

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

**CIVIL CASE 13/119 SC/CIVL**

**BETWEEN: JOSEPH NELSON**  
First Claimant

**AND: JOHN TAMASENG**  
Second Claimant

**AND: PUBLIC PROSECUTOR**  
First Defendant

**AND: REPUBLIC OF VANUATU**  
Second Defendant

**Submissions:** 13<sup>th</sup> & 28<sup>th</sup> February 2017

**Date of Judgment:** 27<sup>th</sup> April 2017

**Before:** Justice Mary Sey

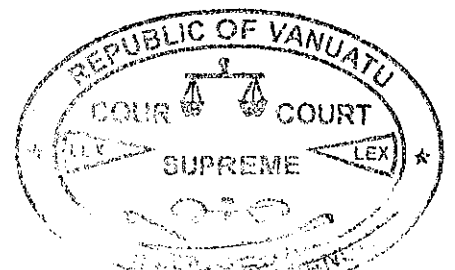
**Appearances:** Mr. Saling Stephens for the Claimant  
Mr. Lennon Huri for the Defendant

**RESERVED JUDGMENT**

1. The Claimants seek damages against the Defendants for unlawful arrest, battery and unlawful imprisonment.
2. The chronology of events can be summarised as follows:

**13 July 2008:** the Claimants were arrested by the members of the Vanuatu Police Force in Luganville upon suspicion on reasonable grounds that the Claimants had committed the offence of rape pursuant to section 12 of the Criminal Procedure Code [CAP 136]. The Claimants were locked up overnight at the Luganville police station.

**14 July 2008:** an official complaint of rape was lodged at the Criminal Investigation Department (CID) of the police force in Luganville, Santo by the victim. The Claimants were transferred from the police station to the Correctional Centre at Belotu.



**16<sup>th</sup> & 17<sup>th</sup> July 2008:** the Claimants were escorted back to the Luganville Police station where they were formally interrogated.

**23 July 2008:** a further statement of the victim was made following the complaint.

**7 August 2008:** the Public Prosecutor's Office issued the information sheet concerning the charge of sexual intercourse without consent against the Claimants.

**13 August 2008:** the Supreme Court Judge issued a warrant to remand the Claimants in custody at the Correctional Centre at Luganville, Santo until Thursday **14 August 2008** when they were taken before the Supreme Court for plea.

**10 February 2009:** the Claimants' counsel sought a voir dire hearing to challenge the admissibility of the records of interview made with the Claimants on 16 & 17 July 2008.

**11 February 2009:** the Claimants were granted bail and told to return to Court for trial on Tuesday 3 March 2009 at 9.00am.

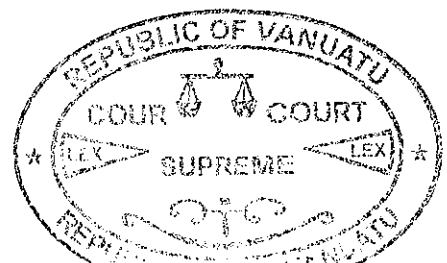
**19 February 2009:** the Court delivered its ruling on the voir dire stating that the records of interview were involuntary and inadmissible.

**10 August 2009:** the Court entered a Nolle Prosequi against the Claimants due to the difficulty the Prosecution faced with identification. The Claimants were discharged and acquitted of the charge laid against them for sexual intercourse without consent.

3. Mr. Joseph Nelson and Mr. John Tamaseng are supportive of each other in their evidence contained in their sworn statements tendered and admitted as **Exhibits C1** and **C2**. The defence evidence was provided by Corporal Berry lakoli who deposed to a sworn statement dated 7 June, 2015. This was admitted into evidence by consent as **Exhibit D1**.

#### 4. **Issues**

- Whether the Defendants committed battery against the Claimants?



- Whether the Defendants unlawfully arrested and unlawfully imprisoned the Claimants?

**Issue 1: Whether the Defendants committed battery against the Claimants?**

5. It is noteworthy that in the Amended Supreme Court Claim filed on 28 May 2014, the issue of battery was not pleaded except in the prayer for relief where the Claimants sought damages for battery. Even though the Claimants specifically state at paragraph 2 of their sworn statements that the Defendants touched their bodies without their consent, no other evidence was adduced to establish that there was any battery committed against the Claimants.
6. In **Republic of Vanuatu v Emil** [2015] VUCA 16, the Court of Appeal stated at paragraph 32 that:

*It is not open to a Court to make findings and awards of damages on issues that are not raised on the pleadings, no matter how much the Court may be "concerned" about evidence which emerges at trial. If it does that, a fundamental unfairness and breach of natural justice occurs because the defendant has had neither notice from the claimant in his pleadings, nor from the Court, of the matter being in issue. He therefore does not have a fair opportunity to file and be heard in support of his defence.*

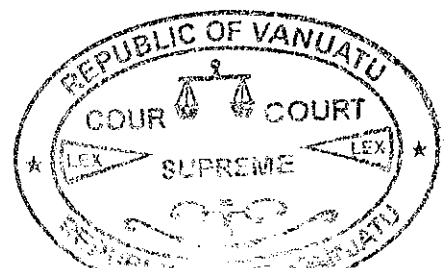
7. The offence of battery involves "the use of force against another, resulting in harmful or offensive contact" (See Black's Law Dictionary (8th Edition)). I must state that I find no evidence of unlawful use of force by the police officers against the Claimants to establish battery at the time they were arrested and taken to the police station on 13 July 2008. In the circumstances, I make no award of damages on the issue of battery.

**Issue 2: Whether the Defendants unlawfully arrested and unlawfully imprisoned the Claimants?**

8. Section 12 of the *Criminal Procedure Code* [CAP136] (CPC) 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.*



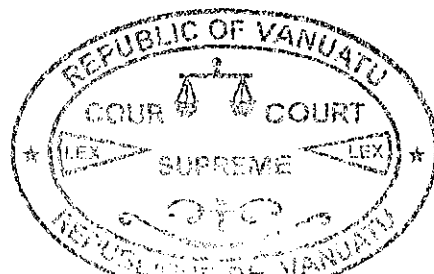
Cognisable offence as defined in the CPC means “any offence for which a police officer may in accordance with the Schedule or under any law for the time being in force, arrest without warrant”.

9. Mr. Huri submits that rape as defined in the schedule of the CPC is a cognisable offence and one for which police officers may arrest a person without a warrant. I agree.
10. Mr. Huri further submits that the Claimants were arrested on 13 July 2008 around 5.30pm and were remanded at the Correctional Centre on 14 July 2008 which is within the 24 hours as stipulated under section 18 (1) of the CPC. With due respect to Mr. Huri, I reject this submission because the proper procedure had not been followed. The provisions of section 18 (1) of the CPC are clear and unambiguous. Where any person is kept in custody he shall be brought before a Court as soon as practicable. (Underlining mine for emphasis).
11. Section 18(1) of the CPC Act provides as follows:

**“18. Detention of person arrested without warrant**

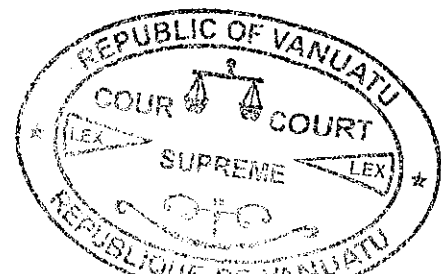
(1) *Subject to subsection (2) when any person has been taken into custody without a warrant for an offence other than intentional homicide or any offence against the external security of the State, the officer in charge of the police station to which such person shall be brought may in any case and 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.”*

11. It is noteworthy that no evidence has been adduced by the Defendants to show that the Claimants were arraigned before the Magistrates’ Court for preliminary inquiry at any given period between the time they were arrested on 13 July 2008 and the filing of the information at the Supreme Court on 7 August 2008. I find that there was no preliminary inquiry conducted by any Magistrate to determine whether or not there was a prima facie case against the Claimants and since there was no preliminary inquiry conducted, it means that no remand



warrants were issued for the Claimants to be detained at the Belotu Correctional Centre until 13 August, 2008 when the Supreme Court issued one. Consequently, the Claimants should not have been remanded at the Correctional Centre on 14 July 2008 without a remand warrant having been issued by a competent Court.

12. Undoubtedly, it seems clear to me that there was a lacuna in the procedure by which the Claimants were taken before the Supreme Court for plea. I am thus inclined to agree with Mr. Stephens' submission that this effectively means that the Claimants were unlawfully kept in custody for 30 days without a remand warrant.
13. The two Claimants claim damages against the Defendants as follows:
  - (1) Battery x 2 = VT 2,000,000
  - (2) Wrongful arrest x 2 = VT 2,000,000
  - (3) Unlawful Imprisonment x 2 at VT100000 x per hour x 30 days
14. Having stated earlier on in this judgment at paragraph 7 above, that I find no evidence of unlawful use of force by the police officers against the Claimants to establish battery at the time they were arrested and taken to the police station on 13 July 2008, the Claimants' claim under this head fails. In the circumstances, I make no award of damages on the issue of battery.
15. On the issue of wrongful arrest, I note from the evidence of Mr. Joseph Nelson that under cross examination he had said that he was taken to the police station for his own safety following a request from his father after an allegation of rape was made against him. In any event, I am satisfied that on 13 July 2008, the Claimants were arrested by the police officers upon reasonable grounds that they had committed rape. This can be gleaned from annexure "B11" which is attached to the sworn statement of Corporal Berry lakoli where the arresting officer, PC Alfred Garae, confirmed that the arrest had been made pursuant to rape case OB/No. 756 dated 13 July 2008. For these reasons, the Claimants claim under this head fails.
16. As regards the claim for false imprisonment, damages for such claims are generally assessed having regard to two principal considerations. The first is the injury to liberty and the second is the injury to feelings – **McGregor on**



**damages** (17th Edition) para 37 – 007. Some guidance has been gained by the Court of Appeal decision in **Warte v Republic of Vanuatu** [2013] VUCA 10; Civil Appeal 52-12 (26 April 2013). The Court of Appeal considered that Mrs. Dornic and Mr. McNicol "*were arrested and imprisoned without cause and in circumstances where the arresting police officers were well aware that the arrests were not justified.*" The Court considered that damages should be awarded within a range of VT400,000 to VT600,000 for false imprisonment.

17. In this present case, I find that the Claimants were imprisoned without due process for a period of 30 days. I consider an overall global sum of VT500,000 each should be awarded to Mr. Joseph Nelson and Mr. John Tamaseng for false imprisonment.
18. Costs are awarded to the Claimants on a standard basis to be agreed between the parties failing which they are to be taxed.

**DATED at Port Vila, this 27<sup>th</sup> day of April, 2017.**

**BY THE COURT**



**M. M. SEY**  
**Judge**

