



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

Constitutional
Case No. 20/2308SC/CNST

BETWEEN: CHRISTINA THYNA GESA
Claimant

AND: REPUBLIC OF VANUATU
Defendant

Date of Hearing 26th March 2021
Date of Judgment: 14th July 2021
Before: Justice Oliver.A.Saksak
Counsel: Mrs Mary Grace Nari for Claimant
 Mr Hardison Tabi (SLO) for the Defendant

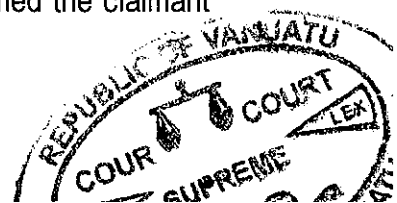
JUDGMENT

A. Introduction

1. This claim is instituted pursuant to Article 6 of the Constitution. The claimant alleges her rights to security of person, protection of the law, freedom of movement and equal treatment under the law, pursuant to Article 5 (1)(c), (d), (i) and (k) of the Constitution were infringed by police officers as agents of the State.

B. Facts

2. The claimant is a registered and practising barrister and solicitor owning her Legal Firm of Cornerstone Lawyers.
3. Prior to writing a letter to the Police on 8th May 2020, she received instructions from a client that some police officers were persistently trying to obtain a witness statement from her at her work place. This employee felt she was being pressurised by the Police to give untruthful evidence in their favour against an alleged offender when in her conscience, she knew it was wrong to do so. She therefore approached the claimant for advice and assistance.



4. Subsequently the claimant wrote a letter to the Police on 8th May 2020 explaining the position of her client and alleging intimidation, threats and abuse of power and requesting the police to exercise restraint.
5. The letter was not delivered to the Police until 12th May. At 2:00pm that day five (5) police officers arrived at USP and arrested the claimant in front of students and bystanders. The Police took her to the station, searched her, removed her bag and valuables and locked her up in the cell for 2 hours.
6. The claimant had a criminal case listed for the afternoon that day, Crc 1376 of 2018 PP v Taima Silas but did not attend due to her detention.
7. The claimant was released from detention after 2 hours and told she was charged with obstructing Police Officers on duty.

C. Reliefs

8. The claimant seeks-
 - (a) A Declaration that her constitutional rights in Article 5 (1) (c), (d), (i) and (k) have been infringed.
 - (b) An order of compensation in the sum of VT 6 million.
 - (c) Costs

D. Defence

9. The defendant denied any breaches of the claimant's constitutional rights as alleged. They however admitted they had arrested the claimant and detained her for 2 hours. The defendant say their actions were authorised by law pursuant to sections 12 and 18 of the Criminal Procedures Code Act [CAP 136].

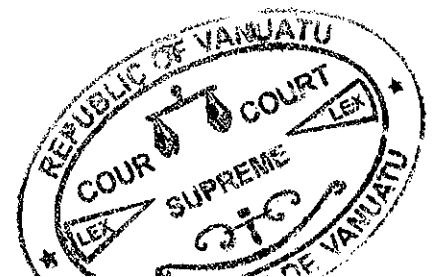
E. Evidence

10. The claimant filed evidence in support of her claims by sworn statement of the claimant herself (dated 2/9/20), of Colin Natonga (dated 28/09/20), of Taima Sailas (dated 28/10/20), of Madonna Meltenoven (dated 12/3/21) and of Martin Mahe (dated 16/03/21).
11. The defendant filed evidence in support of their responses by sworn statements of Sylviana Tabi and Christopher Bong (dated 17/03/21) and of Andrew Kalman and Jackson Noal (dated 18/03/21).

F. The Law

Constitution

12. Article 5 Fundamental rights and freedoms of the individual



"(1) The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health –

- (a) life;*
- (b).....;*
- (c) security of the person;*
- (d) protection of the law;*
- (e).....;*
- (f).....;*
- (g).....;*
- (h).....;*
- (i) freedom of movement;*

(j).....;

(k) equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.

13. Article 6. Enforcement of fundamental rights

"6. Enforcement of fundamental rights

(1) Anyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or is likely to be infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right.

(2) The Supreme Court may make such orders, issue such writs and give such directions, including the payment of compensation, as it considers appropriate to enforce the right."

14. Criminal Procedure Code Act [CAP.136]

Arrest By POLICE OFFICER WITHOUT WARRANT

"ARREST BY POLICE OFFICER WITHOUT WARRANT

12. (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."

15. Detention of Person arrested without warrant

"DETENTION OF PERSON ARRESTED WITHOUT WARRANT

18. (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."

16. POLICE TO REPORT ARRESTS

"POLICE TO REPORT ARRESTS

19. Officers in charge of police stations shall make a report to the Commissioner of Police about all persons arrested without warrant within the limits of their respective stations, whether such persons have been released from custody or otherwise."

17. COMPLAINTS AND CHARGE

"COMPLAINT AND CHARGE

35. (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.

(2) A complaint shall be made under oath and may be made orally or in writing but if made orally shall be reduced to writing by the judicial officer, and, in either case, shall be signed by the private prosecutor and the judicial officer:

Provided that where the proceedings are instituted by a prosecutor or by a public officer authorised under section 33, a formal charge duly signed by any such person may be presented to a judicial officer and shall be deemed to be a complaint for the purposes of this Code.

(3) Subject to subsection (4) the judicial officer upon receiving any such complaint shall, unless such complaint has been made in the form of a formal charge under subsection (2) draw up or cause to be drawn up and shall sign a formal charge.

(4) Where the judicial officer is of opinion that a complaint or formal charge made or presented under this section does not disclose any offence, he shall make an order refusing to admit such complaint or formal charge and shall record his reasons for making such order."

18. WITNESS SUMMONS

"WITNESS SUMMONS

76. (1) If it appears to a court having cognizance of a criminal cause or matter that material evidence can be given by or is in the possession of any person, it shall be lawful for the court to issue a summons to such person requiring his attendance before the court or requiring him to bring and produce to the court for the purpose of evidence all documents and writings in his possession or power which may be specified or otherwise sufficiently described in the summons.

(2) Any person who, having been duly served with a witness summons, without due cause fails to appear in answer thereto, or having appeared refuses to give evidence or produce what is required shall be guilty of an offence and be liable to a fine not exceeding VT 10,000:

Provided that no witness shall be compelled to disclose anything or produce any document or writing in circumstances in which he might plead privilege from so doing."

19. WARRANT FOR WITNESS WHO DISOBEYS SUMMONS

"WARRANT FOR WITNESS WHO DISOBEYS SUMMONS

77. If without sufficient excuse a witness does not appear in obedience to a summons issued pursuant to section 76 the court, on proof of the proper service of the summons a reasonable time before, may issue a warrant to bring him before the court at such time and place as shall be therein specified."

20. WARRANT FOR WITNESS IN FIRST INSTANCE

"WARRANT FOR WITNESS IN FIRST INSTANCE

78. If the court is satisfied by evidence on oath that such person will not attend unless compelled to do so, it may at once issue a warrant for the arrest and production of the witness before the court at a time and place to be therein specified"



21. Penal code Act [CAP.135]

"73A. Obstructing police officer

Any person who obstructs, molests, or assaults any police officer in the performance of his public duties shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding six years or to a fine not exceeding VT 300,000 or to both such fine and imprisonment."

G. The Issues

22. The claimant raised two (2) issues-

- (a) Whether the letters written to the police officers Jackson Noal and Andrew Kalman amount to obstruction with Police Officers on duty and conspiracy to defeat the course of justice?
- (b) Was it lawful for the police to arrest the claimant and detained for up to 2 hours for the allegations made?

23. The defendant raised the following issues-

- (a) Whether or not the arrest of the claimant on 12 May 2020 was unlawful?
- (b) Whether or not the detention of the claimant on 12 May 2020 was unlawful?
- (c) Whether or not the claimant was maliciously prosecuted?
- (d) Whether or not the Police Officers have breached the claimant's constitutional rights under Article 5 (1) (c), (d), (i) and (k)?
- (e) Whether or not the claimant is entitled to compensation?

H. Submissions

24. The claimant submitted by way of written submissions that based on the undisputed facts in evidence, her letters to the Police Officers concerned did not amount to obstruction of police officers on duty or to a conspiracy to defeat the course of justice. She submitted therefore her arrest was unlawful and relying on the authority of Republic v Benard [2016] VUCA 4, She is entitled to compensation.

25. The defendant submitted also by way of written submissions that based on the case authority of Republic v Emil [2015] VUCA 16 and sections 73A of the Penal Code Act and sections 12 and 18 of the Criminal Procedure Code Act the arrest and detention were done lawfully and that therefore there were no breaches of the constitutional rights as alleged.

I. Discussion

26. To answer the issues raised it is necessary to set out the full text of the letter dated 8 May 2020 written by the claimant to the police officers as follows-

" 8 May 2020

*Jackson Noal
Assistant Commissioner of Police
Vanuatu Police Force
Port Vila*

*Kalman Andrew
Officer in charge
Uniform Investigation Branch
Vanuatu Police Force
Port Vila*

Dear Sir,

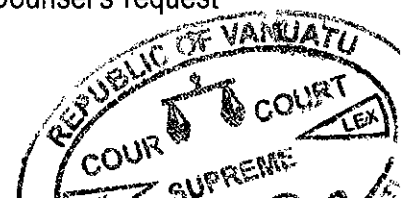
Re: INTIMIDATION OF OUR CLIENT AND ABUSE OF POWER AS SENIOR POLICE OFFICERS

We refer to the above and confirm we have received complaints from our client, Mrs Madonna Meltenoven, about the following:



- (i) *Our client is an employee of Jo Vietnamese restaurant,*
 - (ii) *You have both attended on numerous occasions our client's work place between last week and this week with an intention to intimidate our client about an incident which took place on Saturday 4th April 2020 at around 7pm involving Mr Martin Mahe, the current chairman of the Public Service Commission.*
 - (iii) *Our illegal intention is clearly to fish for information to compile an "harassment case" against Mr Mahe.*
 - (iv) *You have requested our client, against her wish and/or knowledge to attend at the police station today to sign a statement compiled by ourself against Mr Mahe,*
Your actions as both the Assistant Commissioner of Police and the Officer in charge of the Uniform Investigation Branch, Senior Police Officers, clearly amount to an abuse of power and an abuse of the process of lodging a complainant with the police. We put you on notice that we have informed the Professional Standard Unit about your actions.
May we kindly request that you refrain from such action.
In the event that you persist, we will have no alternative but to issue Restraining Orders against yourself pursuant to our client's instructions.
- Yours Sincerely,
(signed)
Christina Thyna Gesa
CORNERSTONE LAWYERS"
(Emphasis added)

27. This letter was the basis of Mr Kalman's complaint ("AK3") made on 10th May 2020 alleging that Mrs Gesa had obstructed the police contrary to section 73A of the Penal Code Act.
28. Subsequent to the letter and complaint, Mrs Gesa was arrested by 5 Police Officers at 2:45pm on 12th May 2020. The police took Mrs Gesa to the Police Station, searched her and locked her up in cell 6 for 2 hours. She was released at about 5:30pm. She was told her charge was obstructing police officers on duty and conspiracy to defeat the course of justice. She was told to attend Court on 24th June 2020 at 9:00am.
29. No charges had been laid against Mrs Gesa subsequently and no summonses were issued. She attended the Magistrate's Court with Mrs Mary Grace Nari at 9:00am on 24th June 2020. However they were informed by the clerk of Court that no case had been registered and listed for that morning.
30. That was a serious omission or failure on the part of the Police.
31. The issue is whether by her letter of 8th May 2020 Mrs Gesa had obstructed the police in the course of their duties?
32. The term " obstruct" is ordinarily defined as meaning to prevent somebody or something from doing something or making progress, especially when done deliberately.
33. Looking closely at the letter of 8th May 2020 first we examine its subject matter " Re: INTIMIDATION OF OUR CLIENT AND ABUSE OF POWER AS SENIOR POLICE OFFICERS. It is essentially a complaint by Mrs Gesa on behalf of Ms Meltenoven about abuses of power by Senior Police Officers, Jackson Noal and Andrew Kalman.
34. Paragraph 1 (i), (ii), (iii) and (iv) relate to and specify the facts and circumstances. Paragraph 2 which is underlined for emphasis in part contains the complaint or allegations of abuses of power. Paragraph 3 (also emphasized) is Counsel's request



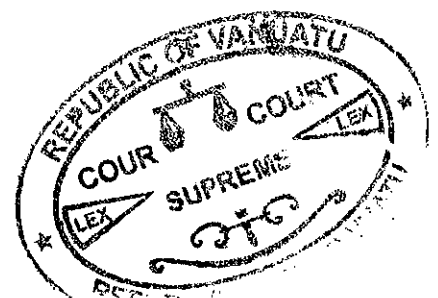
to the policemen to “refrain from” their “action”. What action? The action of intimidating Ms Meltenoven as indicated in paragraph 1 (ii), (iii) and (iv) of the letter.

35. Ms Meltenoven was harassed by Police officers about the incident that occurred on 4th April 2020 at the Vietnamese Restaurant involving Mr Martin Mahe. She was tired of being harassed by Policemen who tried to get her to make a statement that did not reflect what really happened at the restaurant implicating Mr Mahe. They had tried to get her and other employees, of the restaurant several times. Ms Meltenoven resolved to get legal assistance from Mrs Gesa, resulting in her writing the letter of 8th May 2020. Mrs Gesa was only doing a service to her client. As a registered legal practitioner she was paid to do her job to protect her client. Mrs Gesa did not stop the policemen from doing their job. If they were not successful in getting a statement from Ms Meltenoven to be a witness for the prosecution, section 76 of the Criminal Procedure Code Act provides for the issuance of witness summonses by the Court. That was always an option open for the police but they chose not to resort to it, whether ignorantly or deliberately remains questionable.
36. In any event to answer the issue, Mrs Gesa did not obstruct the police in the course of their duties by writing the letter she did, dated 8th May 2020.
37. Going further into the evidence of Mr Andrew Kalman and Mr Jackson Noal Katenga, we see according to the complaint of Mr Katenga that an alleged drunk and disorderly behaviour by Mr Mahe were seen on the evening of 4th April 2020. Despite the occurrences, the formal complaint (“AK 1”) was only lodged on 28th April 2020, some 24 days later. The complaint attached a typed complaint dated 5th May 2020, some 8 days later than 28 April 2020. This lengthy period begs the question: where is the seriousness of this complaint, if any at all?
38. Further, we examine the draft statement of Ms Meltenoven taken on 8th May 2020 by Mr Kalman take some 35 days later after the alleged incidents. I say the statement is a draft because on its face it is not signed by Ms Meltenoven agreeing to its contents. And further the statement does not reflect what Ms Meltenoven said in her evidence at trial of Mr Mahe's case. It appears what was written in the draft statement was taken out from what other witnesses had said and did not actually reflect what Ms Meltenoven saw and could have said if she made a statement herself. It is a little wonder therefore with the several times the police officers attempted to reach her and get her to sign the statement she knew was a lie, she resorted to legal advice from Mrs Gesa. That was her absolute right and privilege.
39. I also note from Mr Kalman's evidence (“AK3”) that he recorded his statement o 10/05/20 which was a Sunday. It is questionable whether he was at work on that Sunday. But secondly he quoted Mrs Gesa saying “ mbae mi givim wan letta long you long Monday 12/05/20”. 12th May 2020 fell on Tuesday not Monday. However these are side issues and may not bear much on the case.
40. The realities of this case are that-
 - (i) Issue 1: The letters written by Mrs Gesa to the Police Officers Jackson Noal Katenga and Kalman Andrew did not amount to obstruction of the Police



Officers in the course of their duties, and did not amount to a conspiracy to defeat the course of justice.

- (ii) Issue 2: The arrest of Mrs Gesa by the Police on 12th May 2020 was therefore unlawful arrest. There was no evidence section 19 of the CPC Act was complied with by the Police.
 - (iii) Issue 3: The detention of Mrs Gesa on 12 May 2020 for 2 hours was therefore unlawful.
 - (iv) Issue 4: The attendance by Mrs Gesa at the Magistrate's Court on 24th June 2020 when a charge had not been laid amounted to a malicious attempt to prosecute her on non-existent charges.
 - (v) Issue 5: Mrs Gesa's constitutional rights to security of person, protection of the law, freedom of movement and equal treatment under the law were infringed by the actions of the police on 12 May 2020 when she was unlawfully arrested and detained for 2 hours, and I so declare.
 - (vi) Issue 6: Mrs Gesa is entitled to be compensated for those breaches.
41. The attitude of Mr Katenga towards Mrs Gesa as reflected in his statement at paragraph 5 and the statement of Colin Natonga dated 28/09/20 show the obvious malice and abuse, and a complete disregard of Mrs Gesa's rights. See Republic v Benard [2016] VUCA 4.
42. I accept on the basis of Benard's case that an award is a public law compensation and not a common law damages. The purpose of the award is not to compensate Mrs Gesa for personal injury but to punish the conduct of the police officers.
43. For Mrs Gesa to be arrested by 5 police officers and detained was high handed and undeserving. In my view Mrs Gesa is entitled to compensation in the sum of VT 1,500,000. Accordingly I order an award of VT 1,500,000 as compensation to be paid by the State to Mrs Gesa.
44. Mrs Gesa is also entitled to her costs of the proceeding on the standard basis as agreed or be taxed by the Master.



45. This judgment is to be served on the Defendant and payment shall be made within 28 days from the date hereof.

DATED at Port Vila this 14th day of July 2021
BY THE COURT


Oliver.A.Saksak
Judge

