevantly section 18 also provides:-



“18. Detention of person arrested without warrant

(1) *Subject to subsection (2) when any 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 practicable to bring such person before an appropriate court within 24 hours after he has been so taken into custody, inquire into the case. Unless the offence appears to the officer to be of a serious nature the officer shall release the person on his signing a written undertaking to appear before a court at a time and place to be named in the undertaking; but where any person is kept in custody he shall be brought before a court as soon as practicable.*

(2) *The officer in charge of the police station may release a person arrested on suspicion of committing any offence, when after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with a prosecution for the offence.*

(emphasis added)

Submissions

19. The claimant says at the outset that the actions of the Police deprived him of his fundamental right to liberty as guaranteed under Article 5 (1) b) of the Constitution of the Republic of Vanuatu. Mr Laumae submits that the claimant had not committed any offence therefore the police had no duty to perform on his property. He submits that the claimant’s arrest and detention resulted from an indirect provocation by the Municipal wardens and Police officers who walked onto his property without a warrant. It was submitted that under s 12 of the CPC, Police powers to arrest without a warrant only apply to cognisable offences. Idle and disorderly conduct was not a cognisable offence as defined at s. 1 and set out in the schedule to the Act. The Police must have a warrant in order to arrest someone for being idle and disorderly. Mr Laumae further submitted that the ZTO order was not an order from the Prime Minister but a normal Police operation order prepared by the Deputy Commissioner of Police endorsed by the Commissioner and copied to the Prime Minister. It was finally submitted that the Police did not comply with the requirements of s 15, 18 and 60 of the CPC and at the relevant time, the claimant did not intend to cause difficulty to any Police officer but was simply exercising his right to freedom of expression by complaining about services provided by the Port Vila Municipal Council.

20. The defendants’ submissions on the other hand are essentially that the claimant wilfully obstructed the Police from carrying out their duties and s 12 (2) b) of the CPC empowers the Police with discretion to arrest a person behaving in such manner without a warrant.

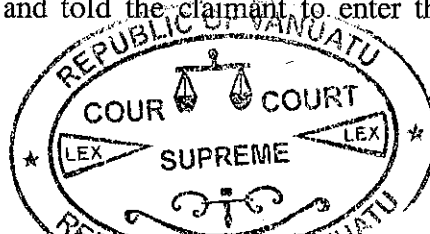
Discussions

21. On 13 April 2017 this matter was set down for a two day trial (26 and 27 June 2017). On the date of trial before the claimant opened his case, Mr Aron made objections to



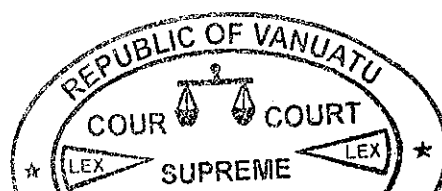
two documents filed by the claimant. The first being the claimant's Notice to cross examine filed on 20 June 2017. The nature of the objection was that the Notice was not filed and served in compliance with rule 11.7 (4) of the Civil Procedure Rules (CPR) which requires that such notice be given at least 14 days before trial. The second document was the claimant's sworn statement also filed on 20 June 2017. The objection raised was that the sworn statement was not filed in compliance with rule 11.6 (b) of the CPR which requires that a sworn statement that is to be used during a trial must be filed and served at least 21 days before trial. It was argued that more than enough time was given to both parties to file all documents required to be used in the trial and adequate notice was given of the trial date. The claimant was first directed to file his sworn statements on 30 November 2016. As it was not filed as directed, further directions requiring the claimant to file his sworn statements were issued on 1st February 2017, 1 March and 13 April. Nothing was filed as directed, having heard Mr Laumae in response I ruled that both documents were ineffective for the purposes of the trial pursuant to rule 18.10 (2) c) of the CPR and were struck out.

22. Mr Laumae then opened the claimants case and called his only witness Wilfred Makaba. His sworn statement was tendered as Exhibit "C1". Mr Magaba was then cross examined. Following cross examination, Mr Laumae proceeded with his re-examination. At the end of the re-examination Mr Laumae informed the Court that that was the claimant's case. The Court then adjourned for lunch. Before that Counsels were informed that the defendants would open their case after the lunch recess. When the Court resumed, I was informed by Mr Laumae that he had filed two applications and wanted the Court to deal with these first. None of these two applications was to re-open the claimant's case.
23. The first application was to shorten time to hear his application for judgment to be given in the claimant's favour pursuant to rule 18.11 of the CPR. The second application was an urgent application to set aside orders disallowing the claimant's sworn statement and the Notice to cross examine. Mr Aron did not object to the applications being heard before he opens his case. On that basis I proceeded to hear submissions from counsels. Having heard the submissions, both applications were rejected. Written reasons are provided in my Ruling of 27 June 2017. The trial then proceeded with the defence case. At the completion of the trial, despite the orders for the filing and hearing of submissions, further delays were encountered. Directions were then issued for the judgment to be issued on the submissions once filed.
24. The only evidence supporting the claim is that of Wilfred Makaba. [Exhibit "C1"] He says that at 10 00 pm to 10 45 pm he was having a few beers after kava with the claimant. This was at the car park within the Property. Two municipal wardens came and spoke to the claimant and he complained to them about the uncollected rubbish on the Property. The Police then intervened and told the claimant to enter the Police



vehicle. He did so and was taken to the Police station. Mr. Makapa says that at that time the claimant's liquor shop had already closed and he could not remember if the claimant acted violently or aggressively towards the Police and Municipal wardens but the Claimant did not obstruct the Police. Under cross examination Mr Makaba said he could not recall when the shop closed and he did not see the claimant being arrested.

25. Corporal Terry Malapa on the other hand in his evidence [Exhibit "D2"] says that when the wardens were talking to the shop keeper, the shop was still open. He walked towards the shop and saw a man buying a bottle of tusker. He told the shop keeper to close the shop as it was already past 11.00am and he could not sell liquor after 1100 pm. Corporal Malapa then heard the claimant complaining to the two municipal wardens. He approached them and told that claimant to close the shop. He says the claimant responded in a loud angry tone saying "*no yufala stap bias westem taem mo useless*". Corporal Makaba says he held the claimant's left hand and reminded the claimant of what he said but the claimant refused to listen and removed Corporal Malapa's hand. After that he cautioned the claimant and told him he was being arrested for obstructing a Police officer in the execution of his duties. Corporal Malapa was not cross examined.
26. Wilfred Makaba's evidence is that from 1000pm to 1045pm he was having a few beers with the claimant but did not see the claimant being arrested. In the absence of any evidence from the claimant, I accept Corporal Malapa's evidence that he arrested the claimant. It is not disputed that the ZTO order was issued by the Deputy Commissioner of Police and was effective for the period 16 August to 14 September 2013. It is also not disputed that the claimant owns and operates a liquor shop on the Property (Green Light Nakamal) and that it was only allowed to sell liquor up to 1100pm. Furthermore, it is not disputed that the Police and Municipal wardens entered the Property on 13 September 2013 when the ZTO order was still in force.
27. Having made these findings, the question remains whether the arrest was lawfully made. Section 4 of the Police Act [CAP 105] as amended sets out the main functions of the VPF: to "*maintain an unceasing vigilance for the prevention and suppression of crime*" and to "*preserve peace and maintain order; protect life and property; enforce laws and prevent and detect offences and bring offenders before the courts*".
28. The ZTO order was issued undoubtedly as part of the VPF's general functions to preserve peace and maintain order. The order noted that there was an increase in criminal activities in Port Vila at the relevant time and that it was often related to alcohol abuse due to liquor outlets operating beyond their closing hours. Various pieces of legislation are also referenced in the ZTO order, one being the Liquor Licensing Act. The legislation provides that where liquor is sold for consumption at the place of trade, a general on- licence or a limited on-licence is required (s4). Businesses operating under both categories of licences, are prohibited from operating



after 11.00pm at night (s18). Under s 21, the Police “for any purpose connected with the fulfilment of their dutymay enter into any licensed premises at any hour of the day or night if the premises are still open to the public..”

29. On the night of 13 of September 2013, the Police did not require a warrant to be on the Property - the Green Light Nakamal . They were fulfilling their duty to ensure that the claimant complies with the law in operating his liquor shop and that is to stop selling liquor by 11.00 pm. The evidence of Corporal Malapa is that the shop was still open after 11.00 pm and still selling liquor. He not only told the shop keeper to close the shop but also told the claimant as the proprietor to close the shop .In response the claimant reacted expressing his dissatisfaction in words to the effect that the Police were biased towards him and were wasting their time and are useless.
30. The claimant submits that under s 12 (1) of the CPC, a Police officer cannot arrest a person for idle and disorderly conduct without a warrant. I accept that submission as the schedule to the CPC makes that clarification that the Police shall not arrest a person for being idle and disorderly without warrant. However the first offence for which the claimant was arrested was for obstructing the Police in the execution of their duties. This was noted in the Watch House Custody Register (WHCR) [Exhibit “D1” annexure “TM3”]. Page 1 notes the offences committed by the claimant: first obstructing officer on duty and second idle and disorderly. Page 2 of the WHCR shows that at 11.30 pm on 13 September, the claimant was detained in Cell No 6. At 12.30 am on 14 September he was given a bottle of water but refused it. He was checked again at 5.34am .At 7.02 am the claimant was given his clothes and at 10.25am he was released from Cell No 6.
31. Under Section 12 (2) b) of the CPC, a Police officer may without a warrant arrest a person for obstructing an officer on duty:

“....

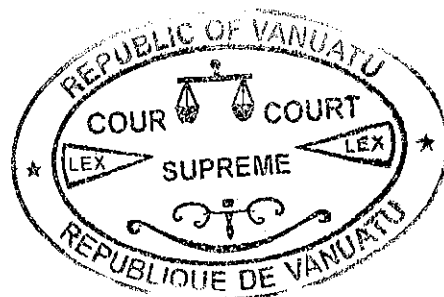
(2). *Without prejudice to the generality of subsection (1) a police officer may without a warrant arrest –*

....

b) any person who wilfully obstructs a Police officer while in the execution of his duty, or

...”.

32. The defendants in support of their case rely on **Hinchcliffe v Sheldon** [1995] 1 WLR 1207. Briefly the facts were that the Police were about to enter an inn as part of their duty to prevent or check if any offences were being committed. The owner gave warning of this to those inside to clear out. Goddard CJ when considering whether the owner’s actions amounted to obstruction said:-



“Obstruction means, for this purpose, making it more difficult for the Police to carry out their duties...”

33. When the claimant was arrested, the Police were carrying out their duties to ensure that liquor outlets including the claimant’s operate within the conditions stipulated in the Liquor Licencing Act. Section 21 of the Act empowers Police to enter such premises at any hour of day or night if the premises are still open to the public. The claimant was not only the owner of the premises but also a Member of Parliament and national leader. He was in a position of influence. Adopting what the Court said in **Hinchcliffe v. Sheldon**, I am of the view that the claimant’s actions were clearly intended to make it more difficult for the Police to carry out their duties as shown by the unchallenged evidence of Corporal Malapa.

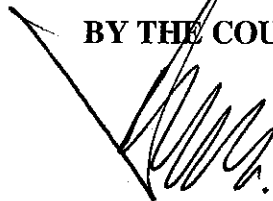
Conclusion

34. Having found that the arrest was lawful, the subsequent claims for kidnapping, false imprisonment, malicious prosecution and damages are therefore rejected. These allegations may only have some basis had I found otherwise.

35. The claim is therefore dismissed. The defendants are entitled to costs to be agreed or taxed by the Master.

DATED at Port Vila this 9th day of April, 2018

BY THE COURT



D. Aru
Judge

