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

Civil Appeal Case No 11 of 2013

BETWEEN: GERALD MOULOU TURALA
Appellant

AND: REPUBLIC OF VANUATU
Respondent

Coram: **Hon. Chief Justice Vincent Lunabek**
Hon. Justice John von Doussa
Hon. Justice Raynor Asher
Hon. Justice Daniel Fatiaki
Hon. Justice Robert Spear
Hon. Justice Mary Sey

Counsel: **Saling Stephens for the Appellant**
Kent Ture for the Respondent

Date of Hearing: **19th July, 2013**

Date of Judgment: **26th July, 2013**

JUDGMENT OF THE COURT

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1. This appeal is against a decision of the Supreme Court given on 11 February 2013 dismissing Mr Turala's claim for damages based on the following cause of action:-
   a) Battery
   b) Unlawful Imprisonment
   c) Malicious Prosecution
   d) Defamation

2. The background to the case can conveniently be explained by the facts set out in the Supreme Court decision:-

"1.1 *This case goes back to 2002. Police Inspector Seru Tapairangi was on the late night shift from 2300 hours on 16 August 2002 to 0700 hours of 17 August 2002. He saw the Claimant (the appellant here), a police officer himself, with another police officer Martin Sarai, drunk and disorderly and causing some commotion on the street just outside the main police station in Port Vila. The Inspector and his other colleague proceeded to stop them. In this process the two policemen resisted and began acting aggressively and in a disorderly manner. They were then invited to the Inquiry Room at the Police Station where the claimant and his collegue were abusive.*

1.2 *The two Policemen were aggressive and uncontrollable. As such the Inspector arrested them and attempted to keep them in Cell No. 6. In this process the Claimant assaulted the Inspector on his face and on his upper left eye. Martin Sarai assaulted the Inspector on his upper lip causing injury.*

1.3 *On 17th August 2002, the Inspector made a formal complaint against the Claimant and his friend at 0445 hours. He attended medical treatment at 0830 hours on the same day. The Medical Report confirms the assault and the injuries complained of.*

1.4 *As a result of the assault and formal complaint, the Claimant was suspended from duties by letter dated 5th November 2002.*

1.5 *On 17th May 2004, the Prosecutions laid formal charge of intentional assault under Section 107(c) of the Penal Code Act against the Claimant.*

1.6 *On 12th July 2004, the Magistrate Court struck out the case and ordered that the Claimant as defendant be discharged.*

1.7 *On 16th November 2004, the Claimant appeared before (an internal Police) Disciplinary Proceeding and pleaded guilty to the charge of causing an act likely to bring discredit to the Police and to the assault on the Inspector. He was punished by loss of one day of his salaries.*

1.8 *On 7th January 2005, the Claimant was re-instated to his position with full salaries by the Acting Commissioner of Police, Arthur Caulton Edmanley. Instructions were also given for payment of all his outstanding arrears.*

1.9 *In Civil Case No. 197 of 2005, the Claimant instituted suit against the Government for his arrears of salaries. By consent reached on 11th December 2005, Counsel agreed to the sum of VT 482,772 plus costs in the sum of VT 30,000. The consent was endorsed by the Court on the same date."*

3. This claim was commenced in 2009 and as amended it came before the Supreme Court at Santo for hearing on 16th July 2012. The claim was for a total of Vt 15 million broken down in the amended claim as follows:-

"a)	*Battery*	-	*2,000,000*
b)	*Unlawful Imprisonment*	-	*2,000,000*
c)	*Malicious Prosecution*	-	*2,000,000*
d)	*Mental Stress and Anxiety*	-	*2,000,000*
e)	*Damage to Personal Professional Reputation*	-	*5,000,000*
f)	*Exemplary Damage*	-	*2,000,000"*

4. The claim was denied in its entirety. Additionally, the defence pleaded that the claim was outside the six year limitation period prescribed by s. 3 of the Limitation Act [Cap.212] for actions in contract and tort. Furthermore, that the police officers involved with the arrest and the subsequent suspension and prosecution acted in good faith and accordingly there could be no liability for any acts done by any of those police officers involved pursuant to s. 40 of the Police Act [Cap.105].

5. In a decision delivered on 11th February 2013, the Supreme Court dismissed all the claims.

6. The appeal is advanced by Mr Stephens on the following grounds:-

"1. *That the trial judge failed to take into consideration and/or give any weight to Mr Turala's evidence.*

2. *Dwelling and relying on unsworn evidence of one Inspector Seru who is not a witness in the proceeding.*

3. *Wrongly inferring at paragraph 5.2(7) of his judgment that the claimant had assaulted Inspector Seru "when Inspector Seru has never swore a statement to that effect".*

4. *Wrongly inferred at paragraph 5.6 of his judgment that the appellant cannot claim damage for personal and professional reputation because the evidence of Inspector seems to outweigh the evidence of the appellant when the evidence of the Inspector Seru was unsworn."*

7. The only point taken by Mr Stephens that requires detailed attention is the assertion that the primary judge relied on the unsworn statement of Inspector Tapairangi that was produced as an exhibit by Commissioner Bong. Certainly, without that unsworn statement being available to the trial judge, it would be reasonable to accept Mr Stephens' argument that there was no effective counter to the evidence presented by and for Mr Turala. However, in the particular circumstances that existed in this case, that evidence was admissible and accordingly available for the trial judge to take account of.

8. The statement of Inspector Tapairangi is on standard police statement form and records Inspector Tapairangi's account of events of the night of 16th August 2002

when he arrested both Mr Turala and the other police officer for being drunk and disorderly. The battery (assault) is claimed by Mr Turala to have occurred during the course of the arrest when Mr Turala and the other police officer resisted the efforts of Inspector Tapairangi to take them in to custody and place them in a cell. .

9. At a directions conference of counsel on 16th July 2012, counsel for the parties agreed with the presiding judge "*that all factual evidence by sworn statements by both the claimant and defendant be received by the Court subject to any objections as to admissibility raised by counsel in their written submissions.*" This, of course, is in accordance with CPR 11.7.

> ***11.7 Use of sworn statement in proceedings***
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> *(1) A sworn statement that is filed and served becomes evidence in the proceeding unless the court has ruled it inadmissible.*
>
> *(2) The sworn statement need not be read aloud during the trial unless the court orders.*
>
> *(3) A witness may be cross-examined and re-examined on the contents of the witness's sworn statement.*
>
> *(4) A party who wishes to cross-examine a witness must give the other party notice of this:*
>
> *(a) at least 14 days before the trial; or*
> *(b) within another period ordered by the court*

10. That notwithstanding, no objection to the production of Inspector Tapairangi's statement by Commissioner Bong was raised by Mr Stephens either before or at the hearing of the claim. That is surprising in all the circumstances. The events of the night of 16 October 2002, that resulted in Mr Turala's arrest, provide the factual backdrop against which this claim critically depended. Inspector Tapairangi's unsworn statement appears to us to be of critical importance to the claim. We do not understand why Mr Stephens did not object to Inspector Tapairangi's sworn statement being produced in this way. We consider that it was admissible per se as a business record. If there was to be issue taken with the Inspector's account of events then an objection should have been taken to the production of the Inspector's statement through Commissioner Bong.

11. Even in this Court, Mr Stephens did not question the admissibility of Inspector Tapirangi's unsworn statement. Instead, his submissions were directed only to the weight that the primary judge gave to that unsworn statement as against the sworn statements of the witnesses for Mr Turala.

12. It is necessary that we say something about the admissibility issue. Vanuatu does not have an Evidence Act. Article 95(2) of the Constitution provides that British and French law in force before the day of Independence *"shall on or after that day continue to apply to the extent that (it) is not expressly revoked or incompatible with*

the independent status of Vanuatu and where ever possible taking due account of custom."

13. The law of evidence for Britain as at the day of Independence is contained in the Civil Evidence Act 1968 UK. The rules as to the production of documentary records as found in s.4(1) of that Act is neatly explained in Phipson on Evidence (13th edit) at para 17.08:

> *"Documentary records. In certain circumstances, "multiple hearsay" may be given in evidence. Such evidence is admissible if "contained in a document... which is, or forms part of, a record compiled by a person acting under a duty, from information which was supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information, and which, if not supplied by that person to the compiler of the record directly or supplied by him to the compiler of the record indirectly through one or more intermediaries, each acting under a duty."*

14. It can easily be inferred that the document (the unsworn statement of Inspector Tapairangi) was part of the police record compiled by the Commissioner under his attendant duties. The statement was also prepared by Inspector Tapairangi from his personal knowledge of the events of 16 and 17 August 2002. It meets the primary basis for admissibility.

15. While the unsworn statement was admissible, that still did not mean that it had to be admitted by the primary judge. Objection could have been taken to the production of Inspector Tapairangi's statement in this manner particularly on the basis that it denied Mr Stephens the opportunity to cross-examine the Inspector. That objection would have had to have been upheld as a matter of fundamental fairness in the trial process.

16. The trial judge acknowledged the evidence tendered by Mr Turala. However, that evidence does not take issue with Inspector Tapairangi's account of events that Mr Turala was found to be drunk and disorderly that night. Mr Turala's evidence dealt more with the circumstances surrounding the arrest and the enforced movement of Mr Turala and his colleague into No. 6. At paragraph 5 of Mr Turala's sworn statement of 28th June 2010, Mr Turala states *"long paragraph 5 hemi talem se mi assaultem polis ofisa: mi wantem talem olsem se polis ofisa injaj long taem ia hemi tekem mi I go long namba 6 blong sarem mi, be mi holem taet uniform blong hem forom mi no save wanem nao hemi wantem sarem mi long namba 6 from mekem se mitufala I stragle smol long entrance blong namba 6 mekem se uniform blong hem I brok. Yes ofisa hemi pusum mi insaed long cell be mi no bin assaultem from I gat fulap ol collegues oli bin stap wetem mi. Late Sergeant Martin Sarai nao hemi bin assaultem ofisa ia."*

17. Accordingly, Mr Turala's evidence before the Supreme Court was essentially that following his arrest there was a struggle as Inspector Tapairangi endeavoured to place him in No. 6 and Mr Turala physically resisted. Furthermore, Mr Turala places the blame for the assault on his companion the Late Sergeant Martin Sarai.

18. We consider that Mr Turala has misunderstood what appears to us to be the very clear determination of the Judge in the Supreme Court. Without any contrary evidence from or for Mr Turala, the Judge determined that the events leading up to the arrest of Mr Turala and the Late Sergeant Martin Sarai for being drunk and disorderly by Inspector Tapairangi were not challenged. Furthermore, the Judge recognised Mr Turala's evidence that he resisted Inspector Tapairangi's endeavours to place Mr Turala in No. 6 by holding on to the Inspector's uniform. Of course, Inspector Turala was perfectly entitled to use reasonable force in those circumstances – s. 36 Police Act..

19. In our view, the evidence from Mr Turala did not establish that he had been either subject to battery or unlawful imprisonment. Indeed, we consider that the trial judge's conclusions to that same effect are unassailable given the nature of the evidence for Mr Turala.

20. In any event, notwithstanding that the primary judge considered that he had dealt with the Limitation Act defence raised in the pleading, we consider that it was not disposed of by his decision of 29th April 2011. A consideration of that decision reveals that the relevant date for the cause of action in question was taken as 5 November 2002 but that was the date that Mr Turala was suspended from his duty as a police officer. However, the claim, while not particularly precise, appears to be primarily directed towards the arrest and imprisonment of Mr Turala on 16th or 17th August 2002. As this claim was commenced on 16th October 2008, clearly it was outside the six years' time limit required by section 3 of the Limitation Act [Cap.212] and thus time barred as to those causes of action (assault / battery and false imprisonment).

21. Accordingly, even if we agreed with Mr Stephens that the unsworn statement should not have been either admitted or given weight (and we do not agree with him in those respects) Mr Turala would still not be able to advance any claim for battery or unlawful imprisonment.

22. We entirely agree with the primary judge that the physical force used by Inspector Tapairangi on Mr Turala at the time of the arrest was within the general powers and duties reposed in Inspector Tapairangi having regard to s.35 of the Police Act and Part 2 of the Criminal Procedure Code as it relates to the use of reasonable force to effect an arrest. A police officer is entitled to use *"all such force as may be reasonably necessary"* to effect a lawful arrest – s.36 Police Act.

23. The primary judge observed that the claim for malicious prosecution was abandoned on 4 May 2009 although it appears to have been inadvertently included in the claim. However, and notwithstanding that the prosecution was struck out by the Magistrates' Court effectively for want of prosecution, in view of the findings in the Supreme Court, we fail to see how prosecution could be considered malicious notwithstanding that it appears not to have been pursued with vigour.

24. That leaves the balance of the claim which effectively is for defamation of character. The pleadings in this respect for both claimant and defendant are not of great

assistance. We consider that the primary judge accurately encapsulated the strength of the defence in paragraph 5.6 of his judgment,

> *"Certainly and surely those actions are contrary to the actions expected from a professional character. Policemen should be law abiding officers who uphold the laws at all times. A policeman who goes out of his way... gets drunk and acts in breach of the peace in the public street causing damage to public property and being abusive to his superior in a public office, is guilty of the most serious disciplinary offence against the reputation of the police force. Interestingly the claimant received a very light punishment."*

25. We agree that there is no evidence that Mr Turala's reputation was unlawfully damaged by the disciplinary action that was taken against him.

26. This appeal has no merit and it is dismissed. The Respondent is entitled to costs on the standard basis to be agreed or taxed.

Dated at Port Vila this 26th day of July, 2013

ON BEHALF OF THE COURT

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

Hon. Vincent Lunabek
Chief Justice