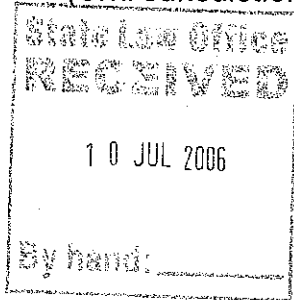


**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**

(Civil Jurisdiction)

CIVIL CASE No.06 of 2005



In the matter of:

the Constitution of the Republic of Vanuatu

AND

In the matter of:

The Criminal Procedure Code Act [CAP.136]

AND

In the matter of:

the Police Act [CAP.105]

BETWEEN: BONGMELEUM MAKENOCK
Applicant

AND: REPUBLIC OF VANUATU
Respondent

Coram: Chief Justice Vincent Lunabek

Counsel: Mr George Boar for the Applicant - present
Mr Sampson Endehipa, Attorney General and Ms Florence Williams for the Respondent

JUDGMENT

• **INTRODUCTION:** Nature of claim and relief sought

This is a constitutional application of the Applicant date 18 May 2005 against the Respondent. The Applicant is Mr Bongmeleum Makenock of Ranvetlam of North Ambrym, Vanuatu. The Respondent is the State Republic of Vanuatu.

The Applicant applies to the Supreme Court, among other matters, for:



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1. The enforcement of the breach of his fundamental rights prescribed by Article 5(1), (b), (d), (i), (k) and Article 5(2)(a) of the Constitution pursuant to the provisions of Articles 6(1), (2) and 53(1), (2) of the Constitution; and
2. The costs of and incidental to the application.

• **THE CASE FOR THE APPLICANT/CLAIMANT**

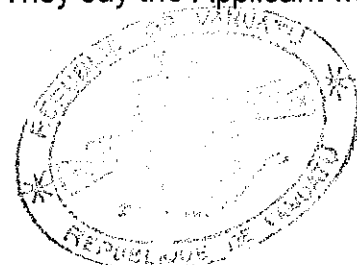
The Claimant's case is that the Respondent Republic of Vanuatu through the actions of Police officers at Lakatoro, Malekula, breaches his fundamental rights as enshrined under Article 5(1)(b), (d), (i), (k) and Article 5(2)(a) of the Constitution.

This happened when the Police at Lakatoro arrested him on the Northern part of the Island of Ambrym on 17 January 2004 and flew him to Lakatoro, Malekula on the same day. He was kept by the Police at Lakatoro for 5 days before a remand Warrant was issued by the Magistrate's Court in Luganville, Santo. The Magistrate's Court in Luganville issued an Order for the remand of the Claimant at the custody of Police at Lakatoro on 22 January 2004. At about 4 May 2004, Police arranged for the payment of the air ticket of the Claimant/Applicant to travel from Norsup to Ambrym via Santo.

The Applicant says when he was under the control of the Police, he was not allowed to talk to his family by phone.

• **THE CASE FOR THE RESPONDENT**

The Respondent's case is that Police officers at Lakatoro station arrested the Applicant on 17 January 2004. They say they have the power to arrest the Applicant without a warrant under Section 12 of the Criminal Procedure Code Act [CAP.136]. They arrested the Applicant on Saturday 17 January 2004 and upon arrival on Malekula, the Applicant was kept at the Police Single Barracks at Lakatoro Police Station to await the Santo Magistrate's Court to issue a Remand Warrant. The Respond says that on 22 January 2004 the Magistrate's Court in Luganville, Santo issued a Remand Warrant for the periods starting from 22 January 2004 to 29 February 2004. They say the Applicant was



locked up for only 2 days during the Remand period for interrogation and investigation into the alleged offence. Then, the Applicant was transferred to the Police Single Barracks to serve the remaining days specified in the Remand. They say the Applicant was well fed and looked after during the periods of Remand Warrant. They say their responsibility ceased after the end of the Remand period and the Applicant was released from Police custody at the end of the Remand Warrant period. Following his release, the Applicant continued to reside for sometime (before returning to his home island) with his uncle Mr David Bong who is also a police at Lakatoro Police station. This arrangement was beyond the knowledge of the Police at Lakatoro.

They also say the police officers never stopped the Applicant from communicating with his wife and children. They say his son and daughter who reside in Santo communicate with their father through telephone.

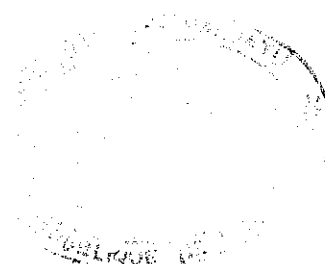
They say after police investigation, the Prosecution advises them that the evidence was lacking and the case was referred back to the local chiefs.

They admit that the Applicant was not brought before a Court but they deny the action of the Police officers ever breached the Applicant's fundamental constitutional rights as alleged by the Applicant. The policemen have acted in good faith to get the Applicant to Lakatoro Police station following reports from the Applicant's chief to the Police head office in Port-Vila that the Applicant has caused death of persons in Ambrym through the practice of black magic.

- **THE EVIDENCE**

Both parties provide evidence in this case. The evidence is made up of the sworn statements of the respective deponents and cross-examination of those respective deponents in the witness box.

The Applicant gave evidence to the following effect:



He is from Ranvetlam Village of North Ambrym, Vanuatu. On 17 January 2004, the Police Officers of Lakatoro Police station, came in the village and arrested him and a Bongmeleum Demise on the allegations that they killed some men of the village through the practice of black magic. On the same day, he was flown to Lakatoro Police station on Malekula. There was not enough seat available so the Police took the Claimant and left Mr Bongmeleum Demise on Ambrym. On arrival at Lakatoro, the Police officers put the Applicant into the prisoners' house from 17 January 2004 to 28 January 2004. When he was sleeping at the house of prisoners, he thought he will be brought before a Court but he was surprised that from 29 January 2004 until 2 February 2004, Police locked him up into the prison house for a period of 5 days. He said he was kept into the prison house from 30 January 2004 to 1 February 2004 and he was not given food and water.

The Police released him on 2 February 2004 and put him back to the prisoners' house waiting for police to charge him or brought him before the Court but he said nothing happened.

He stayed at the prisoners' house from 2 February 2004 until about 4 May 2004 when he returned to Ambrym via Santo. He said he was never brought to Court for any wrong. He did not see a Warrant of Arrest. He never answered to any charge. He did not know why police kept him too long. While he was kept under the control and supervision of the Police, he was not allowed to talk to his wife and children and relatives through telephone. He denied he had never agreed with David Bong to stay with him for 4 months after the expiry of the Remand Warrant. He finally said police never told him that he was released by them.

He was cross-examined. He said he slept into the prisoners' house from 17 January 2004 to 4 May 2004. He confirmed he was locked up into No.6 for 4 days and he slept into the room that the prisoners used to sleep in.

He admitted that at one time he was called to the police station to talk to his daughter but when he arrived at the Police station, the telephone was off. He did not make any attempt to call his wife, children and relatives. He said the Police did not stop him from



talking to his family by telephone. He said the police did not give him food only for 2 days. During his stay he went to see David Bond and they talked about families. He says during the 4 months, he was walking around with David Bong but he slept at the prisoners' house. He was not forced to do anything. He was not threatened.

Mr Bongmeleum Demise is the second witness of the Applicant. His evidence is that he tried to talk to David Bong but he could not talk to him. He did not explain the details or the reasons as to why he could not speak to him by phone.

Ms Meriam Bongmeleum is the next witness. She gave evidence that she telephoned to her father but the police told her that he was not there. He was in the truck with the police.

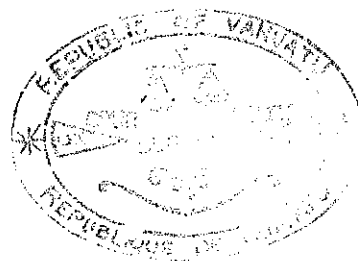
She was cross-examined. She admitted that one time she telephoned her father. She left her mobile phone number with the police. The police returned her call but she turned off her mobile phone.

Mr Worwor Bongmeleum is the last witness of the Applicant. He is the son of the Applicant. He said he tried to talk to his father four (4) times. But the police station is far away from the place his father was.

The Respondent provided evidence through the sworn statements of Sergeant David Bong dated 31 August 2005 and that of Corporal Jean Roger dated 21st March 2006.

Sergeant David Bong gave evidence and his sworn statements were read into Court as evidence in chief.

He attached with his statement a copy of the Remand Warrant of 22 January 2004 and a copy of the report he wrote to Chief Harry Maki of Ranvetlam Village on 11 May 2005 about this case.



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He was cross-examined. He confirmed he is responsible for the CID police station at Lakatoro and he led the team to Ranvetlam, North Ambrym on 17 January 2004. He denied that the police single barracks is the house of prisoners. It is the house of single police. He admitted that if police arrested a man, they can keep him there.

He confirmed that from 17, 18, 19, 20 and 21 January 2004, there was no remand warrant. The remand Warrant was issued on 22 January 2004 to 29 February 2004. He said when the Applicant was locked up for 2 days he was in Santo.

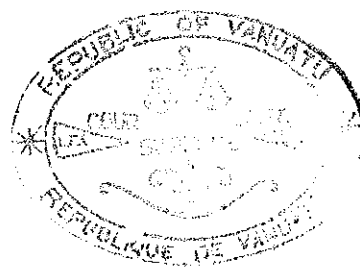
He confirmed that Police left a message in the mobile phone of the daughter of the Applicant (Ms Bongmeleum). Sometimes he saw the Applicant talking to his family. He said on 29 February 2004, he told the Applicant in his office that he was released. He said they made an agreement for the Applicant to stay further with him. The Applicant agreed to stay with him. Police paid for his PTA ticket No. and he made an arrangement with him to stay. He said, the arrangement was made outside the police arrangements. He also said that the son of the Applicant in March 2004 came at one time and talk to him that the family of the victim wanted to kill the Applicant's junior brother. He took statement of another suspect while he was on Ambrym on 17 January 2004. He confirmed that police made arrangement to pay the air ticket of the Applicant to go back to Ambrym.

Jean Roger is the second and the last witness of the Respondent. His evidence was contained in his sworn statement which was read in as evidence in chief..

He was cross-examined. He confirmed the evidence of the Sergeant David Bong.

- **FINDING OF FACTS BY THE COURT**

I have heard evidence of each and all the witnesses and I observe their demeanour in the witness box, I make the following findings:



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On 17 January 2004, the Applicant was arrested by the Police officers of Lakatoro Police station, Malekula, at Ranvetlam in the Northern part of the Island of Ambrym. He was taken by the police to Lakatoro. Upon the arrival there, he was put in the Police Single Barracks. The Police Single Barracks is not a prison house. The evidence is that at Lakatoro there is no prison house and when a man is arrested, he was kept at the Single Barracks of the Police at Lakatoro.

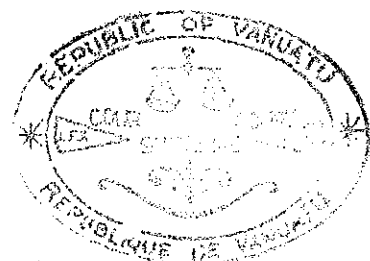
I find that from 17 January 2004 to 21 January 2004, there was no Warrant or Order issued by a Court to remand the Applicant under the custody of the Police at Lakatoro.

A Remand Warrant was issued by the Magistrates' Court of Luganville, Santo, on 22 January 2004 to remand the Applicant under the custody of the Police until 29 February 2004.

I reject that part of the evidence of the Applicant that the Police did not allow the Applicant to communicate with his wife, children and relatives by phone. The evidence which is accepted is to the contrary and in any event, the Applicant did not take any initiative to communicate with his wife or children. So I accept the evidence of the Respondent that they did not prohibit the Applicant to communicate with his family.

The evidence of Ms Bongmeleum confirmed that at a time she telephoned to her father via the Police station and she was informed, her father went into the truck with the Police. So she left her mobile phone number for the Police to return he call. She admitted the police returned her call but she turned off her mobile. She found out after.

I find that the Applicant was not released by the Police. I reject the evidence of Sergeant David Bong to this effect. At the end of the Remand period, the Applicant was not released by the Police officer. I find and accept that the Applicant was still under their control and supervision. This was evidenced in the report letter of Sergeant David Bong of 11 May 2004 to Chief of Ranvetlam of North Ambrym which contradicted his evidence on this point. In his report to Chief Harry Maki of Ranvetlam dated 11 Mau 2005, Sergeant Bong stated:-



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"After we Bongmeleum i bin realease, mi bin hollem taet hem stap wetem tingting se mifala I mas hearem result blong case. Long manis May / Thursday 6th 2004 Prosecution I bin lukluk long case ia mo mekem decision long hem..."

I do not accept that Bongmeleum was released by the Police. Although there was an intention to that effect as shown in the report of Sergeant David Bong the evidence is that he was kept with the Police at Lakatoro to wait for the result of the case. The prosecution office of Luganville, Santo, advised that there was not enough evidence to secure the conviction of the Applicant as charged. That advice was given on 11 May 2004. After that advice the Police purchased the Applicant's air ticket and he flew on the same month of May back to Ambrym via Santo.

It is the finding of the Court that the Applicant was under the authority, control and supervision of the police at Lakatoro police station after 29 February 2004 until his departure in May 2004. This is also confirmed by the fact that the police paid for his air ticket to return to Ambrym via Santo in May 2004. The Respondent's evidence to the contrary is rejected. Finally I accept the evidence of the Applicant that if he had the knowledge of his release by the Police, he would have gone by ship as his son Worwor Bongmeleum works on board a ship which visited Lakatoro on regular basis.

- **THE LAW**

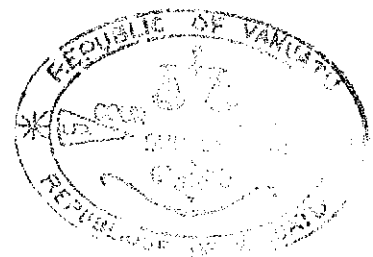
The followings are the relevant provisions of the Constitution and Acts of Parliament:

(1) **Constitution**

**"CHAPETER 2
FUNDAMENTAL RIGHTS AND DUTIES
PART 1 – Fundamental Rights**

FUNDAMENTAL RIGHTS AND FREEDOM OF THE INDIVIDUAL

5.(1) *The Republic of Vanuatu recognizes, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights*

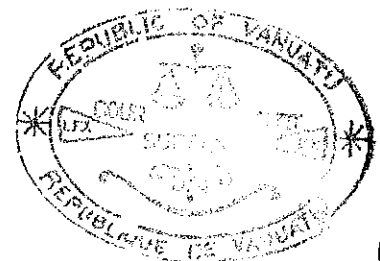


and freedoms of individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health-

- (a) life;*
- (b) liberty;*
- (c) security of the person;*
- (d) protection of the law;*
- (e) freedom from inhuman treatment and forced labour;*
- (f) freedom of conscience and worship;*
- (g) freedom of expression;*
- (h) freedom of assembly and association;*
- (i) freedom of movement;*
- (j) protection for the privacy of the home and other property and from unjust deprivation of property;*
- (k) equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes for the special benefit, welfare, protection and advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.*

(2) Protection of the law shall include the following-

- (a) everyone charged with an offence shall have a fair hearing, within a reasonable time, by an independent and impartial court and be afforded a lawyer if it is a serious offence;*
- (b) everyone is presumed innocent until a court establishes his guilt according to law;*
- (c) everyone charged shall be informed promptly in a language he understands of the offence with which he is being charged;*
- (d) if an accused does not understand the language to be used in the proceedings he shall be provided with an interpreter throughout the proceedings;*



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- (e) a person shall not be tried in his absence without his consent unless he makes it impossible for the court to proceed in his presence;
- (f) no-one shall be convicted in respect of an act or omission which did not constitute an offence known to written or custom law at the time it was committed;
- (g) no-one shall be punished with a greater penalty than that which exists at the time of the commission of the offence;
- (h) no person who has been pardoned, or tried and convicted or acquitted, shall be tried again for the same offence or any other offence of which he could have been convicted at his trial."

"ENFORCEMENT OF FUNDAMENTAL RIGHTS

- 6.(1) Anyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or likely to be infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right.
- (2) The Supreme Court may make such orders, issue such writs and give such directions, including the payment of compensation, as it considers appropriate to enforce the right."

"APPLICATION TO SUPREME COURT REGARDING INFRINGEMENTS OF CONSTITUTION

- 53.(1) Anyone who considers that a provision of the Constitution has been infringed in relation to him may, without prejudice to any other legal remedy available to him, apply to the Supreme Court for redress.
- (2) The Supreme Court has jurisdiction to determine the matter and to make such order as it considers appropriate to enforce the provisions of the Constitution."

- (2) Section 12(1), 18(1), (2) and 19 of the Criminal Procedure Code Act
[CAP.136]

"ARREST BY POLICE OFFICER WITHOUT WARRANT



12.(1) Any police officer may, without an order from a judicial officer, or warrant, arrest any person whom he suspects upon reasonable grounds of having committed a cognizable offence."

"DETENTION OF PERSON ARRESTED WITHOUT WARRANT

18.(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 other than intentional homicide or any offence against the external security of the Republic, 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 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.

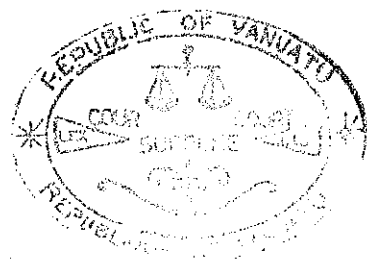
(2) The officer in charge of the police station may release a person arrested on suspicion of committing any offence, when after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with a prosecution for the offence."

"POLICE TO REPORT ARRESTS

19. Officers in charge of police stations shall make a report to the Commissioner of Police about all persons arrested without warrant within the limits of their respective stations, whether such persons have been released from custody or otherwise."

(3) **Section 40 of the Police Act [CAP.105]**

"NON-LIABILITY FOR ACT DONE IN GOOD FAITH



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40. *No suit or other legal proceedings for damages shall be instituted in any court of law against the Minister or the Commissioner or any other member of the Force or any other person for or on account of or in respect of any act, matter or thing done or purported to be done or omitted to be done, in good faith, in the performance or exercise of any duty or power imposed or conferred by or under this Act; and the provisions of this section shall extend to the protection from liability as aforesaid of any person deputed by delegation under this Act or under any other law for the time being in force to perform or exercise any such duty or power aforesaid."*

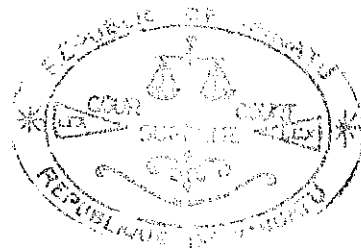
• **APPLICATION OF THE LAW**

On the basis of the facts as found by the Court, the Court makes the following findings of law:

The arrest of the Applicant on 17 January 2004 is lawful as it was made pursuant to section 12(1) of the Criminal Procedure Code. A Warrant of Remand has been issued by the Magistrates' Court in Luganville on 22 January 2004. The Warrant covered the period 22 January 2004 to 29 February 2004. There was no breach of the Applicant's constitutional right during that period.

It was also lawful for the Police to keep the Applicant from 17 to 18 January 2004 which was a 24-hour period after the arrest under Section 18(1) of the Criminal Procedure Code Act [CAP.136].

The Police kept the Applicant under their custody from 17 January 2004 (date of his arrest) to 21 January 2004 without a warrant. The period from 17 to 18 January 2004 is covered and protected by law under ss. 12(1) and 18(1) of the Criminal Procedure Code Act [CAP.136]. The Police has the power to keep the Applicant under their custody under the above said sections of the Criminal Procedure Code Act. The question to be asked is whether or not the custody of the Applicant from 19 to 21 January 2004 without a Court Warrant is lawful?



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At the time of the arrest of the Applicant, the Respondent's evidence is that there was no residing Magistrate at Lakatoro, Malekula. Despite this factual knowledge, the Lakatoro Police officers arrested the Applicant and brought him under their custody at Lakatoro Police station. They have the power to keep him for 24 hours from 17 to 18 January 2004. However, the Police have no power to keep the Applicant under their custody from 19 to 21 January 2004 without a Court Warrant.

By doing so, the Respondent breaches the Applicant's Constitutional rights of liberty, protection of the law, freedom of movement and equal treatment under the law guaranteed under Article 5(1)(b), (d), (i) and (k) respectively of the Constitution.

Finally as found by the Court, after the expiry of the Remand Warrant on 29 February 2004, the Applicant, Bongmeleum Makenock was still kept under the custody, control and direction of the Police officers at Lakatoro. Although, the Respondent provided evidence that the arrangement to keep the Applicant is outside the knowledge and control of the Police at Lakatoro, it is a fact that there is no evidence in support of the Respondent's contention.

Pursuant to section 19 of the Criminal Procedure Code Act [CAP.136],

"officers in charge of police stations shall make a report to the Commissioner of Police about all persons arrested without warrant within the limits of their respective stations, whether such persons have been released from custody or otherwise."

In the present case, there is no evidence from the Respondent about a report to the Commissioner of Police about the release of the Applicant, Bongmeleum Makenock as alleged by the Respondent through the evidence of Sergeant David Bong.

Accordingly, I am of the view that the keeping of the Applicant after the expiry of the Remand Warrant on 29 February 2004 until after 11 May 2004 constituted an unlawful act which was in breach of the constitutional rights of the Applicant under Article 5(1)(b) liberty, (d) protection of the law and (k) equal treatment.



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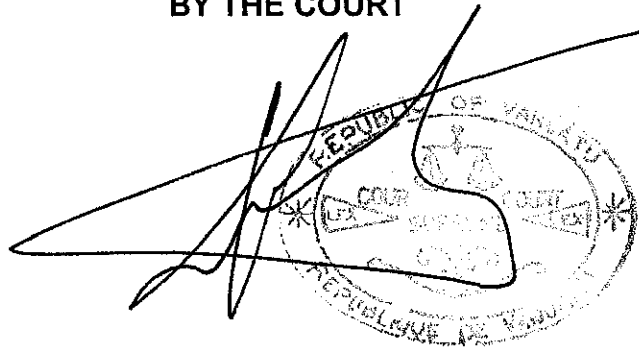
I have considered the Respondent's submission under Section 40 of the Police Act [CAP.105]. However, it is my considered opinion that section 40 of the Police Act has no application in the constitutional application for breaches of rights enshrined and guaranteed under the Constitution.

On the basis of the above findings and considerations the Court entered the judgment in favour of the Applicant Bongmeleum Makenock.

The assessment of damages is adjourned to 11 May 2006 at 11.00AM for submissions.

Dated at Port-Vila this 21st day of April 2006

BY THE COURT

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**Vincent LUNABEK
Chief Justice**