

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 347 of 2010

BETWEEN: **KESTER YEE**

PLAINTIFF

AND: **THE COMMISSIONER OF POLICE**

FIRST DEFENDANT

THE ATTORNEY-GENERAL

SECOND DEFENDANT

Before: **Hon. Justice Kamal Kumar**

Solicitors: **Ms N. Tukaisuva for the Plaintiff**
Mr N. Chand and Ms S. Ali for the Defendants

Date of Judgment: **28 September 2018**

JUDGMENT

Introduction/Chronology of Events

1. On 28 December 2010, Plaintiff in person, filed Writ of Summons with Statement of Claim claiming for damages for alleged breach of his constitutional rights.
2. On 21 January 2011 and 17 March 2011, Defendants filed Acknowledgement of Service and Statement of Defence respectively.
3. On 2 May 2011, Plaintiff filed Summons for Directions and on 18 May 2011, being returnable date of Summons for Direction, Order in terms of Summons for Direction was made.
4. On 30 August 2011, this matter was adjourned to take its normal course by the then Master.
5. On 3 September 2011, Plaintiff filed Affidavit Verifying List of Documents.
6. On 22 September 2011, Leweniqila, Esquire filed Notice of Appointment of Solicitors on behalf of Plaintiff.
7. On 23 September 2011, Defendants filed Affidavit Verifying List of Documents.
8. On 17 October 2012 (after a lapse of more than a year) Plaintiff filed Copy Pleadings.
9. On 31 October 2012, Toganivalu, Esquire filed Notice of Change of Solicitors on behalf of Plaintiff.
10. On 3 August 2013, Minutes of Pre-Trial Conference was filed.
11. On 20 September 2013, Plaintiff filed Summons to Enter Action for Trial and on 22 October 2013, this matter was referred to a Judge.
12. On 28 November 2013, this matter was called in this Court when Plaintiff was directed to file Amended Copy Pleadings and this matter was adjourned to 21 February 2014, to fix trial date.

13. On 21 February 2014, Plaintiff was granted further time to file Amended Copy Pleadings and this matter was adjourned to 4 April 2014.
14. On 28 March 2014, Plaintiff filed Amended Copy Pleadings which was defective.
15. On 4 April 2014, Plaintiff was again directed to file Amended Copy Pleadings and this matter was adjourned to 4 and 5 November 2014, for trial.
16. On 3 November 2014, Plaintiff filed Amended Copy Pleadings.
17. Trial proceeded and completed on 4 November 2014, when parties were directed to file Submissions with Judgment to be delivered on notice.

Background/Agreed Facts

18. The background/agreed facts as appears from the Minutes of Pre-Trial Conference are as follows:-
 - A. That Kester Yee (**“the Plaintiff”**) owns a business situated at Shop 5, Metropole Building, Scott Street, Suva (**“Business”**).
 - B. That on 12th March 2005, a raid termed “Sasa Operation” was conducted by the Fiji Police Force, which involved entering the premises of the Plaintiff.
 - C. That A/Sgt 1113 Sowane and PC Alusio Palu were part of “Sasa Operation” in which the Plaintiff’s business was searched and the Plaintiff and 22 other Chinese were taken into custody of the Nabua Police Station.
 - D. That the Plaintiff was interviewed under Caution at the Central Police Station at 12.36am on 13th March 2005.

Issues for Determination

19. This Court accepts the issues identified in Minutes of PTC are to be determined by the Court which are as follows:-

- “(i) Whether the search conducted at the Plaintiff’s business was lawful; whether a Search Warrant was shown to the Plaintiff’s representative at Shop 5, Metropole Building, Scott Street, Suva.
- (ii) Whether the Plaintiff was subjected to humiliating and degrading treatment by the Fiji Police Force as follows:-
 - (a) Ordered to strip naked
 - (b) Ordered to hold his ears and squat up and down
- (iii) Whether the actions of the Fiji Police Force on 12th March 2005 were contrary to the Bill of Rights specifically, sections 23, 25 to 27 of the Constitution of Fiji (1997) at the time.”

20. **Documentary Evidence**

<u>Exhibit</u>	<u>Document</u>
P1	Summons - Criminal Case No. 1079/05.
P2	Record of Magistrates Court Suva - Criminal Case No. 1079/05.
P3	Copy of letter dated 15 July 2010, from Plaintiff to 1 st Defendant.
P4	Photocopy of letter dated 25 October 2005, from Plaintiff to First Defendant.
D1	Photocopy of Information to obtain Search Warrant dated 12 March 2005.
D2	Photocopy of Search Warrant dated 12 March 2005, under Criminal Procedure Code (Section 106).
D3	Photocopy of Search Warrant dated 12 March 2005, under Gaming Act (Section 13).
D4	Photocopy of Statement from Alusio Palu, Police Officer

D5 dated 12 March 2005.
Photocopy of Record of Interview of Kester Yee (Plaintiff)
dated 12 March 2005.

Plaintiff's Case

21. Plaintiff gave evidence himself and did not call any other witness.
22. During examination-in-chief Plaintiff gave evidence that:-
 - (i) He is a retired businessman and at material time he was running social club for Chinese Community which he opened in 1999, from Metropole Hotel;
 - (ii) On 12 March 2005, at around 4.00pm he came from his home in Nadera to the Club and when he arrived he saw two police vehicles parked in the middle of the road and when he went to the Club the door was closed when he knocked and door was opened by a Police Officer;
 - (iii) When he entered the Club he saw plenty Policemen inside the Club and when he asked them as to what they were doing he was told that there is a raid;
 - (iv) He then asked for search warrant and when he did that he was told by Police Officer in iTaukei language that he is "vivialevu" (talking cheeky) and he will get handcuffed when he told the Police Officer that he cannot say like that;
 - (v) When he again asked for search warrant another Police Officer said that he should be locked up;
 - (vi) After that Police Officer with number 3236 called him in bulk store which was bit dark and asked him to take his shirt, pants and underpants off and to squat holding his ears with Chinese ladies and school girls being present;

- (vii) He knew Mafia people paid Police Officers money to do that to him for which he has no proof but people were talking;
- (viii) He felt very bad and Police did that to him again as he closed business in 2005;
- (ix) They took him to Nabua Police Station and detained him from 6.00pm to 1.00am and was charged;
- (x) He questioned Police and said to them that no one saw him play mahjong and he does not know how to play it and you need four (4) people to play it;
- (xi) On second call, Police said there was no evidence against him and he was acquitted;
- (xii) His name was at No. 22 on list of persons charged (Exhibit P2);
- (xiii) He went to see Andrew Hughes, the then Commissioner of Police and was told he cannot see him, but can see Deputy Commissioner of Police, Moses Driver;
- (xiv) He saw Moses Driver who told him that since he has been charged, he has to go to Court and he cannot do much;
- (xv) He wrote letters to Commissioner of Police but received no response and his lawyer Tevita Fa also wrote letters;
- (xvi) Confirmed that he wrote and signed letters dated 15 July 2010, and 25 October 2005, (Exhibits P3 and P4) and everything he said in Court was put in those letters;
- (xvii) Police continue to charge him from 1995 to 2005;
- (xviii) Police charged him for nothing and Commissioner of Police did nothing;
- (xix) He was not shown any search warrant until date of trial and they may have shown it to others but not him.

23. During cross-examination Plaintiff:-

- (i) When asked if he had gaming licence he stated that Attorney-General told him that he does not need licence to play Mahchong as long as there is no money on table;
- (ii) On 22 December 1989, he made application for gaming licence for Mahchong and Domiko card games;
- (iii) Agreed that he was playing Mahchong at his club with Domiko at his Club;
- (iv) Stated his nature of business was Social Club;
- (v) Stated that he is 75 years old and remembers events in 2005, very well;
- (vi) Stated that type of Police vehicles parked were one small car, a big one (Truck) to load things and take away;
- (vii) Stated that he did not see any Police Officers outside;
- (viii) Stated that he knocked on the door because Police locked it;
- (ix) When it was put to him that when door was broken how could it be locked he stated that was outside and crowbar was used to break the lock;
- (x) When it was put to him that if door was broken then how it could be locked, he stated that he does not know;
- (xi) Stated that he wanted to cooperate with Police Officers but was asked not to talk;
- (xii) Stated that he does not know if Police Officers were talking to him or to each other;
- (xiii) Stated that he asked one Police Officer for search warrant two times and when he asked it for second time, Police Officer said he will lock him up;

- (xiv) Stated that he never saw search warrant dated 12 March 2005;
- (xv) Stated that his shop was located at Metropole Building which belongs to Mr Chan Yee;
- (xvi) Stated that he did not conduct gambling in that shop and it was social club and they play cards;
- (xvii) Stated that he still plays social games, Mahchong and cards from other places where Police never came;
- (xviii) Stated that no money is exchanged but if anyone loses then they have to pay for winners meal;
- (xix) Stated that he never saw search Warrant dated 12 March 2005 (Exhibit D2);
- (xx) In respect to Chung Store in Metropole Building he stated that only social club belongs to him and shop belongs to someone else;
- (xxi) Stated that he was not handcuffed;
- (xxii) Stated that he never resisted to cooperate with Police as he was not there;
- (xxiii) Stated that he knows number of Police Officer who asked him to get naked as 3236 because he asked the officer in charge;
- (xxiv) Stated that he knows the Chinese girl and woman who had gone to Hong Kong and they were sitting and talking at that time;
- (xxv) Stated that no other ethnicity was allowed except Chinese people;
- (xxvi) This business was at Metropole Hotel only because it was for market people who came too early to have morning tea and make some money and in one day about 20 or 30 people came;

- (xxvii) Stated that when Police Officer asked him to take his shirt off he asked what else;
- (xxviii) When asked why he said “what else” he stated that because he also asked him to take his shorts off;
- (xxix) When it was put to him that he was doing it willingly he stated he could not say no because he was a Police Officer and he could not say no and he did not ask Police Officer “why”;
- (xxx) When asked why he did not ask why when he asked for search warrant, he stated that he never asked and only asked for search warrant and he said you order me naked, he will sue him and he cannot do that to him;
- (xxxi) When it was put to him that he willingly took off his clothes to later sue Police he stated that he could not say so;
- (xxxii) Agreed that he could not say no but could say that he will sue them later;
- (xxxiii) Stated that the other case was same as this one;
- (xxxiv) When Police Officer said to him that he plays Mahchong again he stated that he told Policeman that you can Mahchong with four (4) people and he has to play with the Policeman, Policeman’s mother and father;
- (xxxv) Agreed that he said he does not know how to play Mahchong;
- (xxxvi) When asked, then how does he know it takes four (4) people to play he stated that because four (4) people sit down and play;
- (xxxvii) Stated that he only runs social club but does not know how to play and mahjong was administered by Mr Chung since he (Plaintiff) opened the business and that is from 1999 to 2005;
- (xxxviii) Stated that he does not know how to play Mahchong until now;

- (xxxix) Stated that he applied for gaming licence for Mahchong because he thought he needed licence but was told by Government Department that he does not need licence as long as there is no money on the table;
- (xl) Stated that purpose for social club was for resting;
- (xli) Stated that they all knew how to play except him;
- (xlii) Stated he got Chung to administer only big games;
- (xliii) Agreed that they exchanged money and that is why Police took the money from pocket;
- (xliv) Denied that they paid him to play and stated that they pay for food;
- (xlv) Stated that he does not bother what they play or if they exchange money because there was no money on table;
- (xlvi) In reference to part of second paragraph on page 3 of his letter dated 25 October 2010 (Exhibit P4) he stated as follows:-
- “The particulars of offence were playing mahjong. How can I play mahjong when I was not there when the police came in to rob, I entered the shop after the police. Looking at the above incidents I can only conclude that other Chinese nationals who cannot see my success and are not happy with my business bribe the officers. One person who was against my business was Mafia Queen who is now deported but there others such as Jason Zhong. Jason Zhong and his wife now jailed for the charges of 1 billion worth of drugs busted in Laucala Beach.”*
- (xlvii) When asked what game has to do with this he stated that they paid Police and they are in jail now;
- (xlviii) When asked how he knew Police Officers were paid he stated that they offer him \$10,000.00 for Moses Driver;

(xlix) When it was put to him that he wrote on 15 January 2010, he stated that he wrote plenty letters with no reply;

(l) Stated that he complained because Police charged him for nothing and he told them Police was paid by Mafia.

24. During re-examination Plaintiff:-

(i) Stated that name of his business was Kester Yee Catering and Social;

(ii) Stated that he cannot remember what is the shop number and does not know whose shop is shop No. 1;

(iii) Stated that Police Officer never told him as to why he should be naked.

Defendant's Case

25. Defendants called Alusio Palu of Lot 20, Bekoso Drive Navosai, Police Officer as their First Witness (**DW1**).

26. DW1 during examination in chief gave evidence that:-

(i) He has been in Police Force for twenty-four (24) years, is currently based at Transport Pool in Narere and was in Police Force in 2005;

(ii) On 12 March 2005, he went for a raid at Shop No. 1 Metropole Building, Scott Street on instructions of his team leader Sergeant Sowane who has retired from the Force;

(iii) The procedure to conduct raid is that you need a search warrant, a team leader and a back-up team;

(iv) The particular raid was as a result of "Operation Sasa";

(v) For the particular raid two (2) teams were dispatched with his team consisting of three officers including himself, Sergeant Sowane and Constable Ronald with both teams leaving Police Station at the same time;

- (vi) His teams responsibility was to conduct search;
- (vii) They reached the raid location at 4.50pm at Metropole building which is a double storey building;
- (viii) When they reached location Sergeant Sowane showed search warrant (Exhibit D2 & D3) to the owner and told owner that they were going to do a search;
- (ix) All search warrants were issued on the same day and signed by same Magistrate;
- (x) Door was open and they entered and showed search warrant to owner;
- (xi) Later they went upstairs and when they did that, the door was guarded by another officer;
- (xii) Reason for going upstairs was that they suspected gambling was happening on first floor;
- (xiii) They saw gambling implements such as snake ladders and square tin with money on top of the table and gambling taking place;
- (xiv) Next, they were told to conduct search on all the persons inside the room and when they entered there were plenty of them, approximately twenty-four of them;
- (xv) After search was conducted, they found money in their possession, which was counted and kept by the officers from another team;
- (xvi) After search was carried out they took the occupants to Nabua Police Station;
- (xvii) After the search he gave Statement to Police on 12 March 2005 (Exhibit D4).

27. During cross-examination DW1:-

- (i) Stated that Information to obtain Search Warrant (Exhibit D1) is made out for Shop No. 1 Chung's Store and addressed Mr Chung and in the Information and Search Warrant they were only authorised to enter Shop No. 1 in Metropole Building;
- (ii) Search Warrant (Exhibit D3) is made out against Chung Store, Shop No. 1 Metropole Building and he is not aware why two (2) Search Warrants were issued on the same day;
- (iii) When they entered the shop, he assumed Sowane was talking to the owner;
- (iv) Agreed that in order to search another place they would require another search warrant;
- (v) Stated that nowhere in the search warrants it says that they can search any other shop apart from of Chung's Store;
- (vi) Stated that he cannot see the person Sowane was talking to in Court today;
- (vii) Stated that on that day they did search Shop No. 5 and he did not know that adjacent place of Chung's Place was Shop No. 5;
- (viii) Stated that he went and searched everywhere as directed by his team leader and the search warrant was for Shop No. 1;
- (ix) Stated that he could not see owner of Shop No. 1 in Court;
- (x) Stated that when he entered the shop he saw implements on the table with money and when asked if he knew what game they were playing he stated gambling but he does not know name of the game;
- (xi) Stated that he did not ask people in the shop as to what the money was for;

- (xii) When he saw money on table with snake and ladder like game he thought it was gambling;
- (xiii) When it was put to him that he followed instructions to go through search, arrest everyone and take them to Police Station he stated that he followed instructions to search;
- (xiv) In reference to line 9 of Exhibit D4 (Statement) he stated that they had two (2) teams and were told to enter both shops, one being Victoria Parade at same time;
- (xv) They waited at Flea Market and entered the building at 1650 hours;
- (xvi) Money collected were in \$20 and \$10 denominations with some coins;
- (xvii) He does not know Kester Yee or Kesters Catering Shop No. 5 in Metropole Building or Kester Yee being taken to Nabua Police Station;
- (xviii) Stated that his team did the search and other teams collected implements and cash and there were about nine to ten of them including female Police Officers;
- (xix) Stated that they searched twenty-four (24) people before taking them to Nabua Police Station and Constable Theresa PC3236 was part of the team with three (3) officers of Indian ethnicity;
- (xx) Stated that back-up team did not conduct body search and no body search was conducted;
- (xxi) Stated that they conducted normal body search, whereby they make person face wall and they search from top to bottom and they have to touch their body;
- (xxii) When it was put to him that Kester Yee was searched at Patrol Station he stated he could not recall;

- (xxiii) Stated that he could not recall a gentleman objecting or asking question to Sowane;
- (xxiv) Stated that they didn't search on top floor;
- (xxv) When it was put to him that owner of allegedly shop suspected of gambling was different shop from Chung's Store (Shop No. 1) he stated that he thought it was same shop as Shop No. 1 which he assumed;
- (xxvi) Stated he was not aware that Kester Yee was told to strip naked and squat holding his ear.

28. During re-examination DW1:-

- (i) Stated that Exhibit D3 (Second Warrant) is under Criminal Procedure Code and Exhibit D4 (Second Warrant) is under Gaming Act and are different;
- (ii) Stated that Team Leader informed him that he has seen the owner;
- (iii) He assumed building upstairs was part of Chung's Store being Chung's Store because there was a step going to top floor from inside of Chung's Store and as such was considered as part of Chung's Store;
- (iv) Stated that in order to go upstairs where gambling was taking place you had to go through Shop No. 1;
- (v) Stated that he never met owner of Chung's Store and at that time he did not know who was owner of Chung's Store and it was the responsibility of Team Leader to know.

29. Defendant's second witness was Romili N. Kuruvisi of Qtrs 17, Navosa Police Compound, Navosa, Police Officer (**DW2**).

30. During examination in chief DW2 gave evidence that:-

- (i) She has been in Police Force for seventeen (17) years and has been Acting Sergeant for two (2) years;

- (ii) Recalled on 12 March 2005, her team conducted raid a premise in Suva and her role was “that of Interviewing Officer”;
- (iii) She interviewed Kester Yee who was present in Court;
- (iv) When she first saw Kester Yee he seemed upset;
- (v) Other Officers present during the interview were Inspector Bolalailai and Sergeant Sowane and that Kester Yee wanted to be interviewed in English;
- (vi) Stated that she recorded the interview in her handwriting and she signed the Form;
- (vii) Read lines 12 to 21 of Page 1 of Record of Interview (Exhibit D5) which is following terms:-

“I am a woman Police Constable No. 2742. My name is Mili. I wish to interview you Kester Yee in regards to the allegation that you being the owner of Kester Catering Social Room you allow the playing of illegal gambling. You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence. Do you understand the allegation that you will be questioned on?”

Yes.”

- (viii) Read from line 20 on page 2 of Exhibit D5 to end of page 2 which is in following terms:-

“Where is your business licence?”

The Suva City Council is having problem with the type of licence to issue to me for operating the Social Club.

You mean to tell me that the Social Club is now operating without a business licence?

Yes because my application is still being hold there.

This game of maching cards, domiko, what kind of game is this?

Playing of card it is a Chinese game.

Is money involved in this game?

It is up to people who are playing the game if they want to play using money they can use money it is like the game of tarabu where you pay another person when you lose.”

- (ix) Read from line 26 on page 3 to bottom of page 3 of Exhibit D5 which was in following terms:-

“Do you wish to say anything else?

No.

Do you wish to read your statement or have it read to you?

You read it to me. (statement read back to Mr Kester at 0127 hrs and he fully agreed with the statement read back).

Do you wish to change anything in your statement?

No.”

- (x) Read page 4 of Exhibit D5 which is in following terms:-

“Q28. Were any threat or promises made to you upon giving your statement?

A. No

Q29. Can you sign to acknowledge that no threat or promises made in order to give your statement?

A. Yes.

Q30. I wish to advise you that you could be prosecuted for the above case. Do you understand?

A. Yes.”

- (xi) Purpose of signing is that Kester Yee confirms that he agreed to the Interview.

31. During cross-examination DW2:-

- (i) Stated that date of interview was 13 March 2005;
- (ii) Agreed that Kester Yee was about sixty-six (66) years old and she commenced interview at thirty-six (36) minutes past midnight;
- (iii) Stated that Kester Yee was arrested around 5.00pm and there were twenty-four (24) of them and she could not remember how many Police Officers were there and they were told to interview and release them;
- (iv) Did not agree when it was put to her that if she accepted that midnight was not a good time to interview sixty-four (64) year old man for the reason that if the old man was able to stay and play mahjong at late at night then it is okay for him to be interviewed;
- (v) When asked from where did she get information that Kester Yee plays mahjong at middle of night she stated that during the operation there was a team conducting surveillance at Kester Yee's premises in town which was recorded;
- (vi) Stated that since they received information, the execution team raided the premises;
- (vii) Stated that she took the search warrants (Exhibit D2 and D3 to former Magistrates signature accompanied by Corporal Ilaitia Caginavanua and his name appear on the search warrants because of his seniority;
- (viii) Stated that she could not recall what was on the search warrant but if shown, she could tell;
- (ix) In reference to Exhibits D2 and D3, when asked where does it say Kester Yee Catering she stated that it states shop number and trading name of person not there;

- (x) Agreed, that before they conduct raid, they ascertain the name of owner of shop and stated that they did conduct search and records are at Community Policing;
- (xi) When shown Certificate of Business Registration in the name of Kesters Catering Room stated that the place of business is Shop 5, Metropole Building, 1st Floor Scott Stree, Suva;
- (xii) Stated that search warrants have different shop number;
- (xiii) Agreed that name of shop in search warrants is Chung's Store;
- (xiv) In reference to line 16 in Exhibit D5 (Records of Interview) which reads "You are not obliged to say anything unless you wish to do so but what you say may be put in writing and given in evidence" she stated that it was mistake;
- (xv) Agreed that whatever Kester Yee explained to her, she had put in writing and that Kester Yee could not read what she wrote and he was relying on her for entire interview and two witnesses were present;
- (xvi) When it was put to her that when she read the Record of Interview Kester Yee was reliant upon her to explain the contents and be fair and honest she stated that she was being fair;
- (xvii) Stated that no meal was offered and she did not escort him to toilet;
- (xviii) Stated that she did not offer him any break because she assumed he had enough rest from time of arrest;
- (xix) Stated that Kester Yee was not a flight risk or risk that he would run away from custody;
- (xx) When she was asked if it would not have been fair for him to rest and be interviewed the next day she stated that she was given instructions to interview him in the same day and she only followed instruction;

(xxi) Stated that nothing was mentioned as to why Kester Yee was upset.

32. During re-examination DW2:-

(i) Read line 6 to 8 on page 1 of Exhibit D5 (Record of Interview) in following terms:-

“Do you wish to consult your lawyer or Legal Aid or a relative before I commence with this interview?”

No you continue.”

(ii) Confirmed that Exhibit D5 has been signed her and Kester Yee;

(iii) Agreed that their instruction was to search Kester Yees Catering and there was an error in shop number and shop name;

(iv) Stated that person she interviewed as Kester Yee and he had the facilities such as restroom and washroom in the Station;

(v) Stated that her instruction was to interview Kester Yee;

(vi) Read lines 26 and 27 on page 3 of Exhibit D5 in following terms:-

“Do you wish to say anything else?”

No.”

(vii) Stated that he did not tell her about being stripped naked.

Whether the search conducted at the Plaintiff’s business was lawful; whether a Search Warrant was shown to the Plaintiff’s representative

33. It is appropriate to consider Defendant’s Submission that Section 15(1) and (2) of Criminal Procedure Code 2009 (“**CPC 09**”) has retrospective effect and applies here pursuant Section 301(1) of CPC 09.

34. Section 301(1) of CPC 09 provides as follows:-

“301-(1) A court hearing any proceeding for an offence which was commenced prior to the commencement of this Decree may apply the provisions of

this Act if no judgment has been made in the case and no sentence has been imposed on the offender prior to the commencement of this Act.”

35. With due respect to Counsel for Defendants this Court rejects this Submission for following reason:-

- (i) Section 301(1) of CPC 09 is relevant when Court is dealing with the offence the Accused is charged with;
- (ii) In civil proceedings where Police Officers are being sued for failing to comply with provision of law such as searching someones premises without search warrant, then the Court is not dealing with the offence but a civil claim for unlawful search and seizure;
- (iii) Whether Police Officers search was unlawful will have to be determined by looking at the law at the time search was carried out;
- (iv) Whether the search and seizure of items are unlawful is to be decided in accordance with the law that was in existence at the time the search was carried out and not in accordance with law that was not in existence at the time search and seizure was carried out.

36. Hence, the provision applicable and law in place at time search was carried out, which is in 2005, will need to be considered.

37. Section 14(1) of Criminal Proceed Code Cap 21 provides as follows:-

“14(1) If any person acting under a warrant of arrest, or any police officer having authority to arrest, has reason to believe that the person to be arrested has entered into or is within any place, the person residing in or being in charge of such place shall, on demand of such person acting as aforesaid or such police officer, allow him free ingress thereto and afford all reasonable facilities for a search therein.”

38. Sections 13, 14 and 15 of Gaming Act Cap 273 which was the law in 2005, provides as follows:-

“13.—(1) A magistrate or police officer of or above the rank of Assistant Superintendent on being satisfied upon written information on oath and after any inquiry which he may think necessary, that there is good reason to believe that any place is kept or used as a common gaming house may, by warrant, authorise any person therein named or any police officer with such assistance and by such force as may be necessary, by night or by day, to enter, to go to such place and search the same and all persons found therein, and to seize all implements or appliances for gaming and all money, securities for money and other articles reasonably supposed to have been used, or intended to be used for any game or illegal lottery which may be found on such persons and also to detain all such persons until they, and such places, shall have been searched. If any of the things or circumstances which are made by the provisions of this Act, presumptive evidence of guilt are found in such places or on any person therein, every person found therein shall be taken before a magistrate to be dealt with according to law.

(2) All implements or appliances for gaming, money, securities for money and other articles found in a common gaming house or on any person found therein or escaping therefrom which the magistrate is of opinion were used, or intended to be used, for any game or illegal lottery, shall be declared by him to be forfeited to the Crown and shall be dealt with accordingly.

14.—(1) A magistrate on being satisfied, upon information on oath and after any enquiry which he may think necessary, that there is good reason to believe that any implements or appliances for gambling are likely to be found on any person may, by warrant under his hand, order any police officer to arrest and search such person or may, by warrant under his hand, order any person therein named to arrest such person and to take him forthwith before any

magistrate who shall thereupon cause such person to be searched in his presence and if such implement or appliance is found upon such person he shall be dealt with according to law.

(2) Nothing in this connection shall authorise any female to be searched except by a female.

15.—(1) A magistrate or a police officer of or above the rank of Assistant Superintendent may himself do whatever he may authorise a police officer to do whenever such magistrate or police officer of or above the rank of Assistant Superintendent is competent to issue a warrant under the provisions of section 13 and also in any of the following cases:—

- (a) if any person has within the preceding six months been convicted of having kept or used as a common gaming house a place proposed to be entered;*
- (b) if the place proposed to be entered is occupied by a social club and he has reason to believe that habitual gambling is carried out there;*
- (c) if he has personal knowledge of such facts and circumstances as to be satisfied that there are sufficient grounds for a search under the provisions of such section;*
- (d) if he receives the required information orally and either on oath or not on oath under such circumstances that the object of such search would in his opinion be defeated by the delay required in reducing the information to writing:*

Provided that, in this last case, the name and address of the person giving such information are known to or ascertained by such magistrate or police officer of or above the rank of Assistant Superintendent before he acts upon such information.

(2) Whoever in giving such oral information, as is referred to in subsection (1), makes a statement which he knows or believes to be false or does not believe to be true, shall be guilty of an offence and

liable on conviction to imprisonment to a term not exceeding one year or to a fine not exceeding two hundred dollars or to both such imprisonment and fine.”

39. After analysis of the evidence of Plaintiff, DW1 and DW2 and their demeanour this Court makes following finding:-
- (i) Chung's Store was under Police Surveillance prior to raid conducted on 12 March 2005, during the “Sasa Operation”;
 - (ii) Police did obtain Search Warrant from the Magistrate on the basis of Information filed under Criminal Procedure Code Cap 21 and Gaming Act Cap 273;
 - (iii) The shop premises named in the search warrants was Chung's Store, Shop 1, Metropole Building, Scott Street, Suva to be a common gambling house;
 - (iv) Police Officers went to the premises at around 4.50pm on 12 March 2005, to raid the premises known as Chung Store and waiting for clearance to raid the premises together with Chung's Store located in the city;
 - (v) When Police Officers raided the premises with the Search Warrant, they did give the search warrant to the owner of Chung's Store;
 - (vi) When Police Officers entered Chung's Store on ground floor they saw steps leading upstairs from inside the ground floor shop;
 - (vii) When Police Officers went upstairs (First Floor) that is where they saw people sitting around the table with games on the table;
 - (viii) Some school girls and ladies were present on First Floor;
 - (ix) Plaintiffs, “Social Club” shop was located in such a place and manner that any reasonable person would at first instance have reasonable belief that the shop where games were played was Chung's Store, Shop No. 1, Metropole Building Scott Street, Suva;

- (x) The Police Officers who obtained the search warrant had reasonable belief that the shop they had to raid for alleged criminal offence (prostitution) alleged offence under Gaming Act Cap 273 (gambling) was as described in the Search Warrant.
40. It was Plaintiffs own evidence that Mr Chung was his representative for running of the games played at First floor.
41. This Court does not find Plaintiff's evidence credible when he stated that when he asked for search warrant, he was threatened by Police Officers that he would be handcuffed or locked.
42. This Court accepts DW1s evidence that Search Warrant was shown to the Owner of Chung's Store and no threat was made to Plaintiff.
43. This Court holds that search was carried lawfully as the Police Officers believed on reasonable grounds that Chung's Store as the shop where alleged gambling and prostitution was taking place.
- 44. In any event, Plaintiff has failed to plead that the search carried out by Police Officers were unlawful and provide any particulars in the Statement of Claim**

Whether the Plaintiff was subjected to humiliating and degrading treatment by the Fiji Police Force

45. Plaintiff claims that he was treated cruelly and given degrading treatment.
46. Section 25 to 27 of the 1997 Constitution of Fiji which was the Constitution on 12 March 2005 provided as follows:-

“Section 25 Freedom from cruel or degrading treatment:-

- (1) Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment.*

- (2) *Every person has the right to freedom from scientific or medical treatment or procedures without his or her informed consent or, if he or she is incapable of giving informed consent, without the informed consent of a lawful guardian.*

Section 26 Freedom from unreasonable searches and seizure:-

- (1) *Every person has the right to be secure against unreasonable search of his or her person or property and against unreasonable seizure of his or her property.*
- (2) *Search or seizure is not permissible otherwise than under the authority, of law.*

Section 27 Arrested or detained persons:-

- (1) *Every person who is arrested or detained has the right:*
- (a) *to be informed promptly in a language that he or she understands of the reason for his or her arrest or detention and of the nature of any charge that may be brought;*
 - (b) *to be promptly released if not charged;*
 - (c) *to consult with a legal practitioner of his or her choice in private in the place where he or she is detained, to be informed of that right promptly and, if he or she does not have sufficient means to engage a legal practitioner and the interests of justice require legal representation to be available, to be given the services of a legal practitioner under a scheme for legal aid;*
 - (d) *to be given the opportunity to communicate with, and to be visited by: (i) his or her spouse, partner or next-of-kin; and (ii) a religious counselor or social worker;*
 - (e) *to challenge the lawfulness of his or her detention before a court of law and to be released if the detention is unlawful; and*
 - (f) *to be treated with humanity and with respect for his or her inherent dignity.*

- (2) *The authorities holding a person who has been arrested or detained must promptly take all reasonable steps to inform his or her spouse, partner or next-of-kin of his or her arrest or detention.*
- (3) *Every person who is arrested for a suspected offence has the right: (a) to be informed promptly in a language that he or she understands that he or she has the right to remain from making a statement; (b) to be brought before a court no later than 48 hours after the time of arrest or, if that is not reasonably possible, as soon as possible thereafter; and (c) to be released from detention on reasonable terms and conditions pending trial, unless the interests of justice otherwise require.*
- (4) *A person who is ordered to be detained pending trial is, so far as practicable, to be kept apart from convicted persons.*
- (5) *A detained child is, so far as practicable, to be kept apart from adults, unless that is not in the child's best interests.”*

47. At paragraph 4 and 5 of the Statement of Claim Plaintiff pleads as follows:-

- “4. On March 12 2005, at the Plaintiffs shop at Metropole Building, a group of policemen entered the building under the pretences of a raid. In the process of the purported raid the Plaintiff together with other Chinese present was ordered to strip naked.
 - i) He was ordered to take off his shirt,
 - ii) than he was told to take off his long pants
 - iii) thirdly he was ordered to remove his underpants
 - iv) and lastly he was told to hold his ears and squat up and down.All these in the presences of another Chinese lady and a young school girl.
5. In the process of directing the Plaintiff to such actions the Defendant through his servants breached the Plaintiffs Constitutional Rights and human decency.”

48. No evidence was led to say that any other Chinese national were asked to get naked as is stated in paragraph 4 of the Statement of Claim.

49. This Court finds that Plaintiff was not asked to strip naked as pleaded and evidence given by him for following reasons:-

(i) At line 1 to 5 in second paragraph of page 3 of letter written by Plaintiff to then Commissioner of Police on 25 October 2005 (Exhibit P4) he described the events of 12 March 2005 as follows:-

“Upon my arrival to my social room at 4.00pm I demanded them a search warrant and in reply I was told to keep shut before we handcuff you. Upon my request for warrant again I was told off to keep shut otherwise I would be locked. Again I was not there but I was charged and the fact is I did not commit any kind of crime. The police officer (3236) ordered me to get naked and confiscated all my money in my pocket.”

(ii) At second paragraph on page 2 of letter dated 15 July 2010, written to then Commissioner of Police (Exhibit P3) he described the event as follows:-

“I was then taken to Nabua Police Station where I was then humiliatingly forced to strip naked by an Indian Police Constable 3236 who said was instructed by his boss (Senior Superintendent Jone Ravulo after my asking him why he instructed me to do such a disgraceful thing in front of other detainees.”

(iii) It is clear that the Plaintiff contradicted himself in both letters on the basis that in Exhibit P4 he said he was asked to strip naked at the premises whereas in Exhibit P3 he stated he was asked to get naked when he was at Nabua Police Station. In his evidence in chief he gave evidence that Police Officer 3236 asked him to get naked in the bulk store.

50. This Court finds that the allegation of him being asked to go naked is created by the Plaintiff to claim damages from Defendants for the raid they carried out as part of “Sasa Operation”.

51. Plaintiff also cannot rely on 1999 case between him and Commissioner of Police on the ground that that matter was settled out of Court and no determination was made by the Court in respect to issues raised in that case.

52. Plaintiff acknowledged signing the Records of Interview which was explained to him by DW2.
53. It is apparent that Plaintiff was not ill-treated during the interview and was held only for almost seven (7) hours before he was released.
54. Plaintiff by his Counsel submits that because he was 67 years old at time of interview and as such interview should not have been recorded around 1.30am.
55. This Court accepts DW2's evidence that Plaintiff was taken to Nabua Police Station at around 6.00pm which meant that Plaintiff was at the Station for approximately seven and half hours.
56. When Plaintiff gave evidence on date of trial he would have been 75 years old but looked quite active and energetic.
57. No evidence has been produced to show that when his interview was recorded he was suffering from any sickness.
58. In any event, the Plaintiff had not pleaded about the manner of interview or whether the interview was recorded involuntarily.
59. Mere fact that, Plaintiff seemed upset does not mean that he did not answer the question voluntarily.
60. Before concluding this Court feels it prudent to look at the judgment in **Kasim v. Commissioner of Police** [2001] FJHC 47 of 1999 (3 December 2001) and **Commissioner of Police v. Mother and her Child** [2008] FJHC 183 HBA 08.2008 (27 August 2008)
61. In **Kasim** case Plaintiff, a businessman was detained by the Immigration twice at Nadi Airport without being told as to why he was being detained.

On the first occasion, Plaintiff had to miss his flight and book another flight.

Defendants evidence in **Kasim** case was that he was on a "watch list" but his name was to be deleted from the list which Immigration Department failed to do.

62. The facts of **Kasim** case is distinguishable in that in **Kasim's** case the Plaintiff was wrongfully detained whereas in this case Chung's Store was under surveillance before Police conducted the raid and the Plaintiff was informed why he was arrested and charged.
63. In **Commissioner of Police v. Mother and her Child** case the Plaintiff was able to establish that she was humiliated by Police Officers and detained for twenty-six hours whereas in the present case Plaintiff failed to establish that he was humiliated and treated unfairly in any respect.

Just because his shop was raided and he was taken to Police Station, interviewed and released within seven (7) hours does not amount to humiliation or degrading treatment.

Conclusion

64. This Court makes following finding:-
- (i) The search warrants were handed by Police Officers to owner of Chung's Store;
 - (ii) The search carried out by Police Officers was reasonable due to the fact First Floor where suspected gambling and prostitution was taking place appears to be part of Chung's Store;
 - (iii) Plaintiff has failed to plead or provide particulars in respect to the lawfulness or unlawfulness of the search warrants;
 - (iv) Plaintiff was not subject to any torture or degrading treatment;
 - (v) Plaintiff has failed to meet the test for malicious prosecution and plead the particulars in the Statement of Claim of malicious prosecution;
 - (vi) In any event, apart from Plaintiff being asked to strip naked which evidence Court did not believe, Plaintiff has not pleaded or particularized anything about the search warrant or his arrest in the Statement of Claim.

Costs

65. Court takes into consideration that trial lasted for one day, parties filed Submissions and Plaintiff's claim lacked merit and he tried to create evidence to take his revenge against the Police Department.

Orders

66. Court makes following orders:-

- (i) Plaintiff's claim is dismissed and struck out;
- (ii) Plaintiff do pay Defendant's costs assessed in the sum of \$3,000.00 within twenty-one (21) days of this Judgment.




.....
K. Kumar
JUDGE

At Suva

28 September 2018

Toganivalu, Esquire for the Plaintiff

Office of the Attorney-General for Defendants