

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 0138 of 2017
(High Court No. HBC 12 of 2015)

BETWEEN : **THE COMMISSIONER OF POLICE**
THE ATTORNEY-GENERAL OF FIJI

Appellants

AND : **ARVIN CHAND**

Respondent

Coram : **Lecamwasam, JA**
Almeida Guneratne, JA
Jameel, JA

Counsel : **Ms O Solimailagi, Ms S Chand and Ms M Ali for the**
Appellants
Mr A Nand for the Respondent

Date of Hearing : **21 February, 2019**

Date of Judgment : **8 March, 2019**

JUDGMENT

Lecamwasam, JA

[1] I am in total agreement with the reasons and conclusions of Almeida Guneratne, JA.

Almeida Guneratne, JA

The Appeal

[2] This is an appeal against the judgment of the High Court of Fiji at Suva dated 5 October, 2017. By that judgment the High Court held that, the Respondent had been arrested, subsequently assaulted while in custody that had resulted in injuries to the Respondent. The Court ordered \$45,000 as general damages but declined to award any special damages. Against the non-award for special damages the Respondent has appealed and has moved that the judgment be varied. (The judgment of the High Court is contained in pages 8-15 of the Copy Record).

Grounds of Appeal urged by the Appellants and Notice of Grounds upon which the Respondent seeks a variation

[3] The grounds of appeal are contained at pages 2 – 3 of Vol. I of the Copy Record and the Notice of grounds upon which the Respondent seeks a variation of the judgment is at pages 5 - 6 thereof.

[4] I shall now proceed to consider the relative merits of the appeal taking first the grounds of appeal cumulatively for they are intrinsically inter-connected and secondly the grounds urged for a variation of the final judgment and award by the Respondent.

Evidence on the initial Arrest, resistance or otherwise to such arrest and the subsequent alleged assaults and the injuries sustained by the Respondent (Plaintiff) by reference to the various stages of the assault in relation thereto

[5] I shall break up my analysis of the evidence on the aforesaid issues as follows;

The Initial Arrest and the Assaults

[6] Three Police Officers had come to the Respondent's abode on the day in question and upon being questioned in regard to a complaint made by his wife that he had snatched a chain off her neck, he had admitted to the same. Immediately, the Respondent had been assaulted. One officer had booted him in the stomach. Seven or eight kicks it had been. Then the Respondent's brother (Parvin Chand) had intervened and pushed the police officers and he himself had ended up being assaulted. Then the police officers had taken the Respondent and put him into the police vehicle. On the way to the Police Station, at Muanikoso, the Respondent had been put on the road and assaulted again with hands. At the Police Station he had been put on the ground and assaulted once again. One officer had used his boot and kicked the Respondent on the stomach. He had found it difficult to breathe. (Page 528 – 533 of the Copy Record). They had kicked him on the chest as well (p.540).

[7] This evidence shows that there was no real contest in so far as the initial arrest was concerned. It had been pursuant to a reasonable cause, that is, pursuant to a Section 324 charge (Penal Code Act). There was no issue in regard to resistance to arrest as well save for when the brother had sought to intervene to stem the assaults. Although the police denied the assaults, learned counsel for the Appellant put in issue the assaults alleged to have been made on the road at Muanikoso. Counsel asked "Was it probable that just after office hours when the roads were crowded that the Police would have indulged in such conduct?"

The injuries sustained

[8] Nevertheless, in the totality of the evidence that was led the focus was on the injuries sustained by the Respondent in the light of the alleged assaults as recounted above.

The conclusion drawn by the learned Judge

[9] The learned Judge held thus:

“[19] The evidence of the witnesses does not explain at all how the plaintiff sustained injuries while he was in their custody. Witness Gounder said that he and the plaintiff fell on the ground on their way to the vehicle from the plaintiff’s house because the road was slippery. There is no evidence that the plaintiff sustained rib fractures because of the fall.

[20] Therefore, from the evidence adduced by both parties the only reasonable conclusion the Court can arrive at is that the plaintiff has been assaulted by the officers who arrested him and he sustained injuries as a result of the assault.”

[10] Learned Counsel for the Appellants however submitted, as he had done before the High Court, that, the determination of the assault should be limited to the alleged assault at the plaintiff’s residence because the plaintiff has not pleaded in his statement of claim that he was assaulted in three different places.

[11] Counsel relied on the cases of **Ah Koy v Native Land Trust Board** [2005] FJHC 49 and **Blay v Pollard and Morris** [1931] KB referred to therein.

[12] However, the record of proceedings in the present case shows that, all three incidents of the alleged assaults had taken place on 24 February, 2009 without any reference to a particular place. Accordingly, I agree with the learned Judge when he rejected the Counsel's argument which I endorse in this appeal as well. I dare say that, the evidence of witnesses contained at pages 848, 861, 873, 891 and 893 do not, in my view, retract from that assessment. I remain on the same wavelength in regard to the Exhibits the Appellant's Counsel relied on for the said submission.

[13] Consequently, I hold that:-

- (a) Although the initial arrest was lawful, any resistance from the Respondent and his brother had not been to the arrest but to the continuous assault.
- (b) Even if one were to accept the Appellant's contention that, the assault on the road at Muanikoso was made-up and/or an exaggeration, that still left the assault perpetrated at the Respondent's residence and the presumed assault at the police station which brings me to consider the nature of the injuries sustained by the Respondent and the damages claimed.

The Injuries and the Damages claimed

[14] The injuries stood classified into two categories viz: (i) The injuries in general and two rib fractures; (ii) The 'hernia' the Respondent end up with.

Re : (i)

[15] The learned Judge having perused the medical reports recounted the injuries suffered by the Respondent as follows:

- “(i) *Tenderness on the right shoulder arm and left hand restricted range of movement of right shoulder;*
- (ii) *Tenderness on interior chest (right side);*
- (iii) *Tenderness on the back (upper and lower);*
- (iv) *Abrasion on the back;*
- (v) *Rib fractures (6th and 7th ribs). ”*

[16] Consequently, the learned Judge concluded thus:

“[26] At the trial three doctors testified. They spoke about these injuries caused to the plaintiff but there is no evidence as to what extent these injuries could affect his day to day life or in other words whether these injuries are permanent in nature. The burden is on the plaintiff to prove that the injuries caused by the police officers have deprived him of his earning capacity as a technician.

[28] There is no evidence as to how long it took the injuries to heal. However, from the evidence it is (not difficult to) (sic) conclude that he had been in pain until the broken ribs were healed. Taking into (consideration) (sic) the nature of the injuries the Court decides to award \$45,000 as damages.”

Appellant’s contention in seeking to assail the learned Judge’s said findings and conclusion

[17] Learned Counsel for the Appellant was heard to submit that,

- (a) Given the medical report reflected at p.322 of Vol.II of the Copy Record and Exhibit D12, the Judge could have not gone beyond 26 February 2009 to what is reflected in the Maharaj Medical Centre Report from the Report of the Suva Medical Report in which context, counsel stressed on what is stated at paragraph [44] of the Appellant’s written submissions.
- (b) Counsel also relied on Dr. Chandra (the Radiologist’s evidence).
- (c) From (a) and (b) – upon her analysis, she submitted that, the learned Judge fell into error at paragraph [25] of his Judgment in as much as, (as contended on behalf of the Appellants) the learned Judge failed to give consideration to the ‘contradictory evidence’ led on behalf of the Respondent.

My assessment of the said submissions in the light of applicable principles as to the reception of Expert Evidence, a trial judge's approach to the same and the Appellate Court's function

[18] I myself felt obliged to look at all the medical reports (and evidence thereon) which the learned Judge had studied and made an analysis thereon in arriving at his conclusion. Medical (Expert) evidence is one thing. But, the final arbiter as to acceptance of the same is in the area of the trial Judge's discretion. The learned Judge, no doubt, has approached the matter conscious of those inveterate principles in the law. I could not see any error or misdirection and/or non-direction on the learned judge's part in the exercise of his assessment and discretion which might have compelled me to substitute the view of this Court, being an Appellate Court.

[19] Accordingly, I was unable to subscribe to learned Counsel's argument that, the sum of \$45,000 awarded as general damages was excessive.

Re : 'the Hernia'

[20] The learned Judge did not specifically refer to this aspect in his Judgment. However, I did not see in either the Grounds of Appeal or the submissions made before us where the Respondent has espoused that fact which could only have been in a quest to move for an enhancement of the \$45,000 awarded as General Damages. Therefore, I shall refrain from going into such areas as 'Remoteness of Damage', 'But for Causation' and '*Causa Causans*' and '*Causa Sine Qua Non*' – given the spacio – temporal, factors involved between 24 February 2009 and when the Respondent end-up with hernia.

Re : the Non-Award Claimed as Special Damages

[21] The learned Judge rejected this claim of \$700.00 holding that the Respondent 'failed to prove that he in fact incurred that amount.' (*vide*: Paragraph 27 of the High Court Judgment).

The legal principles in regard to the proof of Special Damages

[22] The two inveterate principles in that regard are well established and I need not crowd this judgment by referring to authorities for that purpose. They are:-

- (i) that, in a claim, such special damages must be pleaded with particulars and;
- (ii) evidence must be held to substantiate the particulars so pleaded.

[23] Although I did my best endeavours, I could not find a basis to satisfy myself on the aforesaid twin criteria. That left me with no option but to conclude that I could not see any error and/or misdirection and/or non-direction on the part of the learned Judge's judicial response to the matter and conclusion.

[24] Accordingly, I reject the Respondent's claim based on special damages without any further ado.

[25] In view of what I have said at paragraph [24] above, any consideration of the case of **AG v Valentine** referred to by the Appellant's Counsel is rendered a non-issue.

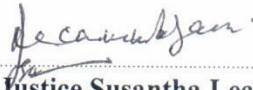
Jameel, JA

[26] I agree with the conclusions of Almeida Guneratne, JA.

Orders of Court

1. *The Appellant's appeal is dismissed and the judgment of the High Court is affirmed in toto.*
2. *The Respondent's claim on 'Special Damages' is rejected and/or dismissed.*

3. *On the principle that Costs follow the event, on a balance, the Appellants shall pay to the Respondent a sum of \$1,500 as Costs of this appeal which shall be in addition to the sum awarded as costs by the High Court against the Appellants in the High Court.*
4. *The said sums to be paid by the Appellants to the Respondent within 21 days of service of this Judgment.*



Hon. Justice Susantha Lecamwasam
JUSTICE OF APPEAL



Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL



Hon. Justice Farzana Jameel
JUSTICE OF APPEAL