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

CIVIL APPEAL CASE No. 1322 OF 2017

BETWEEN: **DANIEL PETER**
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: *24 April 2018*

Date of Judgment: *27 April 2018*

JUDGMENT

1. This appeal is against the dismissal by the Supreme Court of claims for damages in respect of alleged trespass, battery, unlawful arrest, unlawful imprisonment and malicious prosecution involving the police, the public prosecutor and the appellant. The claim was filed in August 2014 and a trial took place in December 2016 and February 2017.The decision appealed is dated 26th April 2017. The notice of appeal was filed on 2nd June 2017 with the grounds being filed in October. The delay was attributable to the ill health of the appellant's counsel. An application for leave to file out of time was lodged to which counsel for the respondents took no objection and leave was granted.

2. The original claim was for damages in excess of five hundred and ninety million vatu. The events which gave rise to the claim took place in August 2011. The facts in brief were that in the early hours of the morning of 18th August 2011 a group of more than 20 men arrived at the appellant's house. He was taken by them

to the Chief's house. He was told by the men he and two others were suspected of using sorcery or black magic to murder a local Pastor. Whilst at the Chief's house he was questioned about the alleged murder and badly beaten by the men. In the morning he was taken by the police to Port Vila and there kept in custody initially for his own safety. He was then charged with intentional homicide and remanded in custody pending trial. Following a bail application in February 2012 he was released, subject to conditions, until the Public Prosecutor entered a *nolle prosqui* in April 2012. The charge against the appellant and others was dismissed and he was acquitted. The other men arrested and charged were not parties to the claim for damages.

3. The evidence as to the exact details of what happened was disputed. After considering all the evidence the Judge in the Court below made findings. The Judge rejected an allegation from the appellant that the police were present when the group of men collected him (and the two others) at about 2 am on the morning of 18th August.

> *"Judging from the evidence before this Court in this present case, I find that the Defendants did not trespass onto the Claimant's land. Moreover, I reject the Claimant's allegation that he, Lemis and Dickson were brought from their various houses by the police at 2:00 am on 18 August 2011 to Chief Kalpoilep's residence and handed over to a group of waiting men who started beating them. I equally reject the Claimant's evidence that a police truck with a cage was waiting to pick him up from his house. The Defendants have not in any way trespassed onto the Claimant's land and the Claimant's claim for trespass must fail."*

4. As to battery the Judge found;

> *"It is the Claimant's case that he was badly assaulted whilst in the company of the police. I totally reject this allegation because the evidence adduced by the Claimant is that he was assaulted at Chief Kalpoilep's residence by a group of Tannese men. At no time has the Claimant alleged that the police officers were present at the Chief's residence during the assault. There is also no proof before this Court of any use of force by the police officers against the Claimant at the time they took him to the police station."*

5. As to unlawful arrest and detention the Judge said:

> *"It seems inexorably clear to me that the Claimant was arrested on 18 August 2011 and he was formally charged with an offence of Intentional Homicide contrary to section 106 (b) of the Penal Code and taken before the Magistrates' Court on 19 August 2011. The Claimant was remanded into custody at the Correctional Centre on the same day which was precisely*

within 24 hours after he had been taken into custody pursuant to the provisions of section 18 (1) of the CPC. Thereafter, on 7 October 2011 after hearing the matter and considering that a prima facie case was disclosed, the Senior Magistrate issued a committal order committing the Claimant to the Supreme Court for trial upon information. On the balance of probabilities, I find that the Claimant was lawfully arrested and detained at the police station and that he has failed to prove the allegation of unlawful arrest and false imprisonment against the Defendants"

6. The Judge then dealt with the claim for malicious prosecution:

"In this present case, Mr Stephens submits that "the Prosecutor knew he was acting unlawfully and that his act would injure the claimant so when being questioned about the charge of Intentional Homicide he did enter a Nolle Prosequi at once." However, Mr Huri contends that even though the Public Prosecutor entered a Nolle Prosequi and the Court discharged the Claimant on 20 April 2011, there was reasonable and probable cause for the prosecution of the Claimant and the Defendants did not act maliciously in his prosecution. It is noteworthy that, despite Mr Stephens' submission, the Claimant has not adduced any or enough evidence to support the allegation that the charge against him was laid without reasonable and probable course. In any event, section 29 of the CPC clearly provides that in any criminal case and at any stage thereof before verdict or judgment, the Public Prosecutor may enter a nolle prosequi by informing the court that he intends that the proceedings shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which the nolle prosequi is entered.

I am satisfied that the prosecution that was launched against the Claimant was made with reasonable and probable cause as there was an identified complainant who had lodged a complaint to the police and an investigation was carried out accordingly. As the Court of Appeal said in ***Republic of Vanuatu v Patunvanu****, "self-evidently, a prosecution launched with reasonable and probable cause may nevertheless for a variety of reasons be later discontinued without this derogating from the original justification for the charge.""*

7. The Grounds of Appeal filed in October 2017 contained grounds 1(a) to (k) and when the appellant's submissions were lodged later the same month there were arguments put forward in respect of grounds numbered 1 to 9. These grounds coalesced into three main propositions.

8. The first was premised on the observation made by the Judge that she agreed there were glaring inconsistencies in the police evidence. The police evidence in defence of the claim came from two groups of police officers. One group consisted of officers who were on duty in the early morning of 18th August

2011. This group of officers was alerted to a problem at Eratap Village at about 2:30 am on 18th August following a visit to the Police Station by Chief Kalpoilep. Officers Marae, Meake, Daniel, Liwulsi, Kalo and Nimisa responded and travelled to Eratap village. As is set out in paragraph 13 of the judgment, when they arrived at the Chief's house they saw a large group of people. They made enquiries and ascertained the appellant and another person were in the house and that they had already sustained injuries. The officers were told not to take the appellant away with them and that their own safety would be threatened if they did. They left after warning the large group of people not to take the law into their own hands. The judgment (see paragraph 13(f) and (g)) details other steps the officers took after they left the village.

9. The second group of officers came on duty later in the morning at 7 am. A telephone call from Chief Kalpoilep requesting assistance was received at the police station at about 9:51 am. Following that call a second group consisting of Sergeant Nicholas and officers Bule, Tolang and Ati went to the village. Their evidence was that they went to the appellant's house at Teouma Bridge and found him there. He was injured *("we could see blood running and bruises all over his body")* and so they removed him and took him back to Port Vila Central Police Station *"to keep him safe".*

10. The Judge agreed that there were glaring inconsistencies in the evidence, namely how did the appellant, in his injured state, get from the Chief's house to his own home. The Judge was able to deal with the inconsistencies in this way at paragraph 18 of the judgment:

> *"I must say I am inclined to agree with counsel's submissions regarding the glaring inconsistencies in the evidence of the police officers as to how and where the Claimant was taken from. I accept the Claimant's evidence that Chief Kalpoilep had sent his son Willy and a group of more than 20 men from Tanna to go and fetch him from his house. I also accept PC Jimmy Nimisa's evidence that when he and his team of night shift officers arrived at Chief Kalpoilep's house at Eratap at 2:45 am they saw some group of people and from that group they found out that the Claimant and another person were at the Chief's house and that they had already sustained injuries on their bodies.*
>
> *In my view, it seems logical to conclude that the Claimant was removed from the Chief's residence following the Chief's phone call to the police as deposed to by the Claimant at paragraph 26 of his sworn statement dated 21 August 2014."*

11. The appellant submits the inconsistencies should have meant the whole of the police evidence was discredited and therefore the Judge was wrong to reach the conclusions she did. It is clear the judge did not regard all of the police

evidence as suspect or discredited and was able to logically resolve issues resulting from the inconsistencies she found. It is equally clear there were parts of the appellant's evidence she had problems with and in some instances preferred the police evidence over his (see paragraph 3 above). The appellant was unable to show any instance in the Judge's analysis of the evidence which could not support the findings she reached.

12. The second set of propositions centred on the allegation of sorcery or witchcraft. It was submitted that the police officers should not and could not have arrested the appellant for sorcery without a warrant. There were allied submissions which referred to the Case of *Malsoklei* [1]. The general tenor of the submissions was this was a case of witchcraft and this Court in *Molsaklei* had directed that there should be no more prosecutions involving witchcraft.

13. Dealing first with the submissions on arrest and detention, it is correct that an offence under section 151 of the Penal Code, practising witchcraft or sorcery with intent to cause harm or detriment to another, is punishable by a maximum sentence of 2 years imprisonment. It is not a cognisable offence under section 1 of the Criminal Procedure Code. However, it is clear the police received a complaint about the death of another person and the appellant was charged with intentional homicide on the basis of that complaint. The charge was under section 106(1)(b) of the Penal Code, premeditated homicide. As such there can be no doubt the charge related to a cognisable offence and the police were entitled to arrest without warrant. What is more, once charged, as the maximum penalty for the offence is life imprisonment, the appellant would have been subject to the restriction on bail to be found in section 60 of the Criminal Procedure Code. Bail could only have been granted by the Supreme Court.

14. As to the reference to *Malsoklei*, the submissions completely misrepresent what that case was about. This Court did not direct that there should be no further prosecutions for sorcery or witchcraft. The case is guidance for how such cases should be dealt with in the future given the nature of the offence. The excerpt from the judgment cited by the appellant in submissions needs to be put into context.

> *"The trial Judge correctly set out the requirements about the onus of proof and the standard of proof, but regrettably we are not able to conclude that those important precepts were applied in this case.*
>
> *It appears that the reasoning in the case started from the proposition that there had been magical behaviour and activity which amounted to black magic. Therefore anything which was otherwise contrary to normal human experienced and inconsistent with the physical realities of life as lived and*

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[1] *Malsoklei v Public Prosecutor* [2002] VUCA 28; CA 02-01 (24 October 2002)

experienced was to be swept under the carpet on the basis that black magic explained such factors that seemed to be inexplicable."

15. Much of what was discussed in *Malsoklei* concerned credibility and the conclusion reached was:

> *"It therefore appears to us that the proper approach for the Court is to say that the only evidence came from someone who clearly was an accomplice and whose credibility was so suspect that it could not be relied on by the Court. It did not even get to the point of having to consider the approach in the case of R v Kilbourne (1973) AC/729. In the case the House of Lords indicated that where there is credible and reliable evidence from an accomplice, providing the trier of fact is vigilant to the dangers of relying on the uncorroborated evidence of such a person, he may nevertheless do so. There was here no corroboration but, much more importantly, the evidence of the accomplice was simply not credible in any way which could make it worthy of consideration.*

16. The third set of submissions related to the reasonableness of the actions of the police and the prosecutor. To some extent they were tied in with the submissions on witchcraft. The appellant argues there was no forensic evidence to support the charge of murder by any means let alone murder by witchcraft. That being so it was unreasonable for the police to charge the appellant as they did and it was equally unreasonable for the prosecutor to maintain the prosecution. These submissions are misguided. They ignore the differences between and nature of criminal investigations and criminal prosecutions. They are basically the same submissions as were put to the Judge in the Court below and they were comprehensively dealt with by the Judge as is set out in paragraph 6 above. The appellant has been unable to point us to any error in the Judge's reasoning.

17. The appeal is dismissed.

18. The appellant will pay the respondent's costs of the appeal which we assess at VT 50,000.

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

BY THE COURT

Hon. Vincent LUNABEK
Chief Justice

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL