IN THE COURT OF APPEAL
APPELLATE JURISDICTION

CIVIL APPEAL NO. ABU 0019 of 2007
(High Court Civil Action No. HBC 227 of 2003L)

BETWEEN	:	**1. COMMISSIONER OF POLICE** **2. ATTORNEY-GENERAL OF FIJI**
		Appellants
AND	:	**1. FRED WEHRENBERG** **2. WALBURG WEHRENBERG**
		Respondents
Coram	:	**Chandra JA** **Kotigalage JA** **Balapatabendi JA**
Counsel	:	**Mr R. Green for the Appellants** **Respondents appeared in person.**
Date of Hearing	:	**15 February 2013**
Date of Judgment	:	**1 November 2013**

JUDGMENT

Chandra JA

1. This is an appeal against the judgment of the High Court at Lautoka.

2. The Respondents filed a writ of summons against the Appellants on 3 July 1996 amended on 17 April 2000 alleging as a first cause of action:

   That the 1st and 2nd Appellants tortured the 1st Respondent physically and mentally at the Rakiraki Police Station on 20 July 1993 in order to obtain a confession and signatures from him for offences which he did not commit.

As a second cause of action that the 2nd and 3rd Appellants tortured the 1st Respondent physically and mentally at the Rakiraki Police Station in order to obtain confession and signatures for offences the 1st Respondent did not commit.

As a third cause of action claiming damages for negligence by the police generally in breach of their statutory duty between November 1990 and January 1996.

As a fourth cause of action claiming damages for negligence in breach of their statutory duty between October 1998 and November 1999.

3. The Appellants in their statement of defence denied the allegations of the Respondents and put the Respondents to the proof thereof.

4. The 1st Respondent gave evidence and led the evidence of his wife (2nd Respondent) and two other witnesses.

5. The Appellants led the evidence of 13 witnesses.

6. The learned High Court Judge by his judgment dated 9th February 2007 decided in favour of the Plaintiffs (Respondents) on the first and second causes of action and decided in favour of the Defendants (Appellants) on the third and fourth causes of action and ordered as follows:

l. Damages awarded to the Plaintiffs (Respondents) :

(a) On the first two causes of action general damages totaling $90,000.00;

(b) Interest thereon at 6% for 10 years and 11 months $57,150.00;

(c) Special damages totaling $408.00

(d) Interest thereon at 4% p.a. $172.82;

(e) Total award $147,730.82.

2. Costs awarded to the Plaintiffs (Respondents) (7days hearing) assessed at $3,500.00.

7. The Appellants appealed against the said judgment of the learned High Court and sought an order to set aside the Judgment dated 9th February 2007 awarding damages in the sum of $147,730.82 to the Respondent and awarding costs against the Appellants on the following grounds:

1. That the learned Judge erred in law and in fact in holding that the Appellant unlawfully detained the Respondent on 20th July 1993.

2. That the learned Judge erred in law and in fact in failing to properly evaluate the thrust of the medical report provided by Dr.K.S.Uluitoga on the 1st Respondent on 20th July 1993 which failed to conclusively indicate on the balance of probability that he had been assaulted whilst in police custody.

3. That the learned Judge erred in law and in fact in holding that the Defendants witnesses were unreliable without fair and sound assessment on the balance of probability on their consistent evidence that the 1st Respondent's injuries were self inflicted.

4. That the learned Judge erred in law and in fact when he departed from the established rules of civil litigation to further deliberate on a cause of action and an alternative remedy after the finding of fact there is no clear evidence on pleaded cause of action for torture.

5. That the learned Judge erred in law in not adhering to the relevant local authority on pleadings.

6. That the learned Judge erred in law and in fact in holding that the 1st Respondent was subjected to physical injury on 18 June 1994 when there is no material evidence on the balance of probability to support such decision.

7. That the learned Judge erred in law and in fact when he failed to take relevant matters into consideration in his ruling in respect to the following matters:

    a) The difficult, annoying, demanding, unreasonable, irrational attitude, and the spiteful behavior of the 1st Respondent against police, government agencies, including the judiciary when his self opinionated views are not considered;

    b) The effect of the delusional and hysterical state of mind of the 1st Respondent in terms of his relationship with the lawful authorities like the police;

    c) The denial by the 1st Respondent that he was not treated for psychiatric assessment at Saint Giles contrary to the evidence adduced by the Appellant and that this fact is judicially noted in his other civil actions;

    d) In believing the tabulated criminal reports compiled by the Respondents as opposed to the police records which shows a substantially lesser figure for conduct which could amount to an offence under the Penal Code;

    e) In dismissing the evidence adduced by the witnesses in relation to the personality and conduct of the 1st Respondent.

8. That the learned Judge erred in law and in fact in awarding damages without clarifying the method he used to arrive at the sum of $50,000 for the 1st cause of action (20 July 1993) and $40,000 for the second cause of action (18 June 1994) and the award of $90,000 for general damages is excessive and unreasonable given the facts of this particular case.

8. Grounds 1 to 5 in the notice of appeal relate to the 1st cause of action and therefore these grounds will be dealt with together in this judgment while grounds 6 and 7 will be dealt with separately. Ground 8 is common to the 1st and 2nd causes of action and will be dealt along with those two causes of action.

9. The Respondents have not appealed against the judgment of the learned trial regarding the dismissal of the third and fourth causes of action in their statement of claim. Therefore there is no necessity to discuss the vast volume of evidence that was placed before court by way of documents by the Respondents to show their dissatisfaction in the manner in which the Police had attended to their numerous complaints while they were residents on Nananu-I-Ra Island.

10. The learned trial Judge prefaced his judgment by setting out the commencement of the Respondents' residency on the Island and their relationship with the other residents which resulted in the numerous complaints made by them to the Police regarding the offences that they alleged were committed against them and their property, their complaints to various State Agencies about the residents carrying on the business of guest houses without authority which all resulted in their troubled life during their occupancy of their property on the Island.

11. It would not be necessary to go into all those details which the learned trial Judge had gone into in dealing with the appeal, as the Appellants' focus was only on the first and second causes of actions in the statement of claim of the Respondents which were decided in favour of the Respondents which center on the two incidents that occurred on the 20th July 1993 and 18th June 1994.

12. The first cause of action based on the incidents of 20th July 1993:

The incident as set out by the 1st Respondent in his affidavit was that he was arrested on Tuesday morning the 20th of July 1993 at the Rakiraki Court Clerks Office by two policemen, namely Aminiasi Tuvura and Sekaia and brought to the Police Station for interviewing and charging on an alleged assault case which they had claimed had taken place on 20.2.1993. That he had requested the policemen politely to wait with the interview and charging until investigations were done by the D.P.P.'s Office and the Lautoka Police regarding the alleged incident. That the policemen had got very angry and shouted at him and thereafter locked him into a cell. That his wife was standing outside the building near the window and had talked to him. After a while he had been taken to the CID building and though his wife wanted to come with him she had not been allowed to come in. The policemen had shouted at him and had tried to force him to admit the charges and sign forms. After about one hour as he had refused to admit the charges Officer Sekaia had left the room. Then Officer Tuvura had stepped up his abuse and suddenly kicked him repeatedly with his shoe and one kick had hit him on his wrist. He had shouted out so that his wife could hear and she had replied stating that she was going to get some help. Officer Tuvara had got wild and continued to pressurize him to admit and suddenly punched him in the stomach. He had fallen to the floor and had difficulty in breathing and had called out in pain. His wife had started banging on the door and the door was opened and his wife had with her Miss Sereanan Saukolo from the Department for Women and Culture. He had been in pain and had been crying out requesting that he be taken to the Rakiraki Hospital which was refused by the policemen. The policemen Sekaia, Tuvura and Nakatarau had been ridiculing and abusing him. He had being lying on the floor for about an hour until his wife and Miss Saukolo had been able to persuade the Police to let his wife take him to Rakiraki Hospital. The Policemen Tuvura and Sekaia had forced their way into the taxi and had ridiculed them. At the Rakiraki Hospital he had been given oxygen, an injection and put on a drip and admitted to the Mens' Ward. An X'ray also had been taken of his stomach. The policemen had been seen talking to the medical staff and had kept on threatening him. After about 2 hours the policemen were allowed to take him away from the hospital. They were taken back to the CID building where he had been again pushed,

knocked about and abused pressurizing him to sign the forms which he had refused. Officer Tuvura had then pushed a pen into his hand and forced his hand to sign some forms and had pushed hard on his arms and shoulder. When his wife begged him to sign the forms he had signed. He had given his finger prints and was allowed to go. He stated that this incident left him with pain in the stomach for about three days, acute depression which lasted several months, nightmares and attacks of perspiration and loss of self-confidence, trust and damage to his reputation. This version of the incident was corroborated in many respects by the affidavits of his wife and Miss Saukolo.

13. As against this version the incident was described by the witnesses of the Appellants' as follows:

Tarun Kumar, Court Officer (DW1) stated that the 1st Respondent had come to sign his bail in the court registry when Police Officer Sekaia came and took him to the Police Station to be interviewed but he had not wanted to go. He had walked towards the window and had got hold of the burglar bar and started yelling at the top of his voice. It had taken about 5 police officers to free him from the burglar bar and in the process he had damaged two of the bars by bending them. He also said that the burglar bars were later repaired by the PWD.

Police Officer Taminiasi Tuvura stated in his evidence that there had been a report of an alleged assault by one Matilda Patrina. That he had been the investigating officer, and after gathering evidence, he had been instructed by his superior officer to interview and lay charges for the charge of assault. That on the 20th of July 1993 the 1st Respondent had called into the station in the morning at the Police Station Charge Room. He had been arrested under a bench warrant which was against the 1st Respondent for some other offence. He was arrested and taken to the Court House on the same day and when the case was called was bailed the same day. When he was informed that the 1st Respondent was in the Court House, he and Inspector Sekaia had approached the 1st Respondent at the court house. The 1st Respondent had been sitting in the Registry and had informed the 1st Respondent their purpose and the 1st Respondent had resisted. The 1st Respondent had

stood up and grabbed the burglar bars of the window of the court office and was shouting at the top of his voice. With the assistance of Inspector Sekaia they had managed to calm the 1st Respondent down and had taken him to the Police Station. He stated that the 1st Respondent was holding the burglars bar so strong that the bar got damaged. He denied assaulting the 1st Respondent and stated that he was able to interview and after he gave his statement he was taken to the hospital. Thereafter the 1st Respondent had been charged and bailed by Crime Officer with a sum of $50 and to attend the Magistrate Court on the 15th July 1993. When questioned by Court he stated that he was acting under the authority of the Code of Criminal Procedure when detaining the 1st Respondent for interviewing on a charge of assault which had been instigated by Matilda Mcreadie. The 1st Respondent had been acquitted of the charge after trial subsequently.

Inspector Sekaia Suluka stated in his evidence that on 20th July 1993 that he was at the Rakiraki Police Station at about 10.00 a.m. There had been instructions to interview the 1st Respondent and his colleague Aminiasi Tuvura had interviewed. The background to those instructions had been an incident of assault where the complainant was Miss McCready. At the Crime Office, Tuvura had interviewed the 1st Respondent and he had witnessed the interview. They had first seen the 1st Respondent in the Registry Office with the Court Clerk. They had informed the 1st Respondent that he would be interviewed in the Crime Office. The 1st Respondent had resisted and had held onto the burglar bars in the Court office window and had kept on shouting from there. They had managed to calm him down and had taken him to the Police Station. The 1st Respondent had been pulling the burglar bar so hard that it had bent. After the 1st Respondent had been taken to the Crime Office in the Police Station, Tuvura told the 1st Respondent that he would be interviewed. The 1st Respondent had been shivering and had gone down to the floor and grabbed the table leg and refused to be interviewed. After he calmed down he had refused to be interviewed in English and had wanted to be interviewed in German. Thereafter his wife had come into the room and had spoken to him in a language that he could not understand and afterwards the 1st Respondent agreed to be interviewed in English. He stated that Tavura did not assault the 1st Respondent. After the interview the 1st Respondent had been taken to the hospital. After bringing him back from the hospital the 1st Respondent had been bailed out

for the offence that he was interviewed and charged. The 1st Respondent had been acquitted in the case against him on the assault charge subsequently.

14. From the above versions of the incident on 20th July 1993 it would appear that the 1st Respondent had been at the Police Station and had been arrested on a Bench Warrant (not connected to what followed thereafter on that day) at first and then bailed out after being produced in Court. Thereafter while at the Court Registry he had been accosted by the two police officers and taken in for questioning regarding an allegation of assault against him which was being investigated. According to the Police Officers they had been acting on instructions regarding the charge of assault against the 1st Respondent made by Miss McCreadie. The Police Officers deny putting the 1st Respondent into a cell and assaulting him as alleged by the 1st Respondent. The 1st Respondent's position is that he had been kicked and later punched in the stomach when he was in the cell. The Police Officers come up with a story that the 1st Respondent started shivering while at the crime office when he was being interviewed and that he had suddenly fallen and had clung on to the leg of the table when they tried to lift him up and they deny the alleged attacks while in the cell. However, the evidence of the 1st Respondent's wife and Miss Soloko who had been outside the building but near the window of the cell, corroborate the version of the 1st Respondent's position that he was put into the cell as they had heard the 1st Respondent shouting out while he was in the cell that he was being kicked by the officers. The Appellants' version that the injuries stated in the medical report were self inflicted would therefore be unacceptable.

15. The learned trial Judge in his judgment considering the evidence relating to the incident on the 20th of July 1993 determined same on the basis of the credibility of the witnesses and arrived at the conclusion that the 1st Respondent had been assaulted as alleged by the 1st Respondent.

16. But prior to arriving at that conclusion the learned Judge considered the position regarding the taking in of the 1st Respondent by the two Police Officers for the purpose of interviewing on a charge of assault as a situation of unlawful detention.

17. In his statement of claim the Respondents were claiming damages for physical and mental torture at the hands of the Police Officers and not for illegal or unlawful arrest. The learned trial Judge had gone beyond the pleadings of the Respondents in dealing with the aspect of arrest and went on to state:

> *"[58] In my opinion the arrest of the First Plaintiff was in breach of his fundamental rights and was unlawful. As did the Court of Appeal in Blundell I think that <u>everything following it occurred while the First Plaintiff was unlawfully detained. He has however made no claim at all about that and this must be recognized. It does not affect the decision of fact whether or not he was tortured. It would go only to quantum of damages</u>."* (Emphasis added)

18. Even at the pre-trial conference there was no issue relating to unlawful arrest raised by the Respondents and therefore the learned trial Judge went beyond the pleadings and the issues that had to be considered in this case. This was an action in tort brought on by the Respondents to claim damages for what they claimed as wrongful acts on the part of Police Officers described as torture and there was no claim based on false arrest which could have been an issue in an action in tort. The Appellants in their written submissions have dealt at length in discussing the aspect of "false arrest" by citing numerous authorities.

19. As the Respondents had not relied on the aspect of false arrest in their pleadings and during the trial it would not have been necessary to go into that question but the learned trial Judge had taken that aspect into account in awarding damages regarding the first incident. However, in the above cited paragraph in the judgment of the learned trial Judge, he

himself has stated that the Respondents have not made any claim at all and that it does not affect the decision of fact whether or not he was tortured.

20. But in considering the quantum of damages to be awarded the learned trial Judge had taken into account his finding that the detention was unlawful per se. Therefore it would be necessary to consider whether his conclusion that the detention was unlawful was correct. The learned trial Judge stated that the decision in **DPP –v- Singh** [1987] FJCA 4 relied upon by the Appellants did not support the position taken up by the Appellants that the detention was lawful as it applied to a situation where an arrest was made when an offence was being committed.

21. In the present case, the detention in question had a background to it as set out by the witnesses for the Appellants. Officer Tuvura had completed an investigation regarding physical confrontation at Nananu-I-Ra Island which involved the 1st Respondent and other residents. Matilda Mcredie had reported that the 1st Respondent had assaulted her. When he got information that the 1st Respondent was in the vicinity of the court he had proceeded there with Inspector Sekaia and wanted the 1st Respondent to accompany them to the Police Station to interview him. When they accosted him, the 1st Respondent had not cooperated with them and had held on to the burglar bar at the Court Registry window and started shouting out. It had been with difficulty that they had been able to take the 1st Respondent to the Police Station to interview him, which had been done subsequently and he had been charged and bailed out during which period the 1st Respondent alleged that he was assaulted. The resistance shown by the 1st Respondent appeared to be clear as he had tried to show that the burglar bar was already bent thereby trying to show that he was not responsible in bending it. But it showed that some incident had taken place there which was related to by the Police Officers as well as the Court Officer, Tarun Kumar (DW1). In the affidavit of the 1st Respondent he has stated that he was arrested at the Rakiraki court clerk's Office by two policemen, namely Aminiasi Tuvura and Sekaia and brought to the Rakiraki Police Station for interviewing and charging on the alleged assault case which

they claimed had taken place on 20.2.1993. This was an admission by the 1st Respondent that he had been informed of the purpose of the detention and he was not complaining that it was a case of unlawful arrest.

22. The learned trial Judge had not considered this sequence of events prior to the alleged assaults in arriving at the conclusion that the detention was not lawful. The action brought against the Appellants by the Respondents was an action in tort and the question to be determined if such a tort was alleged was whether there was an honest belief by the two Police Officers on reasonable grounds and whether there was sufficient justification for their action as stated by Bankes LJ in **Trebeck –v- Croudace** [1918] 1KB 158 when they informed the 1st Respondent the purpose of the detention. The Police Officers had been informed of the whereabouts of the 1st Respondent and they found him in the Court registry and took him to be interviewed and charged. The sequel of events which led to the detention of the 1st Respondent would justify the actions of the two Police Officers and it cannot be said that the said detention was unlawful per se. Therefore the first ground of appeal that the learned Judge erred in law and in fact in holding that the Appellant unlawfully detained the Respondent on 20th July 1993 succeeds.

23. While the learned trial Judge's conclusion that the detention was unlawful per se was erroneous it was also a situation where the learned trial Judge had gone beyond the pleadings and issues at the trial in dealing with the question of unlawful detention.

24. The pleadings of the Respondents relating to the first two causes of action were stated as physical and mental torture. But at the Pre Trial Conference the issues that were identified and on which the trial proceeded were stated as follows:

> *"1. Was the 1st Plaintiff physically and mentally tortured by the 1st and 2nd Defendants on 20.7.1993?*

2. *Was the 1st Plaintiff assaulted by the 1st Defendant on 20.7.1993?*
3. *Was the 1st Plaintiff physically and mentally tortured by the 2nd and 3rd Defendant on 18.6.1994?*
4. *Was the 1st Plaintiff assaulted by the 2nd and 3rd Defendants on 18.6.94?*
5. *Did the 1st Plaintiff sustain injuries as a result of the said assaults and tortures?*
6. *Is the Plaintiff entitled to any general and special damages and costs."*

25. Although the Respondents who were appearing in person in their language had used only the term 'torture" in their statement of claim, in the issues raised as seen above they included the tort of 'assault' regarding the two incidents. The learned trial Judge too made his observations regarding the use of the term "torture" by the Respondents and stated that the tort of assault was identified by them regarding which there had been no objection by the Appellants. Therefore their complaint in the notice of appeal that the learned trial judge had departed from the established rules of civil litigation by considering a cause of action and alternative remedy has no merit. This ground of appeal is based on the fact that in the statement of claim the Respondent had based their cause of action on torture. But as shown above, the issue at the Pre Trial Conference the issues agreed upon puts the question raised by the Appellants beyond issue. The Appellants in their written submissions have failed to address the issues agreed upon by the parties at the Pre Trial Conference and therefore the authorities cited by them at length in the submissions regarding the adequacy of pleadings have no relevance.

26. The learned trial Judge while dealing with the pleadings and issues relating to the incident of assault on the 1st Respondent, went beyond the pleadings and issues when dealing with the detention of the 1st Respondent on 20th July 1994 and arriving at the conclusion that it

was a case of unlawful detention per se. In **Ah Koy –v- Native Land Trust Board** [2005] FJHC 49 ; HBC0546.2004 (19 July 2005) Winter J stated:

> *"….object of pleadings is to inform the court about the precise matters in issue between the parties which the court may determine. Pleadings set the limits of the action. Cases must be decided on the issues on the record and if it is desired to raise other issues they must be placed on the record by amendment (**Blay –v- Pollard and Morris** [1931] LB 628 at 364). It is not for the judge to speculate about the nature for each parties case. The judge and the parties are circumscribed by the pleadings on the record.*
>
> *The parties are adversaries. It is left to each of them to formulate their case in their own way. It is not part of the duty or function of the court to enter upon a general inquiry into a case before it other than to adjudicate it upon specific matters in dispute which the parties themselves have raised."*

27. It is also to be observed that the incident complained of was in 1993 and the trial was taken up in 2006 which was 13 years after the event. It transpired from the evidence at the trial that the 1st Respondent used to keep proper and systematic records of all his actions regarding the occurrences in the island such as his confrontations with the residents which resulted in the multitude of complaints to the Police, which was said to be about 1900 and the whole host of documents showed his complaints to various authorities of the State and Local Authorities and other State Institutions regarding the alleged illegal guest house operations in the Island. Despite the passage of time, he was able to recount the events in relation to the first cause of action very vividly. It is therefore natural that there could be exaggeration to some extent when relating such events. On the other hand when it came to the evidence of the Appellants, the Police Officers who gave evidence were relying on records in Police Diaries and other documents and were not able to recall the minute details of the events relating to the events as described by the 1st Respondent and his witnesses. It would be natural on their part to deny any allegations made against them considering the strained relationship between the Respondents and the Police Officers of the Rakiraki Police Station.

28. The learned trial Judge had to consider the evidence before him in the above background and his conclusion that the 1st Respondent had been assaulted by the Police Officers as alleged cannot be faulted. However, it was necessary to consider the gravity or seriousness of the injuries complained of by the 1st Respondent to award him damages.

29. The injuries that were particularized by the 1st Respondent in his statement of claim were bruises to shoulders and stomach. The medical report presented by him described his position as follows:

> *"The abovementioned was ambulatory, shouting, sweating and was in obvious pain. Blood pressure, pulse and respiration were noted to be normal. Physical examination proved to be normal except for tenderness over the left hypochondrium without any outward signs of physical injuries. Subsequent radiological investigation of the chest did not display any abnormality.*
>
> *The attending Medical Assistant assessed that the clinical presentation was suggestive of Malingering and Depression. A second medical officer assessed the patient to be suffering from Hysteria. He was sedated and subsequently discharged after two hours observation at hospital."*

30. Apart from presenting the medical report no medical evidence was led by the 1st Respondent. He did not give any evidence relating to any subsequent consequential ailments as a result of the alleged assault. Although the 1st Respondent stated that he had been kicked by the police officers the medical report does not reveal any contusions in his body which may have been there if he had been kicked. The only visible sign was the tenderness over the left hypochondrium which may have been consistent with receiving a punch on the stomach. The Appellants suggestion that this may have been caused due to the 1st Respondent falling on the floor as claimed by them is at variance with the position stated by the 1st Respondent that he was given a punch on his stomach. The learned trial Judge had accepted the version of the 1st Respondent based on the credibility of the

witnesses and therefore the suggestion of the Appellants has to be ruled out, the tenderness of the left hypochondrium being the more probable cause of a punch on the stomach. Since the 1st Respondent's evidence has been accepted on a balance of probabilities the conclusion of the learned trial Judge that the 1st Respondent had been given a punch on his stomach is acceptable. However, the effect of such an injury on the 1st Respondent has not been established and the medical report presented by him does not indicate any serious injuries being caused to him. In addition to the physical injury the learned trial Judge had considered that the Police Officers had shouted abusive remarks and that the events in the police station had taken place over a period of three hours and that after returning from the hospital the 1st Respondent being verbally pressured and getting him to sign a document and the taking of his fingerprints. The learned trial Judge further took into account his conclusion that the detention was unlawful per se as an additional factor which conclusion as shown above was erroneous and was going beyond the pleadings and issues in the case.

31. The nature of the injuries received by the 1st Respondent becomes important in assessing the quantum of damages to be awarded to him. The learned trial Judge in arriving at the quantum of damages to be awarded on the first cause of action, relied on **Yogendran -v- Chand and Others** HBC 403 of 2001 (12 April 2005) **Yasir Khan –v- Commissioner of Police & Another** – HBC 075 of 2004L (13 April 2005) **Kumar –v- Commissioner of Police and Another** – HBC 145 of 2003L (17 October 2005) and **Mohammed –v- Commissioner of Police and Another** – HBC 407 of 2002L, Judgment No.60/2006, 31 March 2006).

32. The Appellants have cited several authorities relating to the award of damages where there has been false imprisonment, but the present case is not one where the claim of damages has been for false imprisonment and therefore those authorities cited are not relevant. Of the cases cited by the learned trial Judge and also referred to by the Appellants in their written submissions, **Yasir Khan –v- Commissioner of Police and Another** was an

instance of arrest without authority and incarceration without assault and therefore is not relevant in arriving at the quantum of damages.

30. But in **Yogendran's** case, the victim had four fractured ribs and cuts to the inside of his mouth and was hospitalized as a result of being assaulted while being questioned by the Police and was awarded $50,000.00 as damages. In **Kumar's** case, the victim who had three fractured ribs and a puncture in his left lung and was hospitalized was awarded $50,000.00. In both cases there was medical evidence to substantiate the condition of the victims. In **Mohamed's** case Aggravated damages in a sum of $50,000.00 was awarded to the victim of a police assault who had been hospitalized. In **Taito Navualaba –v- The Commander of Military Forces**, **The Commissioner of Police & The Attorney General of Fiji** HBC 355 of 2003 (8th August 2008) Singh J awarded $45,000 for past and future paid and suffering in a case of brutal assault resulting in 47 days admission to the hospital resulting in post traumatic stress disorder, insomnia and irritability. In **Sashi Prakash –v- Commissioner of Police and Another** HBC 237 of 2001L, the Court awarded a sum of $42,000.00 for pain and suffering both post and future where a suspect had suffered seven fractured ribs, had a swollen mouth, broken dentures and some other injuries. In the light of the nature of injuries caused to the 1st Respondent the injuries are not as serious as those in Yogendran's case, Kumar's case, Navaualaba"s case and Sashi Prakash's case and therefore the granting of the award of $50,000.00 as damages is excessive. This is specially so as the learned trial Judge had considered unlawful detention per se which as stated above was erroneous to enhance the damages to be awarded.

31. Taking into account the evidence of the 1st Respondent and the medical report regarding the first cause of action an award of $25,000.00 would seem to be appropriate taking into account the gravity of the conduct of the Police when the 1st Respondent was taken for interviewing and for the mental anguish and distress caused. The Respondents have not filed any appeal regarding the judgment of the High Court but in their written submission have sought aggravated damages. Damages cannot be claimed by way of written

submissions as they have to be claimed in the original statement of claim. The Respondents did not claim aggravated damages in their statement of claim and therefore they cannot seek aggravated damages at the appeal stage and that too by way of written submissions. The special damages awarded in a sum of $300.00 would remain the same as this quantum awarded was on the basis of the claim made by the Respondents which was accepted by the learned trial Judge as proved.

32. The Second Cause of action based on the incidents on 18 June 1994:

As stated in the statement of claim on 18th June 1994, at about 12.00 noon the 2nd and 3rd Appellants had tortured the 1st Respondent physically and mentally at Rakiraki Police Station in order to obtain a confession and signatures for offences the 1st Respondent stated he did not commit. That the 2nd Appellant assaulted the 1st Respondent by hitting him on his head, grabbing him around the neck and pushing him several times against the wall, while verbally abusing and swearing at him. That the 3rd Appellant assaulted the 1st Respondent by grabbing him by his shirt and pulling him down, whereby he had fallen to the concrete floor on his occiput. The injuries were stated as bruises on neck, elbow and wrists and lump at the back of head. That as a result of the said torture he had suffered severe headache for about one week, pain in shoulder and neck for several days and depression and distress.

33. In his affidavit the 1st Respondent narrated a series of events commencing from 8th December 1993 which he and his wife the 2nd Respondent had encountered with residents of the Island and their complaints to the Police, and that on 29th December 1993 they were assaulted and framed up by a terrorizing gang on their own property in the Island and the Rakiraki Police had accused him and his wife for the offence of affray for the incidents that had taken place on that day. That on 18th June 1994 at about 11.30 a.m. he was arrested by two Police Officers in front of Dosoos Supermarket in Rakiraki and taken to the Police Station and at the Police Station they were told that they would be charged for the offence

of affray that had taken place on 29th December 1993. The Officers had rubbished his explanations and had been told that he would be charged at that time. Thereafter Police officer Sunit Dutt Gosai had got angry and grabbed his shirt and pulled him forcefully down and over to him, as a consequence he had hit his knee on the bench that was there and he had fallen with his head first onto the concrete floor. He had been dizzy and felt sick and vomited into a washbasin in the bathroom. When asked to see a doctor he had been refused. Thereafter Police Officer Nakatarau had grabbed him with his hands by his neck and pushed him several times against the wall shouted at him asking him to knock his head against the wall. He had been hit on the head by Sergeant Nakatarau and was pushing him through the room to make him to sign documents. Some other policemen also had started verbally abusing him. He had noticed the taxi driver Abdul Rauf in whose taxi they had been when arrested near the supermarket entering the Police Station. Thereafter he had been locked into a cell and had been released from the cell around 2 .00 pm at which time he agreed to sign the documents. He had then been charged and released at about 2.30 p.m. He had thereafter gone to the CMW Hospital in Suva on the same day for treatment. The charge of Affray against him had been withdrawn in March 1997.

34. The 2nd Respondent too had given an affidavit which was on the same lines as that of the 1st Respondent regarding the events that had occurred on 18th June 1994. Abdul Rauf the Taxi driver too had given an affidavit wherein he had stated that two Police Officers had taken the 1st Respondent to the Police Station and that he saw Sergeant Tomasi Nakatarau hitting the 1st Respondent on his head and repeatedly threatening to punch him and had held him by his neck.

35. The 1st Respondent, the 2nd Respondent and the said Abdul Rauf gave evidence in Court and related the incidents as set out in their affidavits. The 1st Respondent also produced a Medical Report dated 19th June 1994 given at 01.15 hours which set out his physical and mental condition as fine and stating further that there were slight bruising of the head and

neck, three small bruise marks on the elbow and wrists and a painful lump at the back of the head.

36. In the statement of defence the Appellants denied the allegations of torture made against the Police officers but admitted that on the 18th of June 1994 the First Respondent was questioned and formally charged with the offence of affray.

37. At the trial the Appellants led the evidence of Police Officer Sunil Dutt Gosai. He stated that on the 18th of June 1994 he was at the Police Station and he was requested by Sergeant Deo to charge the1st Respondent. That the 1st Respondent was not cooperating with him and when asked to sit down had folded his arms and had started swaying from left to right and dropped to the floor by himself hitting his head and started shouting, screaming and struggling by himself on the floor and hitting his body on the floor. He denied having pulled him by his shirt towards him which had made him fall. He admitted the fact that the 2nd Respondent was present in the Police Station at that time. He stated that he did not see Officer Nakatarau hitting the 1st Respondent as alleged by the 1st Respondent.

38. The learned trial Judge when considering the evidence relating to this second incident concluded that the evidence tended towards a decision on the balance of probabilities in favour of the Respondent's account and what had happened at the Police Station and upheld the claims by the Respondents which he stated was supported to some degree by witness Abdul Rauff. Therefore this conclusion of the learned trial Judge cannot be faulted.

39. In awarding damages regarding the second incident, the learned trial Judge stated that there was no element of unlawful arrest. He further stated that the physical injury in this incident was a lesser feature but the humiliation and degradation were major and that he was satisfied that the acute depressive illness pleaded by the Respondents is proved and was

attributable in part to that incident and proceeded to grant general damages assessed at $40,000.00.

40. The conclusion reached by the learned trial Judge regarding the liability of the Appellants in respect of the second incident cannot be faulted in view of the fact that he has based his conclusion on the credibility of the witnesses. However, as regards the quantum of damages granted it is seen that apart from producing the medical report which was obtained after an examination on the same day at the CWM Hospital in Suva and his oral evidence regarding the injuries he suffered, no other medical evidence was led to establish the effects of the injuries received by the 1st Respondent. There was no medical evidence to support the 1st Respondent's claim regarding his acute depressive illness which was pleaded by him. In the absence of such supporting evidence the consideration of that aspect in the granting of damages is not acceptable.

41. Considering the nature of the injuries suffered by the 1st Respondent and the allegations regarding the conduct of the Police Officers in respect of the second incident, the grant of $40,000.00 as damages is excessive. It would be appropriate to grant a sum of $20,000.00 as general damages regarding the Respondent's claim in respect of the incident on 18th June 1994 and the mental anguish and distressed caused.

42. The special damages claimed by the Respondent was $108.00 which was accepted by Court as claimed by the Respondents. That amount would remain as special damages to be granted to the Respondents.

43. The total damages that would be granted to the Respondents would be $45,000.00 as general damages and $408.00 as special damages. The learned trial Judge had granted interest for 10 years and 7 months at 6% on the general damages and at 4% on the special

damages. Although interest was not prayed for in the statement of claim of the Respondents, the learned Judge had granted interest on the damages awarded. The Appellants have sought an order to set aside the judgment of the learned trial Judge awarding the sum of $ 147,730.82 which is inclusive of the interest granted.

44. The learned trial Judge in granting interest stated :

> "*Interest has not been claimed. The power to award interest however is not given by the pleadings. It is bestowed on the High Court by section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act, Cap.27. I shall allow interest because of the time lapse between the causes of action and judgment. On the general damages I fix the rate at 6% per annum simple, and on the special damages at 4%. The period is from filing the writ (3 July 1996) till judgment. That period is 10 years 7 months, longer than is desirable……"* (Emphasis added).

45. In Fiji it is well established that interest has to be specifically pleaded to be granted. In **Tacirua Transport Co. Ltd –v- Virend Chand** (1995) 41 F.L.R 44 the award of interest by the High Court was set aside as it was not pleaded. Referring to S.3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (cap.27) the Court of Appeal stated:

> *"This provision must, however, be regarded as subject to the general provision that a claim for interest as for any other relief, must first be pleaded. This was a matter considered by this Court in **Usha Kiran –v- Attorney-General of Fiji** F.C.No.25 of 1989 delivered on 23 March 1990. In that case the Court noted the English rule under which it is mandatory to plead specifically any claim for interest. The Court observed that there was no comparable rule in Fiji, but, following the reasoning in the English Supreme Court Practice ("White Book" 1991 edtition para.18/8/10), considered that interest, if sought, be specifically pleaded. That judgment was followed and applied in **Attorney General of Fiji –v- Waisale Naicegulevu** FCA No.22 of 1989 delivered on 18 May 1990. We see no reason for departing from what is now the established practice of this Court."*

46. The decision in **Tacirua Transport Co. Ltd –v- Virend Chand** was followed in **Shankar –v- Naidu** [2001] FJCA 19; ABU0003U.2001S (18 October 2001) and therefore further established the law relating to the granting of interest in that it has to be specifically pleaded to be granted. In view of this established law, the granting of interest by the learned trial Judge in the present case was erroneous and the interest granted is set aside.

47. As regards ground 7 of the Appellants notice of appeal, the learned trial Judge had considered all matters presented to Court by the parties which involved the two incidents of assault and the matters relating to negligence of duty by the Police as alleged by the Respondents. It would seem to be clear that all matters that have been alluded to by the Appellants in this ground have been considered by the learned trial Judge. It is to be observed however, the claim of the Appellants that the learned trial Judge should have taken into account the 1st Respondent's conduct against the Police and government agencies and other authorities, his delusional and hysterical state of mind in terms of his relationship with the lawful authorities are not matters which would have to be considered regarding the claims made by the 1st Respondent regarding the assaults on him and as to how he was treated as claimed by him. It was the duty of the Police in exercising their public duty to deal with the 1st Respondent in the proper manner and with much restraint as with any other member of the public however difficult a person the 1st Respondent may have been.

Conclusion

48. In the result the appeal of the Appellants is allowed as regards the quantum of damages and the judgment varied as follows:

    1. The General damages on the first cause of action is reduced to $25,000.00;

    2. The Special Damages on the first cause of action would remain at $300.00;

    3. The General Damages on the second cause of action is reduced to $20,000.00;

4. The Special Damages on the second cause of action would remain at $108.00;

5. The interest granted by the High Court is set aside;

6. The costs ordered by the High Court i.e. $ 3,500.00 shall remain payable to the Respondents.

7. There shall be no costs of this appeal.

Kotigalage JA

49. I agree with the reasons and the conclusions of Chandra JA.

Balapatabendi JA

50. I also agree with the reasons and the conclusions of Chandra JA.

Hon. Justice S Chandra
JUSTICE OF APPEAL

Hon. Justice C Kotigalage
JUSTICE OF APPEAL

Hon. Justice S N Balapatabendi
JUSTICE OF APPEAL