

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 30 of 2012

BETWEEN : Nirmala Devi

PLAINTIFF

AND : Virendra Nadan

1st DEFENDANT

AND : Commissioner of Police

2nd DEFENDANT

AND : Attorney General of Fiji Islands

3rd DEFENDANT

COUNSEL : Mr. S. Sharma for the Plaintiff
Mr J. Mainavolau for the 1st, 2nd and 3rd Defendants

Date of Judgment : 23 August 2013

JUDGMENT

1. The Plaintiff, a former market vendor in Labasa Market is claiming damages for the negligence as the result of failure of the 1st Defendant in exercising the duty of care towards the Plaintiff in searching, investigating and recharging for an offence of burglary and receiving stolen property.
2. The first Defendant was a police officer attached to the Labasa Police division. The second Defendant is the Commissioner of Police appointed by the

Government of Republic of Fiji under the Police Act. The third Defendant is joined pursuant the state proceedings Act.

3. The Statement of Claim recites that on 15 May 2004, the first Defendant carried out a search in the presence of public without a search warrant and without any concrete evidence which resulted in degrading her status in the society and subjected to stress, undue and unsustainable pressure as she was labeled as a dishonest person.
4. The Statement of Claim also proceeds to state that the gold jewellery recovered by the police from the custody of the Plaintiff was not stolen property but infact gifted by her mother at the time of her marriage.
5. The Plaintiff also states that she was discharged by the Magistrates Court for the alleged charge due to non availability of witnesses in 2005, and the 1st Defendant as a investigating officer has failed to exercise all reasonable skill and care in ascertaining the availability of witnesses before recharging the Plaintiff which resulted in acquitting her by the learned Magistrate for the same reason in 2008.
6. The Plaintiff's case is founded upon the legal issues relating to the alleged negligence on the part of 1st Defendant in search, arrest, investigation and recharge of the Plaintiff for the offence of Burglary and receiving stolen property and alleged defamation of character.
7. The Defendants in that Statement of Defense inter-alia states that a complaint was received from complainant Rajeshwar Nand, employed as a credit controller for Carpenters Finance Ltd, that his house was broken into and some jewellery were stolen. After the complaint was lodged, police received information that the Plaintiff who was a market vendor had some stolen items in her possession or in her stall at the Labasa market. The Police acted on the information

immediately and searched the stall and recovered one gold necklace and one pair of earrings.

8. In the Statement of Defense, the Defendants denied any irregular or improper procedure followed in search, investigation and charging the Plaintiff for Burglary and receiving stolen property.
9. The Defendants further recites in the Statement of Defense that the complainant was transferred to Viti Levu from Labasa and could not be contacted before the hearing date and the learned Magistrate discharged the accused as absence of the complainant was crucial in order for the prosecution to satisfy the elements of offence which the Plaintiff was charged.
10. As the police were of the opinion that there were sufficient evidence to prove the charge had recharged the Plaintiff for the same charge sheet and even on that day the court was ready to proceed with the trial but the complainant was not present in court, which resulted on acquittal of the Plaintiff.
11. The Plaintiff called four witnesses and the Defendant called six witnesses, respectively at the trial.

The Hearing

Evidence on Behalf of the Plaintiff

12. The Plaintiff testified in the examination in chief that on or about May 2004, two police officers namely 1st Defendant Nandan and Naren without a search warrant came to market stall and recovered some jewellery from her stall. She further testified that the 1st Defendant took her to Police Station from the Police Post. She further testified that she informed the police officers that the jewellery recovered from her stall belongs to her having been gifted to her by her mother Kiran Devi. She also stated that she was ordered by the 1st Defendant to remove her clothing and was ordered to be naked at the Police Station in the

presence of a lady police officer in order to search. She was in the Police Station for 2 days. Her position throughout evidence was that the 1st Defendant was the investigation officer from the very beginning and responsible for instituting charges against her for the alleged offence and reinstating of the same charge again. She also testified that she was discharged by the learned Magistrate initially in 2005 for non availability of the important witness and acquitted her for the same reason after she was recharged in 2008.

13. The Plaintiff explained her relationship with the 1st Defendant even before she was arrested and charged for burglary and receiving stolen property. She testified that prior to this incident, she knew the 1st Defendant and one day he had forced her to sit in his car for a ride which she has refused. The relationship between the two of them became such that they were not in talking terms thereafter. She further stated that she went with her husband to the Police Station and complained to a senior police officer about the invitation of the 1st Defendant for a car ride and matter was settled after an apology was tendered by the 1st Defendant to the Plaintiff in the presence of the others.
14. The Plaintiff claims that society at large considered her as a low standard person after the manner in which she was searched, arrested, investigated and charged by the 1st Defendant. In answering to a question in examination in chief, she stated that because of the negligence of the 1st Defendant she is entitled to seek damages from all Defendants.
15. In cross examination, the Plaintiff stated that the two police officers came to her stall to search were Naren and Seru Lailai. In answering to questions of the counsel for the Defendants, the Plaintiff in one occasion stated that she first saw the 1st Defendant seated inside the Police vehicle and in another occasion stated that she saw the 1st Defendant for the first time at the market post. She also stated under cross examination that she saw the complainant in court in 2005 or 2006 but not in 2008 . Under cross examination she admitted that she

was charged for an offence of house breaking and stealing in the Magistrate court and convicted and imposed a sentence of 16 months imprisonment suspended for 2 years and a fine of \$100.00. When she was questioned about the alleged arrest by the police officers, her position was that she complained to one Mr Nair of Fiji Police and also to Women in Crisis Centre. Counsel for the Defendant suggested that there was not a single complaint lodged to either of the places mentioned by the Plaintiff and that was the reason why she failed to submit any of such complaints as evidence to court to substantiate her position.

16. In re-examination, counsel for the Plaintiff ask the following question to clarify the instructions received by him in relation to the identity of the police officers.

Question: *You said Naren and Lailai took you to Police Post. Did you give such instructions to solicitors?*

Answer: *Yes.*

17. The position she maintained in the cross examination in relation to the identify was consistent even in re examination.
18. The Plaintiff's 2nd witness was Kiran Devi, she testified that she is the lawful mother of the Plaintiff and sometime in 2004 she went to Labasa Police Station to make a Statement regarding the identification of the jewellery recovered from the possession of the Plaintiff. She testified that the jewellery was gifted to the Plaintiff by her half father in her presence. She also stated that she was kept in the Police Station overnight and then released.
19. The 3rd witness of the Plaintiff was Mr Chandra Deo, the husband of the Plaintiff. This witness testified that he too knew the 1st Defendant even prior to year 2004. His main testimony was in relation to the request made by the 1st Defendant to the Plaintiff to sit in his car for a ride which the Plaintiff had refused. His evidence was that he went along with his wife to the Police Station

and lodged a complaint against the 1st Defendant and thereafter referred to a police officer by the name of Mr Kholi.

20. The last witness of the Plaintiff was Roneel Prasad, the acting court officer of the Magistrate court of Labasa. This witness was summoned to tender the record of criminal case no 147/2006, which was between state and the Plaintiff.

Evidence on behalf of the Defendants

21. The 1st Witness of the Defendants was the 1st Defendant. This witness testified that he never took part in search and arrest of the Plaintiff and he was not the investigating officer particularly in the initial stages in 2004. He further testified that he did not compile the witness statements nor conducted caution interview of the Plaintiff. His evidence was that his involvement at the early stages was to subpoena the witnesses. However, he stated that he knew the Plaintiff and her mother before the incident but denied any harassment or decision to charge and recharge the Plaintiff for the alleged offence. He stated that he brought to notice of the DPO, (Divisional Police officer) about the requirement of finances for the purpose of paying for complainant's air fare and accommodation. He stated that it is the duty of the prosecution to get the witness at their own costs on the trial date but could not summon the complainant on the final date due to a difficulty in arranging finances.
22. Even under cross examination, witness stated that he was not the investigating officer and he has only given the task of compiling the docket. He further stated that it was not his duty to check the availability of witness, sufficiency of evidence as he was not the investigating officer. His stance was that he notified that witnesses are in Labasa to the Prosecution Division which informed him their financial difficulties.

23. The Defendant's 2nd witness was PC Naren Chandra. He testified that he along with Seru Lailai upon receiving a telephone call from the Police Station immediately rushed to the Plaintiff's stall and checked her and recovered a gold necklace and pair of earrings from the Plaintiff's possession.

He further explained in his evidence as to why he could not arrange a search warrant. His position was that he was unable to obtain a search warrant as it may take sometime and goods might disappear from the place where it was hidden. He also stated that he was not aware of any inquiry or investigation against the 1st Defendant in relation to the alleged complaint of harassment.

24. Under cross examination the witness testified the role of the investigating officer in a similar offences, as recording statements from the witnesses register the case, carryout in other investigations if there is a necessity, conducting a search, preserving the scene, seizing all items necessary, locating suspects, interviewing suspects, discussing with superior officers and acting on the instructions of the superior officers are some of the key responsibilities of the investigating officer.

25. The 3rd witness of the Defendant's was PC Seru Lailai. He testified that he accompanied PC Naren upon receiving call to search the Plaintiff. He corroborated the evidence of PC Naren with regard to manner in which the search was carried out. He too stated that 1st Defendant never participated in search and arrest of the Plaintiff. He further stated that 1st Defendant did not even take her to the Police Station from the Market Police Post. Under cross examination, this witness testified that police can search a suspect without a search warrant if the police believe that they will move the property to a different place. He further testified how the jewellery was traced and recovered from the Plaintiff's custody and the suspicious behavior of the Plaintiff at the time of search.

26. The Defendant's 4th witness was Shalendra Chand. This witness is the market master of Labasa market. He testified that he has no records of the ownership

of stall in year 2004 as the previous market master who was incharge of records is now deceased. He stated that stall 67 is currently owned by Plaintiff's daughter and he has heard market people talking that Plaintiff's daughter was selling stolen properties.

27. The fifth witness of the Defendants was Inspector Wiliame Sogari. This witness testified that the 1st Defendant was not the investigating officer at the initial stages of the case. The 1st Defendant got involved in this case as a investigating officer only after he was asked to recharge the Plaintiff. He testified that Plaintiff had to be recharged as there was strong evidence against the Plaintiff. He stated that the Plaintiff was discharged initially due to non availability of the main witness. The main witness was not available even when the case was taken for hearing in 2008 which lead to an acquittal of the Plaintiff.
28. This witness further stated that the 1st Defendant could not be subpoenaed on the 1st occasion and approached this witness to get the finance arranged.
29. He stated that the prosecution could not serve summons because the funds required for transportation and accommodation could not be processed prior to the trial date.
30. This witness further stated that trial could not be proceeded in 2008 due to non availability of the complainant. However, this witness stated under cross examination, that main witness was available in 2006 in court but could not be proceeded due to counsel's difficulty.
31. The last witness of the Defendants was Muni Murthi. This witness also testified that he was also attached to the market police post along with PC Naren and PC Seru Lailai. He also corroborated the evidence of all police officers that 1st Defendant never participated in the search. He stated that it was Naren and Lailai that visited the scene and recovered gold jewellery from the possession of the Plaintiff.

The Determination

32. At the outset, court has to deal with the issue of recourse to justice by the public against the alleged negligence of the 1st Defendant which makes the other Defendants liable in the event of proof of negligence of the 1st Defendant.
31. In the case of **Hill v Chief Constable of West Yorkshire** (1988) 'All E.R. 238, court held:

“ The question of law which is opened up by the case is whether the individual members of a police force, in the course of carrying out their functions of controlling and keeping down the incidence of crime, owe a duty of care to individual members of the public who may suffer injury to person or property through the activities of criminals, such as to result in liability in damages, on the ground of negligence, to anyone who suffers such injury by reason of breach of that duty.

There is no question that a police officer, like anyone else, may be liable in tort to a person who is injured as a direct result of his acts or omissions. So he may be liable in damages for assault, unlawful arrest, wrongful imprisonment and malicious prosecution, and also for negligence. Instances where liability for negligence has been established are *Knightley v. Johns* [1982] 1 W.L.R. 349 and *Rigby v Chief Constable of Northamptonshire* [1985] 1 W.L.R. 1242. Further, a police officer may be guilty of a criminal offence if he willfully fails to perform a duty which he is bound to perform by common law or by statute: see *Reg. v. Dytham* [1979] Q.B. 722, where a constable was convicted, of willful neglect of duty because, being present at the scene of a violent assault resulting in the death of the victim, he had taken no steps to intervene.

By common law police officers owe to the general public a duty to enforce the criminal law: see *Reg v. Commissioner of Police of the Metropolis, Ex parte Blackburn* [1968] 2 Q.B. 118. *That duty may be enforced by mandamus, at the instance of one having title to sue. But as that case shows, a chief officer of police has a wide discretion as to the manner in which the duty is discharged. It is for him to decide how available resources should be deployed, whether particular lines of inquiry should or should not be followed and even whether or not certain crimes should be prosecuted. It is only if his decision upon such matters is such as no reasonable chief officer of police would arrive at the someone with an interest to do so may be in a position to have recourse to judicial review.*

32. In view of the above authority, the court has no hesitation to conclude that the Plaintiff has remedy if the negligence of the 1st Defendant is established.
33. In the case of tort where the Plaintiff's case is based on the negligence, the identification of the wrong doer is of paramount importance and the onus of proof of identity entirely lies on the Plaintiff.
34. In the instant case before the court, the Defendants cross examined the Plaintiff on the issue of identification of the wrong doer. The evidence of the Defendants witnesses corroborated the position taken by the Defendants in cross examination of the Plaintiff.
35. The Plaintiff in answering to question in examination in chief testified that her case against the Defendants solely relies on the alleged negligence of 1st Defendant in search, arrest, investigation and charging the Plaintiff for the offence of burglary and receiving stolen property.
36. The Plaintiff in examination in chief testified that the 1st Defendant and Naren came and searched her and her stall for stolen properties. In cross examination she admitted that Naren and Lailai came and searched for stolen properties. All

the officers involved in the search and arrest was summoned by the Defendants to testify before court.

37. The evidence of all police officers was that PC Naren and PC Lailai conducted the search. The evidence in total demonstrably established that the 1st Defendant never took part in search and arrest of the Plaintiff for the alleged offence.
38. The Plaintiff's evidence was that the manner in which the search and arrest carried out by the 1st Defendant at the Labasa market in the presence of other market vendors and the public, has defamed her character and lead to incur the loss of income, pain and suffering, emotional stress and trauma.
39. Section 8(4) (b) (c) and (e) of the Civil Evidence Act 2002 deals with the situation as to how the court should analyse prior admissions contradictory evidence in coming into conclusions.
40. The Plaintiff in cross examination admitted that she was convicted for the offence of house breaking and stealing and sentenced to sixteen months imprisonment suspended for 2 years and \$100.00 fine. The Plaintiff's alleged negligence and defamation is based upon loss of reputation, business endeavours etc.
41. In view of the provisions of the Civil Evidence Act and the evidence in totality, I conclude that the Plaintiff has failed to identify the wrong doer to the satisfaction of the court. In my view, a lack of proper identification goes to the root of the case and miserably affect the Plaintiff's action.
42. The Plaintiff in the Statement of Claim recites that search and arrest carried out by the police officers without a search warrant is necessarily a ground for a case of negligence and a serious lapse in the investigation in consideration of the provisions of law for a free and fair investigation.

43. I turn to the law prevailed in year 2004 in order to conclude whether the Police can carry out a search in certain circumstances without a search warrant.
44. It is noted that criminal procedure code was in force in year the 2004 which was subsequently repealed by Crimes Decree of 2006.
45. The relevant law for consideration in this matter is section 21 of Criminal Procedure Code. Section 21 states as follows:

Any police officer may, without an order from a magistrate and without a warrant, arrest:

- (a) *any person whom he suspects upon reasonable grounds of having committed a cognizable offence;*
- (b) *any person who commits any offence in his presence;*
- (c) *any person who obstructs a police officer while in the execution of his duty, or who has escaped or attempts to escape from unlawful custody;*
- (d) **any person in whose possession, any is found which may be suspected to be stolen property or who may reasonably be suspected of having committed an offence.**

46. On the evidence adduced before the court by the witnesses of the Defendants, it is apparent that the time is of an essence to prevent the movement of the goods in issue. The circumstances under which the police initiated the search and arrest, in my view warrants a situation to carry out of such search and arrest without a search warrant as provided by the Criminal Procedure Code.
47. As a result, I am satisfied that there was no negligence in the manner in which the search and arrest carried out by the police.

48. The Plaintiff in his Statement of Claim proceeded to state that the 1st Defendant has failed to ascertain the availability of the main witness before recharging the Plaintiff after she was discharged by the learned magistrate.
49. The evidence of Inspector Williame Sogari, Division Police Officer testified that there were financial difficulties and delays in arranging finances to summon the witnesses specially when they are in Viti Levu. His evidence was that prosecution bears in costs of air fares, transportation and accommodation of the prosecution witnesses. He testified that although the main witness was not available in court on the day the Plaintiff was acquitted in year 2008 there was an instance where the main witness was available in court to give evidence and due to a difficulty of the Defense Counsel, the trial was adjourned.
50. The evidence of this witness is corroborated by the Plaintiff's exhibit P.E.1.
51. The relevant entry of the learned magistrate on 31 October 2006 is as follows:

Sgt: S Tabaiwalu.
Resident Magistrate

31.10.2006

- | | | | | |
|--------------------|---|---|---|-----------------------|
| | - | <i>Prosecution</i> | - | <i>PC Viliame</i> |
| | - | <i>Accused</i> | - | <i>Present Mr Sen</i> |
| <i>Prosecution</i> | - | <i>stand down for 5 minutes</i> | | |
| | - | <i>Prosecution</i> | - | <i>PC Viliame</i> |
| | - | <i>Accused</i> | - | <i>Present Mr Sen</i> |
| <i>Prosecution</i> | - | <i>ready to proceed</i> | | |
| <i>Mr Sen</i> | - | <i>Part heard with Mr Kumar in Court 1</i> | | |
| <i>Court</i> | - | <i>Due to matte for Mr Sen. At 2.30pm, matter be adjourned.</i> | | |
| | - | <i>Adjourned to November 29th 2006 mention only.</i> | | |
| | - | <i>Bail extended.</i> | | |

52. In consideration of the evidence of the witness and the above entry in the case record clearly demonstrate that the prosecution has ascertained the whereabouts of the main witness and managed to serve summons on a previous trial date although the witness was not available on the subsequent trial date. Thus it is inappropriate for the court to conclude that the police has failed to ascertain the availability of the main witness before recharging the Plaintiff.

Conclusion

53. In my judgment the Plaintiff's claim of negligence and defamation does not have any reasonable and probable cause of action. The onus is on the Plaintiff to prove her case on balance of probabilities. I have concluded that the Plaintiff has failed to establish the identity of the wrong doer to the satisfaction of the court as required by law. I do not accept the evidence of the Plaintiff to conclude that search conducted by the police officers require search warrant in the given circumstances. I am not satisfied that the decision to recharge the Plaintiff was baseless and without any satisfactory material. In fact exhibit P1 clearly shows that decision was taken to recharge the Plaintiff after ascertaining the whereabouts of the complainant. Finally I conclude that the Plaintiff has not established and proved the necessary requisites for an allegation of negligence and defamation.

Orders

I make orders as follows:

(a) Plaintiff's claims against the Defendants are dismissed.

(b) Plaintiff shall pay the Defendants costs summarily assessed in a sum of
\$2,000.00

Susantha N. Balapatabendi
JUDGE