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

CIVIL APPEAL CASE No. 1321 OF 2017

**BETWEEN:** **JOSEPH NELSON**
**First Appellant**

**AND:** **JOHN TAMASENG**
**Second Appellant**

**AND:** **PUBLIC PROSECUTOR**
**First Respondent**

**AND:** **THE REPUBLIC OF VANUATU**
**Second Respondent**

***Coram:*** ***Hon. Chief Justice Vincent Lunabek***
***Hon. Justice John von Doussa***
***Hon. Justice Raynor Asher***
***Hon. Justice Oliver Saksak***
***Hon. Justice Dudley Aru***
***Hon. Justice David Chetwynd***
***Hon. Justice Gus Andrée Wiltens***

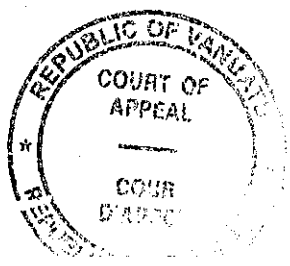
***Counsel:*** ***Mr S Stephen for the Appellants***
***Mr L Huri for the Respondents***

*Date of Hearing:* *20 April 2018*

*Date of Judgment:* *27 April 2018*

# JUDGMENT

1. In July 2008 the two appellants were suspected of the rape of a young woman in Luganville. They were held in custody from 13th July 2008 to 11th February 2009. On 10th February 2009 they appeared before the Supreme Court for a *voir dire* hearing. The Judge in the criminal case reserved judgment and in a written decision dated 19th February made findings about the credibility of the police officers who conducted interviews under caution with the appellants. The Judge concluded the statements were inadmissible in the criminal proceedings. On 11th February 2009 prior to the decision being handed down, the Judge granted both men conditional bail.



2. In April 2009 the Public Prosecutor entered *nolle prosequis* in respect of both appellants and the two were discharged and acquitted of the rape charges.

3. The Appellants commenced proceedings in the Supreme Court claiming damages for battery, unlawful arrest and wrongful imprisonment. A decision in the civil case was given on 24th April 2017. The Judge said there had been no battery and the appellants' arrests had been lawful. The Judge did find there had been a period of 30 days when the appellants had been detained without warrant and that such detention was unlawful. The Judge awarded each appellant damages in the sum of VT500,000.

4. The appellants were dissatisfied with the award of damages and a Notice of Appeal was filed on 2nd June 2017 limited to part of the judgement and in particular, quantum. That is the only issue before this Court. There are no cross appeals by the respondents.

5. The Judge's findings as to the unlawful imprisonment can be found at paragraphs 10 to 13 of the judgment. The paragraph numbering in the published decision have unfortunately gone awry with the number 11 being repeated. That has thrown out the numbering by one. The relevant part of the judgment reads:

> *"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 in 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."*

6. Later at paragraph numbered 16 the Judge says:

*"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."*

7. In discussions before this Court counsel for the appellants agreed the Judge was correct to say there were two principal considerations to bear in mind. He agreed the damages were to be assessed by reference to the degree of injury to liberty and feelings. He accepts, as we do, there was nothing wrong with the Judge's approach to the measure of damages in that regard.

8. He too referred to the *Warte* case and says that a measure of damages can be established by simply calculating *pro rata* the amount of time spent in unlawful detention by the appellants. He is wrong in that approach. It is not simply a matter of calculating some hourly or daily rate as established by *Warte* and multiplying that rate by the time spent in custody by the appellants. It is necessary to look at the

circumstances of the unlawful imprisonment and the personal circumstances of the detainees. In *Warte* there was absolutely no question the police knew there was no cause to arrest Mrs Dornic and Mr McNicol but went ahead and detained them anyway. The circumstances of the detention and the personal circumstances of the appellants were very different in this case

9. The evidence before the Court below was that the father of Joseph Nelson asked the police to take the appellants into custody for their own safety. The father was not called to give evidence about his request or how long he thought the detention should last.

10. It seems clear from what was said by the Judge in the Court below that it was accepted the police had reasonable cause to arrest the appellants in any event. They had received a complaint of rape. By 14th July, the day following the arrest or detention for their own safety the police were in possession of a detailed statement by a complainant.

11. Those two factors would be relevant when considering the measure of damages in this case and, but for other considerations, we find no fault with the Judge's reasoning as to quantum.

12. Before deciding quantum there is of course a need to consider whether or not there has been an unlawful detention. The Judge, for the reasons set out already, found that there had been. We take a different view.

13. The Judge was wrong footed in reaching the conclusion she did at paragraph 11 by the submissions she received from the appellants' counsel. There was no evidence before the Court to call into question the issue of due process. Whilst it is true no mention was made of any proceedings before a Magistrate it is equally true there was no mention in the evidence that there had been no remand by a Magistrate and/or no preliminary enquiry held in accordance with section 143 of the Criminal Procedure Code. There is no reference to this lack of due process in the Statement of Claim. The issue only seems to have arisen in the submissions by the appellants' counsel in closing. He said in those submissions that the Supreme Court discovered there had been no remand or preliminary enquiry and it was only then a remand warrant was issued by the Judge in Luganville.

14. The Judge was also in error when she said it was "*noteworthy that no evidence has been adduced by the Defendants to show that the Claimants were arraigned before the Magistrates' Court*". As it was not part of the appellants' claim or evidence the Judge appears to have reversed the burden of proof in requiring the respondents to prove the existence of proceedings before the Magistrates' Court.

15. If there was any doubt as to whether the appellants had been dealt with properly it would have been a simple matter to call for, as we have done, the case

files from the Magistrates' Court and the Supreme Court. They are public records. Had that happened the Court would have been satisfied that there had been proceedings before the Magistrates' Court and that there was no *lacuna* in the procedure by which the appellants were taken before the Supreme Court for plea. Examination of the case files discloses a Warrant to Remand the appellants signed by Senior Magistrate on 14th July 2008. The warrant was extended on 25th July to 8th August.

16. On 8th August 2008 Senior Magistrate Jimmy Garae signed an Order stating he was satisfied there was a *prima facie* case against both appellants. He remanded both in custody to appear before the Supreme Court on 13th August 2008. The appellants were produced to the Supreme Court on 13th August when they were remanded by Judge Saksak to the next day. There were then a series of remands and extensions until the appellants were released on conditional bail on 11th February 2009.

17. In the circumstances the Judge was wrong to say the appellants had been unlawfully detained for a period of 30 days. The appeal could have been dismissed for that reason. There is no cross appeal by the respondents. If there had been, it is likely to have succeeded. The appellants have been fortunate. To put it another way, there is no change to the Supreme Court judgment despite it now being apparent there was in fact a remand appearance on 14th July 2008.

18. We would also say the Judge was right if there had been a period of unlawful detention. The award of VT500,000 was, in all the circumstances as found by the Judge, a reasonable award. Awards in this area are modest and there was not the aggravating factors of a cynically unlawful act. Nothing submitted by counsel for the appellants has persuaded us the Judge was wrong about the quantum.

19. The appeal is therefore dismissed.

20. The appellants shall pay the respondents' costs assessed at VT50,000.

**DATED at Port Vila this 27th day of April, 2018.**

**BY THE COURT**

REPUBLIC OF VANUATU COURT OF APPEAL

**Hon. Vincent LUNABEK**
**Chief Justice**