

a Vanuatu

Temar and Others v Government of the
Republic of Vanuatu

b [2005] VUCA 10

Court of Appeal

c Robertson, von Doussa, Treston and Saksak JJ

27 April, 3 May 2005

Tort – Vicarious responsibility – State – Actions of police – Police officers arresting, detaining and charging individuals with offences – Police officers following unlawful orders of senior officers – Senior officers subsequently convicted of inciting mutiny –

d *Victims of unlawful police action seeking damages against state – Whether state responsible for unlawful actions of officers – Appropriate test – Relevant considerations – Police Act, ss 35, 40, 46.*

e The appellants were arrested, detained and charged with an offence by members of the Vanuatu police force, under the instruction of four senior police officers. The public prosecutor subsequently refused to give her consent to the prosecution. The Supreme Court found that the arrests were made and the charges brought for an improper purpose and convicted the four senior police officers of inciting mutiny, kidnapping and false imprisonment. The appellants sued the respondent government for false

f imprisonment, malicious prosecution and for damages for assault, on the basis that at all material times the police officers involved in the arrests were in the employ of the state, were dressed in normal police uniforms and had used government vehicles. Section 35 of the Police Act, the relevant statute, provided: '(1) Every member ... shall obey all lawful directions in respect of the execution of his office ... (3) ... and ... apprehend all persons that he is

g legally authorized to apprehend and for whose apprehension sufficient ground exists.' Section 40 of the Act provided that there could be no liability on police officers for acts done in good faith in the performance of their duties. Section 46 of the Act covered the offence of inciting mutiny for which the four senior officers had been convicted. The Chief Justice held that the

h respondent was not vicariously liable for the actions of the police officers directed against the appellants. The appellants appealed to the Court of Appeal.

HELD: Appeal dismissed.

i Once the four senior officers had been found guilty of inciting mutiny under s 46 of the Act it followed that any acts performed by other officers or persons in furtherance of those orders, whether or not those officers or persons were in uniforms or using government vehicles and property, were tainted with

illegality or unlawfulness resulting from or arising out of the illegal or unlawful orders in the first place. It necessarily followed that all the police officers who had taken part in the operation were either acting unlawfully and committing criminal acts outside their legal rights and responsibilities or were following orders in good faith, in which case they had statutory immunity. In neither category could there be any responsibility on the government (see pp 36–37, below). a

[*Editors' notes:* Sections 35 and 46 of the Police Act, so far as material, are set out at p 36, below.] b

Case referred to in judgment

Racz v Home Office [1994] 1 All ER 97, [1994] 2 AC 45, [1994] 2 WLR 23, UK HL c

Legislation referred to in judgment

Penal Code Act (Cap 135), s 64

Police Act, ss 4, 35, 40, 46 d

Appeal

The appellants, Jesse Temar, Noel Amkori, Nadine Alatoa, Obed Nalau, Philip Natato and Anatol Koulon, appealed against the decision of the Chief Justice dismissing their claim for damages for false imprisonment, malicious prosecution and assault against the respondent, the Government of the Republic of Vanuatu. The facts are set out in the judgment. e

Hillary Toa for the appellants.

John Stephens for the respondent.

3 May 2005. The following judgment of the court was delivered. f

ROBERTSON, von DOUSSA, TRESTON and SAKSAK JJ.

The appellants, namely Jesse Temar, Noel Amkori, Nadine Alatoa, Obed Nalau, Philip Natato and Anatol Koulon, sued the respondent for damages for false imprisonment, malicious prosecution and for damages for assault based on the following facts— g

1. Early on the morning of 4 August 2002 officers of the Vanuatu police force arrested the appellants and nine others, including the then Commissioner of Police, Mr Mael Apisai, without warrants.

2. The appellants and the others arrested were taken to the Port Vila Police Station where they were held in a cell and later taken to the Magistrates Court at around 10.30 pm that evening. h

3. The cell was small and over-crowded.

4. The appellants were charged with seditious conspiracy contrary to s 64 of the Penal Code Act (Cap 135) and were released on bail at 11.25 pm.

5. The criminal charges were dismissed when the public prosecutor refused to give her consent to the prosecution. i

6. The arrests were made and the charges brought for an improper purpose,

a in that they were brought as part of an unlawful course of action by senior police officers protesting at the appointment of the new Police Commissioner Mael Apisai.

7. The police officers involved in the arrests and detention of the appellants included Ron Tema, Peter Iauko, Alfred Kokoni, Malachi George, Samson Kalo, Samson Leto, Jean Yves Kali, George Twomey, Erick Pakoa, Holi Simon, b Apri Jack Marikembo and Paul Willie Reuben.

8. Erick Pakoa, Holi Simon, Apri Jack Marikembo and Paul Willie Reuben directed the other officers involved in the arrest to carry them out. On 5 December 2002 the Supreme Court convicted these four senior officers of inciting mutiny, kidnapping and false imprisonment. They were sentenced to c terms of imprisonment which were suspended.

9. They appealed to this court which, on 9 May 2003, upheld their convictions and ordered that each of the four senior officers actually serve the terms of two years imprisonment.

10. Both this court and Supreme Court were satisfied that the four senior officers had incited and led the mutiny that resulted in the unlawful arrest and d detention of the appellants. The other officers involved were considered to be acting under their direction and control.

The appellant Jesse Temar gave evidence showing that the majority of the police officers involved in the arrests and detention of the appellants were and are still in the employ of the respondent. It was his evidence also that e Operation Procedure 2002, during which the arrests were made, was authorised by Api Jack Marikembo who was then the Deputy Police Commissioner for Operations. It was further shown in his evidence that the officers who carried out the arrests were dressed in normal police uniforms and that they had used government vehicles.

f For these reasons the appellants alleged and claimed that the respondent should be held liable for the conduct of its officers and pay damages for false imprisonment, malicious prosecution and assault.

The Chief Justice, in deciding the issue of whether the government was liable, held that the respondent was not vicariously liable for the actions of the police officers against the appellants on the persuasive authority of *Racz v Home Office* [1994] 1 All ER 97. The test in that case was that—

g 'if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside it.'

h His Lordship dismissed the appellants' claims for damages and awarded costs against them.

The appellants appeal to this court on numerous grounds asserting that the learned Chief Justice had erred but, as we view the case, the case is determined by a fundamental point.

i Mr Toa endeavoured to impress on the court that the issue before the Chief Justice was that the government was liable for actions of other officers involved in the actual arrest but that these would not include the four senior

officers. He advanced the arguments that:

- (a) the other officers were acting in obedience to superior orders;
- (b) in carrying out those orders, although unlawful, the officers acted in uniforms and used government vehicles;
- (c) others not charged may not have acted in good faith and
- (d) the state prosecutor had laid charges and conducted prosecutions and then later the public prosecutor refused to give consent to prosecute, resulting in the charges being dismissed.

It is clear to us from the judgment (at p 15) that the learned Chief Justice, in applying the law to the facts, considered and properly applied ss 4, 35 and 46 of the Police Act. Section 35 of the Act was, in our view, the most relevant provision and for that matter we quote it as follows:

'1. Every member [of the Police Force] shall exercise such powers and perform such duties as are by law conferred or imposed upon him, and shall obey all lawful directions in respect of the execution of his office which he may from time to time receive from his superiors in the Force.

2. Every member shall be considered to be on duty at all times and may at any time be detailed for duty in any part of Vanuatu.

3. It shall be the duty of every member to promptly obey and execute all orders and warrants lawfully issued to him by any competent authority, to collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances, to detect and bring offenders to justice and to apprehend all persons that he is legally authorized to apprehend and for whose apprehension sufficient ground exists.' (Chief Justice's emphasis.)

The learned Chief Justice then quoted s 46 of the Act:

'Any member who—

(a) takes part in any mutiny or intended mutiny amongst the Force, or
 (b) knowing of any mutiny amongst the Force does not use his utmost endeavours to suppress such mutiny, or ...

(d) knowing of any intended mutiny amongst the Force does not without delay give information thereof to his superiors officer, shall be guilty of an offence and liable on conviction to a term of imprisonment not exceeding 5 years.'

One of the agreed facts is stated at para 8 at p 3 of the judgment. The superior officers, Erick Pakoa, Holi Simon, Api Jack Marikembo and Paul Willie Reuben, had directed the other officers involved in the arrest. These other officers are listed in para 7 as Ron Tema, Peter Iauko, Alfred Kokoni, Malachi George, Samson Kalo, Samsan Leto, Jean Yves Kali and George Twomey. The four superior officers were convicted on 5 December 2002 for inciting mutiny under s 46 of the Act.

In our view, once those facts were ascertained and agreed, it was inevitable that the learned Chief Justice would have been satisfied that the orders given by the four superior officers found guilty of inciting mutiny under s 46 of the Act were unlawful. It follows, therefore, that any acts performed by other officers or persons in furtherance of those orders, whether those officers or persons were in uniforms or using government vehicles and property, were

a tainted with illegality or unlawfulness resulting from or arising out of the illegal or unlawful orders in the first place. That is the analogy of the 'poisoned tree'.

His Lordship said (at p 16 of the judgment):

b 'The Vanuatu Police Force is a disciplined force which means that all officers must obey the orders of their superiors. Api Jack Marikembo upon signing the Snap Operation Orders 2002 gave the orders for the arrest and detention of the Claimants. *The chain of authority from Api Jack Marikembo was unlawful, it was a mutinous operation knowingly commenced to undermine the appointment of Mael Apisai as Police Commissioner. The arrest, detention and prosecution of the claimants were unauthorized acts by the police involved so unconnected with their duty to uphold and enforce the law of Vanuatu that the government cannot be held responsibility for the actions of those involved.* Evidence has been produced in court that the arresting Police Officers were in uniform and they used a Government vehicle. It also produced in Court that the Sergeant Graham Bihu who is the State Prosecutor appointed by the Public Prosecutor is the prosecuting officer. That evidence makes no difference. *The Officers acted unlawfully, the fact that they used government property without authority does not make the government liable for their acts. This was mutiny.*' (Our emphasis.)

We agree with the learned Chief Justice and uphold his findings and rulings.

e It appeared from the arguments raised by Mr Toa that he was raising claims against the other police officers for personal liability. Mr Stephens assisted the court by handing up a copy of the original pleadings. Unfortunately that claim was not pleaded and it was therefore not open to Mr Toa to raise it. In any event, the court drew Mr Toa's attention to s 40 of the Police Act which provides that there can be no liability on police officers for acts done in good faith in the performance of their duties.

f It necessarily follows that all police officers who took part in the operation were either acting unlawfully and committing criminal acts outside their legal rights and responsibilities or they were following orders in good faith in which case they had the statutory immunity. In neither category could there be a responsibility on the government. It is not necessary to canvas any other appeal grounds as this underlying point is determinative.

g This appeal is dismissed with costs to the respondents.