

BETWEEN: ROSEN LAUTO
Appellant

AND: MARK TOM
Respondent

Date of Hearing: 7 August 2024

Before: *Hon. Chief Justice V. Lunabek*
Hon. Justice J. Mansfield
Hon. Justice R. Young
Hon. Justice D. Aru
Hon. Justice V. M. Trief
Hon. Justice E. P. Goldsbrough

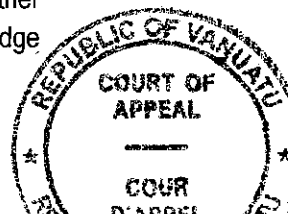
Counsel: *B. Bani for the Appellant*
R. Rongo for the Respondent

Date of Decision: 16 August 2024

JUDGMENT OF THE COURT

A. Introduction

1. On 23 October 2020, the respondent Mark Tom sustained an injury to his right eye when the appellant Rosen Lauto threw a rock at him. Mr Lauto was subsequently convicted of intentional assault causing permanent injury and sentenced to supervision and community work.
2. Mr Tom sued Mr Lauto for VT15,000,000 damages for the personal injury, VT2,000,000 for emotional distress, VT4,000,000 for economic loss, VT2,000,000 general damages, VT1,000,000 punitive damages, interest and costs. By a Supreme Court judgment dated 5 April 2024, he was awarded VT8,000,000 general damages and costs: *Tom v Lauto* [2024] VUSC 45.
3. In the judgment, the primary Judge found that Mr Lauto had thrown a stone at Mr Tom and caused permanent injury to his right eye. He took into account that Mr Lauto had pleaded guilty to the charge of intentional assault causing permanent injury and held that Mr Lauto 'could not challenge the medical report in the civil case or object to its admission without any cross-examination' (at [15]). The Judge then considered whether the assault was provoked by Mr Tom, and found that it had not been. Finally, the Judge



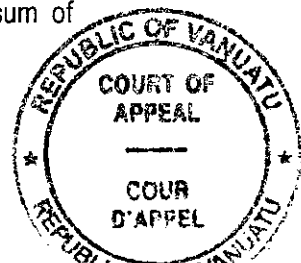
held that Mr Tom had not proved any economic loss and awarded VT8,000,000 general damages and costs.

B. The Appeal and Submissions

4. The appeal was advanced on the grounds that the primary Judge erred in not considering the defence case, that Mr Tom had not proven his case to the required standard and that the Judge erred in awarding damages on the basis of insufficient evidence.
5. At the hearing of the appeal, appellant's counsel Mr Bani submitted that the Judge had erred in not considering the issue of contributory negligence pleaded in Mr Lauto's Defence. He alleged that he threw the stone *after* Mr Tom's friend hit him and he had fallen to the ground, then he threw the stone to protect his (Mr Lauto's) brother Campbell who Mr Tom was holding tight in his arms. Mr Bani submitted that in the circumstances, the damages award could not stand. He accepted that the defence of *volenti non fit injuria* pleaded in the Defence did not mean that Mr Tom could not recover any damages but that that went to the question of contributory negligence. Mr Bani submitted that the appeal should be allowed and remitted to the Supreme Court for rehearing.
6. Respondent's counsel Mr Rongo supported the Judgment made by the Supreme Court. He submitted that the bus driver Obed Timothy's evidence at trial contradicted Mr Lauto's evidence as to who had first shouted and was aggressive at the other. However, he conceded that this was a disputed question of fact and that the primary Judge had not resolved any disputed questions of fact in the Judgment dated 5 April 2024. Mr Rongo also conceded that the primary Judge had not set out anywhere in the Judgment that he did not accept the three defence witnesses' evidence.

C. Consideration

7. It was a concession properly made by Mr Rongo that the primary Judge did not resolve disputed questions of fact in the Judgment dated 5 April 2024. The Judge also did not consider the issue of contributory negligence which had been pleaded in Mr Lauto's Defence. The Judge said the issue was whether the throwing of the stone was provoked by Mr Tom. That was not a question which arose on the pleadings and in the result, led to him failing to consider the contributory negligence issue.
8. The primary Judge seems to have focused on how the confrontation started by briefly referring to certain evidence, but needed to consider the competing evidence, including that of the three witnesses called for Mr Lauto and to make findings and give reasons why they were made. The consideration of that material will then lead to the Judge addressing the claim of contributory negligence on the part of Mr Tom.
9. In addition, in our view, the primary Judge also did not refer to any evidence or give reasons in the Judgment for his assessment of general damages in the sum of VT8,000,000.



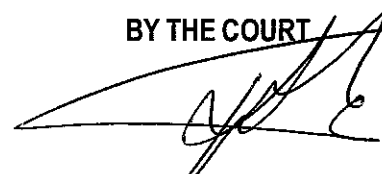
10. In the circumstances, the appeal must be allowed and the matter remitted to the Supreme Court for rehearing before a different Judge.
11. We wish to comment on two additional matters.
12. First, at the rehearing, Mr Tom will need to properly adduce medical evidence. At trial, he relied on the doctor's report attached to his own sworn statement. His sworn statement was not objected to, but the evidence of the medical doctor concerned should not have been attached to another witness' (Mr Tom's) sworn statement. If properly adduced through a sworn statement by the doctor, then notice to cross-examine the doctor can be given and the doctor cross-examined in respect of his evidence. At the rehearing, Mr Lauto may also wish to call independent medical evidence.
13. Secondly, there must be independent evidence as to the economic loss alleged to have been suffered. At the rehearing, Mr Tom may have the opportunity to produce further evidence to support his claim for damages for loss of earning capacity. He said that he could no longer work in the Police Force. If that is pursued, he will need evidence from a relevant officer of the Police Force. The medical reports filed also did not deal expressly with this topic. On the other hand, Mr Lauto may have evidence of other actual or potential earnings of Mr Tom.

D. Result

14. For the reasons given, the appeal is allowed.
15. The Judgment dated 5 April 2024 in Civil Case No. 22/1498 is set aside and the matter is remitted to the Supreme Court for rehearing before a different Judge.
16. The costs of the appeal are fixed at VT50,000, which costs shall follow the event of the rehearing and any appeal therefrom.

DATED at Port Vila, this 16th day of August, 2024

BY THE COURT


Hon. Chief Justice Vincent Lunabek

