

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

Civil Appeal
Case No. 16/2547 CoA/CIVA

BETWEEN: REPUBLIC OF VANUATU
Appellant

AND: TITUS TOGAGI
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice John von Doussa
Hon. Justice John Mansfield
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice Mary Sey
Hon. Justice David Chetwynd

Counsel: *Mr. H. Tabi for the Appellant*
Mr. J. Ngwele Respondent

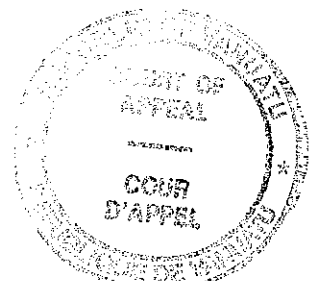
Date of Hearing: 7th November 2016

Date of Judgment: 18th November 2016

JUDGMENT

Introduction

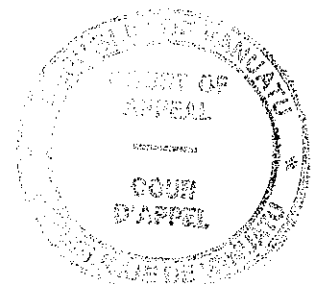
1. This appeal arises from a claim filed in the Court below by Mr. Togagi alleging that he was wrongfully arrested and detained by an officer of the State (the Republic of Vanuatu) being a Police officer at the Saratamata Police station on Ambae. Following the hearing of the claim, judgment was given in Mr. Togagi's favour as the Court found that his arrest and detention was unlawful. In addition, the State was ordered to pay general damages in the sum of VT 250,000.
2. In its appeal, the State is seeking to set aside these orders on four grounds which are summarized as follows. The State (Appellant) says that the primary judge erred in fact and in law:-



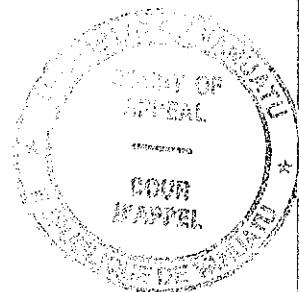
- “1) When he took into account factors which are matters for investigation;
 - 2) When he concluded that Sergeant Willie conceded that there was no evidence that Mr. Togagi was responsible for past incidents;
 - 3) When he gave significant consideration to the fact that Sergeant Willie mentioned in his evidence that he arrested Mr. Togagi for his own safety without considering or giving weight to the existence of the complainant’s statement which resulted in the arrest;
 - 4) When he awarded damages in the sum of VT 250,000 in favour of Mr. Togagi.”
3. The background facts are not in dispute and are set out in detail at paragraphs 2 to 9 of the judgment as follows:-

“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 committing 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 Tari 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 advice Mr Francis Tari to wait outside the police station while he spoke with Mr Togagi.*

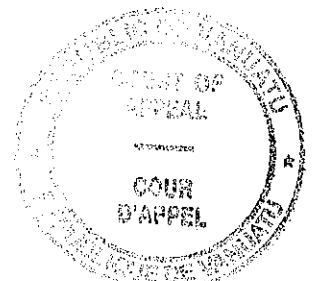


8) *Mr Togagi was then questioned by Sergeant Willie in the presence of another police officer Mary Aga. No evidence was given by Ms.Aga. During the course of this subsequent interrogation Mr Togagi was unsure about the answers to some of the questions being asked and was told by Sergeant Willie that 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."*

4. The trial judge at paragraph 14 of his judgment when discussing the cross examination of Sergeant Willie said:-

"Sergeant Willie acknowledges 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."



Discussion

5. This is a case which turns on the correct application of the law to the facts as the essential facts are not in dispute. The central issue raised by the First three errors alleged in the Notice of Appeal is whether Mr. Togagi was lawfully arrested and detained. The law in relation to arrests without a warrant and the detention of persons arrested without a warrant is set out in section 12 and 18 of the Criminal Procedure Code [CAP 136]. Section 12 (1) provides as follows:-

"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.*

...."

6. And Section 18 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."*

7. The primary judge was referred to the following authorities in relation to suspicion, **Hussein v. Chong Fong Kan** [1970] AC 942 and **Castorina v. Chief Constable of Zori** [1998] LGREV R 241 and also what the New South Wales Court of Appeal said in **Hyder v. Commonwealth of Australia** [2012] NSWCA 336. Whilst not binding on this Court, they provide guidance. In Vanuatu there is the decision of the Court of Appeal in **Republic of Vanuatu v. Emil** [2015] VUCA 16. At paragraphs 13 and 14 in that decision the Court said:-

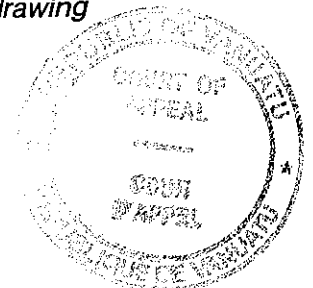
- "13. *There can be no doubt that the Police on receipt of the complaint from Mrs Tasaruru had sufficient evidence to form the requisite opinion justifying arrest, namely that there were "reasonable grounds to suspect" (in terms of section 12 of the Criminal Procedure Code) that an offence had been 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." (emphasis added)*
8. These brief references to the law in **Emil** must be understood in the context of the facts of that case. The police had received a complaint alleging a very serious offence, and the complaint was very specific in its terms. The complaint was that Emil had had sexual relations with his biological daughter on numerous occasions in 2007 which resulted in her pregnancy and her giving birth to a son. In the circumstances of that case the complaint was held to be sufficient in itself to give rise to a suspicion on reasonable grounds that a cognizable offence had occurred. That conclusion was so readily apparent on the facts of that case that the Court of Appeal found it unnecessary to analyze the considerations that could arise in less obvious situations. It is important to note that the Court of Appeal nevertheless recognized that the determination of whether or not a reasonable ground to suspect an offence exists is ultimately for the Court. In short, the test is an objective one. It is not the subjective opinion of the arresting police officer that is determinative, but the objective assessment of all the facts of the particular case by the Court. Thus, it was said in **Hyder v. Commonwealth of Australia** at [15.7] and [15.8].

- (7) *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] HCA 48; (2005) 222 CLR 612 (at [40] per Gleeson CJ, Gummow, Hayne and Heydon JJ; 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 the time but according to an objective criterion: Anderson v Judges of the District Court of New South Wales (1992) 27 NSWLR 701 (at 714) per Kirby P (Meager and Sheller JJA agreeing); see also O'Hara v Chief Constable of Royal Ulster Constabulary (at 298) per Lord Hope;*
- (8) *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 have been told. The reasonable belief may be based on information which has given anonymously or on information which turns out to be wrong. The question whether information considered by the arresting officer provided reasonable grounds for the belief depends on the source of the information and its context, seen in the light of the whole of the surrounding circumstances and, having regard to the source of that information, drawing*



inferences as to what a reasonable person in the position of the independent observer would make of it: O'Hara v Chief Constable of Royal Ulster Constabulary (at 298, 301, 303) per Lord Hope

9. The findings of the primary judge at paragraph 22 to 25 of the judgment are that:-

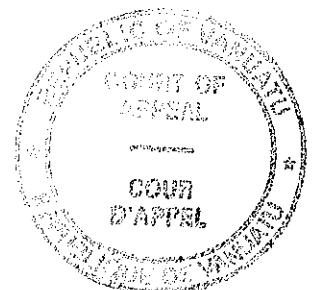
"22. In this case what is clear is that Sergeant Willie relied upon Mr Tari's complaint for any reasonable grounds for suspicion. While it is clear that the complaint refers to Mr Togagi, it lacks any detail as to whether Mr Tari observed the alleged offences himself and if so what he observed or whether the damage that has alleged to have been 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 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 doubt 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 does not meet that threshold. ...

25. I accordingly find that the claimant's arrest and detention was unlawful."

10. The gist of the Appellants submissions is that Sergeant Willie upon receipt of the complaint from Mr. Rodney Tari had sufficient evidence to form the requisite opinion justifying the arrest of Mr. Togagi as there were reasonable grounds to suspect that an offence had been committed. This submission in our view is flawed as it fails to consider all the surrounding circumstances including the lack of detail in the complaint, and the nature of the offence alleged. Despite receiving the complaint, there was no immediate arrest. Mr. Togagi was invited by letter to attend at the Police station and when Mr. Togagi turned up at the Police station Sergeant Willie then advised him to go and see George Tari who verified the damage. George Tari denies doing any verification and advised that Mr. Togagi should see another Agriculture Field Officer to go and verify the damage. Mr. Togagi then returned to the Police station and advised Sergeant Willie accordingly.
11. Aside from what the primary Judge said about the lack of clarity in the complaint, it was nevertheless a complaint for the purposes of section 12 of the Criminal Procedure Code. The question is whether, viewed objectively, the complaint alone was sufficient to provide reasonable grounds of suspicion. The fact that Sergeant Willie advised Mr. Togagi to go and see Mr. George Tari is an indication that Sergeant Willie did not think so. The fact that Mr. Tari said that there was no verification of the damage



further diminishes any reasonable grounds to suspect that Mr. Togagi was responsible.

12. Furthermore, there is no evidence to suggest that after Mr. Togagi was arrested and detained, Sergeant Willie carried out any investigations or enquiries before releasing him. The only conclusion that can be drawn from this is that at the outset, Sergeant Willie did not have reasonable grounds to suspect that Mr. Togagi had committed an offence to justify his arrest and detention. We consider the conclusion of the trial judge that the respondent's arrest and detention was unlawful was correct.
13. On the question of damages, we consider the award of VT250, 000 was conservative. It was necessary that the award be sufficient to publicly acknowledge that the rights of Mr. Togagi had been seriously abused by an officer of the State in the purported exercise of State power. The award is in line with assessments of damages made by the Court of Appeal in **Warte v. Republic of Vanuatu** [2013] VUCA 18 and **Songi George v. Commission of Police & Ors** Civil Case 242 of 2012
14. The appeal is therefore dismissed and the Respondent is entitled to costs on a standard basis to be taxed or agreed.

DATED at Port Vila this 18th day of November, 2016

BY THE COURT



.....
Hon. Vincent Lunabek
Chief Justice

