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IN THE SUPREME COURT OF TONGA  
CIVIL JURISDICTION  
NUKU'ALOFA REGISTRY

CV 61 of 2021

BETWEEN:

**ALILELEI PARISMANA ESERA**

Plaintiff

-and-

**MINISTER OF POLICE**

Defendant

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## JUDGMENT

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BEFORE: LORD CHIEF JUSTICE WHITTEN QC  
Appearances: Mr V. Mo'ale for the Plaintiff  
Mr T. Maka for the Defendant  
Trial: 2, 3 May 2022  
Judgment: 3 May 2022

### The claim

1. In this proceeding the Plaintiff claims damages against the Defendant (sued in his position as vicariously liable for the conduct of the police officers involved pursuant to s. 4 of the *Crown Proceeding Act*) for false imprisonment and trespass to his person arising out of his detention and search on 31 July 2021 purportedly pursuant to s.13 of the *Illicit Drugs Control Act*.

### The evidence

2. The Plaintiff gave evidence and the Defendant called evidence from five police officers.

### *Plaintiff*

3. The Plaintiff gave the following evidence.
4. He is Samoan, married to a Tongan. He has been in Tonga for almost five years. He can speak some Tongan, but he is not fluent. He has a Master's degree in Environmental Science and Engineering. Since he has been in Tonga, the Plaintiff has been employed as a farmer and he has been growing kava at 'Eua since 2017, when he first moved to Tonga. Photographs of his plantation together

with a copy of his commercial export licence were tendered into evidence.<sup>1</sup>

5. On 31 July 2021, at about 4pm, the Plaintiff arrived on the MV Maui from 'Eua at the domestic wharf at Ma'ufanga. All passengers on the boat were advised by police from the Drugs Taskforce to remain on board. About half an hour later, police officers and two police vehicles arrived at the wharf. Two officers came on board, approached the Plaintiff, and told him that he was to go with them. He was shocked and embarrassed. He asked the officers to explain why but they did not provide any explanation. He was then directed to one of the police vehicles and told him to get in the backseat with his bag. Again, no explanation was given. By that time, the Plaintiff said that he was feeling very shocked knowing 'he did not deserve to be treated like a criminal'. There were also passengers and other people on the wharf watching what was going on. While in the police vehicle, the Plaintiff asked the driver to explain why he had been arrested. The driver asked the Plaintiff whether there was anything in his bag. The Plaintiff replied "What do you mean by anything?". The driver asked him the same question about three times and eventually asked whether there was any marijuana in the Plaintiff's bag. The Plaintiff said there was no marijuana in his bag and that he did not smoke it.
6. After a short while in the back of the police vehicle, a female police officer came and talked to the Plaintiff in Tongan. By that time, he could not concentrate and was still in shock at what was occurring. He then asked the female officer, in front of other surrounding officers, to search his bag because he wanted the onlooking passengers and members of the public to witness that he did not have any illicit drugs in his bag. The other reason was that his wife was waiting for him at the wharf to pick him up. His request to the police to search his bag was denied.
7. The Plaintiff was then taken to Central Police Station at Nuku'alofa where a search of his person and his bag was conducted. He was not cautioned, and the searches were conducted without his consent. The police did not find any illicit drugs on him or in his bag. PC Pohiva, who conducted the searches, also took the Plaintiff's mobile phone from him and he was asked to unlock them. The officer then scrolled through his phone. About half an hour later, they were

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<sup>1</sup> Exhibit P1.

returned to the Plaintiff.

8. After the search, the Plaintiff asked PC Pohiva the reason for his arrest. Pohiva did not respond. That prompted the Plaintiff to ask whether he “looked like a meth user”. PC Pohiva replied “yes” and that one day they (the police) “will catch him”. The Plaintiff asked the police officers more than once to return him to the domestic wharf because his wife was waiting for him there. However, he said that the officers laughed and told him to take a walk and to exercise.
9. According to the Plaintiff, this was the second time he had been arrested by police and treated, as he described it, disrespectfully and without any reasonable explanation given.
10. On 9 August 2021, the Plaintiff sent a letter to Acting Police Commissioner Lord Fielakepa detailing his complaint about what he regarded as being his unlawful arrest and detention and the unprofessional behaviour of the relevant officers from the Drugs Taskforce. In that letter,<sup>2</sup> after recounting the circumstances of his arrest, the Plaintiff wrote:

*“After being told to go with them to the police station I believed that I had no choice and that I had to comply with their orders. I was also in fear of being forced into the vehicle if I did not comply with their orders...”*

11. The witnesses for the Defendant gave evidence in the following chronological order.

***Lopini Faha’ivalu***

12. Lopini Faha’ivalu is 35 years of age. He has been a police officer for 15 years. He is currently a Senior Constable and has been stationed at ‘Eua for the past 13 years. His roles include investigations but mostly general policing.
13. On the day in question, Officer Faha’ivalu was at the wharf in ‘Eua dropping off his sister who was returning to Tongatapu on the MV Maui. The passengers were on board the ship and he noticed the Plaintiff standing with a man by the name of Latu Tau. Officer Faha’ivalu had seen the Plaintiff in ‘Eua before even he did not work in ‘Eua, nor did he have a house there to explain his presence. The Plaintiff did not stay long in ‘Eua each time but he appeared to be on the boat

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<sup>2</sup> Page 32 of the court book.

from Tongatapu to 'Eua almost every other day. Officer Faha'ivalu knew Latu Tau who lived in the bush in 'Eua. Latu had been found with arms without licence before and there had been "information about him in relation to illicit drugs". Officer Faha'ivalu then stated:

*"7. Furthermore, Latu always has new people coming from Tongatapu to 'Eua to him. These people come and do not stay for long and will come and go from 'Eua. The Plaintiff has come on numerous occasions and when he goes back to Tongatapu, he stands with Latu until the very last moment before the boat leaves and the Plaintiff will get on and then Latu will then leave.*

*8. There have been cases before here in 'Eua where illicit drugs were found being taken to Tongatapu where the suspects would use similar methods of travelling on the boat. They would wait for the very last moment before the boat leaves and then they would get on the boat. Police has successfully arrested people in the past few years where they found cannabis.*

*9. When I saw the Plaintiff at the wharf, I had reasonable grounds to believe that he was in possession of illicit drugs.*

*10. I met police Officer Tu'ivai at the wharf who was also going to Tongatapu so I told him to keep an eye on the Plaintiff as he maybe in possession of illicit drugs. I also told him to contact the drugs task force to follow the Plaintiff in case he is supplying drugs." [emphasis added]*

14. During his cross-examination, Officer Faha'ivalu gave the following further evidence. He had seen the Plaintiff once before with Latu Tau. He elaborated on the reasonable grounds he considered he had for believing that the Plaintiff was in possession of illicit drugs as being his observance of Latu coming to the wharf with the Plaintiff and the previous "incidents", as he called them, involving Latu Tau. He described Latu as a person involved with drugs and who 'hangs around' with people involved with drugs.
15. Officer Faha'ivalu did not know that the Plaintiff was in 'Eua for the growing of kava and had been since 2017. He was unable to recognise the Plaintiff in one of the photographs shown to him. However, he said he was suspicious of people who just came to 'Eua and left. He also considered that it was not reasonable to have asked the Plaintiff why he was in 'Eua.
16. During re-examination, Officer Faha'ivalu said that he did not detain the Plaintiff in 'Eua on that day because he did not have enough information to provide reasonable grounds for suspecting the Plaintiff was in possession of illicit drugs. That is the reason he told Tu'ivai to just 'keep an eye on' the Plaintiff and to

contact the Drugs Taskforce to follow him to see if he went places where there might have been drugs or people involved with them.

*Tokuta Tu'ivai*

17. Officer Tokuta Tu'ivai gave the following evidence. He has been a member of the Tonga Police since May 2019. He is currently serving with the Tactical Response Group. On 24 July 2021, he went to 'Eua to visit family. On 31 July 2021, he was at the wharf at 'Eua waiting to board the vessel back to Tongatapu. There, he met Officer Faha'ivalu who told Tu'ivai to keep an eye on the Plaintiff because he is possibly in possession of illicit drugs namely cannabis and to contact the Drugs Taskforce when they were close to Tongatapu and inform them that a passenger on the boat "is most likely in possession of illicit drugs".
18. When the vessel was approaching Tongatapu, Tu'ivai tried calling the Drugs Taskforce but no one answered. He then rang the Central Police Station and spoke to an officer by the name of Sakalia. He told Officer Sakalia to contact the Drugs Taskforce and inform them that one of the passengers on board the vessel was "suspected to be in possession of illicit drugs". When they reached Tongatapu, Tu'ivai called Officer Sakalia again and was told that she had contacted the Drugs Taskforce and that Detective 'Otuhouma was on her way to the wharf.
19. The passengers on the ship were told to remain on board until the police arrived. Tu'ivai saw approximately three police vehicles arrive. He named those officers as Heimuli, Hamala, Lufe, Vaiangina, Fifita and others. Tu'ivai then got off the boat and informed the officers that the Plaintiff was wearing a grey hat and black shorts. He then left the area to wait for his vehicle. He noticed Officer Emily 'Otuhouma arrive in her vehicle before he left. By that time, he saw that the police had apprehended the Plaintiff from the boat.
20. In his cross-examination, Officer Tu'ivai said that Faha'ivalu told him that "someone on board *was in possession* of illicit drugs". However, when he was asked whether the statement in his brief of evidence, as quoted above, was correct, Officer Tu'ivai apostatised his last answer and confirmed that his brief was correct. He explained that it had been prepared on the date it bore which was 29 March 2022. The events of 31 July 2021 had not been recorded by him

in any notebook or in any other written form. The contents of his brief of evidence were solely according to his recollection.

21. When he was asked about his written evidence that he was told by Faha'ivalu to keep an eye on the Plaintiff because he *may have been in possession* of illicit drugs, Officer Tu'ivai explained that he believed he could not detain the Plaintiff because he was 'not in full uniform'. And, he added, that he did not detain the Plaintiff because Faha'ivalu had only told him just to keep an eye on him.

*Sione Vaiangina*

22. The next witness was Sione Vaiangina, a police officer of four years' service currently working in the escort unit for His Majesty.
23. On the day in question, he was in a police vehicle with other officers, including Fifita, when they received a call on the radio from Officer Sakalia to assist officers from the Drugs Taskforce at the wharf. When they arrived, he saw Detective Otuhouma from the taskforce. He saw another police officer escort the Plaintiff from the boat to one of the police vehicles. He heard Otuhouma explain to the Plaintiff that he was being detained under s. 13 of the *Illicit Drugs Control Act*. He heard the Plaintiff asking Otuhouma if he could be searched somewhere away from the people, so the Plaintiff was taken to Central Police Station for that purpose.
24. Officer Vaiangina was not cross-examined.

*Emily 'Otuhouma*

25. Emily 'Otuhouma is 25 years of age, has been a police officer for the past seven and is currently a member of the Drugs Taskforce.
26. On the day in question, she received a call from Officer Tu'ifua at the police communications centre saying that they received communication from Officer Tu'ivai who was on board the MV Maui from 'Eua that there was a suspect on the boat "**who was in possession** of illicit drugs". She then called Officer Tu'ivai to confirm the information. He told her that Officer Faha'ivalu told him at the wharf in 'Eua "to keep an eye on the Plaintiff **who was in possession** of illicit drugs and is **probably supplying** it to Tongatapu". 'Otuhouma then asked Tu'ivai for a description of the Plaintiff while she tried to get to the wharf. Based on the "reliable

information” she received, Officer ‘Otuhouma drove her private vehicle to the Taufa’ahau domestic wharf.

27. When she reached the wharf, Officer ‘Otuhouma walked over to the Plaintiff and introduced herself as a police officer. She then informed him that he was being detained under s. 13 of the *Illicit Drugs Control Act* and that the police needed to search him in relation to illicit drugs. She described the Plaintiff as “not being happy” because there were a lot of people at the wharf. She then told him that they would go to Central Police Station and conduct the search there.
28. When they arrived at Central, the search was conducted in the complaint assistance office by Detective Pohiva while ‘Otuhouma recorded the work that had been done in the police action diary. Excerpts from the diary were not tendered in evidence during trial. She confirmed that Pohiva did not find any drugs on the Plaintiff or in his bag. Finally, in her brief of evidence, ‘Otuhouma confirmed that she “had reasonable cause to detain and search the Plaintiff based on reliable information received from another police officer in ‘Eua that the Plaintiff *was in possession* of illicit drugs”.
29. During her cross-examination, ‘Otuhouma gave evidence about the procedure normally followed when suspects are arrested. She denied being told by Tu’ivai that he had been told by Faha’ivalu just to keep an eye on the Plaintiff because he *may have been in possession* to illicit drugs. She confirmed that she was told by Tu’ivai that the Plaintiff *was in possession*. When she was asked whether she tried to confirm the original information with Officer Faha’ivalu, she said that she should have contacted him, but she ‘did not have his phone number’. She otherwise trusted her working relationship with Officer Tu’ivai who she had known in his work with the TRG and combined operations with the Drugs Taskforce.
30. ‘Otuhouma was then asked that if she had been told that the Plaintiff *was possibly* in possession, and that Officer Tu’ivai was just keeping an eye on him, whether she would have detained the Plaintiff. She said that she would have detained the Plaintiff because information from Tu’ivai had always previously been successful. However, when she was pressed to consider the difference between the Plaintiff possibly being in possession compared to him being in possession. as the information upon which she acted, Officer ‘Otuhouma explained that when the information is that a person is *possibly* in possession, the person is not to be

detained on that basis. Instead, the correct procedure required police to follow the suspect and conduct surveillance or seek out other information to confirm whether the person is or is most likely in possession before then detaining them or arresting them.

### ***Tevita Pohiva***

31. The final witness for the Defendant was former Detective Tevita Pohiva. He was a member of the Tonga Police for five years and a member of the Drugs Taskforce since 2018.
32. He could not recall the exact date other than it being in July 2021 when he received a call from Det. 'Otuhouma regarding a suspect on board the MV Maui from 'Eua who "was in possession of illicit drugs". He drove to the wharf and saw that the Plaintiff had already been detained by 'Otuhouma. The Plaintiff was taken to Central Police Station where Det. Pohiva conducted a search of the Plaintiff's person and his belongings. He said that before doing so, he informed the Plaintiff that he was conducting the search pursuant to s. 13 of the *Illicit Drugs Control Act*. He confirmed that no illicit drugs were found on the Plaintiff or in his bag.

### **Submissions**

#### ***Plaintiff***

33. Mr Mo'ale identified the central issue in the case as whether the police officer who detained the Plaintiff had reasonable cause to suspect that he was in possession of illicit drugs. He also identified the relevant principles in relation to the tort of false imprisonment as a form of trespass to the person by reference to the decision in *Edwards v Pohiva* [2003] Tonga LR 236 at [13] and following, referred to further below.
34. Mr Mo'ale submitted that there was 'insufficient foundation' for the police officer involved in the detention of the Plaintiff to have reasonable cause to suspect that the Plaintiff was in possession of illicit drugs for the following reasons:
  - (a) the 'primary' informant, Officer Faha'ivalu, informed the 'secondary' informant, Officer Tu'ivai, only to keep an eye on the Plaintiff as he may be in possession of illicit drugs;
  - (b) Faha'ivalu's mere suspicion that the Plaintiff may be in possession of drugs

was based on his 'subjective and untrue past experiences and unverified information' that the Plaintiff did not:

- (i) work in 'Eua;
  - (ii) have a house in 'Eua to explain his presence; and
  - (iii) stay in 'Eua very long each time he visited.
- (c) on the contrary, the Plaintiff was a commercial kava farmer in 'Eua since 2017 who was currently processing and exporting kava to Hawaii;
  - (d) as Tu'ivai had worked in 'Eua for 13 years, it was reasonable for him to simply go and ask the Plaintiff what he was doing in 'Eua;
  - (e) Faha'ivalu's suspicion about the Plaintiff being seen with Latu Tau was only based on the Plaintiff being at the wharf when Latu was there and Latu had had previously been possession of firearms without a licence and there had been 'information about him' in relation to drugs (but no arrests or convictions);
  - (f) in relation to evidence about Latu and the Plaintiff standing together until the very last moment before the Plaintiff got on to the vessel, Faha'ivalu said that he did not know on that day that Latu had come on the boat from Nuku'alofa;
  - (g) Tu'ivai did not detain the Plaintiff at 'Eua because he did not have enough evidence and had no reasonable cause;
  - (h) Faha'ivalu did not inform Tu'ivai to detain the Plaintiff but simply told him to keep an eye on him and to follow up as the Plaintiff *may have been in possession* of illicit drugs;
  - (i) Tu'ivai admitted that Faha'ivalu told him to keep an eye on the Plaintiff as he may have been in possession;
  - (j) when she called him for confirmation of the information, Tu'ivai told the "arresting officer" 'Otuhouma that Faha'ivalu told him at the wharf to keep an eye on the Plaintiff who "was in possession of illicit drugs and was probably supplying them to Tongatapu";
  - (k) 'Otuhouma should not have detained the Plaintiff without confirming the

information with Faha'ivalu;

- (l) 'Otuhouma was given the information about 15 minutes before the boat arrived so that it could therefore be inferred that she did not have enough time to gather further information and to make a "reasonable decision";
- (m) it was unreasonable to detain the Plaintiff as there was no evidence of any investigation of illicit drugs being conducted in 'Eua at the time and no crime under the *Illicit Drugs Control Act* by which s 13(1) could provide a 'link to the detention'; and
- (n) therefore, as Officer 'Otuhouma did not have reasonable grounds to suspect that the Plaintiff had committed a crime under the Act to justify her detaining him, and Officer Pohiva did not have reasonable grounds to suspect that the Plaintiff had committed a crime under the said Act to justify his search of the Plaintiff without his consent, the Plaintiff's detention and search were unlawful.

35. On the issue of damages, Mr Mo'ale again relied on *Edwards v Pohiva*,<sup>3</sup> referred to further below. In relation to the various heads for which damages can be awarded for torts of this kind, such as damage to reputation, humiliation, shock and injury to feelings, Mr Mo'ale pointed to the Plaintiff's evidence of same as a result of his detention and subsequent search.

36. In relation to the tort of battery, Mr Mo'ale referred to the decision in *Tapiolava v Niu* [2016] Tonga LR 226, where it was stated that battery is the intentional application of force to the body of another person without that person's consent or other lawful justification. Further, as far as damages are concerned, where there is a single brief touching and no injury was caused, the Court must take care to assess damages related only to the battery and not to the effect of the trespass for which any award is made separately for that would constitute double recovery.<sup>4</sup>

37. In the prayer for relief in the Statement of Claim, the Plaintiff claimed \$30,000 as "punitive and aggravated damages for false imprisonment". In his closing submissions, Mr Mo'ale abandoned reliance upon that sum and also clarified the

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<sup>3</sup> [42] ff.

<sup>4</sup> [67].

nature of that claim as being for 'general and aggravated' damages. He posited a reduced amount of \$15,000 for the head but was unable to explain how that was calculated by reference to any of the decisions to which he did refer and the awards of damages in those cases. For example, in *Edwards v Pohiva*, the Plaintiff there was awarded \$30,000 in basic and aggravated damages for having being detained for 25 days, that is, \$1,200 per day. In *Tapiolava v Niu*, for the battery found there, the Plaintiff was awarded \$500.

38. The Plaintiff here also claimed \$1,000 for trespass to his person, that is, the battery claim.
39. A declaration was also sought that the detention and body search was unlawful, although that is not necessary if the Court is satisfied that the torts of false imprisonment and trespass to the person in the form of any unlawful search have been made out.

#### *Defendant*

40. Mr Maka relied on the relevant principles concerning police having reasonable grounds for suspecting the commission on an offence as discussed in *Fainga'a v Lelea* [2005] TOSC 5 (referred to in detail further below).
41. In his written opening remarks, Mr Maka abandoned a submission which sought to dispute whether the detention by the relevant police officers of the Plaintiff amounted to an arrest for the purpose of the tort of unlawful imprisonment. In his closing submissions, he at first appeared unsure about that position. However, he eventually conceded that the evidence here, including that the Plaintiff felt that he had no choice but to comply with the directions of the police officers to go with them, to get in their car, to go to Central Police Station and to be searched, was sufficient to amount to an arrest within the extended definition of that term as considered by the authorities.
42. After summarising the evidence of the witnesses for the Defendant, Mr Maka made the following submissions:

*"11 ... 'Otuhouma said that when they received information that a suspect may be possibly in possession of illicit drugs they usually carry out surveillance and other work to confirm that suspicion and rightly so. However, we need to consider the circumstances in which the information was relayed to them. The information was time sensitive. They received a call*

*fifteen minutes before the boat arrived. In fifteen minutes that [sic] is not enough time to gather a surveillance team and draw out an organised plan as to how they will carry out the surveillance. Surveillance is done in an organised well-planned and thought out manner. A lot of planning and preparation is done beforehand.*

*12 Our present case however left no option for the officer to carry out surveillance. There was no other way to confirm the information other than to detain and search the Plaintiff.*

*13 Throughout trial there were inconsistencies in the evidence as to what exactly was relayed to them. Some officers said that the information they received was that there is a suspect on the boat who is in possession of illicit drugs whilst some say that he may be in possession of illicit drugs. However, it is easier to focus on the wording of what was said instead of having regard to the circumstances in which the officer formed the suspicion. The Defendant invites this court to look at the main part of the information which is a) a suspect, b) possession of illicit drugs.*

*14 ... in light of the time sensitive nature it is not important to focus on the verb 'is/was' as opposed to 'may'.*

*15 It is entirely possible that the information may have changed over the course from 'Eua to Tongatapu. But the court should make a special exception for this case given that there was not enough time to authenticate the information or carry out surveillance. They cannot simply arrive at the wharf and then follow the suspect. They do not know his name, they do not know where he lives and there is a risk of possible evidence being lost. It would basically defeat the purpose of a surveillance.*

*16 Finally, the Defendant agrees that police should not exercise their powers unreasonably at the expense of people's liberty and individual rights. There have been several cases of this but **this case again is and should be a special exception.**"*

43. In relation to quantum, Mr Maka submitted that the claim for \$30,000 for false imprisonment was excessive. He referred to the decisions in *To'ia v Leone* [2003] TOSC 3 and *Pacific Capital Industries Ltd & De Feng Mo v Kingdom of Tonga* (unreported, Supreme Court, CV 27 of 2020, 23 November 2020). By way of comparison to the awards in those cases, Mr Maka submitted that a reasonable award here would be \$1,000 in total.

44. However, Mr Maka then declared:

*"The Defendant states that under s. 174 of the Tonga Police Act a police officer or authorised officer shall not be liable in any proceeding for damage or injury caused by the exercise of his powers, duties and responsibility in good faith. The Defendant admits that **this was not pleaded** in a statement of*

*defence however, invites the court to exercise its discretion in considering this section.”*

### Consideration

45. In *Pacific Capital Industries v Kingdom of Tonga*, *ibid*, the principles of the tort of false imprisonment were summarised as follows:<sup>5</sup>

- (a) One of the pillars of liberty in English-based legal systems is that every imprisonment is *prima facie* unlawful, and that it is for a person directing imprisonment to justify his act: *Fifita v Fakafanua* [1998] TOCA 1.<sup>6</sup>
- (b) The tort of false imprisonment is a form of trespass to the person. It has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it. It is a tort of strict liability. There is no onus on a Plaintiff to prove that the imprisonment was unlawful or malicious. Once the Plaintiff establishes the fact of imprisonment, that is sufficient to make out a *prima facie* case and the onus then falls on the Defendant to prove that the detention was lawful. It may be so, for example, if it is pursuant to an order of the court or the exercise of statutory powers. An action for false imprisonment will succeed or fail depending on whether the Defendant can, as a matter of law, justify the detention or imprisonment: *To'a v Inu* [2009] TOCA 21.<sup>7</sup>
- (c) False imprisonment is complete deprivation of liberty for any time, however short, without lawful cause. The prisoner may be confined within a definite space by being put under lock and key or his movements may simply be constrained at the will of another. The constraint may be actual physical force, or merely the apprehension of physical force: *Otuafi v Sipa* [1990] TOSC 9<sup>8</sup>
- (d) Arrest consists in the seizure or touching of a person's body with a view to his or her restraint. Words may however amount to arrest if, in the circumstances of the case, they are calculated to bring, and do bring, to a person's notice that he or she is under compulsion and he or she thereafter

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<sup>5</sup> [89]

<sup>6</sup> Citing Lord Atkin in *Liversidge v Anderson* [1941] 3 All ER 338 at 362.

<sup>7</sup> As discussed in *Edwards v Pohiva* [2003] Tonga LR 231 at [13].

<sup>8</sup> Citing Clerk and Lindsell para 17-15), *Murray v Ministry of Defence* (1988) 2 All ER 521 (HL).

submits to the compulsion. It occurs also when, by words or conduct, a police officer makes it clear that he will, if necessary, use force to prevent the individual from going where he may want to go. Whether or not a person has been arrested depends not on the legality of the arrest but on whether he has been deprived of his liberty to go where he pleases: *Taulanga v Kama* [2005] TOSC 32.<sup>9</sup>

- (e) In non-forcible cases, the Plaintiff must show that in the circumstances he or she felt obliged to submit to the instructions or directions of the Defendant. A wholly voluntary submission is insufficient. The Plaintiff must submit in circumstances where he or she reasonably considers that there was no choice but to submit: *Attorney-General v Niania* [1994] 3 NZLR 106 (at 108) Tipping J.

46. In this case, I am satisfied on the Plaintiff's evidence of his detention at the wharf when approached initially by two police officers and then a number of others, including Otuhouma, that he reasonably considered he had no choice but to submit to their directions and go with them. In those circumstances, he was arrested for the purposes of the tort of false or wrongful imprisonment.

47. Which then brings us to the real issue in the case, that is, whether the arresting officers had reasonable cause to suspect that the Plaintiff had committed an offense under s. 13 of the *Illicit Drugs Control Act*, which provides, relevantly:

"If a police officer has reasonable cause to suspect that any person has committed an offense under this Act he may detain and search that person."

48. My research has not unearthed, nor was I referred to, any published decision in the Kingdom in which a claim for damages for unlawful imprisonment or trespass arising out of a purported exercise of the powers of detention and search provided by s 13 of the *Illicit Drugs Control Act* has been considered. The vast majority of cases involving complaints of unlawful arrest or unlawful search are in the criminal context and more often than not arise out of circumstance in which police have exercised statutory powers under provisions such as ss 122 or 123 of the *Tonga Police Act*. Section 115 of that Act also empowers a police officer to arrest

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<sup>9</sup> Citing *Fainga'a v Lelea* [2005] TOSC 6 (CV 38/03, 6.1.05), *Alderson v Booth* [1969] 2 All ER 271 (DC), *Shaaban bin Hussien v Chong Fook Kam* [1969] 3 All ER 1626,1629 (PC); *Spicer v Holt* [1976] 3 All ER 71,79 (HL).

a person without a warrant whom the police officer believes on reasonable grounds is committing an offence, is about to commit an offence or has committed an offence. Section 122 concerns the search of a person without a warrant and is in similar terms. It provides that a police officer, if satisfied on reasonable grounds that a person has any of the objects mentioned in subsection (2), which includes illicit drugs, in his possession, and that it would be impractical or unreasonable or not in the interests of justice if the officer was required to apply for a warrant, the officer may stop and detain that person and conduct a search. Although the terminology in the two Acts is similar, there are differences.

49. Section 13 of the *Illicit Drugs Control Act* requires the officer to have reasonable cause to suspect that a person has committed an offence. It does not provide that the officer may detain where he or she has reasonable cause to suspect that a person may possibly commit an offence.
50. In determining whether a police officer has reasonable cause to suspect that a person has committed an offence, guidance is gained from decisions in the criminal context and in the other civil cases referred to above where powers were exercised or purported to be exercised under the *Tonga Police Act*.
51. In *Faing'a v Lelea*, to which Mr Maka referred, and which has been referred to in subsequent cases such as *Lolohea v Kingdom of Tonga* [2009] Tonga LR 168, the court considered a claim in the context of the former s. 21 of the *Police Act* since replaced by s. 115 of the current Act. There, the former Chief Justice, observed that:

*"The test for the lawfulness of an arrest under section 21(a) comes down to the same thing in each case - did the Police officer have reasonable grounds for the arrest? That requirement is very limited (Dumbell v Roberts [1944] 1 All ER 326 (CA)) and the Police have to act at once, on the facts as they appear on the spot and the arrest should be justified by these and not on an analysis in the courtroom later (Wiltshire v Barrett [1965] 2 All ER 271 (CA)). See also Kaufusi v Lasa & Ors [1990] Tonga LR 39,42 & 139 (CA)....*

*In Fifita & Edwards v Fakafanua [1998] Tonga LR 127 (CA); [1998] TOCA 1; [2000] 5 LRC 733 (CA) the Court of Appeal stated (at p 130) that the onus on the arresting officer was to provide evidence, failing appropriate admissions, to answer affirmatively the 2 questions which were stated by Woolf LJ in Castorina v Chief Constable of Surrey (1988 The Times 15 June, unreported, but cited in Chapman v DPP (1989) 89 Cr App R 190 (DC)) (referred to in Archbold Criminal Pleading Evidence and Practice (1993) vol 1 para 15-144):*

*'(1) Did the arresting officer suspect that the person who was arrested was guilty of the offence? The answer to this question depends entirely on the findings of fact as to the officer's state of mind.*

*(2) Assuming the officer had the necessary suspicion, was there reasonable cause for that suspicion? This is a purely objective requirement to be determined by the judge if necessary on facts found by a jury.'*

*As those questions were referred to in submissions, it is appropriate to mention that they have now in effect been replaced by what was said by Lord Hope of Craighead in the House of Lords in London in O'Hara v Chief Constable of the RUC [1996] UKHL 6; [1997] 1 All ER 129,138-9 (HL):*

*" ... the test ... is a simple but practical one. It relates entirely to what is in the mind of the arresting officer when the power is exercised. In part it is a subjective test, because he must have formed a genuine suspicion in his own mind ... . In part also it is an objective one, because there must also be reasonable grounds for the suspicion which he has formed. But the application of the objective test does not require the court to look beyond what was in the mind of the arresting officer. It is the grounds which were in his mind at the time which must be found to be reasonable grounds for the suspicion which he has formed. All that the objective test requires is that these grounds be examined objectively and that they be judged at the time when the power was exercised.*

*This means that the point does not depend on whether the arresting officer himself thought at that time that they were reasonable. The question is whether a reasonable man would be of that opinion, having regard to the information which was in the mind of the arresting officer. It is the arresting officer's own account of the information which he had which matters, not what was observed by or known to anyone else. The information acted on by the arresting officer need not be based on his own observations, as he is entitled to form a suspicion based on what he has been told. His reasonable suspicion may be based on information which has been given to him anonymously or it may be based on information, perhaps in the course of an emergency, which turns out later to be wrong. As it is the information which is in his mind alone which is relevant however, it is not necessary to go on to prove what was known to his informant or that any facts on which he based his suspicion were in fact true. The question whether it provided reasonable grounds for the suspicion depends on the source of his information and its context, seen in the light of the whole surrounding circumstances."*

*In other words, the test as to whether reasonable grounds for the suspicion to justify an arrest exist is partly subjective, in that the arresting officer must have formed a genuine suspicion that the person being arrested was guilty of an offence, and partly objective, in that there had to be reasonable grounds for forming such a suspicion: such grounds could arise from information received from another (even if it subsequently proves to be false), provided that a reasonable man, having regard to all the circumstances, would regard them as reasonable grounds for suspicion; but a mere order from a superior*

*officer to arrest a particular individual could not constitute reasonable grounds for such suspicion. Whether the information provided reasonable grounds for the officer's suspicion depended on its source and context, viewed in the light of the whole surrounding circumstances. (O'Hara; Archbold 2003 para 15-24 (the corresponding paragraph to 15-144 in Archbold 1993))*

*In O'Hara (p 141) Lord Hope also referred to the statement by Lord Justice Clerk Wheatley in the Scottish case of Dryburgh v Galt 1981 JC 69, 72:*

*"Suffice it to say that the fact that the information on which the police officer formed his suspicion turns out to be ill-founded does not in itself necessarily establish that the police officer's suspicion was unfounded. The circumstances known to the police officer at the time he formed his suspicion constitute the criterion, not the facts as subsequently ascertained. The circumstances may be either what the police officer has himself observed or the information which he has received."*

52. In applying those principles to the evidence in this case, I am not satisfied that the police officers involved had reasonable cause to suspect that the Plaintiff was in possession of illicit drugs for the following reasons.
53. Firstly, the evidence was that the Plaintiff was in fact detained not by Officer 'Otuhouma, but by two other officers who had arrived at the wharf before her. Officer Vaiangina and Tu'ivai identified in their evidence that there were number of other officers at the wharf, some of whom were named by Tu'ivai. However, the officers who first approached the Plaintiff and detained him and directed him to go with them were never identified. More importantly, and self-evidently, there was no evidence from those officers as to the circumstances in which they detained the Plaintiff and critically whether they had any reasonable grounds for suspecting that he was in possession of illicit drugs. That omission in the Defendant's case is fatal to his defence.
54. Secondly, and notwithstanding, even if one were to treat 'Otuhouma as the detaining officer, I am still not satisfied that she had reasonable grounds for suspecting that the Plaintiff was in possession of illicit drugs.
55. Mr Maka asked the court to make a "special exception" of this case. I do consider that this case is an exception to the normal cases of this kind but not for the reasons advanced by Mr Maka.
56. Consistent with the principles referred to above, there are many cases in which police will conduct a search without warrant or arrest or detain suspects on the

basis of reasonable suspicion. In those cases, where it later turns out that the information provided to the arresting or searching officers was incorrect because, for instance, in the context of drug raids, no illicit drugs were found, the arrest and subsequent search may not be necessarily considered unlawful. If that had been the extent of the evidence in this case, it is more likely than not that the Plaintiff's claim would have been dismissed.

57. However, this case was not one of those. In this case, the only reason that Officer 'Otuhouma was involved in the Plaintiff's detention was because of the information she received from Officer Tu'ivai that the Plaintiff was in possession of illicit drugs. It is obvious from the evidence of Faha'ivalu and Tu'ivai referred to above that that was not in fact the information that Faha'ivalu gave in the first instance. He conceded that the bases for his suspicion about the Plaintiff were insufficient grounds to warrant detaining the Plaintiff pursuant to s. 13. That is why he said he told Tu'ivai just to keep an eye on the Plaintiff because he may have been in possession of illicit drugs but to otherwise get the Drugs Taskforce to follow up and conduct further enquiries. When he was cross-examined, Officer Tu'ivai's evidence was unreliable in terms of what he was told by Faha'ivalu compared to what he in turn he told 'Otuhouma. He was the proverbial 'weak link' in the chain of communication and for the Defendant's case. I am satisfied that Faha'ivalu only told Tu'ivai to keep an eye on the Plaintiff because he may have been in possession of illicit drugs and to contact the Drugs Taskforce to follow it up.
58. Unfortunately, that breakdown in communication meant that what Tu'ivai told 'Otuhouma was not accurate and in an important respect. As noted, s. 13 does not permit the detention and search of a person whom a police officer suspects on reasonable grounds *might possibly* commit an offence. It requires that those grounds base a suspicion that the person *has* committed an offence.
59. Therefore, to accede to Mr Maka's submission that the error in this case should be treated as a special exception, would be to sacrifice the Constitutional rights of the Plaintiff in favour of avoidable carelessness on the part of police. In my opinion, that would not be a just outcome nor a proper interpretation or application of section 13.
60. Thirdly, Mr Maka's submission that this operation was "time sensitive" and that

the information given to Officer 'Otuhouma could not be verified in the time available cannot be accepted. She said that she received the information some 15 minutes before the boat was about to dock. There was no evidence from any of the police officers that they did not have the ability to maintain surveillance over the Plaintiff once he disembarked the vessel. The very fact that a number of police officers arrived at the wharf in a number of vehicles was some evidence of the fact that the police had the resources available to monitor the Plaintiff after he left the vessel and to ascertain whether or not there were in fact good grounds for detaining him. They did not do so. Instead, they acted on the erroneous relaying of information by Officer Tu'ivai, and to the Plaintiff's detriment.

61. Therefore, this is not a case where the information provided to the arresting officer turned out later to be incorrect or inaccurate in some way. In this case, through a lack of care on the part of the police officer relaying information, an arresting police officer has detained the Plaintiff without proper cause.
62. I do not accept as reasonable, or as a defence to the claim, that Officer 'Otuhouma was not able to verify the source information with Faha'ivalu because she did not have his phone number. That, in my respectful view, is yet another example of the lack of proper approach by the police to an operation such as this. There was a Communication Centre involved, which was a hub of information from Tu'ivai eventually to 'Otuhouma and other officers who were instructed to assist at the scene. One would have thought it a simple matter for Officer 'Otuhouma to find out from the communication centre how she could contact Faha'ivalu. There was no evidence that she tried. Had she done so, and had she been told by Faha'ivalu that the Plaintiff was just to be monitored because he might be in possession of drugs, then as 'Otuhouma herself confirmed, the correct procedure required that the Plaintiff would not have been detained at that point and that he would have been monitored in some way or other information sought before any decision was made to detain and search him.
63. For those reasons, I am satisfied that the Plaintiff's detention amounted unlawful imprisonment.
64. For completeness, I will address Mr Maka's belated submission in relation to s. 124 of the *Tonga Police Act*. Apart from the fact that the apparently informal application to amend the defence was made in closing submissions, and without

notice to Mr Mo'ale or his client, which would ordinarily militate against the granting of leave to amend at such a late stage, even if leave had have been granted, it would not assist the Defendant.

65. Section 124 provides:

A police officer or authorised officer shall not be liable in any proceeding for damage or injury caused by the exercise of his power, duties or responsibilities in good faith.

66. On a plain reading, s. 124 is designed to protect individual police officers. In this action, the Plaintiff did not sue any of the individual officers who detained or searched him. Further, the protection only applies where good faith is demonstrated. In this case, there was no evidence of that. The Defendant's pleaded case failed to acknowledge the error in communication. It was only in closing submissions that Mr Maka was compelled to confront it. Even then, the issue was characterised as 'inconsistencies' in the evidence.

67. Turning then to the quantum of damages to be awarded.

68. I agree with Mr Maka that the claim originally pleaded by the Plaintiff of \$30,000 for false imprisonment was grossly excessive. So too was Mr Mo'ale's belated stab at the lower figure of \$15,000.

69. Cases of trespass to the person such as assault and false imprisonment present an exception to the general rule that a Plaintiff must prove actual loss and damage. In cases such as the instant, actual damage need not be proved and a successful Plaintiff is entitled, at least, to nominal damages. Substantial damages are recoverable for discomfort and any convenience and injury to dignity. In addition, general damages are recoverable for physical injury for the Plaintiff's pain and suffering, loss of amenity and enjoyment of life. These constitute a conventional sum which is to be taken as the sum which society deems fair: *Otuafi v Sipa* [1990] TOSC 9.

70. There are two aspects of an award of damages for false imprisonment: compensation for loss of liberty and damage to reputation, humiliation, shock, injury to feelings and so on which can result from loss of liberty. In calculating the proper compensation for loss of liberty, an analogy with personal injury cases is closer than cases of defamation where the compensation is for something akin

to pain and suffering.

71. A penal element can properly be involved in the form of aggravated damages, although they are primarily awarded to compensate the Plaintiff for injury to his proper pride and dignity and the consequences of being humiliated.
72. In the instant case, no claim was made for exemplary damages.
73. The approach to be taken to an assessment of damages in cases such as the present was described in *Edwards v Pohiva*<sup>10</sup> as being well established and has been applied in a number of cases since:<sup>11</sup>

*“... it is preferable not to attempt to assess a figure under each possible individual heading and to add up the total. There could certainly be no error in refraining from attributing separate amounts to various headings or to topics regarded as matters to be adverted to in assessing general damages.”*

74. In *Edwards*, which was decided in 2003, the Court of Appeal opined that the primary judge’s assessment of damages equivalent to \$680 per day failed to make adequate allowance for aggravating factors which were germane to that case. The Court took a broad, global approach to what was an appropriate award of basic and aggravating damages to compensate each of the respondents for the harm suffered. As Mr Mo’ale identified in his submissions, the award in *Edwards* amounted to \$1,200 per day. However, the circumstances in that case were far more serious than the present.
75. The decision referred to by Mr Maka provides a more realistic comparator.
76. Further, an important factor in this assessment is that the Plaintiff was detained for a total of approximately two hours. That again takes this case outside the circumstances of most of the other cases referred to by counsel in their submissions.
77. The Plaintiff’s situation here is also significantly different to that considered in *Pacific Capital Industries*. There, on the battery claim, an award of \$1,000 was ordered in circumstances where the Plaintiff there was struck by police officer on his hand making his mobile phone fall to the ground and damaging it. Here, as

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<sup>10</sup> [42] ff.

<sup>11</sup> Affirmed by the Court of Appeal in *Kingdom of Tonga v Lolohea* [2009] TOCA 13 which adopted the orthodox approach discussed by the Australian High Court in *Gamser v The Nominal Defendant* (1976) 136 CLR 145 at 155.

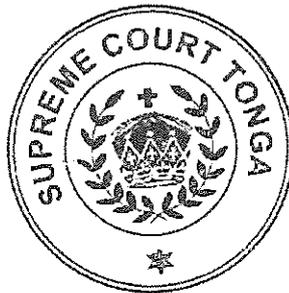
best the evidence describes it, the search of the Plaintiff by Det. Pohiva was nothing other than the usual pat down or external search. There was no indication of anything more demeaning or intrusive such as a naked or cavity search.

78. In all the circumstances, after taking into account the Plaintiff's shock, humiliation and embarrassment when he was detained at the wharf in front of many other people and how he was treated during and after his search at Central Police Station, over a period of some two hours, I consider an appropriate award for general and aggravated damages to be \$1,000 for the unlawful imprisonment and \$500 for the unlawful search.

### **Result**

79. Judgment in favour of the Plaintiff.
80. The Defendant is to pay the Plaintiff:
- (a) damages in the total sum of \$1,500; and
  - (b) his costs of the proceeding, to be taxed in default of agreement.

NUKU'ALOFA  
3 May 2022



A handwritten signature in black ink, appearing to read "M. H. Whitten".

M. H. Whitten QC  
LORD CHIEF JUSTICE