THE
SEYCHELLES
LAW REPORTS

SUPREME COURT DECISIONS

VOLUME
1997

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Published by Authority of the Chief Justice

JUDGES OF THE SUPREME COURT

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Hon. C. A. Amerasinghe (Appointed on 13 February 1994)
Hon. S. J. Bwana (Appointed on 5 January 1994)

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CITATION

These reports are cited thus:
(1997) SLR

Printed by
Imprimerie St Fidèle

CASES IN THIS VOLUME

Attorney-General v Robert	*97*
Barbe v Commissioner of Police	*92*
Bouchereau v Panagary	*116*
GS Pillay & Company Pty Ltd v Sinon	*107*
Lucas v Public Service Appeal Board	*111*
Panimports (Pty) Ltd v Gagitien Estate (Pty) Ltd	*120*
Pillay v Regar Publications (Pty) Ltd & Ors	*125*
Prunias v Darou	*87*
Republic v Albert	*27*
Republic v Brioche	*72*
Republic v Francis (alias Kalenba)	*63*
Republic v Gilbert	*11*
Republic v Joseph	*53*
Republic v Snoopy's Mini Market	*60*
Republic v Soomery	*47*
Rose v Monnaie & Or [enclaved land]	*177*
Rose v Monnaie & Or [trespass]	*186*
Silbersand (Pty) Ltd v Bonne	*159*
Textil Basquit (Tebasa) v Owner and Charters of The Vessel "Global Natali"	*164*

DIGEST OF CASES IN THIS VOLUME

ACCESS TO LAND

- *Land – enclave – access – prescription – encroachment*

Rose v Monnaie & Or **177**

ADMIRALTY LAW

- *Admiralty law – cargo loss – time for filing defence*

Textil Basquit (Tebasa) v Owners and Charterers of The Vessel "Global Natali" **164**

CONFESSIONS

- *Criminal procedure - confessions – repudiated and retracted statements*

Republic v Gilbert **11**

CAPACITY TO SUE

- *Civil procedure - capacity to sue – trespass*

Prunias v Darou **87**

DEFAMATION

- *Defamation – qualified privilege – malice – the press – truth – fair comment – damages*

Pillay v Regar Publications (Pty) Ltd & Ors **125**

DEFENCES

- *Criminal law – s 192 Penal Code – s 195 Penal Code - manslaughter - elements of manslaughter - mens rea - defences*

Republic v Francis (Alias Kalenba) **63**

DRUG TRAFFICKING

- *Drug trafficking – possession – admissibility of evidence*

Republic v Albert **27**

EMPLOYMENT

- *Employment law - Employment Act 1990 - failing to pay compensation – revision - pleadings - unlawful sentence*

Republic v Snoopy's Mini Market **60**

ENCLAVE

- *Land – enclave – access – prescription – encroachment*

Rose v Monnaie & Or **177**

ENCROACHMENT

- *Land – enclave – access – prescription – encroachment*

Rose v Monnaie & Or **177**

EVIDENCE

- *Criminal law - sexual interference with a child - s 135(1) Penal Code - Art 18(4) Constitution - unsworn evidence - corroboration*

Republic v Brioche **72**

EXTRA-JUDICIAL PROCESS

- *Procedure – extra-judicial process – summary judgment*

GS Pillay & Company Pty Ltd v Sinon **107**

FAIR COMMENT

- *Defamation – qualified privilege – malice – the press – truth – fair comment – damages*

Pillay v Regar Publications (Pty) Ltd & Ors **125**

INJUNCTIONS

- *Civil procedure - injunctions – interim orders*

Panimports (Pty) Ltd v
Fagitien Estate (Pty) Ltd. **120**

INTERIM ORDERS

- *Civil procedure - injunctions – interim orders*

Panimports (Pty) Ltd v
Fagitien Estate (Pty) Ltd. **120**

JUDICIAL REVIEW

- *Constitution – public service – dismissal – judicial review*

Lucas v Public Service Appeal Board **111**

LEGAL PERSONALITY

- *Locus standi – legal personality*

Silversand (Pty) Ltd v Bonne **159**

LESION

- *Land purchase by state – Lesion*

Attorney-General v Robert **97**

LOCUS STANDI

- *Locus standi – legal personality*

Silversand (Pty) Ltd v Bonne **159**

MALICE

- *Defamation – qualified privilege – malice – the press – truth – fair comment – damages*

Pillay v Regar Publications (Pty) Ltd & Ors **125**

MANSLAUGHTER

- *Criminal law - s 192 Penal Code - s 195 Penal Code - manslaughter - elements of manslaughter - mens rea - defences*

Republic v Francis (Alias Kalenba) **63**

MENS REA

Criminal law - s 192 Penal Code - s 195 Penal Code - manslaughter - elements of manslaughter - mens rea - defences

Republic v Francis (Alias Kalenba) 63

QUALIFIED PRIVILEGE

- *Defamation – qualified privilege – malice – the press – truth – fair comment – damages*

Pillay v Regar Publications (Pty) Ltd & Ors 125

PERSONAL INJURY

- *Damages – personal injury*

Bouchereau v Panagary 116

PRESCRIPTION

- *Land – enclave – access – prescription – encroachment*

Rose v Monnaie & Or 177

PROOF

- *Trespass to land – evidence – documentary proof*

Rose v Monnaie & Or 186

PUBLIC SERVICE

- *Constitution – public service – dismissal – Judicial review*

Lucas v Public Service Appeal Board **111**

ROBBERY

- *Criminal law - s. 281 Penal Code - s. 23 Penal Code - robbery with violence - common intention*

Republic v Joseph **53**

SENTENCING

- *Sentencing – partial suspension*

Republic v Soomery **47**

SEXUAL INTERFERENCE

- *Criminal law - sexual interference with a child - s 135(1) Penal Code - Art 18(4) Constitution - unsworn evidence - corroboration*

Republic v Brioche **72**

SUMMARY JUDGMENT

- *Procedure – extra-judicial process – summary judgment*

GS Pillay & Company Pty Ltd v Sinon **107**

THE PRESS

- *Defamation – qualified privilege – malice – the press – truth – fair comment – damages*

Pillay v Regar Publications (Pty) Ltd & Ors **125**

TRESPASS

- *Civil procedure - capacity to sue – trespass*

Prunias v Darou **87**

- *Trespass to land – evidence – documentary proof*

Rose v Monnaie & Or **186**

VIOLENCE

- *Criminal law - s 281 Penal Code - s 23 Penal Code - robbery with violence - common intention*

Republic v Joseph **53**

Republic v Gilbert

Criminal procedure - confessions – repudiated and retracted statements

An office block was broken into, some equipment was removed and the premises were set alight. The intruder had gained access to the building by removing louvre panes from a ground floor window. Fingerprints from the crime scene were found to match those of the accused. The accused was charged with breaking and entering, theft, and arson. Following the accused's arrest and detention by the police, he made two statements. In his first statement to the police, the accused denied any involvement in the incident. The day after his arrest, the accused was interviewed again and confessed to the crime. Before the trial the defence objected to inclusion of evidence from the second statement on the basis that the accused had not made a confession. The Court held a voir dire and heard evidence from three of the police officers involved in the case. Following that trial, the Court concluded that the accused had voluntarily made the second statement and had repudiated it in Court because it was self-incriminating. Evidence on the second statement was admitted and the trial proceeded.

HELD

(i) A court is entitled to found a conviction solely on an admission of guilt by the accused provided that it is satisfied beyond reasonable doubt that the confession was either made voluntarily or, in the case of a repudiated statement, that it was made and was repudiated because of its truth;

(ii) Where a statement or confession is retracted, the Court usually looks for corroborating evidence to determine which version is the likely truth; and

(iii) In relation to repudiation, once the Court is satisfied that the statement was made, the Court may reasonably infer that it was repudiated because it was true.

Judgment: Accused convicted on all counts.

Legislation cited
Seychelles Penal Code, ss 264, 291, 318

Cases referred to
David Antoine v R (unreported) Criminal Appeal 32/1995
Guy Roger Pool v R (1965-76) SCAR 88

Foreign cases noted
Gathuga & Waweru v R (1953) 20 EACA 294
Tuwamoi v Uganda [1967) EACA 84

Frank ALLY for the Republic
Frank ELIZABETH for the Accused

Judgment delivered on 21 May 1997 by:

ALLEEAR CJ: The accused stands charged with the following offences:

Count 1
Statement of Offence
Breaking and entering into an office and committing a felony therein, namely stealing in a public office contrary to section 291 (a) of the Penal Code as read with section 264(e) of the Penal Code and punishable under section 291 (a) of the Penal Code.

Particulars of Offence
Francois Patsy Gilbert during the night of 13 October, 1996 and the early hours of the morning of 14 October, 1996 at Victoria, Mahe, broke and entered into an office, namely the

Administration Office of the President's Office, and committed a felony therein, namely stealing therein a plastic bag containing, three audio tapes, a bunch of keys, a notebook and a sum of R2000 in cash belonging to the Government and the employees therein.

Count 2 Statement of Offence
Stealing from a public office contrary to and punishable under section 264(e) of the Penal Code.

Particulars of Offence
Francois Patsy Gilbert at the place and date mentioned in Count 1 and within the course of the same transaction stole from a Public Office, namely the Administration Office of the President's Office, a plastic bag containing three audio tapes, a notebook, and a sum of about R2000 in cash deposited or kept therein belonging to the Government and the employees therein.

Count 3
Statement of Offence
Arson contrary to and punishable under section 318(a) of the Penal Code.

Particulars of Offence
Francois Patsy Gilbert at the place and date mentioned in Count 1 wilfully and unlawfully set fire to a building, namely the Administration Office of the President's Office.

During the early hours of 14 October 1996, shortly after 1 am, the Administration block of the President's Office in the State House compound was set on fire. By the time the fire brigade and the police were alerted and reached the scene of the fire the first floor of the said building was virtually destroyed.

The offices of the Cabinet Affairs Secretary, the Advisor to the President of the Republic of Seychelles and offices of supporting staff were located on the first floor of the building. In those offices there were several expensive pieces of

equipment such as computers, printers, photocopiers, television sets, video recorders etc. Highly confidential documents like cabinet papers and the record of the Constitutional Commission were also stored on the first floor of the said building.

CID officers, fingerprint experts and other high ranking officers of the Seychelles Police Force all started their investigations around 8 am on 14 October 1996. The Administration Block building was thoroughly combed inside and outside. It was noticed that two glass louvre blades were missing from the window frame of the men's toilet situated on the ground floor. Metres away from the said toilet a glass louvre blade, was found lying in the grass by SP Antoine Belmont, which fitted exactly the said window frame. SP Paul Bedier undertook photographic and fingerprint examination on the said louvre blade (Exh. P3). The fingerprint examination of the impression found on the louvre blade and the finger impression taken from the accused led SP Becher to the irresistible conclusion that the two impressions were identical, i.e, they were made by the same person.

ASP Ronnie Mousbe also assisted in the search of the area inside and outside the compound of the Administration Block of the State House building. He found in the Bel Air cemetery, not far from the said building, a plastic bag in which there were three audio tapes, a notebook, a bunch of keys and a key ring. On one of the audio tapes there was a label 'Psi on chantait'. SP Bedier lifted fingerprint impressions from one of the said audio tapes (Exh. 4). When the impressions were compared with the fingerprint of the accused person, they were found to be identical. SP Bedier confirmed that the impressions that were lifted from the audio tape and the glass louvre blade were fresh and very clear. Based on his training and experience he said the impressions could not have been more than one week old.

Once SP Bedier satisfied himself that the prints lifted from the scene of the crime matched those of the accused taken by

Inspector Dubignon on a form, he sought a second and third opinion from his two assistants, namely Inspector Reginald Elizabeth and Inspector Sylvia Chetty. The latter confirmed that after SP Bedier had carried out his fingerprint examination and came to the conclusion that the prints lifted at the scene of crime matched those of the accused person they were asked to compare those sets of prints and give their opinions thereon. Both Elizabeth and Chetty who were called by the defence deposed that they agreed with the conclusion reached by SP Bedier. When asked in Court to identify the characteristics of each point of similarity marked out by SP Bedier on Exhs. 21, 26 and 34 there were some divergences in the characteristics of the ridges designated by SP Bedier and those of the two expert defence witnesses. For instance what SP Bedier described as a bifurcation, Inspector Elizabeth thought was a ridge ending. There were also divergences between the evidence of Inspector Elizabeth and Inspector Sylvia Chetty. I have attributed the divergences to the fact that while SP Bedier used a magnifying glass in Court, the two other witnesses, who are in their mid-forties and wear glasses, compared the exhibits with their naked eye. My view on this matter was confirmed by Inspector Sylvia Chetty who pointed out that "with the naked eye it is difficult to state with a high degree of certainty the characteristics of the ridges." With the aid of a magnifying glass I have no doubt that both Inspectors Elizabeth and Chetty would have reached the same conclusion as that of SP Bedier. Both defence witnesses stated in no uncertain terms that when they were asked for their second and third opinion by SP Bedier they agreed entirely with his conclusions.

The evidence is clear that whoever had gained access to the Administration Block of the President's Office did so through the gap made after two glass louvres were removed from the window frame of the men's toilet on the ground floor. A concrete block was found just outside the said window on the ground apparently to help the intruder to climb up the said window with greater ease. The cleaner who was responsible for cleaning the building testified that on Friday 11 October

1996 when she cleaned the said toilet all the louvres in the said window frame were intact.

On the first floor of the building on an office desk, the police found an empty match box and a gallon of Agip oil. There is evidence that the said gallon was on a shelf on the floor of that office before the employees occupying the said office left on Friday evening. Undisputedly the fire started on the first floor of the building before spreading to the other parts of the building. Unfortunately, in an attempt to put out the fire, fire officers spread a lot of water on the burning building and the gallon of Agip oil was wet when SP Bedier examined it. No print impressions therefore could be lifted from it or were found on it. The person who had entered that building to set fire to it must have used the Agip oil as an accelerant.

Claudette Arnephy, an employee in the Administrative Block, testified that on Friday 11 October 1996 before she left the office for home she had R2000 in a cash box which was in her desk drawer. On Monday 14 October 1996 the drawer was found to have been broken and the contents of the cash box were missing. Penny Belmont, Marie Francoise, Jules Nageon and Raymond Brioche positively identified the items found by SP Mousbe in the plastic bag in the Bel Air cemetery. The bunch of keys which was left by Marie Francoise in a tray on her office desk was identified to be the office door keys belonging to the Government. All the aforesaid witnesses testified that the items found in the plastic bag were in the said building on Friday 11 October 1996. Therefore, there can be no doubt that if they were found in the plastic bag in the Bel Air cemetery that someone must have removed them from the said office of the Administration Block and left them at the place where they were subsequently found.

The accused's concubine, called by the prosecution, deposed that on the night of Sunday 13 October 1996, whilst she was in bed with the accused, the latter told her that he was going to the toilet which is situated outside the house. She noticed that the accused remained absent for a relatively long period

of time. However, she could not recall the exact period of time during which the accused was absent from the house. Neither was she able to tell the Court at what time the accused left and when he returned home. She was certain that it was after the television station went off the air that she went to sleep that night.

Following his arrest and detention by the police on 21 October 1996, the accused gave two statements to ASP Quatre. In his first statement he denied all involvement in the offences levelled against him. On 22 October 1996, he was again interviewed by ASP Quatre. In a second statement he confessed to his involvement in the crime. The defence objected to the adduction in evidence of the second statement on the ground that it had never been made. In other words, the accused repudiated the second statement. The Court heard evidence from ASP Ernest Quatre,Inspector David Dubignon and Lance Corporal Jeffrey Mane on a voir dire to ascertain whether or not the accused had in fact made the second statement. After the conclusion of the hearing on the voir dire, the Court was satisfied beyond all doubt that the accused did voluntarily make a second statement which he repudiated in Court. I am satisfied beyond doubt that the accused denied making the second statement because of its incriminatory nature.

In the case of *David Antoine v R*, (unreported) Criminal Appeal 32/1995, this Court held:

> The Court is entitled to found a conviction solely on the admission of an accused person provided that the Court is satisfied beyond doubt that the confession was either made voluntarily or in the case of a repudiated statement that it was made but repudiated because of its truth.

In the case of *Tuwamoi v Uganda* [1967] EACA 84 the Court of Appeal for Eastern Africa reviewed its earlier decision and made the following observation:

> We would summarise the position thus: The trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually the Court will only act on a confession if corroborated in some material particular by independent evidence accepted by the Court. But corroboration is not necessary in law and the Court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true.

In the case of *Guy Roger Pool v R*, the Seychelles Court of Appeal made the following comments with regard to the conclusion reached by the Court of Appeal for Eastern Africa in *Tuwamoi v Uganda*. It stated:

> We certainly do not dissent from the proposition that the same standard of proof is required in all cases, but we think, with respect, that the conclusion overlooks the distinction between a retracted and a repudiated confession as indicated in *Gathuga & Waweru v R* (1953) 20 EACA 294. Each case, as indicated in the House of Lords decision referred to above, must depend on its own circumstances, but in general we consider that the need to look for corroboration in Seychelles will arise in any case of a retracted confession, while in the case of a repudiated confession, it will depend entirely on the circumstances whether corroboration should be regarded as an essential element.

It is perhaps worth emphasising the distinction in principle between a statement or confession which is retracted and one which is repudiated. In the former case, the trial court looks for corroboration as a matter of practice, if not of law, to assist it in determining which of the two stories told by the accused is likely to be the truth. In the case of a repudiation, once the Court is satisfied that the accused did in fact make the statement. it is a reasonable inference to draw in the absence of contrary indications that it has been denied because of its truth.

In the accused's first statement it is stated as follows:

> I am a soldier in the Defence Forces and it has been five years since I joined the Forces. I was based at the Barbarons Camp and my duty was to be among the security escort of the President when he is going out and when he is going home at Barbarons. When I was doing the escort I went anywhere I was detailed to go with the President if it was my escort day. During my escort time among all the other soldiers we were placed at the State House compound, at the garden, at the front gate, at the La Poudriere road at the mountain, at the coco de mer tree and at the footpath facing the front garage and at the car park. We do not make sentry in any office but if we are asked to come and do something at the offices we come. Apart from the offices up at State House at the President's Office there is also the Administration Offices down close to the front gate facing Revolution Avenue not far from the Bel Air cemetery and there is a fence all round. Since I have been at Barbarons I have run away from the camp three times and the last time was in June. I think it was on the 29th June 1996, until today. Like I am being questioned by the Police and I have been asked where I was on Sunday 13th October 1996, I was at home at my wife's place at

St. Louis. She was present at home and did not go to work on that day. I remained at home and did not leave to go anywhere until U went to sleep at 9.00 pm after the French News on television. The only time that U left home was on Sunday morning when I brought my child ti my mother-in-law May Marguerite's place. My mother-in-law lives close to where I live. Her house is situated opposite my house. Everyone who lives at her place was present. Danny and Serge, who is a National Guard, live there. There is a girl by the name of Anna who lives there, also is Danny's wife. As I have been told by the Police that I have been arrested in connection with the fire that burnt the Administration Office at State House I do not know anything about that fire. I have not set fire to the Administration Block of State House during the night of Sunday 13th of October to 14th October 1996. I was at home on that day. Even when I was working at State House I did not work at the Administration Block of State House. I went there regarding a housing problem. I saw a girl at the reception, it was only once in March 1996. During the time that I have been absent from the army camp since June 1996, I have not been at the office, not even at the State House. After I had seen the Secretary,I went home and told my wife. I was told by her that she had already seen Georgie who is the Chairman of the Bel Air District. I did not know if there was any fire at State House until I heard on the news on television on Monday 14th October 1996 and during the time that I have been absent from the camp I have not been at State House not even to any army camp. Not even after the fire. The day I went to State House concerning the housing affair I went only at the Reception and not to any other office.

The second statement reads as follows:

> I am going to state what made me go away from the Army Camp is because I have encountered so many problems, and not with the officers, but with my fellow soldiers. The NCOs do not delegate duties as they are ordered. If they know that you are a good worker and that the officers are satisfied with your performance they put pressure on me and I cannot remain in the camp. I want to go away and I do go away. After I have been arrested and been locked up after I have been released I repeated the same thing again. It seems that someone is playing 'grigri' at me. As I have said earlier on I went away from the army camp since June 1996, when there was too much pressure on me. I wanted to quit but I was not granted permission. Since I have left the army camp and I have not been able to work and every time I tried to seek work I am discouraged. Sunday 13th of October 1996, at around 7.00 am to 8.00 am I left home and told my wife that I was going to my mother's place at Anse Etoile and I did not go there. I was going to meet a girlfriend but did not meet her. I waited for her but she did not turn up. It was at St. Lows. At around 6.00 pm I returned home and my wife was present at home. I remained at home. My wife did the cooking. After we had finished eating and had watched television we went to sleep at around 9.00 pm. I woke up during the night as I wanted to pass urine. I put on the television in order as to get light as the electricity had been cut off. We had to use candles. My wife also does the same thing. After I had finished passing urine I went back to sleep. It was around 11.00 to 11.30 pm. I got some sleep. Afterwards I was awoken. I cannot say what was the time but I slept for quite a while but I did not know the time as I did not

have any thing that tells the time. After that I could not sleep any more. I just relaxed. I got the idea of putting fire at the State House Administration Office. As soon as I got the idea I woke up. I was wearing a black t shirt and a multi coloured short. I took my box of cigarettes and my match box and I went off. I passed at the main road at Curio Road and arrived at Bel Air. I walked until I arrived at the cemetery and walked up to the fence at State House where the wires have been cut. I passed through the wires and walked up to the coco de mer tree and arrived at the Administration Office. I stood and I observed and there was not any soldier. I removed two louvre blades at the window downstairs as the building is a two storey building. I placed the louvre blades on the ground and went inside. I went upstairs and I took three cassettes inside an office. I took a plastic bag and placed the three cassettes in the plastic bag. There were two or three keys inside the plastic bag also there was a small red book. I took the matches and set fire to the papers that were inside an office facing the President's office. There were a lot of papers inside the office and there were computers. After I had set fire to the papers the fire started. I walked out and went downstairs. I went out from where I came in from the two missing louvre blades. I jumped outside the building. Once outside I took one of the two louvre blades and placed it up among the bushes. I arrived at the fence and got out through the fence. Arriving outside the fence I looked inside the plastic bag containing the cassettes and I left the plastic bag at the grave and I went home. Before I walked home I stood by the roadside and I saw the smoke rising up from the direction of the Administration Office but I did not see the flames. I heard the alarm of the fire fighters; since I was walkinghome I heard the

> sound of fire brigade. After I had been there on the road for some time I went home and after I got inside the house, I was asked by my wife where I had been. I told her that I have been by the road side and looking at the fire. It was around the early hours of Monday 14th October. I went to sleep until the afternoon when my child was admitted at hospital. I went to see my child at the hospital. My wife stayed with him at hospital and I went home. It was announced on television at night that there had been a fire at the Administration Office at State House. I was not asked by anyone to set fire at the offices. I just got the idea at night and I went down to set fire there. I regret doing such an act. Apart from the cassettes, the keys and the note book, I did not take anything else at the Administration Office. I took them before I set the fire.

It is plain that in his repudiated statement the accused had made an unequivocal admission of the crime. I have come to the conclusion that he denied that he ever made the second statement not only because of its truth but also because he thought that was the only way for him to escape conviction and punishment. The fingerprint of the accused on the glass louvre blade and on the audio cassette which was inside the building in an office amply show that it was the accused who had broken into the building, set fire to it, and stolen the items specified in the particulars of offence.

In the administration of justice, courts of law do often rely on the expertise of witnesses to assist them. When an expert witness informs the Court, often with the aid of photographs, that he took the fingerprints of the accused and found them to be identical with those on an object connected with the case, this is very strong circumstantial evidence. Courts take judicial notice of the fact that finger marks remain unaltered throughout life, and that no two persons have identical fingerprints. In other words, no proof is required of these facts.

The Courts are entitled to found a conviction solely on the correctness of fingerprint identification provided that they satisfy themselves beyond reasonable doubt that the impressions lifted on objects found at the scene of crime are identical with the fingerprints of the accused.

The accused exercised his right of silence and did not personally give evidence. No adverse inference is drawn. The accused, however, as indicated earlier in the judgment called two fingerprint experts from the fingerprint bureau to testify on his behalf. These experts confirmed the correctness of the fingerprint evidence of SP Bedier although in court they described the characteristics of some of the ridges on the various impressions differently from the description of the characteristics given by SP Bedier.

At the close of the defence case, the court invited both counsel to submit written submissions. In his submission, Mr. F. Elizabeth stated that the charges laid against the accused person were defective in many respects. For instance, Mr. Elizabeth observed that the statement of offence in counts 2 and 3 failed to state the statute and the relevant sections which the accused was alleged to have contravened. He wondered in such a situation how could the accused person be expected to properly prepare for his trial and indeed be said to have had a fair trial. With respect, I do not share the opinion of defence counsel that counts 1 and 2 of the indictment are inaccurate, incomplete or imperfect. They are complete, perfect and accurate. They provide all the necessary information required so that in no uncertain terms the accused was made aware of the charges levelled against him.

It was also submitted by defence counsel that counts 1 and 2 charged the same offence twice and were therefore bad for duplicity. A count is said to be bad for duplicity when it charges more than one offence in the same count. Therefore, with respect, I do not think that counsel has properly grasped the meaning of duplicity.

Mr. Elizabeth's next contention was with regard to the particulars of the offence, counts 1 and 2, which according to him merely stated that "the properties allegedly stolen belong to the Government and the employees therein but neither employees nor Government are named." Counsel queried which Government the prosecution was referring to. Was it the Government of Seychelles or any other Government, and which Government employees were referred to, he wondered. It goes without saying that the jurisdiction of this Court extends only to the territory of Seychelles. Moreover are we honestly doubtful of the ownership of State House. In my view there can be no question as to which Government and employees were being referred to in the said particulars of offence.

In the particulars of offence, counts 1, 2 and 3, it is stated "that during the night of the 13th October 1996 and in the early hours of the morning of the 14th October 1996, the accused broke and entered into an office, namely the Administrative Block of the President's Office, and committed a felony therein." The defence took issue with regards to the dates specified therein and remarked that the offence was not committed on 13 but in the early hours of 14 October. The defence further pointed out "that the prosecution's case 'hinged' entirely on circumstantial evidence of identification."

In my opinion I see nothing wrong in stating the time at which the offence was committed in the way stated in the particulars of offence, counts 1 to 3.

Earlier in the judgment, it was pointed out that once the Court is satisfied that the accused's fingerprints were found at the scene of crime, in the absence of an innocent explanation, or any explanation at all, the Court can convict on that evidence alone. In the present case, in addition to the fingerprint evidence, we have damning evidence against the accused provided by himself in his repudiated statement. The Court is also mindful of the fact that provided a confession is given

voluntarily like it was in the present case, the Court can rely on it on the principle that no man would voluntarily incriminate himself out of his own mouth if he was not guilty.

I have considered the whole of the evidence in this case including the two statements given by the accused. The evidence is so overwhelming that no Court can come to any conclusion other than the guilt of the accused on all three counts. The accused's guilt in respect of all three counts having been proved beyond doubt I accordingly convict him as charged.

Record: Criminal Side No 34 of 1997

The Republic v Albert

Drug trafficking – possession – admissibility of evidence

The police received a drugs tip-off and searched the flat of the accused in his presence. Officers found 25 small parcels of cannabis resin in a bag the accused was wearing. They also found in a wardrobe a one kilogram block of cannabis resin that had been partly chipped. The accused denied the block belonged to him and at his trial claimed that it had been planted by the police. The accused was charged with two counts of drug trafficking. There was no direct evidence that the accused was engaged in drug trafficking. The charge relating to the kilogram block gave rise to the rebuttable presumption that the accused possessed it for the purposes of trafficking and was in the act of trafficking or of preparing the drug for the purposes of trafficking.

HELD:

(i) The Court must be satisfied that the accused possessed the controlled drug and had knowledge of that possession. Possession of a controlled drug may be established through a continuous act that involves either physical custody or the exercise of control;

(ii) When considering a charge for drug trafficking, once it has been established that the accused had both possession of the controlled drug and knowledge of that possession, circumstantial evidence may be admitted from which a reasonable inference may be drawn that the possession of the controlled drug was for the purposes of trafficking; and

(iii) The mere fact that a controlled drug is found in shared accommodation is not sufficient to infer a joint enterprise by the occupants. The only inference that may be drawn is that all the occupants had knowledge of its possession. The fact that only one of the occupants is charged is not in itself enough to rebut the presumption under section 14 of the Misuse of Drugs Act. The accused may not rely on the non-prosecution of the other occupants to cast doubt on his or her own culpability.

Judgment: Accused convicted on both counts.

Legislation cited
Misuse of Drugs Act, ss 2, 5, 14, 15, 26
Dangerous Drugs Act, s 4A [*Repealed*]

Cases referred to
Cedras v R (unreported) Criminal Appeal 11/1998

Foreign cases noted
R v Bland [1988] Crim LR 41
R v Downes [1984] Crim LR 552
R v Gordon [1995] 2 Cr App R 61
R v Morris [1995] 2 Cr App R 69

Anthony FERNANDO Principal State Counsel, with
Laura ALCINDOR State Counsel for the Republic
Nicole TIRANT for the accused

Judgment delivered on 4th December, 1997 by:

PERERA J: The accused stands charged on two counts. Under count 1 he is charged with the offence of trafficking in a controlled drug contrary to section 5 read with section 26(l)(a) of the Misuse of Drugs Act (Cap 133) and punishable under section 29 of the said Act. The particulars of the offence, as

stated in the charge are that the sccused on 7 October 1997 at Sans Souci, was trafficking in a controlled drug, namely 14 grams and 810 milligrams of cannabis resin, by doing an act preparatory to or for the purposes of selling, giving, transporting, sending, delivering or distributing the said controlled drug. Under count 2, he is charged under the same provisions. The particulars of the offence thereunder are that the accused on the same date and place as in count 1, was found to be in possession of 1 kilogram and 30 grams of cannabis resin, which gives rise to a rebuttable presumption of having possessed the controlled drug for the purpose of trafficking and/or was trafficking in the said drug by doing an act preparatory to or for the purposes of selling, giving, transporting, sending, delivering or distributing the said controlled drug.

The case for the prosecution was that around 7.45 pm on 7 October 1997, ASP Ronny Mousbe, upon receiving information, led a party of 10 police officers to the "Feba Estate" at Sans Souci where the accused was occupying a ground floor flat. The police party took positions in the land adjoining the flats in the dark. Two officers from that party testified in Court; they were PC Danny Appasamy (PW2) and PC Ange Michel (PW3).

According to PC Appasamy, when they were occupying a vantage position to view the entrance of the flat of the accused, he observed that the lights inside were on. ASP Mousbe then telephoned the accused's number from his mobile telephone, but received no reply. Hence the officers were directed to lie down, and await the arrival of the accused. PC Appasamy hid behind a bushy tree about 25 feet away from the entrance door to the flat, while PC Michel was lying on the ground about 15 feet away from that door. The distance between the two officers was about 10 feet. The Court observed those positions on a visit of the locus in quo and was satisfied that the two officers would have had an unobstructed view of anyone entering the flat by that door,

which was the only convenient entrance as the rest of the house is about 5 to 6feet above ground level.

PC Appasamy stated that after about three hours (around 11pm), he heard the sound of a car which came to the compound of a row of four flats, the last of which was occupied by the accused. At the visit of the locus in quo the Court observed that the accused's flat was numbered as "No. 13" and that an open garage used by all the occupants of the flats was about 50 metres from the entrance to the accused's apartment. The accused in his evidence claimed that the place was very dark and that the distance from the garage to his house was about 200 meters. However, after the visit of the locus in quo, counsel for the accused suggested that the distance was about 50 meters. PC Appasamy testified that there was sufficient light in the area. The Court observed that there were lights on poles to illuminate the roads leading to the flats and adjoining houses in that estate and that there were six garden lights facing the entrances to the four flats. Whether all those lights were functioning that night is not in evidence, apart from the evidence of PC Appasamy that there was sufficient light in the area.

Soon after the car was parked in the said garage, PC Appasamy saw a woman coming towards the accused's flat opening the door and entering the flat which was already lit. About 23 minutes later, the accused followed her and entered the apartment. PC Appasamy testified that he identified the woman as Marie Celine Quatre whom he "knew very well" and the man as "Raniza", the accused. PC Michel (PW3) went in first and met the accused near the door and explained that the police officers wanted to search for drugs. PW3 told PC Appasamy to search the waist bag around the accused's waist. Finding some black substance, PC Appasamy asked the Accused what it was, and he replied "sa i bann stim" (that is steam). He then removed the waist bag, the belt which was worn through the loops of a pair of jeans. He put the bag on a table and in the presence of the accused, ASP Mousbe, PC Michel and PC Dufrene took out 25 pieces of black substance

from the first compartment of the waist bag. In another compartment closed with a zip fastener he found several Seychelles currency notes which he counted in their presence, amounting to R4,141.05. From the larger compartment of the waist bag he removed a mobile phone and a black wallet. Marie Celine Quatre, who is admittedly the concubine of the accused and is living in that apartment with him and a child 7 months old, started to cry and the accused told her "pa bezwen gele sa ki zot war dan sa lakaz pou mwan" (don't cry, what's in the house is mine).

On the directions of ASP Mousbe, the mobile phone and the black wallet were handed over to Marie Celine Quatre. He then took custody of the 25 pieces of black substance and the money which he replaced in the waist bag.

On the instructions of ASP Mousbe, PC Michel commenced searching the apartment. He first searched the kitchen, which is the first room as one entered from outside. There were pantry cupboards, an electric cooker and a washing machine. The cupboards have no locks but are pressed shut. PC Michel testified that he searched the kitchen thoroughly and found no cannabis. He then proceeded to the sitting room, where he searched the chairs, a book rack and a desk with three drawers, which had no locks. Connecting the sitting room to the single bedroom of the apartment is what one may call "a small corridor" about 3 1/2 feet long and 3 1/2 feet broad. There stood a wooden built-in wardrobe which had a top shelf with two doors without locks. The bottom portion which rested at floor level with no gap underneath had four shelves. This portion also had two doors without locks. PC Michel testified that searching the shelves from the top, he found a white plastic bag concealed under some ironed clothes in the bottom shelf. He stated that if he did not lift those clothes he would not have noticed the bag. There were other plastic bags in the wardrobe which contained babies "pampers". PC Michel testified that he showed the plastic bag to the accused and asked him "what is this?" and he replied "sa kilo hashish pa

pou mwan" ("that kilogram of hashish does not belong to me").

PC Michel stated that that plastic bag contained a rectangular block of black substance about 30 cm long and 15 cm wide and about 1 inch thick. He further stated that on the block was a gold coloured seal with a design that looked like the head of a bird, and that one of the edges of that block was chipped off. This rectangular block and the plastic bag were then kept in custody by PC Michel thereafter.

There is a piece of evidence elicited from PC Appasamy which needs to be stated at this stage. He testified that while PC Michel was searching the apartment, Marie Celine Quatre wanted to go back to the car to fetch the small child who was sleeping inside. Then ASP Mousbe ordered one of the officers to accompany her.

The case for the defence is that the rectangular block of cannabis resin was introduced by the police officers before he entered the apartment and that while Marie Celine Quatre went in to change her clothes, as they were going out to eat a "sandwich" at the Beau Vallon Bay Hotel that night, he stayed back in the car with the sleeping child. He therefore claimed that he did not know what had happened after Marie Celine Quatre entered the apartment until the officers came up to the car and handcuffed him. I shall deal with this matter in greater detail in considering the defence in the case.

As regards the exhibits produced in the case, both PC Appasamy and PC Michel testified that the exhibits were in their custody overnight in their lockers until they were taken to Dr Philip Gobine, the Government analyst, for analysis. Dr Gobine in his testimony stated the procedure he adopted in receiving the exhibits from the respective police officers and the handing over of the reports with the exhibits and the residue after analysis. As regards the 25 pieces of black substance. the possession of which is charged under count 1, he certified that "the resinous material" was cannabis resin

(Exh. P4). The sizes of the pieces ranged from 2cm to 4.6cm. The weight was 14gm and 810mg. As regards the rectangular block, the possession of which is charged under count 2, he certified that "the resinous material is cannabis resin". It was 24.5cm in length and 13.5 cm in width, and weighed 1kg 30gm (Exh. P3). Dr Gobine identified the seals that he affixed and his signature on the four corners of the envelopes in which he enclosed the cannabis resin after analysis before opening them in Court.

The Court is satisfied that the chain of evidence regarding the production of the exhibits had been maintained. In her submissions to the Court however, counsel for the accused invited the Court to consider that Dr Gobine did not testify regarding the gold coloured design of either a bird or the hood of a cobra appearing on the rectangular block of cannabis resin produced in the case. She submitted that Dr Gobine would not have failed to observe such a significant feature. The inference that was sought to be drawn was that what Dr Gobine analysed was not what has been produced in court. The following excerpts from his cross-examination would illustrate the nature of his testimony as regards matters falling outside the scope of scientific analysis.

> Q: Did you notice when you say that this is a rectangular block, did you notice that a big chunk of it was missing?
>
> A: Yes, I pointed it out to the officer. When I say rectangular block, I am not talking in precise terms because even when you say this is rectangular, scientifically it may not be precise. Somebody may say that there is a little dent here, a little scratch there.
>
> Q: You were asked to try and be precise as possible in describing this particular item before it was opened in court. You said that

that piece missing is noticeable; it is not something that you would miss out?

A: You are implying that it is noticeable, what I am talking of is from memory, it was a rectangular block. I cannot go into fine details and say there were little whatever on the block, it was a rectangular block. If anybody here looks at the block, it is a rectangular block, yes there is a little piece missing, but that was upon my receiving the block. That was the way it was, so I just measured it as a rectangular block.

Counsel who examined the block of cannabis resin after it was admitted as an exhibit, ought to have cross-examined Dr Gobine as to whether he noted the gold seal in particular. No such question was put to him. Hence he answered only the precise questions as to the shape, colour and weight of the substance which alone were material to his analysis. There is no doubt whatsoever that what was analysed by Dr Gobine was inserted in a brown envelope by him, sealed and his signature placed on the four corners. The seals were opened only after Dr Gobine was satisfied that his signature had not been tampered with. There was therefore no doubt that what was produced in court as the exhibit was what was analysed by Dr Gobine as cannabis resin in his report (Exh.P3). Hence the omission of Dr Gobine to mention the gold seal had no real significance. I am also satisfied that the 25 pieces of cannabis resin produced with the report Exh. 4 are the same drugs that were allegedly obtained from the possession of the accused.

The defence was one of total denial of the charges and an allegation of drugs being introduced by the police officers. The accused who testified on oath stated that he was a fisherman by profession. Explaining his movements on 7 October 1997, he stated that he left for his mother's house at Plaisance by bus and was there from about 6.30 am to about 11.15 pm.

Marie Celine Quatre joined him at Plaisance around 10.30 am. She came by car. The police officers found the lights of the house on around 8 pm when they arrived. It is not conceivable that Marie Celine put on the lights at 10.30 am before she went to join the accused. Hence it is possible that they went out much later in the evening. Be that as it may, the accused stated that having fished and snorkled, he was with his mother till about 10.30 pm. He then decided to go to the Pizzeria at Beau Vallon for a pizza. But when he came there with his concubine and child, it was closed; they then decided to go to the Beau Vallon Bay Hotel "for a sandwich". But as Marie Celine's clothes were not suitable to enter the hotel, they went all the way to Sans Souci to change her clothes and return. He stayed in the car with the sleeping child which was about 50 metres away from where the car was parked in the open garage. I have already described the lighting condition in that area. At the locus in quo PC Michel and PC Appasamy remembered having seen another car and a pickup in the front of the accused's parked car. The Court observed that a person sitting in the front passenger seat, where the accused claimed he was, could observe Marie Celine going down a few concrete steps towards the entrance of their flat. Hence, if as was claimed by the Accused, PC Michel and PC Appasamy had entered the apartment after Marie Celine did, while he sat in the car, there was a strong likelihood that he would have seen the two officers and at least five more officers converging outside his apartment. That would have given him an opportunity to get away. The accused however testified that two or three minutes after Marie Celine went, she was escorted back by about five police officers. One of them put a pistol on his head and informed him that they were going to search for drugs. They took him out of the car and handcuffed him. They took the mobile phone and a black wallet from his pocket. They searched the car and took him, Marie Celine and the child to the apartment. When he came to the apartment he saw two officers inside the house and some others outside. One of them, Ange Michel, showed a plastic bag and asked him "what is this?" and he replied "let me see" and after seeing he said "that is not mine". Michel thereafter

started to search the living room, the bedroom and the wardrobe from where they claimed they had found the rectangular block of cannabis resin in the white plastic bag.

The accused further testified that when PC Michel, who was doing all the searching, opened the first drawer of the desk in the living room, he found the waist bag which has been produced as an exhibit in the case. He denied that it was ever round his waist that night. He stated that he had R12000 in that bag, of which R2000 was inside the unlocked drawer of the desk in the living room, as he had no bank account. The accused also stated that an agreement of sale was also in the waist bag. That document (Exh. DI) was shown to PC Appasamy and PC Michel during their testimonies. Both officers denied having ever seen it before. The accused testified that Isha Rose the purchaser on the agreement took him to a lawyer's office at State House Avenue around 2.30 pm on 6 October 1997. There two women told them to wait in a room till they prepared the document. The office was later identified as the Chambers of Mr Kieran Shah, Attorney-at-Law. He stated that both of them signed the document in that office.

One Rosy Pool from Mr Shah's Chambers was called by the defence to testify regarding the execution of the agreement of sale. In her evidence-in-chief she stated that the accused came to see Mr Shah regarding the sale of a boat. She further stated that she did not know the other person, but that his name is in the document. It is significant that the accused in his evidence stated that it was the other person who took him to a lawyer's office. Questioned by his own counsel in his examination-in-chief he stated

> "Q: Did you see any lawyer?
>
> A: We saw two women and they told us to wait in a room and they prepared everything."

Ms Pool further testified that she prepared the draft which was approved by Mr Shah. The sale price was R10,000. She stated that both parties signed the document in her presence and identified the signatures in Exh. Dl. She stated, however, that she did not see the parties exchanging money. She was paid R400 for the work. However on being cross examined she said that she saw money being exchanged. Further on in the cross-examination she admitted that since the transaction involved the exchange of money she assumed that money would have passed. She concluded her evidence by finally admitting that all that she could state with certainty was that the document was signed and that she was paid R400 for drafting and typing it.

The accused testified that the waist bag, which he claimed was removed from the drawer of the desk contained only R12000 in cash and the agreement of sale, but nothing else. PC Appasamy however stated that he removed all the contents of the waist bag which included 25 pieces of a black substance, currency notes, a mobile phone and a black wallet. As regards the currency notes, he stated that he counted all the money, amounting to RR4,141.05, in the presence of the accused in the house. In his examination-in-chief the accused stated -

> Q: Did you see your copy of this document when the police counted the money at your house?
>
> A: I did not observe the police counting the money at that time as you know when I came into the house and they showed me a package, I was very excited. They were looking at my pouch, I was not thinking of money or the paper at that time. I was thinking of the problem that I would be in.

Q: What happened after the police found this money? Did they say anything to you?

A: They told me that they are taking the money because they had already seen illegal things in my house that can cost money and that they must take the money as an exhibit.

The accused further testified that after he was taken to the police station in a police van he was shown the items alleged to have been recovered from him once again. He stated that it was then that he noticed that his money was missing and that "like magic", money had turned into 25 little pieces of hashish. He further stated that he did not notice the sale document at that time. It was sought to be established that this document Exh. D1 produced in Court was the second original copy which was handed over to the buyer of the boat, Isha Rose.

The accused admitted that he had been searched by police officers for suspected possession of drugs before while he was living in Plaisance and had been under surveillance. He stated that nothing was detected on him or at his residence. He stated that he did not smoke, or sell hashish or marijuana and denied that he told Marie Celine Quatre in the presence of the police officers that everything in the house belonged to him. He also denied that he was wearing the waist bag that night and that he ever stated "that is steam" as claimed by PC Appasamy.

As regards count 1, the prosecution relied on section 2(c) of the Misuse of Drugs Act (Cap. 133) to establish trafficking contrary to section 5 thereof as the presumption in section 14 does not apply, the quantity being less than 25 grams. Hence the burden lay on them to prove that the accused was trafficking in 14 grams and 810 milligrams of cannabis resin in the form of 25 pieces of varying sizes, by doing an act preparatory to or for the purpose of selling, giving,

transporting, sending, delivering or distributing. Section 2(c) of Cap 133 is similar to section 4A(a)(c) of the previous Dangerous Drugs Act. The Court of Appeal in interpreting that subsection in the case of *Philip Cedras v R* (unreported) Criminal Appeal 11/1988 stated:-

> Possession of a dangerous drug is an act albeit a continuous act involving the physical custody or control of the drugs. If a person is in possession of a dangerous drug for the purpose of trafficking, he is evidently doing an act for the purpose of trafficking and such act is clearly caught by section 4A(1)(c).

The issue that arises for consideration under this count is whether the prosecution has proved beyond a reasonable doubt that the waist bag was removed from the waist of the accused and that it contained among other things 25 pieces of cannabis resin. The version of the accused that the waist bag with R12,000 was kept inside an unlocked drawer of a desk in the living room is not plausible. There was another wardrobe in the bedroom. As the bedroom door could be locked, it was a safer place to keep money. Further there was no necessity for the police officers to take the pouch as an exhibit if it had only cash, and steal part of it. They could have stolen the whole amount and denied the existence of the pouch altogether. If they had intended to "plant" the drugs, as claimed by the accused, they could have restricted themselves to the rectangular block of cannabis resin. They would not have opened themselves to an allegation of stealing, especially if there was a document in the nature of Exhibit D 1, a copy of which could have been produced even if it was destroyed. The claim that the pouch had R12000 and not R4141.05 was a red herring drawn to discredit the evidence of PC Appasamy and to create a doubt that he may have introduced the 25 pieces of cannabis resin on the way to the police station. The agreement to sell dated 6^{t} October 1997 appears to be another fabrication for the same purpose. Rosy Pool contradicted the accused and stated that she did

not know the name of the buyer, while the accused stated that it was Isha Rose the buyer who took him to the lawyer's office. Ms Pool stated that she saw both parties sign the document. However exhibit D 1 shows that although the name of the purchaser is given as Isha Rose in the caption of the agreement, the document was been signed by one "Z.I. AADI." Neither Ms Pool nor the accused testified as to this discrepancy. Both claimed that it was signed by the purchaser who, according to the accused, was Isha Rose who took him to the lawyer's office. It is pertinent that in the absence of any evidence, counsel for theaccused in her submissions stated that the boat was bought "by the father in the name of his son." There was no such evidence in the case.

Ms Pool therefore lied when she categorically stated that both parties to the agreement signed in her presence. She was nervous and excited when testifying and made contradicting statements. It is patently clear that although the document may have been drafted and typed by her, it was not signed by one Z.I. AAIDA and the accused in her presence. According to the prosecution witnesses and the accused himself, no complaint was made that part of the money in the waist bag was missing. The document therefore appears to have been prepared under suspicious circumstances, and hence I place no reliance on its contents. I am satisfied that the waist bag contained only R4141.05 as testified by PC Appasamy.

There is no reason to doubt the evidence of both PC Appasamy and PC Michel that the waist bag was being worn by the accused that night and that there were 25 pieces of cannabis resin which the accused stated to be his "steam". I accept the evidence of both these officers on the aspect of possession and knowledge on the part of the accused. The said quantity of cannabis resin was therefore in the possession of the accused with complete knowledge of the substance. The accused testified inter alia that he did not smoke cannabis. If that is so, by being in possession he was doing an act for the purpose of trafficking. Further, although there was no direct evidence of selling, the presence of

money with the cannabis resin in the pouch was a significant factor which indicated that the cannabis resin was being sold. The accused could not satisfactorily explain how he could have possessed a sum of R4141.05 that night as his earnings as a fisherman was about R500 to 600 per day. As was observed by Morland J in the case of *R v Morris* [1995] 2 Cr App R 69 at 75:

> ...evidence of large amounts of money in the possession of a defendant or an extravagant lifestyle on his part, prima facie explicable only if derived from drug dealing, is admissible in cases of possession of drugs with intent to supply if it is of probative significance to an issue in the case.

Such a consideration is however permitted only once possession and knowledge have been established, as in the instant case, and the only element needed to be established is trafficking of the controlled drug.

In the case of *R v Gordon[* 1995] 2 Cr App R 61, large sums of money were found on the accused who was found in possession of cocaine. It was submitted by counsel in that case that drug traffickers usually explain the presence of large amounts of cash in the house on the basis that they did not trust the banks. In the instant case too the accused stated that he had no bank account. Yet he testified that he paid R1500 per month as rent. He had three fishing boats which he stated were worth around R50,000. What Morland J in the *Morris* case (supra) meant by "probative significance to an issue in the case" was that such evidence made the intention of the accused to supply those drugs more or less probable.

On the basis of the finding that the accused was in possession of the pouch which contained the cannabis resin and the money, the reasonable inference to be drawn in the absence of an explanation was that the money constituted the sale proceeds of that day.

It is in this sense that an amount of R4141.05 found in the possession of the accused together with a quantity of cannabis resin around 11.30 pm that night becomes relevant as being probative to the issue of trafficking under Count 1. I am therefore satisfied beyond a reasonable doubt that the ccused was knowingly in possession of 14 grams and 810 miligrams of cannabis resin for the purpose of trafficking as charged under count 1. Accordingly I find him guilty on count 1 as charged.

As regards count 2 the prosecution relies on the presumption contained in section 14(d) of Cap 133 that -

> A person who is proved or presumed to have had in his possession more than
>
> ….
>
> (d) 25 grams of cannabis or cannabis resin shall, until he proves the contrary, be presumed to have had the controlled drug in his possession for the purpose of trafficking in the controlled drug contrary to section 5.

In the instant case, the prosecution relies on the 2nd limb of that section, namely "a person ... presumed to have had in his possession." For this purpose, section 15(2) states that "the fact that a person never had physical possession of a controlled drug shall not be sufficient to rebut a presumption under this section."

Admittedly, the accused did not have physical possession of the rectangular block of cannabis resin weighing 1 kilogram 30 grams, which has been produced in the case after analysis. It is the case for the prosecution that this block was found by PC Michel while searching a wardrobe in the sitting-room area. The defence version is that the police officers introduced the block after Marie Celine Quatre had entered but before he was brought to the house. PC Michel testified

that he was instructed by ASP Mousbe to enter the house only if the accused was in. Hence he did not enter when Marie Celine Quatre entered. While awaiting further instructions, the accused entered. It was then that he and PC Appasamy entered, and first searched the waist bag the accused was wearing. PC Michel and PC Appasamy were followed by ASP Mousbe and PC Dufrene. As stated earlier, the accused could have seen them entering the compound of the apartments from the adjoining land where they were hiding. The version of the prosecution witnesses that they entered only after the accused entered is more probable in the circumstances of the case. Counsel for the accused invited the Court to consider that a child of such tender years would not have been left alone in the parked car even for a brief moment. That is a subjective consideration. The car park is in an open area served with several lights. The distance to the house was about 50 metres. The accused himself stated that he and Marie Celine Quatre were to go to Beau Vallon Bay Hotel for a "sandwich" after she had changed her clothes. I do not find the behaviour of the accused to be unrealistic when he left the sleeping child, who, he may have considered should not be disturbed, and joined Marie Celine for a short time. Hence I reject the defence of the accused that the said block of cannabis resin was introduced or "planted" by the police officers, who had no motive or opportunity to do so.

Accordingly the prosecution had to establish that the accused should be presumed to have had the drugs in his possession. Under section 15. absence of physical possession is insufficient to rebut the presumption. On the application of counsel for the accused, the plastic bag containing the block of cannabis resin was tested for finger and palm prints in an attempt to rule out handling by the accused. However no prints of anyone were found as the bag did not yield prints due to it being old and crumpled. The accused testified that the apartment was rented by him at a monthly rental of R1500. Hence as tenant, he was entitled to hold the keys of the premises. Counsel for the accused submitted that even if the accused was entitled to hold the keys, yet at the relevant time,

they were with Marie Celine, and hence legally it could not be said that one who holds the key has control over the house and its contents. This contention is untenable. She further submitted that where there was evidence that two persons were living together in a house over which both had control, it could not be presumed that one alone had custody and control of the drugs. The fact that drugs were found in a house or room solely occupied by two persons living together would not per se raise an inference of joint enterprise. In the case of *R v Downes* [1984] Crim LR 552, a flat occupied by a couple living together was searched by the police. They found a block of cannabis resin weighing 27 grams and 13 packets of a similar substance weighing 3.6 grams each. They also found a box containing cash, notebooks, scales and other documents. The woman was jointly charged with possessing drugs with intent to supply. She admitted that the box and some of the cash belonged to her, but denied the rest. She was however convicted as charged. In appeal the conviction was quashed on the basis that "unless two persons in joint possession of controlled drugs were engaged in a joint venture to supply drugs to others, the mere fact that one knew of the other's intention to supply them, but had no intention to supply them himself, did not constitute the necessary intent for the purposes of the offence."

In another case *R v Bland* [1988] Crim LR41, the qppellant had been living with her co-accused in one room of a house. The police found traces of drugs in that room. She was charged with possession with intent to supply. She denied any knowledge of the presence of the drugs and said she could not believe that her partner had either possessed or supplied drugs. The case against her rested solely on the fact that she was living with him at a time when he was undoubtedly dealing drugs. The Court of Appeal, quashing her conviction, held that the fact that she had lived together with the co-accused in the same room was not sufficient evidence from which the jury could infer that she exercised custody and control. The only inference that could be drawn was that she

had knowledge, but that alone was insufficient to establish custody or control.
Hence even if both the accused and Marie Celine Quatre were jointly charged, the charge being both several and joint, the accused could have been convicted independently. The accused maintained that the house was well protected by burglar bars. There was therefore no possibility of anyone else entering. It was he who stated to Marie Celine in the presence of the police officers that everything in the house belongs to him. He may have intended to exculpate her. Hence in such circumstances there may not have been sufficient evidence for the prosecution to charge her merely for the reason that she lived with him. It does not therefore avail the accused to rely on the non-prosecution of Marie Celine Quatre to cast a doubt as to his guilt, and to evade liability.

Counsel for the accused further contended that count 2 was bad for duplicity. It was submitted that while in the statement of offence the count is based on trafficking, in the particulars of offence the words "and or" have been used thereby relying on the presumption under section 14 and trafficking under section 2(a) of the Act. She submitted that the statement of offence and the particulars must be read together. Simply stated, duplicity means "no one count of the indictment should charge the defendant with having committed two or more separate offences." Count 2 contains a charge under section 5 for trafficking in a controlled drug. As the quantity is more than 25 grams, the prosecution relied on the rebuttable presumption in section 14. The accused in such circumstances is not being charged for two offences. The particulars only state the various ways the offence of trafficking may be committed, so that the accused may prepare his defence accordingly. Hence there is no duplicity in count 2 as known to law.

I am satisfied beyond a reasonable doubt that the block of cannabis resin was found inside the wardrobe in the course of the search made by PC Michel, and was not introduced as

claimed by the accused. The accused admitted that PC Michel searched the entire house. If as claimed by the accused, the cannabis resin block was introduced by the police there would not have been any necessity to go through a "sham" search as the only persons present there, apart from the police officers, were the accused and Marie Celine Quatre. The evidence of PC Appasamy and PC Michel corroborated on material particulars. The minor discrepancies highlighted by counsel for the accused did in no way affect the veracity of their testimonies, nor were they of sufficient significance to doubt their evidence. Hence the accused, having failed to rebut the presumption on a balance of probabilities, should be presumed to have had the controlled drug in his possession for the purpose of trafficking.

Accordingly I find the accused guilty of the offence of trafficking as charged in count 2 as well.

Record: Criminal Side No 45 of 1997

Republic v Soomery

Sentencing – partial suspension

The respondent carried out two thefts on the same day. He was charged with stealing in two separate cases and pleaded guilty. In sentencing for the two convictions together, the Magistrate decided to treat the accused as a first offender. The accused was sentenced to 18 months imprisonment, 2 weeks to be served immediately and the remainder suspended for 2 years. The Attorney General filed an application to revise the sentence. At issue was whether a partially suspended sentence could be imposed under section 282 of the Criminal Procedure Code.

HELD:

(i) Section 25 (a) to (h) of the Penal Code prescribes the types of punishment that may be imposed for a conviction under section 282 of the Criminal Procedure Code. Section 25 refers to the sentence in its in entirety. A sentence can be suspended in full or the whole sentence must be served; and

(ii) The Criminal Procedure Code does not allow the partial suspension of a custodial sentence. Although a partial suspension of sentence may strike a balance between harm to the public and the benefit to the convict, particularly in the case of first offenders, any such suspension is ultra vires the courts.

Judgment: for the appellant. Order made revising sentence. No further custodial period imposed.

Legislation cited
Criminal Procedure Code, ss 282, 328
Penal Code, s 25

Foreign legislation noted
Criminal Courts Act 1973 (UK), s 23
Criminal Law Act 1977 (UK), s 47
Criminal Justice Act 1991 (UK)

Cases referred to
Dugasse v R (1978) SLR 28
R v Roy Doudee (1980) SLR 50
R v Cliff Finesse (unreported) Revision 6/1995
R v William Rose (unreported) Revision 7/1995

Foreign cases noted
R v Fitzgerald (1971) 55 Cr App R 515

Karen DOMINGUE for the Republic
Nichole TIRANT for the Respondent

Judgment delivered on 19 June 1997 by:

PERERA J: This is an application filed by the Attorney General in terms of section 328 of the Criminal Procedure Code (Cap 54) seeking revision of an order made by the Senior Magistrate imposing a partly suspended sentence. The circumstances under which this sentence came to be imposed are as follows.

Particulars of offence are as follows:
The respondent in the instant matter was charged before the Magistrates' Court in cases . 649/96 and 650/96 with the offence of stealing. According to the particulars of the charges, in case 649/96 it was alleged that he stole a black mini-moke canopy, one front bumper, one fuel cap and one number plate from a mini-moke bearing the number plate S. 4927 belonging to Victoria Car Hire on 26 June 1996. In case 650/96 it was alleged that on the same date and place he

stole one white mini-moke canopy and four hub cups from a mini-moke belonging to Silversand Car Hire. The respondent pleaded guilty in both cases.

In case 650/96, the Senior Magistrate sentenced the respondent (accused) to a term of 18 months imprisonment suspended for a period of 2 years, and in addition imposed a fine of R2,500.

In case 649/96, which forms the subject-matter of the instant revision, the Senior Magistrate stated –

> As I have noted, offences of this nature should be nipped in the bud. In this case, since you have committed both offences in those IWD cases on the same day and time and place, I treat you as a first offender for the purpose of sentencing hereof.
>
> In this case I believe and emphasise that the sentence hereof should be a deterrent and serve as an example to other potential offenders of this nature. I sentence you to undergo 18 months imprisonment. But you will serve only 2 weeks in prison so that it can cause you a short, sharp, shock which will prevent you from repeating this offence. Though I note our laws do not provide ..... for partly suspended sentences. I believe no law prevents the court from passing such partly suspended sentences as done in other jurisdictions. Therefore I hereby suspend the part of the unserved sentence for two years.

The issue before this Court is whether a partly suspended sentence could be imposed under section 282 of the Criminal Procedure Code. This Court has in the cases of *Dugasse v R* (1978) SLR 28, *R v Roy Doudee* (1980) SLR 50, *R v William Rose* (unreported) Revision 7/1995 and *R v Cliff Finesse*

(unreported) Revision 6/1995 held that such a sentence was ultra vires the provisions of the Criminal Procedure Code. It appears that the Senior Magistrate was not oblivious to the state of the law on this matter. But he ventured to state that he believed that there was no law to prevent the sentencing official from passing such partially suspended sentence "as done in other jurisdictions". With respect, section 25(a) to (h) of the Penal Code prescribed the different kinds of punishment that the courts in Seychelles may impose on a convict. Section 282 of the Criminal Procedure Code empowers the Court to suspend certain sentences of not more than two years, to a period of not less than one year and not more than three years. This section refers to the sentence in its entirety, and hence if a sentence of imprisonment is suspended, the whole of it stands suspended, otherwise the whole sentence has to be served subject to any remission under the Prison Act.

Section 282 was modeled on section 23 of the Criminal Courts Act 1973 of the United Kingdom. In interpreting that section, the courts in the case of *R v Fitzgerald* (1971) 55 Cr App R 515 held that although there is no statutory bar to passing two sentences of imprisonment either concurrently or consecutively, one of which is to take effect immediately, and the other of which is to be suspended, such a course was wrong in principle and the courts should avoid mixing up sentences which fall into different categories.

However the 1973 Act was amended by the Criminal Law Act of 1977. Section 47 of that Act provided statutorily the imposition of a partially suspended sentence. But the Criminal Justice Act 1991 which came into operation on 30th September 1992 repealed that provision and hence the English Courts have reverted back to the pre-1977 position.

Prior to the enactment of section 47 of the 1977 Act, the Advisory Council on the Penal System supporting the argument for partial suspension stated at paragraph 282 of their report –

> We view the partly suspended sentence as a legitimate means of exploiting one of the few reliable pieces of criminological knowledge - that many offenders sent to prison for the first time do not subsequently re-offend. We set it not as a means of administering a "short, sharp, shock," nor as a substitute for a wholly suspended sentence, but as especially applicable to serious offenders or first time prisoners who are bound to have to serve some time in prison, but who may well be effectively deterred by eventually serving only a small part of even the minimum sentence appropriate to the offence. This, in our view, must be its principal role.

Hence the aim of a partial suspension of sentence was to strike a balance between any harm to the public and benefit to the convict. In Seychelles, with the recent trend toward leniency to first offenders, the amendment of the Criminal Procedure Code to permit partial suspension of sentences may achieve the purpose of benefitting the convict without harming the public. But until such an amendment is made, the imposition of a partial suspension of sentence is invalid. Hence the sentence imposed by the Senior Magistrate is quashed.

This Court in exercising revisionary jurisdiction is empowered to alter, maintain, reduce or reverse a sentence of the Magistrates' Court. In the present case, the Senior Magistrate considered the respondent as a first offender although he had committed two separate offences, as they were committed on the same day and time and in the same place but in respect of two different vehicles belonging to different owners. He therefore decided to give him a "short, sharp, shock" limited to 2 weeks imprisonment. The respondent has served that term and hence it could be unjust to impose a higher custodial sentence at this stage. Therefore acting in terms of section

329(1) (b) read with section 316 (a) (ii) I would alter the nature of the sentence to a term of 2 weeks imprisonment effective from the original date of conviction and sentence.

Sentence revised accordingly.

Revision No. 4 of 1996

Republic v Joseph

Criminal law - s 281 Penal Code - s. 23 Penal Code - robbery with violence - common intention

Three accused were jointly charged with robbery with violence following an incident which occurred on 23 February 1995 at Mont Buxton. The first accused had entered the complainant's shop on the morning of 23 February 1995, jumped over the shop counter and grabbed the complainant's handbag, which contained various amounts of local and foreign currency and jewellery. The complainant took hold of the first accused's t-shirt and was dragged by him through the only door of the shop where they both fell. The second accused, who was at the scene of the incident, had then picked up the handbag and run away, followed by the other two accused. On account of the struggle with the first accused, the complainant received superficial injuries. The trial was only against the second accused following the guilty pleas and subsequent convictions of the other two accused.

HELD:-

(i) The first accused, by taking the hand bag containing cash and jewellery, being articles capable of being stolen, and depriving the owner of its possession; and the second accused, by picking up the same bag and running away, have committed theft. The first accused, by exerting force on the victim to dispossess, and causing her to fall on the ground and sustain wounds to her body, completed the act of robbery;

(ii) The fact that the second accused watched the incident and thereafter picked up the handbag establishes that the two accused

were acting in furtherance of the common intention of committing theft; and

(iii) The second accused is equally guilty and responsible for all acts of commission of the first accused.

Romesh KANAKARATNE for the Republic
Frank ELIZABETH for the Accused
Accused - present

[Appeal by the Accused led to his sentence being reduced to 3 years on 14 August 1997 in CA 4 of 1997.]

Judgment delivered on 24 January 1997 by:

AMERASINGHE J: The accused Tony Joseph was charged before the Supreme Court with committing robbery with violence, contrary to section 281 as read with section 23 of the Penal Code.

Particulars of the offence are as follows:
Roy Estico, Tony Joseph (alias Togo) and Vincent Marie (alias Toe) on the 23rd day of February 1995 at Mont Buxton, Mahe robbed Marie Andre Wester (alias Idola) of a handbag containing Seychelles Rupees 4,725, US Dollars 6,943, Holland Gilder 800, 30 Dubai Dirhams, Kenyan Shillings 1,500, Italian Lira 100,000, South African Rand 325, Sri Lankan Rupees 100, three gold necklaces, two gold earrings, one gold bracelet, two cross pendants in gold, two small earrings, and three gold rings, and some personal documents, and at the time of such robbery did use personal violence to the said Marie Andre Wester.

The two eye-witnesses to the incident, unlike in very many cases of robbery, knew the three accused personally. The instant trial was only against the second accused as the other two accused have been convicted on their own pleas and

sentenced. Marie Stella Henriette, the first witness, has lived in Mont Buxton.

The complainant in her evidence said that as usual she opened her shop at Mont Buxton on the morning of 23 February 1995 between 7.30 and 8.30 a.m. As customary, she had carried to her shop in her handbag foreign and local currency along with jewellery described in the aforesaid particulars of offence. Her first customer, as confirmed, was the first witness who purchased a lemonade and left the shop. After the first witness left the shop the complainant consumed coffee and seeing the first accused approaching the shop had gone towards the counter in the shop. She had seen the second accused behind the first accused. The first accused, before the Complainant could get behind her counter, had jumped over and grabbed the hand bag, at which timethe complainant had got hold of him by his t-shirt. The first accused, struggling to escape, had dragged the complainant through the only door of the shop to the outside, where both had fallen. The second accused had then picked up the handbag containing her currency and jewellery and had run away from the shop followed by the other two accused. The first witness while leaving the shop had seen the three accused coming towards the shop and thereafter, on hearing the complainant's screams, had looked back to witness the three accused running away from the shop.

On account of the struggle with the first accused the complainant has received superficial injuries to her body. Detective Constable Jesta Vidot and Doctor Agnes Vel confirmed the injuries sustained by the complainant on an examination of her.

Social Worker Michelle Docteur, Constable Jesta Vidot and Corporal Justin Dogley testified to the voluntary statement of the second accused recorded by Corporal Dogley on 27th February 1995, produced marked exhibit P8. The aforementioned statement of the second accused, after

inquiry, was admitted by the Court in evidence on the reasons recorded in a separate ruling of the Court filed on record.

As pointed out by the counsel for the second accused the two eye-witnesses were either uncertain or at variance on the following facts.

1. The time of the first witness entering the shop.

2. The first accused placing a ten rupee note on the counter.

3. The first witness being accompanied by her son.

The evidence before the Court reveals no circumstances to conclude any of the witnesses were untruthful. The complainant specifically stated that she was uncertain on matters that appear to be at variance with the first witness. The second accused opted to remain silent and did not call any witnesses. I warn myself and draw no adverse inference from the exercise of the aforesaid discretion by the second accused.

I am conscious that the prosecution has the burden to prove the charges against the accused beyond a reasonable doubt at all times. Corporal Dogley produced a cross pendant handed over to him by the second accused as item 9. The same pendant was shown earlier to the complainant, who identified it as one of the articles contained in her stolen handbag.

Corporal Dogley also testified to the fact that since 23 February 1995 he had been looking for the three accused on the complaint made and on the night of 23 February on information he had visited the Plaza bar and the first and the second accused evaded arrest by running away. In the second accused's statement P8 the accused has admitted the aforesaid fact.

I find no reason to doubt the veracity of the witnesses who testified before the Court and I conclude that the few contradictions are on account of human error. I therefore accept that the said witnesses have all given truthful evidence.

In section 280 of the Penal Code (Cap 158) the offence of robbery is defined as follows:

> Any person who steals anything, and at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he is liable to imprisonment for life.

The evidence of the complainant, as admitted in the statement of the second accused, was that the first accused, by taking the handbag containing cash and jewellery, being articles capable of being stolen, and depriving the owner of its possession, and the second accused by picking up the same bag and running away, have committed theft. The first accused, by exerting force on the victim to dispossess, and causing her to fall on the ground and sustain wounds to her body, has completed the act of robbery. The evidence also established that the first accused has used violence against the complainant by the use of force by causing her to be pulled, dragged and to fall on the ground in the ensuing struggle in the commission of the theft.

The charge of robbery punishable under section 281 of the Penal Code is to be read with section 23 of the same Code which reads thus

> When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution

> of such purpose, each of them is deemed to have committed the offence.

It is apparent from the evidence of the complainant and the statement of the second accused that the three accused came together to the shop, and while the first accused stole the hand bag of the complainant and struggled with the complainant to effect the release of the stolen article, the second accused watched over the incident and thereafter picked up the handbag at the first opportunity available, establishing that the two accused were acting in furtherance of the common intention of committing theft. It is further established that in the course of the resistance of the complainant that the first accused struggled with the complainant at the risk of wounding her, and doing so amounts to violence against her, and it was undoubtedly the probable consequence of the prosecution of the common intention of committing theft. I therefore find that the second accused was aware and conscious of the probable resistance and struggle resulting in the wounding of the complainant. The second accused is equally guilty and responsible for all acts of commission of the first accused.

In view of the aforesaid reasoning the proposition of the counsel for the second accused that there is no evidence to establish violence in the commission of theft by the second accused is without merit.

I find the charge of committing robbery with violence as read with section 23 of the Penal Code proved beyond a reasonable doubt by the prosecution.

I find the accused guilty of the charge of robbery with violence punishable under section 281 of the Penal Code and I convict him of the offence as charged.

Record: Criminal Side No 23 of 1996

Republic v Snoopy's Mini Market

Employment law - Employment Act 1990 - failing to pay compensation – revision - pleadings - unlawful sentence

The defendant was charged with failing to pay compensation contrary to section 80(2) (n) and punishable under section 81(1) of the Employment Act 1990. The facts were such that the accused had failed to pay the complainant the sum of R5702.76, being the compensation owed to her for length of service, one month's salary in lieu of notice, arrear of salary and accrued leave. The representative for the accused had pleaded not guilty to the charge, however later changed his plea on account of pressure from the Senior Magistrate. The Senior Magistrate sentenced the accused to a conditional charge for a period of two years. The prosecution had applied for revision of the Magistrate's decision and an alteration of the order so that, in addition to the sentence, the complainant was compensated for the monies owed under section 82(4) Employment Act 1990.

HELD:

(i) Nobody has a right to put pressure upon an accused person so as to make him or her change his or her plea;

(ii) An accused must plead freely without fear of any retributive action on the part of the court; and

(iii) The sentence was an express breach of section 82(4) of the Employment Act 1990. By failing to order Snoopy's Mini Market to pay the sum owed to the complainant, the Senior Magistrate had erred in law.

Alexia ANTAO for the Republic
Respondentin person

Judgment delivered on 21March 1997 by:

ALLEEAR CJ: Snoopy's Mini Market, represented by Mr Romeo Quatre, was charged with failing to pay compensation contrary to section 80(2) (n) of the Employment Act 1990 and punishable under section 81 (1) of the Employment Act 1990. The particulars of the offence were as follows:

> Whereas during the month of April 1991 Snoopy's Mini Market (Pty) Ltd. represented by Mr Romeo Quatre, without reasonable cause failed to pay Ms Brigitta Volcere the sum of R5702.76 being compensation as determined by the competent officer as follows:
>
> (i) Compensation for length of service,
>
> (ii) one month's salary in lieu of notice,
>
> (iii) arrears of salary,
>
> (iv) accrued leave.

Mr Romeo Quatre, initially pleaded not guilty to the charge. Subsequently after several postponements, Mr Quatre claims that he was pressurised by the Senior Magistrate to change his plea and he pleaded guilty. If what Mr Quatre says is correct and true then this is a practice which must stop immediately. Nobody has a right to put pressure upon an accused person so as to make him or her change his or her plea. An accused must plead freely without fear of any retributive action on the part of the court.

After Mr Quatre changed his plea the Senior Magistrate sentenced him to a conditional charge for a period of two years with effect from 4 November 1994. This sentence was in express breach of section 82 (4) of the Employment Act 1990 which states:

> Wherever any person (including a legal person) is convicted of an offence under this Act and in connection with that offence monies, whether consisting of wages, compensation, benefits earned, payments in lieu of notice or otherwise, are due and payable to another person in respect of whom the offence has been committed, the Court shall, in addition to any penalty imposable under this Section order the person convicted to pay to the other person the monies due.

By failing to order Snoopy's Mini Market, represented by Mr Romeo Quatre, to pay the sum owed to Ms Brigitta Volcere, the Senior Magistrate erred in law. The prosecution applied for revision of the decision of the Senior Magistrate and this Court acceded to the request for revision. In exercising its powers of revision, the Supreme Court can alter or revise an order already made. Hence in addition to the sentence imposed on Mr Romeo Quatre I order Snoopy's Mini Market, represented by Mr Romeo Quatre to pay Ms Brigitta Volcere the sum owed to her i.e. R5,702.76 as determined by the competent officer.

Revision case no 5 of 1996

Republic v Francis (alias Kalenba)

Criminal law - s 192 Penal Code - s 195 Penal Code - manslaughter - elements of manslaughter - mens rea - defences

The accused was charged with unlawfully killing David Barbe. On the afternoon of 17 June 1991 at Castor Road, English River, the accused and David Barbe had a drunken altercation whereby the former punched the latter twice on the face causing him to fall and hit his head against the edge of a ditch. As a result of the fall, David Barbe sustained serious head injuries and died the following day. Several eye-witnesses saw the incident. The accused claimed that David Barbe had initiated the altercation. The learned Chief Justice ruled against the accused.

HELD:-

(i) In order to succeed in proving the charge of involuntary manslaughter against the accused person, the prosecution bears the burden of proving the following elements beyond reasonable doubt: (i) that there was an unlawful act; (ii) that the unlawful act was committed by the accused person; (iii) that death of the deceased person resulted from the unlawful act of the accused;

(ii) A killing is manslaughter if it is either (a) the result of a reckless act or omission on the part of the accused or (b) the result of an unlawful act where the unlawful act is one where a reasonable person would see the risk of some harm being caused albeit not serious harm;

(iii) Where manslaughter is alleged to result from an unlawful act involving a risk of

some harm, it is essential that the act must be proved to have been unlawful;

(iv) The mens rea can consist either of recklessness as to the possibility of the accused's act or omission resulting in death or serious injury or, in the case of death resulting from an unlawful act, the mens Rea appropriate to that act; and

(v) The defence of self-defence is available to an accused person charged with the offence of Manslaughter and becomes available to an Accused who has sustained a physical attack from the victim.

Case Cited
R v Lipman (1969) 53 Crim App R 600.

Alexia ANTAO for the Republic
Anthony JULIETTE for the Accused

Judgment delivered on 30 January 1997 by:

ALLEEAR CJ: The accused, Jeffrey Francis, (alias Kalenba) is charged with the offence of manslaughter contrary to section 192 of the Penal Code and punishable under section 195 of the Penal Code. The particulars of offence are that Jeffrey Francis (alias Kalenba) on 17 June 1991 at Castor Road, Mahe, unlawfully killed David Barbe.

On Monday 17 June 1991 in the afternoon at Castor Road, English River, following an altercation between the accused and the deceased, David Barbe, the former punched the latter twice on the face causing the latter to fall and hit his head against the edge of a ditch along the said Castor Road. David Barbe sustained serious head injuries due to his fall as a result of which he died the following day.

There were several eye-witnesses to the said incident. Georges Pierre (PW4) was one of them. He said he was seated on the wall of one Michel Richmond by the side of Castor Road. The time was around 1 pm. He witnessed an incident between the accused and one Jason Charles. Shortly after the said incident was over, the deceased came along the Castor Road. The Accused who was standing close to a lamp post with a bottle of Guinness in his hand, asked him for a cigarette. The deceased playfully touched the abdomen of the accused. The accused swore at him. The deceased said "you ask me for a cigarette then you swear at me." The accused who was apparently in a sour mood did not like what the deceased said to him and punched him in the face. The deceased fell down. When he was on his feet again, the accused punched him a second time. The deceased fell backward hitting his head on the tarmac and became motionless. The deceased remained immobile on the ground for about 2 to 4 minutes. At the same moment the accused immediately left the scene and walked up in the direction of the Radio Seychelles Station. One Robert Confait came along and helped to pick up David Barbe, and put him in a car which drove away in the direction of English River. The next day Georges Pierre learnt that David Barbe had died.

On 17 June 1991 at around 11.10 am Albert Joseph Pierre Louis, another witness, was standing by the shop of "kaliman" at English River. He saw the deceased whom he observed was in an inebriated state. The deceased told him he was going to climb a mango tree to pick some mangoes. At the same moment the accused came along Thomson Lane. The deceased stopped the accused and said the following to the latter "What you are doing is wrong, you are assaulting everybody at English River." The accused replied, "I have done nothing to you and I am going home". The deceased repeated "what you are doing is wrong and I have to talk to you." The accused replied "you are putting me on my nerves. I have done nothing to you."

At that Albert Joseph Pierre Louis said he intervened and told the accused to leave the deceased alone. Before going away the deceased told Albert Joseph Pierre Louis that he would meet him at Krishna Mart shop at around 2 pm the same afternoon.

In the afternoon when Pierre Louis reached Krishna Mart's shop he was informed of the incident which had taken place between the accused and the deceased. He proceeded straight to English River clinic to see the deceased. The next day he was on his way to work when he learnt that the deceased had passed away. He was detailed to be on sentry duty at the mortuary, Victoria Hospital. Upon reaching the mortuary he made a visual examination of the body of the deceased. He saw a bump at the back of the deceased's head. There were about 7 stitches on the right side of the deceased's chin.

Bernard Jourdan Delorie recalled the incident of 17 June 1991. He said at around 1.30 pm he parked his car along the English River road and went inside "Kailasam", shop to buy a tin of milk. Whilst he was inside the said shop he heard an argument outside. When he came out he heard the accused say to the deceased "I am on good terms with you and we have no quarrel. Why are you doing all this?" The deceased pulled the t-shirt of the accused. The accused lost his temper and punched the deceased. As a result of that blow, the deceased fell backward hitting his head on the tarmac by the gutter. After the accused had punched the deceased, he ran upwards the Union Vale Road followed by one Daniel Charles who gave chase to him. The accused picked up two stones in order to defend himself. Delorie helped to put the deceased in his car in order to transport him to the English River Clinic.

Robert Confait, another eye-witness who undoubtedly came to this Court to mislead it, deposed that on17 June 1991 between 1.30 and 2 pm he was in the vicinity of Chang Lai shop at Castor Road. He saw Daniel Charles, Jason Charles and Bernard Jourdan Delorie on the road. He heard the

deceased say to the accused "you asked me for a cigarette then you swear at me." The deceased pulled the t-shirt of the accused which was over his trousers. The accused and the deceased started arguing. The accused punched the deceased on the side of his face. The deceased fell backward in a sitting position against the wall of a house bordered with CI sheets. The deceased got up immediately. The accused punched him again. This time the deceased fell back hitting his head by the edge of the gutter by the road side. The deceased remained motionless on the road.

With the help of one Poppy Delorie, he helped to put the deceased inside Delorie's car. The deceased was taken to English River Clinic. From the English River Clinic the deceased was transported to the Victoria Hospital. In the evening Robert Confait went to visit the deceased. The latter was still unconscious lying in bed. The next morning he learnt that the deceased had died.

Robert Confait spoke of an incident between the Charles brothers and the accused person. The said incident he said had occurred on the night prior to the incident giving rise to this case. Robert Confait wanted to link the incident between the accused and the Charles' brothers with the incident between the accused and the deceased in order to show that the accused was provoked to act in the way he did. I do not think that the two incidents had anything to do with each other. They were quite separate incidents.

On19th June 1991 Dr Rubel Brewer was present when Dr Wang, who has since left the Republic, performed a post mortem examination on the body of the deceased. Doctor Brewer recalled that the deceased had died of brain damage due to skull fracture. He said that the head injury could have been caused by a blow received at the base of the skull.

Shortly after the incident of 17 June 1991, the accused left the Republic, unknown to the authorities. On4 November 1992 Mireille Charles made the following deposition in Court

pursuant to section 133 of the Criminal Procedure Code Cap 54. She has since passed away and was obviously not available to depone in this trial. Her deposition, a copy of which was made available to defence counsel, has been admitted in evidence in this case pursuant to section 133(l) of the Criminal Procedure Code Cap 54. In her deposition Mirielle Charles stated

> My name is Mireille Charles of Castor Road, a house wife of 43 years old. In June 1991 I was living in Castor Road, Mahe. I know the accused Jeffrey Francis alias Kalenba. I knew the deceased too. I recall an incident which occurred on 17 June 1991. It was in the afternoon. The incident occurred on the road. I was coming from Ah Seng's shop. I saw a lot of people along the road. I saw the accused and the deceased talking. They were conversing. They were by the road side. I heard the accused ask the deceased for a cigarette and deceased gave him one. Then I saw the deceased raise the shirt of the accused saying it is wrong to walk with a weapon or stick whereupon the accused slapped the deceased on the face and the deceased fell on the road. The accused fell on his feet. I saw the incident clearly although I was not close to the deceased and the accused.
>
> David rose to his feet and Kalenba punched him in the face. He fell backwards and his head was in the ditch and body on the road. Then I left. David never got up. I did not notice whether Kalenba had anything in his hand then I went home.

The accused gave an unsworn statement to the Court in which he stated thus

> On the 17th June 1991, at around 11 o'clock, it happened that the deceased, David Barbe, tried to pick a quarrel with me. I ignored him and went on my way.
>
> After that, at about 1.15 p.m, I was going to buy some items from the shop. When I got to English River, between Chang Lai Seng's shop and Bonte's, I saw some empty bottles being thrown at me and I also saw stones being thrown at me. I was looking to see where they came from and they were coming from either side of me. I was hit at the back of my head. I looked up and I saw David Barbe talking to Jason Charles. After speaking to Jason, he came towards me. When he was coming towards me, Jason and his brother who were throwing stones at me stopped throwing stones at me. When David came towards me, I was about to leave by another way and he pulled at my shirt.

In order to succeed in proving the charge of involuntary manslaughter against the accused person, the prosecution bears the burden of proving the following elements beyond reasonable doubt:

> (i) that there was an unlawful act; (ii) that the unlawful act was committed by the accused person; (iii) that death of the deceased person resulted from the unlawful act of the accused.

It is worth remembering that the defence of provocation and diminished responsibility are applicable only to the charge of murder so as to reduce that crime to manslaughter. However, the defence of self-defence is still available to an accused person charged with the offence of manslaughter. It stands to reason that the defence of self-defence can only be invoked if there has been an attack by the victim on the accused.

A killing is manslaughter if it is either (a) the result of a reckless act or omission on the part of the accused or (b) the result of an unlawful act where the unlawful act is one, for example, an assault which all sober and reasonable people would inevitably realise must subject the other person i.e the victim to the risk of some harm resulting, albeit not serious harm. Unlawful in this context means criminal and not tortious. Mens rea of some kind is also an essential ingredient in manslaughter. That mens rea can consist either of recklessness as to the possibility of the accused's act or omission resulting in death or serious injury or, in the case of death resulting from an unlawful act, the mens rea appropriate to that act.

Where the manslaughter is alleged to result from an unlawful act, involving a risk of some harm, it is essential that the act, usually alleged to be an assault, must be proved to have been unlawful. In *R v Lipman* (1969) 53 Crim App R 600 the Court recognised the necessity to prove the mental element of assault where that was alleged to be the cause of death amounting to manslaughter.

In this case, in spite of minor inconsistencies in the various testimonies of the witnesses who testified, it is crystal clear to me that on 17 June 1991 prior to the incident giving rise to the present case, the accused had been involved in a stone throwing incident with the Charles' brothers. The latter incident had nothing to do with the subsequent incident between the accused and the deceased. I say this for the following reasons. If the deceased had anything to do with the previous incident of stone throwing the accused would not have asked him for a cigarette. Nobody in his right mind asks for a cigarette from someone who has only a while ago been a participant in a stone throwing incident against him.

What happened is that following the stone throwing incident the accused went and stood by an electric post with a Guiness bottle which was half full. When the deceased came near him, the accused asked him for a cigarette. The

evidence shows that the deceased had been consuming drinks that morning. In his inebriated state he pulled the t-shirt worn by the accused over his trousers. That was indeed a silly thing to do but one has to admit that drunken persons usually do such silly things. The accused asked the deceased to stop pulling at his t-shirt and the latter persisted. The accused lost his temper and voluntarily and unlawfully punched the deceased on the side of his face causing the deceased to fall in a sitting position. As soon as the deceased got up on his feet the accused punched him again. The deceased fell backwards, hitting his head against the edge of a gutter. The deceased sustained serious head injuries as a result of which he died the following day.

There was indeed no need for the accused to strike a second blow when the deceased got up he had done nothing to provoke the accused. The second blow inflicted on the deceased was in the circumstances intentional, malicious and unwarranted. The accused cannot be said to have acted in self defence. The defence of self defence becomes available to an accused who has sustained a physical attack from the victim.

On the evidence I accordingly find all the elements of the offence of manslaughter proved beyond reasonable doubt against the accused person. I find him guilty and convict him as charged.

Record: Criminal Side No 1 of 1992

Republic v Brioche

Criminal Law - sexual interference with a child - s 135(1) Penal Code - ar. 18(4) Constitution - unsworn evidence - corroboration

The complainant, a nine year old child, gave unsworn evidence claiming that on her way home from buying fish on 28 August, the accused had called her and asked her to help him find a 25 rupee note which he claimed to have lost. She was familiar with the accused because he and her mother had been friends, but had fallen out. She stated that as she was helping the accused he touched her shoulder and then put his hand in her underwear and ran his hand in her vagina, inserting his finger. She told him to stop and then moments later found the 25 rupee note. Soon afterwards, her mother approached them and the accused asked her to hide. The complainant stated that she refused to hide and went to her mother. However, she did not recount what happened until the following night.

At the trial it was admitted that the complainant and her mother had discussed the incident a number of times. However, she denied that her mother had coached her at all.

At the time of arrest, the accused claimed that he was not informed of his constitutional rights and was forced to make a statement. At the trial, a voir dire took place to determine whether there was indeed a breach of article 18(4) of the Constitution. It was found by Alleear CJ that he had been informed of his constitutional rights and that his statement was provided voluntarily.

HELD:

(i) The Court was satisfied on the evidence of the complainant that she was speaking the truth and had not been coached by her

mother or anyone else and has not given a rehearsed version of the incident in Court;

(ii) There can be no conviction of an accused solely on the unsworn evidence of the complainant unless that evidence is corroborated by some other material evidence in support thereof, implicating the accused;

(iii) The accused, in his voluntary statement, admitted that he touched the body of A and that he had put his hand inside her panty and ran his hand on her vagina caressing it; and

(iv) The unsworn evidence of the complainant is corroborated by the admission of the offence by the accused himself in his statement.

Karen DOMINGUE for the Republic
Jacques HODOUL for the Accused

Judgment delivered on 24 October 1997 by:

ALLEEAR CJ: Willy Brioche, the accused, is charged with the offence of sexual interference with a child contrary to and punishable under section 135(l) of the Penal Code, as amended by the Penal Code (Amendment) Act No 15 of 1996.

The particulars of offence are that Willy Brioche on 28 August 1996 at Grand Anse, Praslin, committed an act of indecency towards A, a girl under the age of fifteen years.

On 30 August 1996 at around 1430 hours, SI Marie May Bacco was on duty at Grand Anse Praslin police station when one B called at the station with her daughter A. On behalf of her daughter A, aged 9 years, B made a report to SI Bacco.

Following the said report SI Bacco recorded a statement from A in the presence of her mother.

At 1500 hours SI Bacco, accompanied by B and A, went to a location where A alleged the incident giving rise to the present case had occurred.

On 2 September 1996 Inspector Sylvia Chetty, who was accompanied by SI Bacco and A proceeded to the location of the alleged offence. A pointed out several spots to Inspector Sylvia Chetty who took photographs of same.

On4 September SI Bacco took A who was accompanied by her mother, to the Grand Anse Clinic for medical examination by a gynaecologist.

On 5 September 1996 shortly after noon SI Bacco, who was in the company of Corporal Dogley, arrested the accused at his work place at Praslin Beach Hotel. The accused was taken to Grand Anse Police station where he was detained overnight.

On the 6 September 1996, when SI Bacco resumed duty at 8 in the morning she saw the accused in his cell. She gave him a lemonade and asked him how he was and whether he had slept well. The accused replied that he had slept well and that he was all right. Around 11 am the accused was taken out of cell and was interviewed by Lance Corporal Freminot. SI Bacco was present during the interview. The accused was cautioned and he voluntarily gave a statement which started at 11.28 am and ended at 11.50 am.

According to SI Bacco, the accused recounted in a story form how the alleged incident had occurred. The statement was read over to the accused person after it had been recorded. The accused was asked to make any addition, alteration or correction. He made none. He affixed his thumb print at the end of the statement.

SI Bacco admitted in cross-examination that the father of her concubin is the brother of B's mother. She added that she had been posted to Praslin since September 1995 and had known B one year prior to the alleged incident. This witness stated that it was not within her knowledge whether or not the accused had had an affair with B. She was also unable to say whether or not B was on good terms with the accused. She confirmed that B had written three letters to the Commissioner of Police to inquire about the progress of the investigation of the case. She was not aware if the National Council for Children had been contacted by B on two occasions. She admitted that she had instructed SI Sylvia Chetty on 2 October 1996, to take photographs of the alleged scene of offence. She stated that the first time she saw A was on 30 August 1996 at Grand Anse Police Station.

A, who turned 9 years old on 23 October 1996, deposed that she lives at Grand Anse, Praslin with her mother, grandmother, brothers and sisters. She is in P4 attending primary school at Grand Anse, Praslin. She told the Court that she knew the accused who used to come to the house of her grandfather during the lifetime of the latter.

This witness testified that although her mother, grandmother and herself were in good terms with the accused prior to the alleged incident they are no longer so as "the latter has done these wrong things to me." She recalled the day of the incident. She had gone to buy fish by the seaside. On her way home, the accused called her and asked her to accompany him to the market. The accused asked her to walk in front of him. When she returned home her grandmother asked her to take the empty pig food container to the house of X. On her way home from X’s house she saw the accused again. The latter called her and asked her to help him look for his R25 note which he had lost on his way. She agreed to help the accused to search for the lost note. At the same moment they saw a man coming in their direction. The accused asked her to hide amongst some undergrowth. After the man had passed them they continued looking for the lost note. Whilst

she was thus engaged she said the accused touched her shoulder. Then he put his hand in her panty and ran his hand in her vagina. He inserted his finger inside it. She said she told the accused that she was leaving and he did not want her to go. He pulled her backwards and they continued searching for the lost note. Moments later she found the missing note. While she was handing it over to the accused she saw her mother approaching. The accused asked her to hide. She did not hide but went straight to her mother. She said her mother swore at the accused before taking her home.

When they reached home she said she did not talk to her mother. The following night, however she recounted the alleged incident to her mother. Her mother was very angry. The next morning her mother took her to the Grand Anse Police Station where she related to SI Bacco what had happened to her. The latter recorded a statement from her. A few days later her mother took her to hospital to be examined.

A stated that what she told the Court had actually taken place. Before the incident she said the accused was on good terms with her mother. He used to come to her mother's house. On the day of the incident she was wearing a dress and shorts underneath it. The accused did not remove her clothes. She added that whilst the accused was touching her private part she was frightened. On the night of the incident she said she felt "ashamed". She could not finish her dinner. She did not report the incident to her mother because she was frightened that she would be beaten up.

In cross-examination this witness agreed that she had spoken about the incident to her mother on several occasions prior to coming to court. Her mother told her to speak the truth and relate to the Court what the accused had done to her. She denied that her mother had coached her.

B, the complainant's mother, a tour guide representative deposed that she has known the Accused for about four to five years. She denied that she had ever been in

concubinage with the accused but she stated that she and the accused were friends. She explained that she fell out with the accused because the latter was pestering her for sexual favours. She had told the accused point blank that she was not interested in having sexual intercourse with him.

This witness stated that on the evening of 28 August 1996 she returned home from work at around 6.30 pm. She saw her other three children but A was not at home. She enquired from her mother about the whereabouts of A. Her mother told her that she has sent A to take the empty pig food container to the house of C. As it was getting dark B went out to C's house to look for her daughter. A was not there. B went to the shop. From the shop she went on the road looking for A. She came across D. She asked the latter whether he had seen A. The latter replied in the negative. She went on looking for A and as she did so she called out “A, A” aloud. She eventually saw A standing in front of the accused in a small foot path. She asked A what she was doing with the accused. A did not reply. The accused came towards her and spoke to her saying, "even if we are no longer in good terms do not beat A. I had lost my R25 note and I asked A to help me look for it."

B said that after hearing the accused's statement she was still angry with him for having asked her daughter at such a late hour to look for his missing money. She and A went home. Whilst A was having her dinner she noticed that she was not her usual self.

The following evening when she had calmed down she asked A again whether in truth she was only looking for the missing note for the accused. At that moment she said A broke into tears and recounted to her what the accused had done to her.

The next morning she contacted SI Bacco at Grand Anse Police Station. At the station A gave a statement to SI Bacco. On the same day Sl Bacco took A and B to the scene of the alleged incident. There A pointed out the places where the incident was alleged to have taken place.

Five days after the incident she went back to the police station after A had complained to her that her vagina was painful. SI Bacco arranged for A to be medically examined at the Grand Anse Clinic by Dr Sankoro. The latter declined to examine A but referred her to Victoria Hospital to be examined by a gynaecologist. Later same day a lady doctor examined A in Victoria Hospital. She said the gynaecologist in Victoria Hospital said that there was nothing wrong with her daughter.

B admitted that on at least two occasions she had spoken about the incident to her daughter. She denied that she was determined to see the accused convicted and be jailed. What she wanted she said was to see that justice was done.

B admitted that she had approached F to ask him to correct some letters which she had written before sending them to the National Council for Children and the Commissioner of Police. She denied that after the doctor had said that there was nothing wrong with A she had said that she herself would damage A's vagina with her finger so as to ensure that the accused got convicted. She admitted that although her cousin is the boyfriend of SI Bacco, she did not take advantage of that relationship to ensure that the investigation against the accused was speeded up. She denied that she had coached A to tell lies to the Court or to mislead the Court.

D, a mason living in Grand Anse, Praslin testified that on the evening of the incident at about 6.40 pm he did not see the accused and A together but saw B opposite the Grand Anse Clinic. The latter asked him if he had seen A and he said no.

Sylvette Lemielle, a constable then stationed at Grand Anse Police Station, deposed that on 5 September 1996 when she resumed duty at 4 pm, she saw the accused who was being detained in a cell at the Grand Anse Police Station. She noticed that the accused looked normal. She did not see anybody in her presence assaulting the accused. She saw when PC Laundry brought a takeaway box and gave it to the

accused. The next morning she came off duty at 8 am. Sylvette Lemielle was positive that the accused was not ill-treated in her presence.

Andre Freminot, a police officer, was stationed at Grand Anse Praslin on 6 September 1996. He was not on duty on the day the accused was arrested but worked on the next day from 8 am to 4 pm. He said at around 11.30 am he recorded a statement from the accused. The statement was witnessed by SI Bacco. The accused, he remarked, gave the statement voluntarily. The statement was given in Creole language in a story form. After the statement had been recorded it was read over to the accused and the accused was informed that he could make any addition or alteration to it. The accused made none. The accused affixed his right thumbprint at the end of the statement. Both he and SI Bacco signed the statement.

Police Officer Freminot denied that pressure was brought to bear upon the accused to make him give a statement.
Before the production of the statement in evidence, objection was raised by Mr. Hodoul in terms of article 18(4) of the Constitution. The contention of the defence was that the accused had not been told by the arresting officer the reason for his arrest and about his right to silence and his right to be defended by a legal practitioner of his choice. A trial within a trial was held to determine the issue of whether there had been a contravention of article 18(4) of the Constitution.

Article 18(4) of the Constitution is couched in these terms:

> A person who is arrested or detained shall be informed at the time of the arrest or detention or as soon as is reasonably practicable thereafter of his rights under clause (3).

Clause (3) states:

> A person who is arrested or detained has a right to be informed at the time of arrest or detention or

> as soon as is reasonably practicable thereafter in, as far as is practicable, a language that the person understands of the reason for the arrest or detention, a right to remain silent, a right to be defended by a legal practitioner of the person's choice and, in the case of a minor, a right to communicate with the parent or guardian.

Andre Freminot was positive that at no time had the accused asked to contact a lawyer. He added that there were no physical marks on the body of the accused and the latter was made comfortable in his cell and he did not make any complaint to anyone. The accused, he said, was not beaten or threatened in any way. He was not promised anything. The accused gave his statement voluntarily.

SI Marie May Bacco confirmed that the accused was arrested on5 September 1996 at Praslin Beach Hotel. At the time of his arrest, the accused was informed of the reason for his arrest. In fact SI Bacco said she herself told the accused of the allegation made against him. According to SI Bacco she also informed the accused of his right to be defended by counsel of his choice. Confronted by the allegation of B the accused replied that he too had heard about same. Before boarding the police vehicle, the accused was informed of his right of silence. SI Bacco recalled that when she had gone to arrest the accused Corporal Dogley was with her. After the accused was brought to Grand Anse Police Station and the formalities completed he was told he would be detained and was placed in a cell.

The accused was served lunch. Before SI Bacco went off duty at 4 pm she went to the accused's cell to see whether he was alright. The next morning, that is 6 September 1996 when she took up duty, SI Bacco said that she went to the accused's cell and asked him how he had slept. The accused replied he was okay. SI Bacco asked the accused whether he wanted tea. The accused said he wanted a soft drink, and one was bought for him. The accused did not make any

complaint to SI Bacco nor did he ask for the services of counsel. The accused never asked her why he was being detained.

SI Bacco explained the formalities preceding the recording of the statement from the accused. She said the accused was taken to the interview room. The allegation of A was put to him again. The accused replied that he would give his version of the events, whereupon Corporal Andre Freminot cautioned him and the accused recounted his version of the events and Corporal Freminot recorded the statement.

SI Bacco was present throughout the recording of the statement in the CID office. SI Bacco saw no bruises or marks on the accused. After the statement was recorded it was read over to the accused. He was given the choice to add to, correct or alter it. The accused affixed his right thumb print as his signature. The statement was given voluntarily without promises, threats or inducement made to the accused according to SI Bacco. The accused was comfortable when he made the statement. He was normal; there was nothing wrong with him. SI Bacco maintained that she did inform the accused of his constitutional rights.

The accused testified on the voir dire. He said he was working as a gardener employed by Praslin Beach Hotel when he was arrested by SI Bacco. The accused stated that he was not informed of the reason for this arrest. He was simply arrested and taken to Grand Anse Police Station. He said when he reached the Grand Anse Police Station he was slapped three times on the back of his neck. He said he gave his statement voluntarily after Lance Corporal Freminot asked him whether he would like to make a statement. He also confirmed that after the statement was recorded it was read over to him and he was informed that he could make any alterations, additions or corrections to it. The accused denied that he was informed of his constitutional right upon arrest. The accused stated that he was not aware that B had made an allegation against him.

After the Court had heard evidence on the voir dire, the Court was satisfied beyond doubt that the accused was informed of his constitutional right and that he was not subjected to any ill-treatment by the police officers. The Court ruled that the statement was given voluntarily and admitted it in evidence.

The translated version of the accused's statement runs thus:

> On Wednesday 28 August 1996, around 6.15 pm, I came from Theophane Jean Baptiste's to get a bottle of toddy. I drank the bottle of toddy at his place and afterwards I went down towards the beach and at that time there was a 25 rupee note in my pocket. When I arrived further down near one Charles I checked in my pocket and noticed that my money in my pocket was missing and so I started to look for it. When I arrived further down at a junction of a footpath I saw a small girl whom I know as A who is the daughter of B, and A, I know her very well and her family as well.
>
> I am used to them and I also before used to play with B's children. Sometimes I bring them for walks everywhere but lately I was not frequenting there because I am not on good terms with B. When I saw A I called her and I told her to come and help me to look for my money as I have 25 rupees which is lost and at that time it was around 6.30 pm and I continued to look for my money until I reached near a clump of (vyeyfiy). Whilst we were looking for my money there, A and me, A picked up the money and gave it to me. After she had given me my money she asked me for a lemonade and I told her that I can't give her money as I am not on good terms with her mother. Just a few minutes after I saw her mother (I saw her mother) B coming and she said to A who at that time was standing near me, facing me "all this time you have gone to bring pig food? Where were you?" And so I replied by saying "excuse me

I had lost my 25 rupees and I have asked A to give me a hand to look for it." B did not reply and she took her child and went to her place and I went towards the beach. Whilst I was looking for money together with A I did not see anybody passing by but I saw someone coming behind me and at that time we were near the clump of (vyeyfiy) and I told A to hide and I also hide in case people will see her with me and tell her mother. I did not notice if that person was Patrick Barbe but it was a tall person and whilst we were hiding A and me I did not see anybody pass by near us. I recalled A was wearing shorts but I do not know what she was wearing on top of her shorts if it was a T.Shirt or a dress. After I came out from hiding I hold A on her shoulder with my left hand and put my right hand and started to pass on her body going down towards her thigh and afterwards I took my right hand and put it inside A's panty and ran my hand on her vagina, caressing her vagina, and after I took out my hand, but I want to say that I did not put any finger inside A's vagina and if A said that I put my finger in her vagina it is not true.

I did not have any intention to do anything with A and A did not tell me anything when I was passing my hand on her. It was a bit dark at that time so I could not see A's face if she was shy or embarrassed. I want to state that on that day I did not meet A earlier because I was working.

When I was there with A I did not show any other money in my hand to A. I had only 25 rupees that I was looking for.

HRTP of Willy Brioche

In his statement the accused admitted that he had touched the vagina of the complainant by putting his right hand inside A's panty and caressing her vagina. He denied that he had inserted his finger inside A's vagina. He said at the time he was caressing and touching A's private part, it was dark and he could not see A's face to notice if she was embarrassed or not. A, he added, did not say anything to him.

In his unsworn statement to the court the accused simply stated that he had asked A to hide at the back of a tree because he was not on good terms with B.

The accused had previously indicated to the Court that he would be calling two witnesses from Praslin. They were never called because, in defence counsel's opinion, there was nothing material that they could say in the defence of the accused.

In this case the complainant, aged 9 years, gave unsworn evidence. She was allowed to do so after the Court, through questioning of her, was satisfied that she was of sufficient intelligence and could give a coherent version of the alleged incident. The Court further satisfied itself before relying on the evidence of the complainant that the latter was speaking the truth and had not been coached by her mother or anyone else and has not given a rehearsed version of the incident in Court.

Although corroboration is not required as a matter of law in cases of indecent assault, there can be no conviction of an accused solely on the unsworn evidence of the complainant unless that evidence is corroborated by some other material evidence in support thereof implicating the accused. In this case the accused himself in his voluntary statement which he had given to Lance Corporal Freminot at Grand Anse Police Station had admitted that he touched the body of A and that he had put his hand inside her panty and ran his hand on her vagina, caressing it. The accused denied inserting his finger inside A's vagina although A stated that he had done so.

The accused had contended that his constitutional rights provided for under article 18(4) had been contravened. On a voire dire held during the trial within a trial the Court satisfied itself beyond reasonable doubt that that was not the case. The Court was satisfied beyond reasonable doubt that the accused had been informed of the reason for his arrest, of his right of silence and of his right to retain counsel of his choice. The accused never challenged the voluntariness of his statement. It is on record that he stated that when the allegation was put to him at the police station the next day he agreed to give a statement and it was a voluntary one. Hence the unsworn evidence of the complainant is corroborated by the admission of the offence by the accused himself in his extrajudicial statement.
In court the accused did not allege that what he had stated in his statement was not true. He only clarified that he had asked the complainant to hide because he was no longer on good terms with the complainant's mother.

On the evidence led in support of the charge of indecent assault, I find the offence of sexual interference under section 135(1) of the Penal Code proved beyond reasonable doubt.

I accordingly find the accused guilty and convict him as charged.

Record: Criminal Side No 12 of 1997

Prunias v Darou

Civil procedure - capacity to sue – trespass

The plaintiff sued the defendant for trespass to land. The defendant objected because the plaintiff was a co-owner of the land. The plaintiff moved to amend the plaint to include the other co-owner. The co-owners had the capacity to sue as fiduciaries at the time when the action was initiated.

HELD:

A pleading can be amended at any stage of the proceedings, as long as such an amendment does not convert a suit of one character into another.

Judgment: for the plaintiff, amendment of application allowed.

Legislation cited
Seychelles Code of Civil Procedure, s 146
Seychelles Civil Code, art 818

Foreign legislation noted
Law Reform (Miscellaneous) Provisions Act 1934 (UK)

Cases referred to
Fisherman's Cove Hotel v Dumbelton Ltd (1978) SLR 15

Foreign cases noted
Burns v Campbell [1951] All ER 965
Finnegan v Cementation Co Ltd [1953] 2 All ER 1130
Hilton v Sutton Steam Laundry [1946] KB 65
Ingall v Moran [1944] KB 160
Raleigh v Goschen [1898] 1 Ch 73

John RENAUD for the Plaintiff
Jacques HODOUL for the Defendant

Ruling delivered on 1 day of July 1997 by:

PERERA J: This action was filed by Andre Prunias, the plaintiff, as the owner of a parcel of land at Glacis, bearing no H. 1011, claiming damages from the defendant for trespass and a restraining order on her from entering the land. This action, filed on 10 January 1992 has since then had a chequered history.

The instant ruling arises from a preliminary objection raised by the defendant that the plaintiff cannot maintain this action as the land which forms the subject matter is co-owned and that hence the plaintiff as one co-owner cannot act on his own.

Mr Renaud, counsel for the plaintiff moved to file an amended plaint wherein the caption had been amended to read as –

> Andre Prunias acting on behalf of himself and on behalf of Mrs Lucie Prunias, who are fiduciaries - Plaintiff.

Counsel also produced a copy of an appointment of fiduciary made before a notary on 26 September 1979 wherein the plaintiff and his wife, Lucie Prunias, had been appointed as fiduciaries in respect of the said land. This appointment has been duly registered in the Land Registry on 9 October 1979.

As regards fiduciaries, article 823 provides inter alia that –

> ..... they shall act jointly or severally as the notarial document provides. If there is no provision all fiduciaries shall be deemed to act jointly.

The notarial document produced in the case does not make provision for one fiduciary to act on his own, and hence the original plaint should have been filed by both fiduciaries jointly.

Mr Hodoul, counsel for the defendant, submits that the amendment seeks to permit the plaintiff to bring an action in a different legal capacity, thus altering the nature of the action substantially. Secondly he submits that pleadings cannot be amended after the close of the plaintiff's case.

Section 146 of the Code of Civil Procedure (Cap 213) provides that –

> The Court may, at any stage of the proceedings, allow either party to alter or amend his pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:
>
> Provided that a plaint shall not be amended so as to convert a suit of another and substantially different character.

The amended plaint sought to be filed contains averments identical to those in the original plaint and hence there is no change in the cause of action pleaded. Mr Hodoul's contention is that the original cause of action was pleaded by Andre Prunias as a co-owner in his own capacity and that presently he and his wife are seeking to plead the same cause of action in different legal capacities as fiduciaries, and consequently the proposed amendment of the caption would convert a suit of one character into a suit of another and substantially different character. He relies on the case of *Fisherman's Cove hotel v Dumbelton Ltd* 1978 SLR 15 wherein Sauzier J, in interpreting section 146, cited the English case of *Raleigh v Goschen* [1898] 1 Ch 73, where some members of the board of admiralty and naval officers were sued for trespass in the discharge of their official duties. It was held that no action lay against them in tort as they were agents of the Crown. It was also held that an action would lie against them for trespass as individuals. At that stage an

application was made to amend the plaint so that the defendants be sued in their personal capacities. The Court refused the application on the basis that such amendment could change one action into another of a substantially different character.

The rationale of that decision seems to be that once it has been averred that the tort was committed by agents of the Crown in the course of their official duties, a subsequent averment that that tort was committed by them in their personal capacities was clearly a changing of one action to another. Such reasoning was consistent with both equity and the law.

The position of a plaintiff is somewhat different. A plaintiff must have capacity to sue. Just as a minor cannot sue in his own capacity, a co-owner, in view of article 818 of the Civil Code, can only act through a fiduciary. In paragraph 4 of the original plaint it was averred that-

> 4. the plaintiff avers that he and his co-owner are owners of the aforesaid land .....

At the time of institution of the action, the plaintiff and his wife, the other co-owner, had been lawfully appointed as fiduciaries to the co-ownership. Hence there had been an error or omission in the drafting of the plaint. In the case of *Inqall v Morgan* [1944] KB 160 the plaintiff claimed in a representative capacity as the administrator of his son's estate. However he received letters of administration only two months after the institution of the action. It was held that, as an action under the Law Reform (Misc) Provisions Act 1934 for an accident claim can be brought only by an administrator, the plaint was incompetent at the date of institution. Similar decisions were made in the subsequent cases of *Hilton v Sutton Steam Laundry* [1946] KB 68, *Burns v Campbell* [1951] All ER 965 and *Finnegan v Cementation Co Ltd* [1953] 2 All ER 1130.

The instant case has to be distinguished on the basis that the

plaintiffs had the capacity to sue as fiduciaries at the time of institution of the action although the caption was not properly drafted. They were both de jure and de facto_fiduciaries. Under section 146 of the Code of Civil Procedure, a pleading can be amended at "any stage of the proceedings" as long as such amendment does not convert a suit of one character into another. As there is no change in the cause of action and as the plaintiffs had the capacity of fiduciaries at the time of institution of the action, allowing the application for amendment will not prejudice the defendant in a way that cannot be compensated by awarding costs.

Accordingly the application for amendment of caption is allowed and the amended plaint dated 1 April 1997 is accepted. The defendant however will be entitled to R500 as costs. The defendant may also file an amended defence, if so advised. If not, the case for the defence can proceed.

Record: Civil Side No 9 of 1992

Barbe v The Commissioner of Police

Public Officers (Protection Act) – time bar

The plaintiff alleged he was assaulted by three police officers. Over a year later he issued proceedings against the defendant and sought to file a plaint out of time.

> **HELD:** Section 3 of the Public Officers (Protection) Act contains a six month statutory limitation for the institution of an action. It merely puts an end to the accessory right of action. Hence it is inappropriate to refer to it as 'prescribed' as prescription implies adverse possession against the true owner. There the substantive right ceases, while when an action is time barred, the substantive right survives by other means.

Judgment: for the defendant.

Legislation cited
Code of Civil Procedure
Public Officers (Protection) Act, s 3

Foreign Legislation Cited
Company Directors Disqualification Act 1986 (UK), s 6
SI 2023 of 1987, r 3
Limitation Act 1993, s 5

Cases referred to
J Labrosse v S Allisop & Ors (unreported) CS 285/1996
Foreign cases
Secretary of State for Trade and Industry v Davies & Ors [1996] 4 All ER 289
Sitaram Paraji v Nimba 12 Bom 320

Antony DERJAQUES for the Applicant
Anthony FERNANDO for the Respondent

Order delivered on 31 October 1997 by:

PERERA J: The instant application is to file a plaint which is time barred, out of time. In a supporting affidavit, the applicant avers that he "intends and wishes" to file a civil plaint against the Commissioner of Police in respect of assaults made on him by three police officers on 10 November 1994. He further avers that if the Commissioner of Police is to be considered a "public officer" and is protected by the Public Officers (Protection) Act (Cap. 192), he was out of time by about 8 months. However it is observed that if the alleged assaults took place on 10 November 1994, and as this instant application was filed only on 5 August 1996, he was 15 months out of time.

Section 3 of the Public Officers (Protection) Act (Cap 192) contains a statutory limitation period of six months for the institution of any action against a public officer acting in the exercise of his office or anyone aiding or assisting him in such circumstances. That provision is absolute and mandatory as the Court has not been granted any discretion to extend the limitation period. The applicant avers that he failed to file the action because he was ignorant of the law. He further avers thus –

> I was unable to visit my attorney-at-law because I was destitute and unable to meet my fees or court expenses, I therefore waited for some time in order to work and save money. I was also ignorant of the existence of the legal aid scheme.

The maxim "ignorantia legis neminem excusat" posits that it is no excuse to plead ignorance of law. In this respect West J in the case if *Sitaram v Nimba* 12 Bom 320 took the definite view that ignorance of the law cannot be considered as sufficient to condone a delay in timing for an action out of time, as specified in section 5 of the Limitation Act 1993, as to do so would put a premium on ignorance. It was also held that

"there can be no such things as bona fide mistakes of law, for good faith implies due care and caution."

The instant application is perhaps the first of its kind in Seychelles. Under the provisions of the Code of Civil Procedure (Cap 213) this Court has jurisdiction to entertain an action originating upon a plaint or petition based on a cause of action. There is no provision in that Code or any other law "to file a plaint out of time", as in the case of applications for leave to appeal out of time. In the latter type of applications, the party is already before the court and has defaulted in following a rule of court or a statutory provision as regards filing an appeal. Such rules and provisions invariably provide discretion to the court to grant leave in appropriate cases. Section 3 of the Public Officers (Protection) Act, however, does not grant the court any discretion.

Mr. Derjaques, counsel for the applicant, cited the case of *Secretary of State for Trade and Industry v Davies & Ors* [1996] 4 All ER 289. That case concerned the Company Directors Disqualification Act 1986 (UK),section 6 of which requires the court to make a disqualification order against any person, on an application made by the Secretary of Trade, where it is satisfied that such person is or has been a director of a company which has become insolvent and that his conduct as a director of that company makes him unfit to be concerned in the management of a company. Such an application is made in the public interest.

The limitation clause contained in section 7(2) of that Act is as follows

> Except with the leave of the court, an application for the making under section 6 of a disqualification order against any person shall not be made after the end of the period of 2 years beginning with the day on which the company of which that person is or has been a director became insolvent.

Rule 3(1) of SI 2023 of 1987 provided that the applicant should file at the same time evidence in support of the application for a disqualification order, and copies thereof should be served on the respondent.

In that case, the originating summons was filed within the statutory period of two years, but there was a failure to file the evidence within that time. Hence, the applicant sought an extension of time, and stated the reasons for being unable to obtain affidavits of certain officials.

The Court of Appeal, in granting an extension, stated (per Millett LJ) -

> The case is brought in the public interest to disqualify directors alleged to be unfit. The charges (particularly of false accounting and trading while insolvent) are particularly serious and there is an obvious public interest in having them determined. The delay was not minimal and the explanation for it is unsatisfactory, but it has not affected the timing of the hearings and has not caused prejudice to the first respondent. The proceedings were initiated in time, and the first respondent was made aware of the nature of the allegations intended to be made against him before the statutory period had expired.

The learned Judge further stated –

> One of the purposes which Parliament had in mind in enacting the two year time limit must have been to allow directors of companies which have become insolvent a reasonable degree of security from disqualification with the passage of time. If they had been notified within the time limit, not only of the Secretary of State's decision to bring disqualification proceedings against them but also of the nature of the allegations upon which they are to be based., the statutory purpose has to this

extent been fulfilled.

The ratio decidendi of that case is that where proceedings are not brought to enforce private rights, but are brought in the public interest in order to protect the public, the court should be liberal in using its discretion as the primary purpose of a disqualification was the protection of the public and not the punishment of the director.

With respect, I fail to see how this case would assist counsel for the plaintiff who in this unusual motion seeks leave to file a plaint in respect of an action which has been time barred under section 3 of the Public Officers (Protection) Act. As I stated in the case of *J Labrosse v S. Allisop & Or* (unreported) CS 285/1996.

> Section 3 of the Public Officers (Protection) Act (Cap. 192) contains a six month statutory limitation or a bar to the institution of an action. It merely puts an end to the accessory right of action. Hence it is inappropriate to refer to it as "prescribed" as prescription implies adverse possession against the true owner. There the substantive right ceases, while when an action is time barred, the judicial remedy cases, but the substantive right survives by other means. This section bars any action to enforce a claim in respect of any act done or omitted to be done by a public officer in execution of his office.

Hence this Court has no discretion to interfere with a statutory time limit fixed by Parliament, which perhaps may have been done, as Millett LJ stated in the case cited supra, to give public officers a reasonable degree of security from being sued with the passage of time.

In the circumstances the motion, being totally devoid of merit, is dismissed, but without costs.

Record: Civil Side No 218 of 1996

Attorney-General v Robert

Land purchase by state – fraud - duress – time bar - lesion

The defendant as an executor and fiduciary of an estate entered into an agreement to sell land to the plaintiff. The plaintiff paid the purchase price and obtained possession of the land. The defendant failed to execute the deed of transfer. The plaintiff sought an order directing the transfer of the lead. The defendant averred that the sale was a disguised compulsory acquisition and the purchase price was out of proportion to the property's true worth. The defendant further averred that the action was time barred.

HELD:

Once the parties have agreed on the thing and the price, a promise to sell property subject to registration is complete and effective as between the parties.

Judgment: for the plaintiff.

Legislation cited
Civil Code of Seychelles, arts 825, 1113, 1116, 117, 1118, 1304, 1589, 1650, 1674, 1678, 1680, 2262, 2265, 2271
Seychelles Code of Civil Procedure, s 135

Cases referred to
Hoareau v Gilleaux (1978-1982) SCAR 158

Anthony FERNANDO for the Applicant
Bernard GEORGES for the Respondent

Judgment delivered on 29 October 1997 by:

AMERASINGHE J: On behalf of the Government of Seychelles, the Attorney General instituted proceedings against the defendant as "the executor and fiduciary for heirs

Ronald Robert" for an order directing the defendant to execute the transfer deeds or, on the failure of the defendant to execute such deeds, for the court to order that the judgment of this Court stand in lieu of such transfer deed" and "for costs".

On the pleadings of the parties, the following facts are without dispute.

(1) The defendant is the executor and fiduciary for the heirs of Ronald Robert, the owners of land parcel S 365 - Providence Quarry.

(2) The defendant, himself a co-owner, was granted by the co-owners in a document appointing him as fiduciary, the power to sell, lease, mortgage or otherwise dispose of or deal with the parcel S 365.

This Court on 6 March 1997 ruled on the plea in limine litis raised by the defendant to the effect that a bare direction to sell by the co-owners is sufficient to satisfy a 825 of the Civil Code without the specific approval in writing by the co-owners of the offer.

(3) The plaintiff, by a letter dated 8 May 1986 (exhibit P1) addressed to the defendant, offered to purchase parcel S 365.

(4) The defendant, after clarifications made by the plaintiff at his request, accepted the plaintiff's offer of R1,150,000 by his letter dated 26 August 1986 (exhibit P4).

(5) The plaintiff, having first paid the agreed purchase price, obtained possession of the said parcel.

(6) The defendant failed to execute the deed of transfer when requested by the plaintiff.

The defendant in his pleadings contended that the transaction between the parties was a disguised compulsory acquisition of parcel S 365 by the plaintiff as the offer amounted to a fraud as it was accompanied by a threat of compulsory acquisition and that the acceptance of the offer was under duress. It is further averred by the defendant that the purchase price offered and accepted on the threat of compulsory acquisition was out of proportion to its real worth. The defendant therefore prays for a declaration that, "the offer and acceptance of payments by the government and the defendant respectively of parcel S 365 to be null, and to rescind such offer and acceptance, with costs".

The defendant by an amendment to the amended statement of defence claims that the plaintiff's action is time barred by the lapse of five years, under article 2271 of the Civil Code.

In dealing with the point of law arising on the plea of prescription it is of note that article 2271 of the Code is subject to the exceptions in articles 2262 and 2265 of the Code. The counsel for the defendant raises the point of law on the basis that the plaintiff has sued on the contract where the five years period of prescription is applicable under article 2271 of the Civil Code, but he conceded that the point of law should fail if it is decided by the Court that the action of the plaintiff is a real action in respect of rights of ownership of land or other interests therein. Principal State Counsel had no hesitation in describing the plaintiff's institution of proceedings as a real action in respect of rights of ownership of land. According to him the plaintiff seeks only a deed of transfer of land to establish the formal ownership of the parcel of land S 365 in respect of which exhibits P1 and P4 witness an offer and acceptance for sale, where the two parties have mutually agreed upon the thing and the price leading to a presumption of a sale under article 1589 of the Civil Code. There can be no doubt that the cause of action pleaded by the plaintiff is the defendant’s failure to execute a deed of transfer resulting from the offer and acceptance for the sale of parcel S 365 for which the plaintiff has already paid the purchase

price and obtained possession of the parcel of land. He cites the Louisiana Civil Law Treatise (2nd edition) Volume 2 paragraph 173 at page 470 where 'real actions' are described as actions for the enforcement of the right of ownership of movables and immovables. He also points out that in *Stroud's Judicial Dictionary* (4th edition) Volume 4 at page 2252 that a 'real action' is defined as "that action whereby a man claims title to lands, tenements or hereditaments in fee or for life".

I am satisfied that on the plaintiffs' pleadings and on the admissions by the defendant it is clearly established that the action before this Court is a real action in respect of the plaintiffs' right of ownership acquired by a purported purchase of parcel S 365 established by exhibits P1 and P4 for valuable consideration. Hence the period of extinctive prescription applicable to the instant action is 20 years which has not yet elapsed since the offer and acceptance and the presumed sale dates back to the year 1986. I therefore deny the defendant's point of law.

On the facts pleaded by the plaintiff, the defendant alleged that the contract constituted on the offer and acceptance was voidable on the grounds of duress, fraud and lesion. It is averred by the defendant that the plaintiff's offer of purchase was accompanied by a threat of compulsory acquisition of parcel S 365, therefore he contends that the acceptance was under duress and the offer amounts to a fraud. On the face of the plaintiffs' witness Simone Mellie, an Assistant Director of the Land Division, stating that to her knowledge no steps were taken by the plaintiff to acquire the subject matter and that no threat was made, the only evidence adduced on the issue of the threat was restricted to the following question and answers that transpired in the examination in chief of the defendant.

Q "What was the Government's reaction when you said you did not want to sell the land?"
A "They said there were two options, accept price or we acquire it".

The evidence on the said issue is vague and unconvincing. On the evidence of the defendant the discussion between his brother Guy Robert and the Minister in respect of the sale and consideration for the property had taken place just after his mother's death in 1984, thus indicating the plaintiff's readiness to negotiate to determine the purchase price over a period of 2 years culminating with the offer and acceptance in 1986. Although the witnesses for the defendant attribute to the Government a threat of compulsory acquisition, in the absence of any writing to that effect, the failure of the witnesses to name any agent of the Government specifically responsible for such a threat is conspicuous. There was evidence elicited from the witness called by the plaintiff that acquisition of land during the period in question was a regular feature and that compensation paid on such acquisitions was during a period of time extending over 20 years. The evidence of the defendant and his brother Guy Robert very clearly demonstrates their feeling of hopelessness when the offer to purchase their property was made by the Government. Their reluctance to displease the Government due to the fact that Guy Robert was the highest ranking Government representative of Seychelles in Australia, that the defendants' son-in-law Patrick Lablache was in charge of lands at that time and that the Head of State was personally known to the defendant, very probably had a very strong bearing on the defendant's acceptance of the offer finally. In the event of an acquisition the risk of the defendant losing his house and the delay in the payment of compensation causing the defendant to be homeless for a long period of time were added reasons that influenced the defendant to accept the offer. It is obvious that in the conditions prevailing at the time of the offer and acceptance by the defendant, as depicted by their evidence, the defendant had found no alternative other than to the accept the offer of the Government with the monetary value of the property being made available to the defendant without an inordinate delay, that would have otherwise followed in the event of a compulsory acquisition. However I find that the evidence fails to establish that the

offer of the Government to purchase was accompanied by any real threat of acquisition for the simple reason as revealed in the evidence for the defendant, as well as by Simone Mellie for the plaintiff, that it could not have escaped the attention of the defendant that the Government in any event had the option to compulsorily acquire the property without resorting to any threats on a balance of probabilities I therefore hold that a threat was superfluous and was never made.

In the absence of a threat of compulsory acquisition of parcel of land S 365 by the plaintiff the contention that the agreement is voidable for duress and or for fraud fails.

Counsel for both parties also examined the resulting position if it is a fact that the Government did make a threat to the defendant, of compulsorily acquiring the property if the defendant failed to accept the offer. Because a compulsory acquisition of any property is a lawful exercise of the Government, any such threat cannot make a contract voidable on the ground of duress (see article 1113-1 of the Civil Code).

In accordance with article 1116 of the Civil Code, if the threat of compulsory acquisition is an intentional contrivance practiced to make a party accept an offer then only fraud shall cause the contract to be null. In the instant action, as determined earlier, there is no evidence to conclude that the plaintiff intentionally brought to bear on the defendant any threat of a compulsory acquisition, as such intention cannot be presumed.

Counsel for the defendant, Mr George, submitted that in accordance with article 1118 of the Civil Code that lesion vitiate the contract and hence the demand for rescission. Whether the defendant made such a demand in his statement of defence is an issue that arises from his claim. As rightly pointed out by the Principal State Counsel, since the acceptance of the offer of sale by P4 there is no evidence of a

demand orally or in writing made for rescission of the contract on the ground of lesion. The only averment with reference to lesion in the statement of defence is in paragraph 6 of the statement of defence as follows:

> The defendant was compelled to agree to sell the said parcel S 365 and to accept a price for it out of proportion to its real worth.

In my view I find that there is no demand made by the defendant in accordance with article 1118 for the rescission of the contract on the ground of lesion. It is all the more significant that the purchase price paid by the plaintiff was R1,100,000 and the value of the property as assessed by the defendant at the time of negotiations as depicted in exhibit D5 was only R2,000,000, in view of the fact that the provisions of article 1674 of the Civil Code lay down that the price paid by the buyer should be less than one half of the value of the parcel of land for the seller to be entitled to rescission. The seller being the defendant, Guy Roberts' estimate in D4 is considered irrelevant.

Be that as may, at the stage of the submissions by counsel for the defence after the cases for the plaintiff and the defendant were closed, an application was made by the said counsel under article 1680 of the Civil Code for the appointment of three experts to produce reports on the valuation of the property as at the relevant date. He also submitted that article 1680 of the Civil Code provides that, "the court shall not admit any claims that a contract is vitiated by lesion, unless the plaintiff is able to make out a prima facie case that the circumstances are sufficiently serious to warrant an investigation by the court". It is counsel's view that to enable the party concerned to establish a prima facie case the Court should suspend further proceedings and give expression to article 1680 of the Code by appointing three experts as required in it. There is no doubt that the proposed procedure is not tenable. If counsel is right, after the closure of the case for the defendant without a prima facie case being established

in the course of the hearing to warrant an investigation as in the instant case , the Court is called upon to look for evidence to support the defendant's case. It cannot be overlooked that it is at the hearing proper that the evidence to resolve the matters in issue has to be presented to Court, and not when judgment is due after the conclusion of the hearing (See section 135(1) of the Code of Civil Procedure). I therefore hold that a party concerned, having first made a demand under article 1118 of the Civil Code, should have had recourse to the provisions of Article 1650 to have three experts appointed by the Court, either before the commencement of the hearing or at the latest before the case was ripe for judgment after the hearing was concluded. Hence the defendant has failed in these proceeding to satisfy the Court that a prima facie case exists for it to admit the instant claim on lesion.

Defence counsel's claim of lesion while denying the sale of the parcel of land S 365 surprised the Principal State Counsel. On an examination of the statement of defence it discloses that the defendant has not specifically denied the sale of land but claims that the transaction is, "voidable on account of duress and fraud on the part of the Government". There is no dispute between the parties that by exhibit P1 the plaintiff made an offer to purchase parcel of land S 365 for R1,150.000 and the defendant by exhibit P4 communicated to the plaintiff the acceptance of the offer. In accordance with article 1589 the two parties, having mutually agreed upon the thing and the price, the transaction completes the sale as far as the parties are concerned.

In *Hoareau v Gilleaux* (1978-1982) SCAR 158, the Seychelles Court of Appeal held:

> That the trial Judge had rightly interpreted article 1589 of the Civil Code of Seychelles, namely that when the parties have agreed on the thing and the price, a promise to sell, property subject to registration, is complete and effective as between the parties.

Principal State Counsel relying on article 1678 raised the point of law that this sale having been concluded on26 August 1986 on the acceptance of the offer by exhibit P2, the defendant's right to sue for rescission on the ground of lesion after the expiration of 5 years is time barred. Mr Georges, counsel for the defendant, stated that on the grounds of duress and fraud there was no sale and in any event the property has not been transferred to the plaintiff. It is settled law on the authority cited that the defendant cannot in law deny the sale to the plaintiff on the operation of article 1589 of the Civil Code. I uphold the point of law that the defendant in any event is subject to a time bar in exercising his right to sue for rescission of the contract of sale with the 5 year period for extinctive prescription ending by 26 August 1991. I therefore find that the claim of rescission is proscribed.

In response to the statement of defence that the contract sought to be enforced is voidable on the grounds of duress and fraud on the part of the Government, Principal State Counsel raised a point of law that on the operation of article 1304 of the Civil Code the right to claim a nullity and rescission is time barred by the lapse of five years. On the cross-examination of the defendant and his brother Guy Robert it was established by Principal State Counsel that until the lapse of five years from the acceptance of the offer that there has been no allegation of any threat of compulsory acquisition if the offer was not voluntarily accepted. In spite of the reasons adduced by the defendant that due to the circumstances prevailing at the given time and their close association with the Head of State, it is a fact that there has been no complaint of any compulsion or of an absence of voluntary acceptance of the offer during the said five years. As the alleged duress and fraud relates to the offer there cannot be a continuation of either after the acceptance of the offer. In considering the fact that not only did the plaintiff pay to the defendant the agreed price but also obtained possession forthwith, it is unacceptable that the defendant's silence and inaction was due to the plaintiff having had no

deed of transfer to the property.

As submitted by Principal State Counsel, in view of article 1117 of the Civil Code, contracts entered into by duress or fraud shall not be null as of right but shall only give risk to a right to an action for nullity or rescission, and with the operation of article 1304 of the Civil Code such action will be time barred after a period of five years.

It is not the case of the defence that duress continued even after the acceptance of the offer or that the fraud was discovered thereafter. As declared before, a valid sale ensued with the acceptance of the offer, and the five years period runs from the acceptance of the offer on 26 August 1986.

Therefore the said point of law is upheld, and even if there has been duress and fraud affecting the offer and acceptance by the parties, the right to a claim for nullity and rescission is time barred by the lapse of five years under article 1304 of the Civil Code.

On the pleadings, admissions and on exhibits P1 and P4 the plaintiff, having established on the balance of probabilities a legally valid sale of parcel S 365, on the application of article 1589 of the Civil Code the defendant was obliged and was liable to execute a deed of transfer in favour of the plaintiff but has failed to do so. I therefore enter judgment in favour of the plaintiff, directing the defendant to execute a deed of transfer for parcel S 365, and on the failure of the defendant to execute a transfer deed within a period of one month from this day, it is further directed that this judgment of this Court is to be effective as the document of transfer in lieu of such deed.

The plaintiff is entitled to the costs of action.

Record: Civil Side No 428 of 1995

GS Pillay & Company Pty Ltd v Sinon

Procedure – extra-judicial process – summary judgment

The defendant was summonsed extra-judicially. The Process Server reported that the writ of summons was served. The Process Server did not sign or date the writ of summons. The defendant claimed that no service had occurred.

HELD:

(i) There is no legal requirement that the copy of a writ of summons served on the defendant in a case under summary procedure should be signed and dated by the Process Server; and

(ii) Before final judgment is signed, the Court must be satisfied that the writ has been personally served on the defendant.

Judgment: motion of the defendant dismissed.

Legislation cited
Administration of Justice Act
Courts Act, ss 20, 22, 23
Seychelles Code of Civil Procedure, ss 295, 297

Ramniklal VALABHJI for the Plaintiff
Frank ELIZABETH for the Defendant

Ruling delivered on 11 July 1997 by:

PERERA J: The instant ruling concerns the validity of a writ of summons served by the Senior Process Officer of this Court in terms of section 295 of the Seychelles Code of Civil Procedure (Cap 213) read with schedule D of the said code. On 26 May 1994 the attorney for the plaintiff filed a copy of the writ of summons and the endorsements thereon, for the

signing of final judgment by this Court: according to the report of service, the writ of summons dated 17 August 1993 had been issued to a process officer for service as an "extra-judicial process" envisaged in section 22 of the previous Courts Act (Cap 93). That section was repealed by the Administration of Justice Act No. 6 of 1983, and the present practice is that all process for service are tendered by Attorneys at the Registry of this Court for taxation and payment of the necessary fees and thereafter handed over to the process officers for service. This is consistent with section 20(2)(d) of the present Courts Act (Cap 52). However Process Officers still retain the power to serve judicial as well as extra-judicial process as is recognised in section 23(1). Hence service in the instant matter cannot be invalidated as it entails only a fiscal irregularity.

According to the Process Officer's Report, the writ of summons was served on Andre Sinon, the defendant, on 20 August 1993. The writ warned the defendant that unless within 12 days after the service of the writ, inclusive of the day of service, leave to defend was not obtained from a judge; the plaintiff would proceed to judgment and execution.

The defendant having failed to apply for !eave: the plaintiff applied for final judgment on 26 May 1994, 9 months after the alleged service on the defendant. Judgment was signed on 30 May 1994. Application for execution was filed on 19 December 1994, and the warrant to levy was issued on 9 January 1995. Consequently certain moveables were seized on 22 May 1996 and the defendant was appointed legal guardian.

Prior to the seizure, the Ddfendant filed a motion dated 16 August 1995 seeking to set aside the final judgment on the basis that –

1. The defendant was never served with summons or writ to attend court.

2. There is no return of service to show that the defendant was duly served with summons.

Section 297 of the Code of Civil Procedure provides that –

> 'After judgment the court may, under special circumstances, set aside the judgment and, if necessary, stay or set aside execution, and may give leave to appear to the writ, and to defend the action, if it shall appear reasonable to the court so to do, and on such terms as to the court may seem just.

counsel for the defendant produced the writ of summons which he stated'was served on the defendant and questioned the process officer why he had not signed or dated it. The process officer replied that the copy served is not signed and that it is on the original writ returned to the attorney that the process officer appends his signature and date of service. Hence there is a judicial admission by the attorney as agent of the defendant that the writ of summons was served. It has not been sought to be established that the date of service on the original writ filed in this Court after the defendant had defaulted obtaining leave to defend is incorrect. The specimen form provided in schedule D of the said Code requires the server to make an endorsement "on the writ after service thereof". This endorsement is the report of service to the person who caused it to be served. There is no legal requirement that the copy of a writ of summons served on the defendant in a case under summary procedure should be signed and dated by the process server.

Section 295 requires that before final judgment is signed, the dourt must be satisfied that the writ has been personally served on the defendant. When the Court signed final judgment in this case on 30 May 1994 the Court accepted the report of service of the process officer. The admission that the writ was served on the defendant shows that the Court had acted on reliable material. Hence the motion dated 16

August 1995 is dismissed.

I find that a subsequent motion dated 24 May 1996 has been filed to stay execution of judgment. In view of the order made in respect of the motion dated 16 August 1995, that motion is also dismissed.

The process officer shall accordingly proceed with the sale of the items seized.

Theplaintiff will be entitled to costs.

Record: Civil Side No 126 of 1994

Lucas v Public Service Appeal Board

Constitution – public service – dismissal – judicial review

The petitioner was dismissed from the public dervice. He appealed his termination to the respondent. His appeal failed. The petitioner sought a writ of certiorari quashing a decision by the respondent and claiming that respondent failed to give him a fair hearing.

HELD:

(i) The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, and the subject-matter that is being dealt with. The essential element is that the person concerned should have a reasonable opportunity to present their case; and

(ii) If an applicant to the Public Service Appeal Board is represented by counsel, at the conclusion of any evidence lead by counsel the Board does not have an obligation under the principles of natural justice to question the applicant or his lawyer to see if the applicant wishes to testify or call any witnesses and to then note the response.

Judgment: for the respondent. Application dismissed.

Foreign cases noted
Associated Provincial Picture House Ltd v Wednesbury Corporation [1947] 2 All ER 680
Jagoo v National Transport Authority (1988) MR 99
Local Government Board v Arlidge [1915] AC 120
Russell v Duke of Norfolk [1949] 1 All ER 109
Bernard GEORGES for the Petitioner

John RENAUD for the Respondent

Judgment delivered on 10 March 1997 by:

AMERASINGHE J: The petitioner invokes the supervisory jurisdiction of this Court under article 125 (1) (c) of the Constitution of the Republic of Seychelles (hereinafter called the said Constitution) and seeks the issue of a writ of certiorari quashing the decision of the 26th December 1995 of the respondent Public Service Appeal Board (hereinafter referred to as the Board) established under chapter XI of the said Constitution.

In accordance with the application the [etitioner, being aggrieved by the termination of his employment under the Government of Seychelles, has appealed to the respondent resulting in the aforesaid decision. In *Local Government Board vs. Arlidge* (1915) AC 120 it was held that the hearing of an appeal is an exercise of the quasi-judicial function. Article 125 (7) of the Constitution describes an "adjudicating authority" to be one that exercises quasi-judicial functions, hence the operation of article 125(1)(c) in relation to this application and the jurisdiction of this Court.

The petitioner pleads the denial of a fair hearing by the respondent and in paragraph 5 pleads the following grounds in support of the application:-

(a) "breached natural justice in not hearing the petitioner and in not allowing him to contradict or explain evidence led against him by his employer;"

(b) "erred in leading the petitioner to believe that his case had been accepted when it had not".

It became clear at the hearing of this matter that the counsel for the applicant Mr Bernard Georges relied only on the first ground with the emphasis that the applicant was denied a fair

hearing. He expressed the following views in support-

> It is a cardinal principle of fairness and natural justice that no order adverse to a person or prejudicial to him can be made without a person given an opportunity of being heard in the defence of his action. The proposition is so trite that it's been accepted and requires no legal support in my humble submission.

The counsel for the respondent, who was himself the Chairman of the respondent Board, disagrees with the applicant's assertion that he was not given an opportunity to be heard. It is his contention that the applicant was satisfied with only a denial of the allegations made against him. I do not think that counsel for the respondent appreciates the applicant's position as stated in paragraph 5(4) of the application, the complaint being that an opportunity was not given to the applicant to contradict or explain evidence led against him by his employer. Counsel for the applicant in reference to the principles of natural justice complains that the applicant was not given the opportunity to be heard. It is evident from the record that at the commencement of the hearing the respondent had questioned the applicant but there is no reference in the proceedings to the applicant being denied the opportunity to be heard.

I believe the observation of Tucker L.J. on the said subject in *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118 is relevant.

> The requirement of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth. Accordingly I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted one essential

> is that the person concerned should have a reasonable opportunity of presenting his case.

In dealing with the only substantial ground in support of the application as urged by the applicant, although the record of proceedings before the respondent Board shows that neither the applicant nor any witnesses have given evidence before the Board, that by itself does not amount to a denial of an opportunity of the applicant to be heard or to present his case. Could only a recording in the proceedings have indicated such opportunity being provided to the applicant? The respondent Board was not required to grant an oral hearing to the applicant (see *Jagoo v National Transport Authority* (1988) MR 99). However it is without dispute that the respondent Board did afford an oral hearing on the applicant's appeal.

It is not alleged by the applicant that he sought an opportunity to testify before the Board and present evidence on his behalf and that the Board rejected his request. It is common ground that the Board held an inquiry in respect of his appeal and the only witness called was cross examined by the counsel for the applicant. If the applicant at that stage wished to testify and call witnesses there can be no doubt that he had all the opportunity he required. When the applicant was represented by counsel, I do not think that to satisfy the principles of natural justice the Board had an obligation to question the applicant or his attorney and record the response received to satisfy the availability of the aspired opportunity in question.

I fear that the second ground pleaded in support of the application in its paragraph 5(b) reveals the reason behind the failure of the applicant to make use of the opportunity to testify and or call evidence. If the applicant allowed himself to be influenced by spur of the moment remarks or observations of the members of the Board, he has only himself to blame, however it cannot amount to a denial of rights by the Board. I find that no deliberate attempt on the part of the Board to lead or mislead the applicant to believe that the Board did favour his cause. Counsel for the applicant also referred to

Wednesbury principles. In the case of *Associated Provincial Picture House Ltd, v Wednesbury Corporation* (1948) 1 KB 223, [1947] 2 All ER 680, Lord Greene MR found that in judicial review proceedings a court will quash an order of the tribunal "if it is found that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision". As rightly pointed out by Mr John Renaud, counsel for the respondent, the applicant has not relied upon the said principle in support of his application.

I therefore for the reasons given above deny the issue of a writ and dismiss the application.

Record: Civil Side No 72 of 1996

Bouchereau v Panagary

Damages – personal injury

The plaintiff was hit by a car driven by the defendant. The defendant conceded liability. The plaintiff suffered permanent defects in his eyesight, and significant incapacity in his right leg. He is 53 years old.

HELD

> The plaintiff's inability to engage in sports and other activities cannot be given much consideration, due to his age.

Judgment: R75,000 awarded in respect of injuries, pain and suffering, and moral damages. R1000 entitlement for the amount spent on the medical report.

Cases referred to
Simon Maillet v Louis (unreported) CS 177/1990
Sinon v Kilindo (unreported) CS 225/1992

France BONTE for the Plaintiff
Mr SCOTT, a representative of the State Assurance Company, for the Defendant

Appeal by the plaintiff was decided on 3 April 1998 in CA 29 of 1997

Judgment delivered on 11 September 1997 by:

PERERA J: The plaintiff claims a sum of R240,000 in respect of personal injuries suffered consequent to a road accident involving a taxi bearing no S 876, owned and driven by the defendant. According to the evidence of the plaintiff, the accident occurred on 11 December 1995 around 6.30 pm. He was at that time talking to one Larue at the entrance to a by-lane when the taxi, in overtaking a stationary pick-up, moved

too far towards the right side of the road and hit both the plaintiff and Larue. Both of them got thrown and Larue died as a result of his injuries. The plaintiff's head hit a rock when he fell.

After a visit to the locus in quo it was abundantly clear that the defendant had been negligent. Mr Scott, counsel for the State Assurance Corporation, very correctly conceded liability on behalf of the defendant. Hence there remains only the assessment of damages payable.

According to the medical report of Dr A Korytnicov, the consultant orthopedic surgeon, the plaintiff had the following injuries on admission:

1. Comminuted fracture of the proximal end of the right tibia and fibula.

2. Fracture of the maxilla bone.

3. Multiple fractures of the ribs of the right chest.

4. Multiple lacerations of the skull, body, limbs and right eye.

He was treated by the orthopedic surgeon for the lacerations and fractures, by the dental surgeon for the injury to the maxillary bone and by the ophthalmologist for the injury to the right eye.

According to the medical report of Dr TD Bonnelame, the consultant ophthalmologist, the plaintiff suffered –

1. Right post-traumatic optic neuropathy.

2. Right lower lid cicatricial ectropion.

3. Epithora.

His conclusion, six months after the accident was-

> All three components have resolved significantly. The scars around the right lower lids and temple would be of permanent nature. The maximum persisting is a consequence of (2). The epithora may continue to improve in time.

The plaintiff was a Sergeant in the Police Mobile Unit at the time of the accident. He is 53 years old. In his testimony he stated that he could not use his right leg without the use of crutches. He also stated that when he looked sideways he saw double vision. He further stated that due to the injury to his jaw, he could not bite his food. On being cross-examined he stated that although his fractured ribs had healed, he still had the scars.

On a consideration of the medical reports and the oral evidence of the plaintiff, it is clear that the plaintiff suffers a substantial incapacity to his right leg. There is also sufficient evidence to accept that he has a certain amount of weakness and defect in his eyesight.

The plaintiff claims as follows –

1	Injuries	-	R 72,000
2.	Pain and suffering	-	R 54,000
3.	Loss of amenities	-	R 63,000
4.	Moral damages	-	R 50,000
5.	Medical Report	-	R 1,000
			R240,000

In this respect it is opportune to consider some of the previous awards of this Court for injuries similar to those of the plaintiff in this case.

In the case of *Simon Maillet v Louis* (unreported) CS /1990, the plaintiff sustained a fracture of the left tibia and fibula. After treatment by traction and casting, he continued to have

pain in his ankle and also had a limp. He was engaged in sports activities before the disability. The Court, taking into consideration the nature of the injuries and the associated pain and suffering, awarded R30,000 as moral damages. In addition a sum of R10,000 was awarded for loss of amenities and enjoyment of life.

In the case of *Sinon v Kilindo* (unreported) CS 225 of 1992 the plaintiff suffered a compound comminuted fracture of the right tibia and fibula. The plaintiff was only 20 years old and had engaged in sports activities before the disability. On a consideration of the injuries, pain and suffering, loss of amenities of life and the age of the laintiff, I awarded a total sum of R69,197.20.

In the instant case, the plaintiff is 53 years old. He was a training instructor at the Police Mobile Unit. However due to his present disabilities he has been entrusted with duties of a clerical nature. He claimed that he could not write properly now and hence has to get the assistance of a corporal.

On the basis of previous awards and on a subjective consideration of the plaintiff's disabilities as evidenced by the medical reports I award a global sum of R75,000 in respect of the injuries, pain and suffering, and moral damages.

As for loss of amenities, he claimed that he had difficulty in chewing food due to the injury to his jaw, and also had a disability in his vision. Considering the nature of the injuries, I am inclined to believe him. As he is now 53 years old, his inability, to engage in sports or other activities cannot be given much consideration. However I award R10,000 under this head. In addition, he will be entitled to a sum of R1000 spent on the medical report.

Accordingly judgment is entered in favour of the plaintiff in a total sum of R86,000 together with interest and costs.

Record: Civil Side No 110 of 1996

Panimports (Pty) Ltd v Fagitien Estate (Pty) Ltd

Civil procedure - injunctions – interim orders

An interim injunction was issued against the defendant restraining them from disposing of certain assets. The defendant applied to have the injunction removed and claimed that the land in respect of which the injunction was granted was not related to the main cause of action pleaded, and was already encumbered.

> **HELD:** There are no interlocutory injunctions in the law of Seychelles.

Judgment: for the defendant with costs. Order for grant of injunction vacated on ground it was issued without jurisdiction.

Legislation cited
Land Registration Act
Seychelles Code of Civil Procedure, ss 170, 304

Cases referred to
Laporte v Lablache (1956-1962) SLR 274
Jean Maurel v Angel Isle (Pty) Ltd and Ors (unreported) CS 159/1996

Foreign cases noted
Mareva Compania Naviera SA v International Bulk Carriers [1980] 1 All ER 213

Serge ROUILLON for the Plaintiff
Charles LUCAS for the Defendant

Ruling on the application to withdraw the interim injunction issued delivered on 16 January 1997 by:

AMERASINGHE J: At the instance of the plaintiff petitioner on 26 September 1996 an interim injunction was issued restraining the defendant respondent from disposing of its

only known assets at Anse Marie-Louise, Praslin, until the final disposal of the action before the courts.

The defendant respondent on receipt of notice of the interim injunction by an affidavit dated 24 October 1996 moved Court “to withdraw the injunction" on the following grounds-

(1) That the learned counsel for the petitioner has acted without a mandate, authority, right and locus standi to make the averments in the affidavit supporting the application for an injunction.

(2) That paragraph 2 of the said affidavit aver, that the "defendant has a good cause of action against the defendant." The unfortunate lapse being obvious and of no consequence, no further comment is needed.

(3) That the land in respect of which the interim injunction is granted does not relate to the cause of action pleaded, which is on a contract between the parties.

(4) That the defendant has substantial assets as described in paragraph 5 of the statement of objections and that the Director of the defendant company, Enrico Famulari, is a Seychellois national.

(5) That the plot of land in question is already encumbered, hence an injunction will serve no purpose in view of the existing encumbrances receiving priority.

It is observed at this juncture that the defendant's assertions by affidavit have not been disputed by the plaintiff.

As decided in *Jean Maurel v Angel Isle (Prop) Ltd& Others* (unreported) CS 159/1996 on 7 November 1996, the Seychelles Code of Civil Procedure (hereinafter referred to as the Code) does not provide for interlocutory injunctions, hence recourse has to be had to the principles of the courts of

England, vide *Laporte v Lablache* (1956 - 1962) SLR 274. In the ex parte issue of an interim injunction the affidavit supporting the application takes the place of oral evidence and the Court relies upon the facts vouched for by the deponent. The first objection of the defendant touches upon the validity of the affidavit to support the application. Section 170 of the Code provides thus: "except on interlocutory applications on which statements as to his belief, with the grounds thereof, may he admitted." On a reading of the contents of the affidavit of the plaintiff's attorney, the grounds for his belief are non-existent, hence it has to be concluded that the application for the injunction has not been supported by proof of facts relied for the court to act upon.

In the absence of reasons to the contrary the attorney-at-law is presumed to be properly instructed by the defendant to depone to the facts in the affidavit, although such assertions without the grounds for his belief are insufficient. Hence the order of the court is wanting in lawfully admitted facts for the issue of the injunction. The defendant therefore succeeds on this objection.

In respect of the objection on the want of a good cause of action, the plaintiff at the stage of seeking an interim injunction has only to satisfy the court that on the pleadings a reasonably maintainable cause of action is disclosed, which in my view in the present proceedings was satisfactorily discharged by the plaintiff.

Although the rest of the averments are wanting in clarity, it could reasonably be understood to mean that the injunction obtained fails to protect any rights, interests or claims arising under the contract. The defendant is no doubt correct in the assertion, as on any action founded on contract, that section 304 of the Code only provides for an injunction to prevent the repetition or continuance of the (wrongful act or) breach of contract arising out of the same contract or relating to the same property or right. The action of the plaintiff being for loss and damages consequent on the breach of contract, it has no

bearing on the repetition or continuance of a breach of contract. The affidavit supporting the plaintiff's application clearly states the injunction sought is to prevent the defendant from disposing of its only asset and causing it by its own actions to be unable to satisfy any judgment entered against it in these proceedings.

Injunctions issued under such circumstances are common in the United Kingdom, however in view of specific provisions in section 304 of the Code it is not reasonable to import such powers into the jurisdiction of the Supreme Court of Seychelles. The injunction that has come to be known as the "Mareva injunction" was recognised by the judgment in the case of *Mareva Compania Naviera S.A v. International Bulk Carrierr S.A. "The Mareva"* [1980] 1 All ER 213. The object of this injunction was "preventing a defendant from dissipating or concealing his assets so as to make a judgment against him worthless or difficult to enforce." I therefore conclude that such interlocutory injunctions are not known to the laws of Seychelles. The objection is therefore upheld. However a claimant before the court is not without relief as under similar circumstances, it could have recourse to the provisions in the Land Registration Act (Cap 107) Part VIII under "Restraint on Dispositions" Division 1 on Inhibition.

It is also held in defendant's favour that in the absence of evidence to the contrary that the defendant has substantial assets to meet the award of damages if made against it in these proceedings and that the defendant has in no way affected those with claims against it. The objection on the ground of existing encumbrance is considered without merit as the plaintiff's claim will be in any event subject to prior claims against the property in question.

The above matters considered by the Court being sufficient to dispose of the matter before it, I vacate the order for the grant of the injunction on the ground that the Court issued it without jurisdiction.

The defendant is entitled to costs from the plaintiff.

Record: Civil Side No 238 of 1996

Pillay v Regar Publications (Pty) Ltd & Ors

Defamation – qualified privilege – malice – the press – truth – fair comment – damages

The defendant published an article suggesting that the plaintiff used his position as a Minister to obtain special benefits when selling his house.

HELD:

(i) To succeed in a defamation action, the plaintiff must prove that

(a) The statement is defamatory;

(b) It has been reasonably understood to refer to him; and

(c) It has been published to a third person.

(ii) When considering whether a publication is defamatory, it should be assessed as a whole, including headings.

(iii) The defence of qualified privilege is available where:

(a) The person who makes the communication has an interest or a duty to make the communication to the third party, and the third party has a corresponding interest or duty to receive it;

(b) The publication is fair and accurate; and

(c) The report is published without malice.

(iv) Malice may be inferred where the defendant purposely did not inquire as to the truth of the statements. Malice does not require spite or desire for vengeance.

(v) No special privilege of publication attaches to the press.

(vi) To rely on the defence of truth, the defendant has the burden to prove that the statements were true. It is not necessary to prove every word of the libel. The defence is available if the main charge or gist of the publication was true.

(vii) The defence of fair comment is different from qualified privilege and is available where

(a) Each statement of fact in the words complained of is true; and

(b) The comments on the facts were bona fide, and fair comment on a matter of public interest.

(viii) The following principles should be considered when assessing damages for defamation –

(a) Consideration of the injury suffered;

(b) Conduct of the defendant and the circumstances of publication; and

(c) Exemplary damages are available for defamation.

Judgment: for the plaintiff. R450,000 awarded.

Legislation cited
Defamation Act 1952, s 6

Cases referred to
Barrado v Berlouis & Another (1993) SLR 12
Claude Vidot (unreported) SCA 36/94

Foreign cases noted
Adam v Ward [1917] AC 309
Arnold v King –Emperor AIR 1914 PC 116
Attorney-General v Observer (Spycatcher Case) [1990] 1 AC 109
Chalmers v. Payne (1835) 2Cr.M.& R. 156
Davies v Shepstone (1886) 11 App. Cas. 190
Dingle v Associated Newspapers Ltd [1961] 2 QB 162
Egger v Chelmsford [1965] 1 QB 248
Lewis v Daily Telegraph Ltd [1962] 3 WLR 50
Neething v The Weekly Mail (1994) 1 SA 708
Pratt v BMA [1919] 1 KB 244
O'Keefe v Walsh [1903] 2 IR 681
Uren v Fairfax (1966) 117 CLR 118
Youssoupoff v Metro-Goldwyn-Meyers Pictures Ltd (1934) 50 TLR 581

John RENAUD for the Plaintiff
Bernard GEORGES for the First, Second and Third Defendants
Fourth Defendant absent and unrepresented

Appeal by the defendant was dismissed on liability but damages reduced to R175,000.00 on 5 December 1997 in CA 3 of 1997

Judgment delivered on 22 January 1997 by

PERERA J: The plaintiff was a former teacher and lecturer

and is presently the Minister of Education and Culture. It is not in dispute that he also held administrative posts in the same Ministry at some time, and was the Principal Secretary prior to being appointed as Minister.
The instant action for defamation is based on an article that appeared in the "Regar" newspaper, issue of 22 December 1995, in the Creole language. It is also not in dispute that the plaintiff was a Minister at the time of publication of this article, which is marked exhibit P1.

The plaintiff, however, relies only on certain excerpts from that article to aver that the statements therein in their natural and ordinary meaning or by innuendo refer to him, that they are false, and that they constitute a grave libel on him. These excepts, as set out in the plaint, are as follows –

> Dernye ka ki montre ki gouvernman pa pe aplik sa bann lareg fondamantal se le fe ki Msye Patrick PILLAY, minis pour ledikasyon, in vann son lakaz dan leo Pointe Au Sel ek gouvernman, pour en pri R700,000.00.
>
> An 1993, Msye Patrick PILLAY ti aste en lakaz Fairview, La Misere, avek gouvernman menm, pour en pri R305,000.00. Gouvernman tin aste sa menm lakaz, ki lo en arpan later, detrwa lannen avan pou R320,000.00. I annan tou laparans ki gouvernman in fer "en bon deal" pou minis PILLA Y.
>
> I pa sanble ki i ti pou sanz son lakaz Pointe Au Sel pour enn ki pli fay La Misere. Donk diferans R400,000.00 ki Msye PILLAY in fer lo sa de tranzaksyon i sanble koman en gran lavantaz pour li. Eski i en kondisyon spesyal pour li akoz i minis, oubyen nenport dimoun i kapab ganny sa kalite deal?
>
> Si i pe senvi son pozisyon koman minis pour ganny lavantaz spesyal, sa i definitivman pa prop. Annou

pa bliye ki si bann gro zofisye i enplike dan bann keksoz ki pa onnet, tou dimoun pou fer parey. Nou bezwen en sistenm kot napa "de pwa de mezir.

The English translation as appearing in the plaint is as follows-

"Another deal for the Minister"

The latest example which illustrates that the Government is not complying with the fundamental rules laid down, is the case of Mr Patrick PILLAY, Minister for Education and Culture. He sold his house situated at Pointe Au Sel to the Government for a sum of R700,000.00.

In 1993 Mr Patrick PILLAY purchased a house at Fairview, La Misere from the Government for a sum of R305,000.00. The house which stands on 3 acres (sic) an acre of land was purchased by the Government a few years ago for the price of R320,000.00. This transaction bears all the hallmarks of a good deal for Mr PILLAY, undertaken by the Government.

It does not appear that Mr PILLAY would have exchanged his house at Pointe Au Sel for a house of less value at La Misere. The difference of R400,000.00 that Mr PILLAY benefited from the transaction appears to be a great advantage to him. Is it a special treatment for the Minister or anybody else can benefit from this kind of deal?

If he is using his position as Minister to obtain special advantage, this is definitely not right. We should bear in mind that if Senior Officers are involved in dishonest deals, everybody would follow suit. There ought to be a system where "two weights and two measures" does not exist.

The defendants in their statement of defence denied the veracity of the English translation of the excerpts of the article and hence the plaintiff called a sworn interpreter to prove the translation. I shall deal with the disputed areas of the translation as I proceed.

In paragraph 5 of the plaint, the plaintiff avers thus –

> The said statements, either in their natural and ordinary meaning, or by innuendo mean and are understood to mean, that the plaintiff who is the Minister of Education and Culture-
>
> (i) used his position as Minister to obtain a favourable advantage for himself.
> (ii) is in the habit of doing shady deals.
> (iii) he is setting a corrupt precedent encouraged by the Government.

The Alleged Defamatory Meaning

The defendant is entitled to have read as part of the plaintiff's case the whole of the publication from which the libel is extracted and also any other document referred to which qualifies or explains its meaning. Thus if a libel is contained in a newspaper paragraph, not only the paragraph, but also the heading must be taken into account. As Alderman B stated in the case of *Chalmers v. Payne* (1835) 2Cr.M.& R. 156, "if in one part of the publication something disreputable to the plaintiff is stated but that is removed by the conclusion, the bane and the antidote must be taken together." In doing so, words must be construed in their natural and ordinary meaning, that is, in the meaning in which reasonable men of ordinary intelligence would be likely to understand them, where nothing is alleged to give them an extended meaning or an innuendo created.

It is on these rules of interpretation that I propose to examine the entirety of the article to consider whether the meanings

alleged by the plaintiff as set out in paragraph 5 of the plaint, would be the meaning which a reasonable man would attach to them.

In paragraph 3 of the statement of defence, the defendants admit that "on 22nd December 1995, in an article entitled "Ankor En Deal Pour Minis", the defendants wrote and published an article of and concerning the plaintiff. The words "Pour Minis" evoked divergent interpretations. Counsel for the defendants maintained that it referred to "Ministers" in plural form. The plaintiff, in his testimony, disagreed and stated that it was in singular form and that if the plural was intended, it should have been "Pour Bann Minis". Angel Judith Sanders (PW2), the Court Interpreter called by the plaintiff stated that although it could be in the plural, "taking the article as a whole", she took it to be a personal reference to the Minister referred to in the article. Anne Elizabeth (PW3), another interpreter of this Court, testified that in the context of the whole article it referred to the single Minister, Mr. Patrick Pillay and that the word "Ankor" meant that there were previous deals by this Minister. Hence the natural and ordinary meaning contained in the heading of the article is that the plaintiff had engaged in deals of similar nature before. But the second defendant, who assumed the responsibility for writing the article, insisted that he meant "Ministers" in general and that the plaintiff's deal was one such instance.

The defendants produced six articles that appeared in the "Regar" newspaper preceding the article in dispute, wherein land transactions involving the Government and certain public officers and two Ministers were published. On a question raised by the Court as to whether an average reader who had not read any of these previous articles would have understood the heading in the way the defendants aver, the second defendant replied that there was the possibility.

It is a truism that words are almost found embedded in specific contexts. But sometimes to an average reader, a word would mean what it says or signifies. Stephen Ullman, in

his book on "Semantics" puts it with delightful asperity, thus – “When I use a word", said Humpty Dumpty, "it means just what I choose it to mean - neither more nor less." Some in their eagerness to underline the importance of context and to demolish the belief that there is a "proper" meaning inherent in a word, go almost as far as Humpty Dumpty in their dogmatic utterances. The second defendant's insistence is reminiscent of such an attempt, unless it is accepted as an inept usage of the Creole language.

The by-line however is less contentious and as translated by PW2, reads, "Mr. Pillay buys a house and sells the other one - is everything in order?" Counsel for the defendants relies on a "Genera and Species" argument, not only to explain the relationship between the headline and the by-line, but to establish that the plaintiff was not "targeted" for singular attack, and that the publication was made for the public benefit in a general sense.

As I stated earlier in the judgment, the plaintiff has relied on certain excerpts from the article appearing in exhibit P1. The English translation has been challenged and in fact, there is an erroneous reference to "3 acres", where it should be "an acre". This Court has therefore the advantage of reading the translation in the plaint with the translation provided by the sworn interpreter in the course of the proceedings.

The first paragraph of the article (which is not reproduced either in Creole or English in the plaint) as translated in Court by PW2 is as follows –

> The SPPF Government refuses to accept that Government transactions ought to be made in the open and that big officers should not have any special favours while buying or selling property from the Government. However it is necessary that these conditions are observed if the Government wants to put into practice the policies of honesty and transparency in public

> affairs. The last case that shows that the Government is not applying those fundamental rules is the fact that Mr Patrick Pillay the Minister of Education has sold his house at upper Pointe Au Sel to the Government for a sum of Rs. 700,000.

The natural and ordinary meaning a reasonable person would attach to this introductory portion of the article would be that the Government was not following fundamental rules of honesty and transparency, especially when buying and selling property from or to high ranking public officials, and the latest case was the transaction with Mr Pillay. The reasonable inference that would be drawn from such an assertion would be that this transaction was a dishonest or "shady" one,hat is, in contra-distinction to the policies of "honesty and transparency" advocated in the article.

Mr Georges, counsel for the defendants, sought to compound such an interpretation by submitting that the publication in question was a build-up over a period of time, whereby the "Regar" newspaper published similar articles concerning public officials and two Ministers regarding land transactions which the newspaper thought were irregular. He further submitted that, had this been an isolated article without such a build-up, there might have been a case for defamation ex facie the article. He therefore urged the Court to consider the purport of the article in the context of a series of articles published previously to expose lack of honesty and transparency on the part of the Government in land transactions, especially when dealing with public officials. But, that would depend on whether the readers of the "Regar" issue of 22 December 1995 read the earlier articles commencing from 22 October 1993, or even if they had read, had forgotten the contents. Otherwise, there would have been publication at least to a section of the readers for the first time. The article exhibit P1 does not refer to previous articles of that nature. The reference to "the last case" or the "latest case" being that of Mr Pillay highlights his transaction as an

example of a dishonest and shady one.

The article then proceeds to question the purpose of the Government in buying the plaintiff's house at Pointe Au Sel. Then a statement of fact is made, that it is not situated in a place where it can be used for any public purpose. By a process of deduction, it states that the question arises as to whether that house standing on a land 3/4 acre in extent is worth that price. In a previous case, *Barrado v Berlouis and Another*(1993) SLR 12, an enterprising politician of the day asked similar questions in a defamatory political broadcast. As the trial Judge in that case, I held that the defendant was making defamatory statements under the guise of asking questions. The Seychelles Court of Appeal affirmed that finding. In the instant case too, the defendants, by the same method, were conveying to the public that the Government had purchased a property which could not be used for any public purpose and paid a sum of R700,000 which was above the real value. That would be the natural and ordinary meaning of that paragraph.

These questions formed the background to the main subject of the article upon which the plaintiff has based the instant action for defamation. I shall set out the balance portion of this article as translated by the sworn interpreter in Court, as neither party raised any objections as to its accuracy-

> In 1993, Mr Pillay had bought a house at Fairview, La Misere, from the same Government for a price, that is, Rs. 305,000. The Government bought the same house that is on an acre of land several years before for Rs.320,000. It is obvious that the Government has made a good deal for Minister Pillay. It does seem that he would have changed his house at Pointe Au Sel for one of lesser value at La Misere, so the difference of Rs.400,000 that Mr. Pilidv has made on that transaction seems to be a big advantage for him. Is it a special condition

> for him because he is a Minister or can anyone benefit from that sort of deal?

The last paragraph reads thus –

> Nobody questions the right of Mr Pillay to buy or sell any house except if he is using his position as Minister to gain any special advantage. This is definitely not correct. Let us not forget that if the big officers are implicated in those sort of dealings that are not honest, everyone will do the same. We need a system where there are no "two weights and two measures.

This paragraph was meant to be the antidote to the bane contained in the previous paragraphs. But taking the two together, the meaning a reasonable man would gather would be that –

> (1) The Government bought the Fairview Estate house and property some years prior to 1993 for R320,000.
>
> (2) In 1993, the same house and property was sold to the plaintiff for R305,000.
>
> (3) The Government bought the plaintiff's house and property at Pointe Au Sel for R700,000.
>
> (4) The plaintiff would not have sold his Pointe Au Sel House in exchange for a house of less value at Fairview Estate.

The deduction to be drawn from those facts is that, in commercial parlance, the plaintiff "bought cheap and sold dear" so that in connivance with the Government, he made a profit of R400,000. Mr Georges however submitted that the article used the "guarded" word "appears" (isanble) when referring to the advantage gained by the Plaintiff. He claimed

that it was not a categorical statement, but merely an opinion, and hence there was nothing defamatory.

As regards the last paragraph, Mr Georges pointed out that the plaintiff had omitted to state in the plaint, the opening sentence whereby the writer qualified the comments that followed by stating "nobody questions the right of Mr. Pillay to buy or sell any house ...", and submitted that it would have been so omitted as on a reading of the whole article, there was no hint of defamation in it.

In his submissions, Mr Georges stated that –

> The fact that the first paragraph complained of is a fact, and the second paragraph complained of is a fact, the Minister is left with a legitimate complaint of whether the R400,000 was a good advantage to him or not.

As I stated at the very commencement, the case for the plaintiff is that the defendants have sought to rely on an arithmetical difference between the prices of two properties of unequal value and utilized it to defame him by stating to the public who would not know the correct valuations of the respective properties that he had connived with the Government and entered into a shady deal and appropriated a sum of R400,000 from public funds. To the plaintiff, the prices reflect the correct values of the two properties. If the defendants claim otherwise, the burden was on them to establish it and justify their allegation of an undue advantage. This, they failed to do. Hence the plaintiff has proved the defamatory meaning alleged in the plaint.

Effect On The Plaintiff

A person's enjoyment of the right to society of his kind depends on his possession of certain qualities and therefore if he is believed by others to lack those qualities, he might be deprived of the society of such persons who believe him to lack those qualities. The plaintiff is professionally a teacher

and lecturer. Presently he is the Minister of Education and Culture. In either of those categories, the society expects the post-holder to set exemplary standards in ethical and moral behaviour. Thus an imputation of dishonesty, whether it amounts to a crime or not, would be defamatory of such an individual.

The plaintiff testified how he noticed that the respect and regard he had from his subordinates had waned due to doubts about his integrity. He also stated that some persons invited for parties did not attend them and shunned him after the article in question appeared in the "Regar" newspaper. Anne Elizabeth (PW3) an interpreter of this Court, called by the plaintiff to testify regarding the impact, stated that she believed the contents of the article. Questioned about her reactions, she stated –

> I was angry, because it shows that people who have powers and positions, they can do favours to themselves, which is being approved by Government, and other people like us Seychellois, we have to pay so much money to get a piece of land, which is not fair.

This evidence stood unchallenged. To succeed in an action for defamation, a person must prove three things about the statement: (a) It is defamatory; (b) It has been reasonably understood to refer to him; and (c) It has been published to a third person.

The last two aspects have been satisfied without dispute. As already stated, the plaintiff has been portrayed as a dishonest person. Although statements of fact have been disguised as questions and comments,the pith and substance of the article is discernible to any ordinary person with average intelligence. The attempt to hide the real purpose has been like an attempt made by an ostrich to bury its head to avoid predators, not realizing that the rest of its body is widely exposed. Consequently, the defamatory statements have exposed the

plaintiff to hatred, ridicule and contempt and caused him to be shunned and avoided. It has also lowered him in the estimation of the right-thinking members of the society and disparaged him in his profession.

The Defences

The law of defamation, however, tries to strike a balance between an individual's right to have his reputation protected and freedom of speech, which implies the freedom to expose wrongdoing and thus to damage reputation. Hence the law provides certain defences for the person who makes a defamatory statement about another for an acceptable reason.

The case for the defendants is tersely set out in the statement of defence under the sub-heading "Particulars" as follows –

> The defendants are engaged in the dissemination of information to the general public through their newspaper. The plaintiff, a Minister of Government, sold his house to the Government for a sum much greater than the one paid when he bought another house from the Government and the economic advantage of this was commented on by the defendants in an article. In the premises the defendants and the Seychellois public had a common and corresponding interest in the subject-matter and publication of the said words.

Hence, the defendants plead the defence of "qualified privilege", which is available to newspaper publications. They also plead the defence of "fair comment" and aver that the words complained of were used in "good faith, without malice, upon a matter of public interest, namely the fairness of a Minister of Government selling his house at a much greater sum to the Government than the sum paid for one in a better area acquired by him from the Government."

The defendants also plead the defence of "truth" in substance and in fact. In English law, this defence is termed "justification".

Statements made on an occasion of qualified privilege are protected "for the common convenience and welfare of society." According to Lord Atkinson in the case of *Adam v Ward* [1917] AC 309 –

> A privileged occasion is ..... an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

Lord Donaldson in the *"Spycatcher case"* [1990] 1 AC 109, commenting on the crucial position of the press, stated –

> It is not because of any special wisdom, interest, or status enjoyed by the proprietors, editors, or journalists. It is because the media are the eyes and ears of the general public. Indeed it is that of the general public for whom they are trustees.

In England, unlike in the United States of America, the law does not recognise any special privileges attaching to the profession of the press as distinguished from the members of the public. The reason has been explained by the Privy Council in the case of *Arnold v King - Emperor.* AIR 1914 PC 116 as follows –

> The freedom of the journalist is an ordinary part of the freedom of the subject and to whatever length the subject in general may go, so also may the journalist; but apart from statute law, his privilege is no other and no higher. The responsibilities which attach to his power in the

> dissemination of printed matter may, and in the case of a conscientious journalist do make him more careful, but the range of his assertions, his criticism, his comments, is as wide and no wider than that of any other subject.

In the instant matter, I concede that there was a reciprocal interest in the newspaper and the public regarding land transactions between the Government and the public and especially public officers. But in disseminating information about the transactions of the plaintiff, did the defendants cross the Rubicon? The defence of qualified privilege is available to a newspaper so long as the report is (a) fair and accurate and (b) published without malice.

As regards accuracy of the report, the plaintiff does not deny that he purchased the Fairview Estate property in 1993 for R305,000 and in 1995 sold his Pointe Au Sel property for R700,000. But he testified and adduced other evidence to establish that he gained no undue financial advantage and that there was no shady deal as was being made out in the article.

The plaintiff testified that due to an unfortunate incident that occurred in the family in August or September 1991 it became necessary to leave the Pointe Au Sel house. This fact has not been contested by the defendants. He was Principal Secretary of the Ministry of Education at that time. Through the assistance of the then Minister, he was able to obtain the house at Fairview Estate initially on rent. He further testified that that house which had been rented to expatriate officers was in a dilapidated condition. However, he and his two children liked the area and the seclusion and decided to stay on.

In 1993, he applied to purchase that house. As he did not have sufficient funds at that time, he obtained a loan from the Seychelles Housing Development Corporation to finance the purchase price of R305,000 partly. He sold his Pointe Au Sel

property only in 1995, for R700.000. Thereafter he demolished the Fairview Estate house and rebuilt it with the proceeds of the sale and also paid off the SHDC loan. Philip Belle (PW4), a stone mason, testified that the Fairview Estate house was demolished by him at the request of the plaintiff. He further justified that "it was a house that had been built for a long time, and it was in a bad state of repair." He also stated that some parts of the walls had large cracks separating them and that the roof made of asbestos was leaking. On the basis of this evidence, it could be reasonably inferred that the condition of the house in August 1991, when it was purchased, would not have been very much different. The plaintiff stated that he paid the price of R305,000 quoted by the Government, although he thought it was on the high side. He was aware that this property had been purchased by the Government a few years before, for a sum of R320,000, from a private individual. The defendants allege that the plaintiff sold his house "at a much greater sum to the Government than the sum paid for one in a better area". The burden of proving that the Fairview Estate property, which the defendants considered was in "a better area", was worth much more, and how much more, lay on they who asserted it. So it has to proved that the Pointe Au Sel property was not worth R.700,000. No such evidence was adduced by the defendants.

Learned Counsel for the defendants, in submitting a list of facts which he considered to be established, stated inter alia that –

> The plaintiff has not produced a valuation, has chosen deliberately not to produce a valuation of the La Misere house, to rebut the suggestion that he had not obtained an advantage, which obligation was squarely on him to do. He was the one complaining, he who alleges, must prove. He alleged that he had not obtained an advantage. In my humble submission, his evidence fell short of proving that he had not.

Here, counsel was mistakenly fitting the boot to the wrong foot. In an action for defamation, the burden is always on the defendant to prove the allegation in the alleged defamatory publication.

When this matter was canvassed by counsel for the plaintiff in the course of his submissions, counsel for the defendants clarified his position and stated –

> The burden of proving the truth of the allegation rested on my clients and my clients alone at all times. What I did say however was that it was up to the plaintiff to prove that the house at Fairview was not worth R305,000 and that he did not make R400,000 as a difference between the two sales and purchases. That was our *allegation, and it was up to him to dispute, because until he did, I submit that it was open to my client to assume and to presume that when one sells a house at R700,000 and buys another one for R300,000, there is a difference of R400,000 which appeared as an advantage.*

With respect, having stated the burden of proof correctly, counsel for the defendants fell into the same error. Any primary school child would know that the arithmetical difference between R700, 000 and R300, 000 is R400,000. If that was the only news that the "Regar" newspaper considered it had a duty to publish for the benefit of the public, then every time a person sold his car and bought a motor cycle, would also be an occasion for publication, as evidently such a person gains a pecuniary advantage from the difference in prices. No reasonable man would expect such news. The article was using those transactions of the plaintiff as the latest example of the failure on the part of the Government to practice the policies of honesty and transparency. There lies the innuendo.

In the case of *Barrado* (supra), counsel for the first defendant also wrongly submitted that the plaintiff was "unable to show that the statements made by the defendant were not justified." Ayoola JA had this to say on the aspect of burden of proof -

> The nub of the allegation complained of was that she acquired businesses and properties with dishonest means and not that she acquired them in breach of any regulation. As to the latter, truth of the allegation or imputation is a matter of defence, since the falsity of defamation is presumed until disproved by the defendant.

Although it was not his burden, the plaintiff adduced evidence to establish the dilapidated condition of the Fairview Estate house. Hence although the Government purchased that property for R320 000 sometime earlier, the depreciation in value of the house due to a deterioration of its structural condition would have reduced the overall value. The defendants emphasized the aspect of the location. Counsel for the defendants sought to suggest that the Fairview Estate was an exclusive high class area where the property values were equally high. The fact that wealthy people and important Government officials reside there alone does not make the area a high class one. Some Government officials occupy Government owned or leased properties for lack of a choice. In the case of the plaintiff, he purchased the property only to demolish the house shortly thereafter, as it was not fit for occupation, and not for aesthetic reasons. When the defendants were communicating to the readers that the Fairview Estate house was worth much more than R305,000, they were suppressing the depreciation in value of the house. It was their burden to substantiate their assertions.

As regards the Pointe Au Sel property, Mr Hubert Alton, quantity surveyor (PW1), testified that he valued the property which consisted of two parcels of land, one with a house thereon at R750,000 in 1994. He stated that the property was worth approximately R400,000 and the house R350,000. This

valuation was done at the request of one Alexis Monthy, who was then occupying the house. However, the plaintiff, on 18th August 1994, agreed to sell Mr Monthy one of the parcels (parcel No.C.3063 - in extent 2897 sq. metres) and the house for R650,000. (Exhibit D7) Mr. Monthy paid a sum of R100,000 as a deposit and agreed to pay the balance by 15th September 1994. As he failed to comply with this condition, the plaintiff instituted proceedings in this Court (Case No.232/94) and obtained a discharge of this agreement and retained the deposit.

One Miranda Esparon (DW2), the concubine of Alexis Monthy and one of the parties to the said promise to sell, called by the defendants to rebut the evidence of the plaintiff that the agreed price was R750,000, failed to achieve the purpose for which she was called when she admitted under cross examination that at the time of signing the agreement, she was not living with Monthy and that she was therefore not present when the plaintiff and Monthy had initial discussions regarding the proposed sale. Hence Mr Hubert Alton's evidence that he valued the property at R750,000 and Miranda Esparon's evidence that such valuation was done for the purpose of obtaining a loan from the Development Bank, lend support to the plaintiff's evidence that the property was to be sold for R750,000. In any event, nothing flowed from this discrepancy, if at all, as the plaintiff subsequently advertised the whole property for R750,000 on the basis of the valuation.

The plaintiff stated that although a foreigner showed interest in purchasing, he failed to come with the purchase price. The plaintiff then sold the smaller portion of the land for less than R50,000 and offered parcel C.3063 and the house to the Government for R700,000. Faced with those explanations from the plaintiff, counsel for the defendants then sought to question the propriety of a Minister buying and selling with the Government. The plaintiff agreed that people not knowing the actual facts, would criticize such transactions, but stated that such criticism was not justified in his case, as the defendants failed to inform the readers that the two properties were not of

equal value. On the contrary, the article made out that he had paid less for a more valuable property and sold a less valuable property for a higher price.

As Hoexter JA stated in the case of *Neethling v. The Weekly Mail* (1994) 1 SA 708 (cited with approval by Adam JA in the case of *Roger Mancienne v Claude Vidot* (unreported) CA 36/94 -

> In deciding whether a defamatory publication affects qualified privilege, the status of the matter communicated (i.e. its source and intrinsic quality) is of critical importance. In this connection obvious questions which suggest themselves (the examples given are not exhaustive) are: Does the matter emanate from the official and identifiable source or does it spring from a source which is informal and anonymous? Does the matter involve a formal finding based on reasoned conclusions, after weighing and sifting of evidence, or is it no more than an ex parte statement or mere hearsay?

The defendants had every opportunity to investigate the aspect of valuation of the respective properties, as the fact that a Minister transacted with the Government alone was not sufficient to allege dishonesty and shady dealing if the valuations correctly reflected the market values. Therefore, when the defendants cited the plaintiff's transaction as the latest example of non-compliance by the Government of the policies of honesty and transparency in public affairs they were, by innuendo, making a defamatory statement of and concerning the plaintiff. As they failed to investigate the factual situation, the defendants had no duty or right to publish their "ex parte statement" to the public. The second defendant categorically admitted that the article contained his own subjective opinions. The defence of qualified privilege therefore fails.

As to the defence of truth, or justification, if the libel contained defamatory statements both of fact and of opinion, the defendant must prove that the statements of fact are true and the statements of opinion are correct. However, according to an exception under section 5 of the Defamation Act 1952 (UK), which is the law applicable in Seychelles, it is now not essential to prove the truth of every word of the libel. "If the defendant proves that the main charge or gist of the libel is true, he need not justify statements or comments which do not add to the sting of the charge or introduce any matter by itself actionable." (*Gatley* - paragraph 1390).

According to McNae's *Essential Law for Journalists* - (12th Edition) at page 135 –

> The defence of justification is not only difficult; it is dangerous. If it fails, the court will take a critical view of the newspaper's persistence in sticking to a story which it decides is not true, and the jury may award greater damages accordingly.

In the instant case, it is true that the plaintiff purchased the Fairview Estate for R305,000 and sold his property at Pointe Au Sel for R700,000 also to the Government. However, the truth of the gist or sting of the libel that these transactions were examples of dishonest and shady transactions of the Government with public officials remains unproved. Accordingly this defence as well fails.

Although a defendant may not be able to show that he was actuated by circumstances described as "qualified privilege" or "justification" (or truth), he may escape liability for publishing a defamatory statement by establishing that his statement was a "fair comment on a matter of public interest." This defence does not extend to allegations of fact. The defence of fair comment is distinct from the defence of justification. In "fair comment", the state of mind of the defendant when he published the defamatory words is most

material. Proof of actual malice defeats the defence. But in "justification" the state of mind of the defendant is immaterial. Another distinction is that in the plea of fair comment, the right exercised by the defendant is shared by every member of the public, while in "qualified privilege" the right is not shared, but is limited to an individual who stands in such relation to the circumstances that he is entitled to say or write what would be libelous or slanderous on the part of anyone else. A comment is a statement of opinion on facts.

In paragraph 10 of the statement of defence the defendants rely on the following particulars as the basis for their comment–

> [The] words complained of by the plaintiff were fair comment made in good faith and without malice upon a matter of public interest, namely the fairness in the plaintiff, a Minister of Government, selling his house at a much greater sum to the Government than the sum paid for one in a better area acquired by him from the Government.

Subject to section 6 of the Defamation Act 1952, a defendant under a plea of fair comment must prove (1) that each and every statement of fact in the words complained of is true; and (2) that the comment on the facts so proved was bona fide and fair comment on a matter of public interest.
Although the defendants aver that they commented on the "fairness" of the transaction, the article, in its opening paragraph, makes a statement of fact which they could not prove. The transactions of the plaintiff with the Government were neither dishonest nor shady. Had the defendants investigated their facts, no such allegation could have been made bona fide. As was stated in the case of *Davies v. Shepstone* (1886) 11 App. Cas. at page 190 –

> It is one thing to comment upon or criticize, even with severity, the acknowledged or proved acts of

> a public man, and quite another to assert that he has been guilty of particular acts of misconduct.

Accordingly, the defendants cannot rely on the defence of fair comment. On the whole, therefore, the defendants have failed to defend themselves in respect of the article that appeared in the "Regar" newspaper issue of 22 December 1995, under the heading "Ankor En Deal Pour Minis", which contained statements of unverified facts concerning the plaintiff, which were defamatory of him, and caused him prejudice by exposing him to hatred, ridicule and contempt and injuring him both personally and professionally. Consequently, the case against the fourth defendant having been withdrawn, the first, second and third defendants will be liable in damages.

Assessment of Damages

In awarding damages, the basic principles have to be followed. Ayoola JA in the *Barrado* case (supra) stated -

> In my judgment, in an action for damages for libel or slander, English law applies in determining the nature and quantum of damages to be awarded. Where the circumstances justify it, exemplary damages could be awarded.

The principle of awarding damages where the plaintiff elects to sue more than one defendant in the same action in respect of the same publication is laid down in *Gatley on Libel and Slander* (8th edition, paragraph 1463) as follows –

> In an action against two or more persons as co-defendants in respect of a joint libel, the jury may not discriminate between them in finding separate damages against the different defendant, but there must be one verdict and one judgment against all for the total damages awarded.

As regards the nature of damages awarded in defamation cases, Windeyer J summed up the position in the case of *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 150 as follows –

> It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways - vindication of the plaintiff to the public, and as a consolation to him for wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.

The principles followed in the assessment, are basically –

(1) Consideration of the injury suffered. Here, the good standing and repute, the nature of his profession and the gravity of the imputation are relevant.

(2) Regard must be had to the conduct of the defendant and the circumstances of the publication.

(3) Punitive damages may be awarded against the defendant by way of a deterrent.

In *Barrado*(1993) SLR 12, I, as the trial Judge, considered the official status of the plaintiff in assessing damages. Ayoola JA approving this, stated -

> The learned Judge could not have discussed the circumstances of the libel without adverting to the office held by the respondent and the motive of the scurrilous attack on her. Also, it was perfectly legitimate for the Judge to have taken

> into consideration the status of the respondent (plaintiff) in the assessment of damages. The higher the plaintiff's position the heavier the damages (see for instance *Youssoupoff v Metro-Goldwyn-Meyers Pictures Ltd (1934) 50 TLR 581; Dingle vAssociated Newspapers Ltd (1961) 2 QB 162; Lewis v Daily Telegraph Ltd [1962] 3 WLR 50)*

The plaintiff in the instant case is the Minister of Education and Culture, an important Ministry in the Government. Imputations of dishonesty on the part of such an official who is expected to set the trend to promote the educational and cultural values in this country is to be considered seriously. In the *Barrado* case (supra) the plaintiff was the Personal Assistant of the President of the Republic. She was not merely a typist or clerk, but one who held a position of trust and confidentiality. Although the Court of Appeal reduced the award from R550,000 to R100,000, it is still the highest award made in a defamation case in Seychelles. As Lord Radcliffe stated in *Dingle* (supra) "The damages awarded have to be the demonstrative mark of vindication."

Unlike in the case of the plaintiff in *Barrado*, who was awarded damages as a solatium for the wrong done to her personal reputation, in the instant case, the plaintiff Minister has to be compensated not only on the basis of a solatium but also to vindicate himself before the public who alone determine the future of a politician.

The second consideration is that regard must be had to the conduct of the defendant and the circumstances of the publication. The second defendant testified that in addition to being the editor of the Regar newspaper, he also did translations of documents. He further stated that although he had no formal training in journalism, he had trained himself and attended seminars and hence he knew that it was the responsibility of a journalist to be satisfied as to the truth of

the facts he published. He further stated that he checked the facts regarding the sales to the plaintiff and by the plaintiff and the respective prices from the Lands Registry, which he considered was a reliable source for information. He maintained that the article contained only opinions based on those facts. As regards the values he obtained from the Land Registers, he stated that he made a subjective assessment that they did not reflect the correct values. He stated that he was not a valuer, hence he had no basis for such assessment. According to the evidence disclosed in the case, which this Court has accepted, there was nothing dishonest or shady in the transactions. Had the defendants cared to verify or inquire, and not been reckless, there would have been no justification for this publication. *Gatley* states at paragraph 778 that –

> A failure to inquire as to the truth of the statement or to try to verify it may be so extreme that the defendant cannot be regarded as really believing his statement to be true. ..... So where the defendant purposely abstained from inquiring: into the facts or from availing himself of means of information which lay at hand when the slightest inquiry would have shown that the imputation was groundless, or where he deliberately stopped short in his inquiries in order not to ascertain the truth, a jury may rightly infer malice.

When the second defendant claimed that he made investigations, he was referring to the ascertaining of the two transfers and their respective prices from the Lands Registry. Had the article been limited to that, it would have been purely innocuous. But the defendants either purposely abstained from inquiring about the correct property values or was reckless about it and made positive allegations that the Pointe Au Sel property was situated in a place where it could not be used for any public purpose and hence was not worth the price the plaintiff received and so also that the Fairview Estate property was worth more than the amount paid by the plaintiff.

Having done the damage, the defendants cannot camouflage the sting by using words as "it does seem" and questions of one form or another. The antidote was not effective to cure the bane in the article.

While still on the aspect of conduct of the defendant and the circumstances of the public, the article entitled "politicians with thin skins" appearing alongside the article that forms the subject-matter of this case is relevant. It has been published as a "contributed" article, but the editor has to take the responsibility for the setting. Any reasonable reader would understand its contents as a precursor to the article regarding the plaintiff. That article stresses the importance of a free press in a democracy. It refers to the late Robert Maxwell, the newspaper magnate of the United Kingdom as a "notorious crook" who "suppressed all remarks about him simply by threatening massive law suits against anyone who suggested he was acting improperly". The article then asks the question "Are we in the Seychelles being led down the same path?" The connection between the two articles was confirmed, when counsel for the defendants in cross examination asked the plaintiff to read it in Court. He referred to the question referred to above and asked the plaintiff "Isn't that what you are doing now?", to which the plaintiff replied in the negative.

That article was again an antidote to the bane. It proceeds to state that "politicians are showing that they are thin-skinned to a degree that makes one wonder if they have something to be scared about." Referring to the American system, it states "over there, they start with the assumption that all politicians are potential crooks and that they need to be watched carefully. For that reason, all questions raised about the character of public officials, about their actions in office are considered legitimate and can be scrutinized and questioned as part of the normal business of the press.

Then the writer exhorts the prospective litigant and the judiciary thus –

> Looking at some of the recent cases or judgments, and some of those threatening cases here, I cannot help but think that a similar approach would serve us well too.

Then alongside that article appears the article entitled "Ankor En Deal Pour Minis", which is a calculated fabrication of facts against the plaintiff. The connection would be unmistakable to a reasonable reader. The point under consideration is the intentional behaviour of the defendants to focus attention on the defamatory article against the plaintiff.

In cross-examination, the second defendant stated that he did not think that the article contained "malicious accusations" against the plaintiff and hence he did not regret publishing it. Several times in the course of the cross-examination he stated that the article contained his own personal observations on the transactions, which he did not consider defamatory. He was, as the editor of a newspaper, unaware that what mattered in libel was not his subjective consideration but the objective view of a reasonable man. His conduct was therefore both reckless and irresponsible, and consequently, as stated above, deprived him of the qualified privilege granted to newspapers.

I have also considered the aspect of malice which was stressed by counsel for the plaintiff. As *Gatley* states at paragraph 762 –

> The plaintiff will succeed in proving the existence of express malice if he can show that the defendant was not using the occasion honestly for the purpose for which the law gives protection, but was actuated by some indirect motive not connected with the privilege.

As McCardie J stated in *Pratt v BMA* [1919] 1 KB 244-

> Malice in the actual sense may exist even though there be no spite or desire for vengeance in the ordinary meaning of the word.

Thus, any indirect motive other than a sense of duty is what the law calls malice. If the occasion is privileged, it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason.

To establish malice, the dlaintiff relied on the following facts

(1) The plaintiff and the second defendant worked together at the Ministry of Education and were friends. But when the plaintiff's political affiliations became obvious, the second defendant, who held opposing views, terminated the friendship gradually.

(2) In February 1993, when the plaintiff was the Principal Secretary to the Ministry of Education, the second defendant's wife who was then the Directress of the polytechnic was transferred as Acting Director in the Ministry. She did not accept that position and resigned. This added to the animosity of the second defendant towards the plaintiff.

(3) The second defendant was generally antagonistic towards the SPPF Government. He stated that in 1979 he was detained in custody for a period of 7 weeks by a warrant issued by the President under the Emergency Regulations. He claimed that no reasons were given for such detention. Questioned by Counsel for the plaintiff as to whether he was still bitter about it, he stated "I still have questions about the validity of the detention, certainly."

(4) Soon after the wife of the second defendant resigned from her post, the "Regar" newspaper of 26 February 1993 edited by the second defendant (exhibit P2),

criticized the plaintiff for not releasing the "O" Level and "A" Level examination results in detail. The article, criticizing the plaintiff, who was then the Principal Secretary, stated "Mr Pillay has adopted the characteristic response of secrecy when the information is not convenient". There was there an imputation of dishonesty.

(5) In the article in the issue of 13 October 1993, (exhibit P3) the defendants criticized the plaintiff for remaining in the post of Chairman in the Seychelles Broadcasting Corporation after being appointed as Minister. There was there an imputation that he disregarded the principle of impartiality.

(6) In the issue of [h] June 1993 (exhibit P4) the defendants criticized the plaintiff, who as Chairman of the SBC was responsible for allocating time for political broadcasts at the time of the referendum, preceding the promulgation of the Constitution. The article alleged that the plaintiff was not granting adequate time for the opposition parties. There was there an imputation of political victimization, and lack of impartiality.

(7) The defendants' newspaper in the issue of 28 May 1993 (exhibit P5) directly alleged that the plaintiff was dictating his own personal judgment as Chairman of the SBC.

The criticisms of the plaintiff in the aforesaid articles (exhibits P3, P4 and P5) may not amount to defamation in themselves. However they illustrate a consistent pattern of personal criticism of the plaintiff during the period subsequent to the transfer of the second defendant's wife from the prestigious post of Director of the Polytechnic and the obvious bitterness he developed when the plaintiff was appointed as Minister in the same Ministry. Hence the inference of malice cannot be disregarded in its entirety in assessing damages.
In the *Claude Vidot* case (supra) Adam JA disagreed with

Ayoola JA as regards reference to awards in previous cases. However Ayoola JA comparing the *Barrado* case justified the award of R100,000 on the basis that "the publication itself, the circumstances of its publication and the conduct of the defence demonstrated such viciousness" which his Lordship stated was lacking in the *Claude Vidot* case. He further stated that in the latter case the consideration was the carelessness of the defendants in publishing the defamation without investigation and repeating the libel originated by some other person. For this reason, and for other infirmities in the judgment of the trial Court, the award of R120,000 was reduced to R25,000.

In the instant case, I base the assessment on the following considerations –

(1) The position of the plaintiff in the country. As Ayoola JA stated (supra) "The higher the plaintiff's position, the heavier the damages."

(2) The recklessness of publishing without verification.

(3) The allegation of dishonestly against a public figure which remained unproved.

(4) The effect of the publication on the personal and political reputation of the plaintiff.

(5) Evidence of the second defendant that he saw no reason to apologize.

(6) The mitigatory fact claimed by the defendant of the publication. The defendant claimed that the "Regar" has a weekly circulation of 2600 copies. "The pen is mightier than the sword." The fact that the article has been published in the Creole language in a newspaper that carries articles in English as well indicates that it was meant to be read and understood by the majority of the readers in the community.

> Further, as a newspaper is read by hand to hand circulation after purchase, it would be a fair estimate that an average of five persons read one copy of the newspaper. Thus a minimum of 10,000 persons would have actually read the newspaper and an equal amount would have heard about the contents by discussion. I do not therefore consider that the actual number of copies issued for circulation could be considered as a fact mitigatory of the extent of the publication.

It is settled law that as an award in a defamation case cannot be arrived at by any purely objective consideration, it must be assessed "at large" on a consideration of both incriminatory and mitigatory factors as disclosed in the evidence in the case. Such "damages at large" are given as compensation and not as punishment. Damages for a single delict must be awarded as the amount against all the defendants. As Kenny J stated in the case of *O'Keefe v. Walsh* [1903] 2 IR 68 (CA) (cited by Adam JA in the *Claude Vidot* case) –

> Where there is a single cause of action arising from a joint tort, and damages is the only relief claimed against the tortfeasors, and the action is fought out to the close on that basis, the Jury has no power to sever the damages.

Lord Denning MR reiterated this principle in the case of *Egger v. Lord Chelmsford* [1966] 3 All ER 406 at 411 when he said –

> If the plaintiff sues them all three jointly, then by a settled rule of law dating to 1611, there can only be one judgment and one assessment of damages.

The plaintiff has withdrawn the case against the fourth efendant, the printer. Hence the contesting defendants were the "Regar" Publications (Pty) Ltd (first defendant), the editor (second defendant), and the publisher (third defendant). The

plaintiff claims a sum of R600,000 from those defendants jointly and severally. There is a vast difference in the professional status of the plaintiff in the *Barrado* case, who was eventually awarded R100,000 and the instant plaintiff who is a senior Minister in an important Government Ministry. I have carefully considered all the above factors that need to be considered in making an assessment of damages.

I consider a sum of R450,000 as being a reasonable amount that should be awarded to the plaintiff.

Accordingly, judgment is entered in favour of the plaintiff in a sum of R450,000 payable by the first, second and third defendants jointly and severally, together with interest thereon and costs of action.

Record: Civil Side No 11 of 1996

Silversand (Pty) Ltd v Bonne

Locus standi – legal personality

The plaintiff sued the sefendant under the name "Silversands Car Hire, a car rental firm represented by its director, Mr Bernard Port-Louis". The defendant claimed that the plaintiff was not a legal person and did not have capacity to sue. The plaintiff sought to amend the term "firm" to "company".

HELD:

(i) A firm has no existence. It is a mere expression used for convenience, not a legal entity; and

(ii) Leave to correct a name may be granted, even though the relevant period of limitation has expired. The mistake must be genuine, and not misleading, and must not cause reasonable doubt as to the identity of the person intending to sue.

Judgment: for the plaintiff. Substitution allowed.

Foreign legislation noted
The Supreme Court Practice (England) Order 20 (UK), r 5
Courts Act (UK), s 17

Cases referred to
Consal Consulting Engineers v Commercial Bank (Seychelles) Ltd (1979) SLR 162
J Rose v MSD (unreported) CS 191/1992
Marie-France Julienne v The Publisher of La Verite (MSD) (unreported) CS 212/1992

Foreign cases noted
Sadler v Whiteman [1910] 1 KB 868
Raleigh v Goschen [1898] 1 Ch 73

France BONTE for the Plaintiff
Philippe BOULLE for the Defendant

Ruling delivered on 6 March 1997 by:

PERERA J: The instant ruling concerns the locus standi of the plaintiff to sue the Defendant. In the plaint dated 16 May 1995, the plaintiff was captioned as "Silversands Car Hire, a car rental firm represented by its director, Mr Bernard Port-Louis". The defendant filed a defence on merits and raised a plea in limine litis as follows -

> The plaint discloses no case of action as the plaintiff is not a legal person and has therefore no capacity to sue the defendant.

Before a ruling was made, counsel for the plaintiff filed a motion seeking an amendment of the caption to read "Silversands Car Hire (Ry) Ltd, a car rental company represented by its director Mr Bernard Port Louis", and paragraph 1 to read - "at all material times, the plaintiff was a registered company carrying on the business of car rental and the defendant was a client of the plaintiff".

According to the certificate of incorporation, the plaintiff is incorporated under the Companies Act 1972 as a company titled "Silversands (Proprietary) Ltd". The term "firm" is defined in *Stroud's Judicial Dictionary* (4th edition) at page 1045 as-

> A term derived from the Italian word which means simply "signature" and it is as much the name of the house of business as John Nokes or Thomas Stiles is the name of an individual

Farwell LJ in the case of *Sadler v Whiteman* [1910] 1 KB 868 at 889 defined a "firm" as follows –

> In English Law, a "firm" as such has no

> existence, partners carry on business both as principals and as agents for each other within the scope of the partnership business; the firm name is a mere expression not a legal entity, although for convenience it may be used for the sake of suing and being sued.
>
> ..... it is not correct to say that a firm carries on business; the members of the firm carry on business in partnership under the name and style of the firm.

The case of *Consal Consulting Engineers v Commercial Bank (Seychelles) Ltd* (1979) SLR 162 was also decided on the same basis. In the instant case, by describing a proprietary company duly registered under the Companies Act, as a "firm", the plaint disclosed a juristic person as a non juristic person not due to lack of capacity but due a misdescription. Mr Boulle submits that by seeking to amend the term "firm" to a "company" a juristic person is being sought to be substituted in place of a non-juristic entity that has instituted the action. In short, a new plaintiff was said to be intervening in the case.

The cause of action in the case is based upon a breach of an agreement dated 8 November 1991 whereby the defendant hired a motor vehicle from "Silversands" agreeing to abide by the conditions set out in the contract. In those circumstances, would a substitution of the plaintiff, involve a situation where a different party enters for the first time to sue the defendant on a cause of action initiated by someone else?

In the cases of *J Rose v MSD* (unreported) CS 191/ 92 and *Marie-France Julienne v The Publisher of La Verite* (MSD) (unreported) CS 212/1992), the plaintiffs sued a political party which did not have legal personality at that time. Hence that party, not being a juridical person could neither sue nor be sued. The plea in limine litis raised in those cases that the plaint did not disclose a cause of action against the MSD party had necessarily to be upheld as the MSD was neither a

natural person nor a juristic person. An attempt to substitute the leader of that party in his personal capacity accordingly failed. In the English case of *Raleigh v Goschen* [1898] 1 Ch 73, members of the board of admiralty and naval officers were sued for trespass in the discharge of their official duties. It was held that no action lay against them in tort as they were agents of the Crown and the Crown at that time could not be sued in tort. Upon a finding that an action would lie against them in their personal capacities, an amendment was sought to substitute their names as defendants. The Court refused the application on the basis that it would change one action into another of a substantially different character.

Those cases should however be distinguished, as in the instant case the defendant had contracted with "Silversands" and hence an amendment of the nature sought in the motion will not affect the contractual obligations inter se. "Silversands" retains its juristic personality. The description as a "firm" is an error in the pleading which did not change the character of the suit. In this respect the *Supreme Court Practice* - 1995 Vol 1, commenting on Order 20 Rule 5 (2) of the Supreme Court Rules (UK) regarding substitution of plaintiffs, which is applicable by virtue of s 17 of the Courts Act (Cap 52) states –

> But leave to correct the name of a party may be given even though the effect of doing so is to substitute a new party and even though the relevant period of limitation has expired provided the court is satisfied that the mistake was genuine and was not misleading or such as to cause reasonable doubt as to the identity of the person intending to sue.

Being satisfied that there had been a misdescription of the plaintiff company as a "firm" which mistake would not have caused any doubt on the defendant as to the identity of the party suing, and also as the proposed amendments do not change the character of the suit, I allow the substitution of the

proper name and style of the "Silversands (Proprietary) Ltd" as the plaintiff and the amendment of paragraph 1 of the plaint as prayed for in the motion dated 29 September 1995. The plaintiff shall however pay the defendant costs fixed at R750.

Record: Civil Side No 187 of 1995

Textil Basquit (Tebasa) v
The Owners and Charterers of the Vessel "Global Natali"

Admiralty law – cargo loss – time for filing defence

The plaintiff consigned some cotton bales to be shipped on the Global Natali. There was an onboard fire and the bales were lost. The plaintiff issued a claim against the defendant for loss of cargo. An arrest warrant was served on the vessel which was anchored in the territorial waters of Seychelles, and on the Harbour Master. An acknowledgement of service was filed 3 days out of time. The defendant then applied to file its statement of defence out of time.

HELD:

(i) Under admiralty law, any person claiming to be the owner can acknowledge service of writ as the action in rem is against the res, the vessel, and notice is to the whole world. Service is effected on the vessel, not on an individual;

(ii) Service on the Captain, even if on board, is not an alternative allowed by the rules of practice, and is insufficient as notice to all parties who may have an interest in the ship, such as a mortgagee, as there is no privity, either real or implied, between the Captain and those parties;

(iii) An action in rem is procedural, the purpose being to secure the personal appearance of the owner of the vessel. It does not mean the vessel itself is the wrongdoer, but it has been the means by which the wrongdoer (its owner) has done some wrong to another party. An action in rem is a logical method by which a wrongdoer is brought

before the court as a defendant to what then may turn into an action in personam; and

(iv) In admiralty actions, deposits in the nature of security are provided when an arrested vessel is released from arrest. The arresting party cannot have the res under arrest and also seek monetary security for their claim.

Judgment: for the defendant. Case to proceed to hearing.

Cases referred to
Village Management Ltd v A Greers (unreported) SCA 3/95

Foreign legislation noted
Supreme Court Practice (England), order 75 (UK), r 3

Foreign cases noted
Howard v Bodington (1877) 2 PD 203
Hughes v Justin [1894] 1 QB 667
Re Hartley [1891] 2 Ch 121
The August 8 [1982] 2 AC 450
The Dictator [1892)] P304*The Gemma* [1899] PD 285
The Marie Constance (1877) 3 Asp MLC 505
The Prins Bernhard [1964] P 117

Ramniklal VALABHJI for the Plaintiffs
Philippe BOULLE for the Defendant

[Appeal by the defendant to file notice of appeal out of time granted on 13 April 2000 in CA 7 of 1999.]

Ruling delivered on 21 July 1997 by:

PERERA J: This is an action in rem originating under order 75 r 3 of the Rules of the Supreme Court (U.K.) by a writ of summons with a statement of claim endorsed, by Textile

Baquit (Tebasa) of Brazil against "the owners and charterers" of the vessel Global Natali" presently anchored in the territorial waters of Seychelles. The plaintiffs claim a sum of US$775,078.26 in respect of 'loss of cargo", consequential loss, expenses, interest and costs. The claim for consequential loss being unliquidated, learned counsel for the plaintiff withdrew that claim.

In an affidavit filed with a praecipe for a warrant of arrest under order 75 r *3* it was averred that the plaintiffs were the owners and consignees of cargo consisting of bales of cotton shipped under bills of lading nos FOT2/02 and FOT6/02. According to the copies of the bills of lading produced, 2297 bales were shipped on B/L no 2/02 and 748 bales on B/L no 6/02. The total C and F value of the 3045 bales is US$771,642.05. It was averred further that the "loss of cargo" occurred as a result of a fire on board the vessel Global Natali.

Warrant of arrest was issued by this Court on 28 February 1997 and according to the report of the process officer, the warrant was served on the vessel by affixation and on the Harbour Master on the same day at 4.55 pm.

An acknowledgement of service dated 14 March 1997 was filed by Mr P Boulle, attorney-at-law, on 17 March 1997 on behalf of "Elpida Marine (Company) Ltd" as owners of the vessel. This acknowledgement was filed 3 days out of the time specified in the writ of summons.

The instant matter concerns a motion and affidavit filed by the said company, claiming to be the owners of the vessel, to file a statement of defence out of time. A statement of defence has also been attached to the motion dated 30 May 1997.

The motion is supported by an affidavit filed by Mr P Boulle in his capacity as the attorney for the defendant company. The averments may be summarised as follows-

1. The statement of claim endorsed on the writ of summons is only partly liquidated and hence was not taken by the defendant to be a final statement.

2. Hence, the defendant was led to believe that a further statement of claim would be lodged.

3. Paragraph 9 of the affidavit dated 21st May 1997 states that "the action is based on damages caused to cargo" whereas the statement of claim endorsed on the writ of summons refers to "loss of cargo". Hence the plaintiffs should file and serve a fresh statement of claim.

4. The acknowledgement of service was filed within 14 days after the writ of summons came to the knowledge of the defendant.

Thus basically, leave is being sought on alleged defects in the statement of claim, which the defendants state misled them, and on the ground that the acknowledgement was filed within 14 days after the writ of summons came to their knowledge.

The action in rem has been filed against the "owners and charterers" of the vessel. The plaintiff has disclosed that the owners are "West Coast Marine Company Limited' and that the charterers are "Global Container Lines (Bahamas) Ltd." However, unlike in a regular civil action, anyone claiming to be the owner could acknowledge service of writ as the action in rem is against the res, the vessel, and notice is to the "whole world". Service is affected not on an individual but on the ship or vessel. In the case of *The Prins Bernhard* (1964) P 117, the writ was served on the Master of the ship but was not affixed on the mast of the ship or on any other conspicuous part of the ship. Order 75 r 11 requires that service of a warrant of arrest or a writ in an action in rem against a ship, freight or cargo shall be affected by

(a) Affixing the warrant or writ for a short time on

> any mast of the ship or on the outside of any suitable part of the ship's superstructure, and on returning the warrant or writ, leaving a copy of it affixed (in the case of a warrant) in its place or (in the case of a writ) on a sheltered, conspicuous part of the ship.

Hewson J in the above case stated -

> …this method of service prescribed by RSC order 9 r 12 (as it was then) for giving notice to all interested parties is a rule of the court. It has been firmly established by many years of usage. It may not be a perfect way of informing all interested parties that an action in rem is laid against the ship; but no other method has yet been suggested or devised. This method is well known throughout the maritime countries of the world.]t is based upon experience for the protection of all interested parties.

The learned Judge setting aside the service of the writ of summons, further stated

> I have great sympathy for the process server, but the courts must be vigilant towards the rights and interests of third parties who might conceivably be affected by the writ or the consequences of its service. I must do what I can to safeguard the interest of those who have had no proper notice of the existence of this writ, and ….. I am not disposed to save the service of this writ. The degree of irregularity in the service of the writ in rem was not such that I can feel disposed to overlook it.

It is clear that RSC Order 75 Rule II applies to situations where a warrant or writ is served on a "manned" ship. In *The Marie Constance* (1877) 3 Asp MLC 505, Sir Robert

Phillimore observed that –

> Service on the Captain, even on board the ship, is not an alternative allowed by the rules of practice, nor sufficient notice to all parties who may have an interest in the ship; as for example, mortgagees, and others, between whom and the Captain there is no privity, either real or implied. I shall not allow judgment to be entered until I am satisfied that the writ of summons has been served in the proper manner, and the proper times have elapsed for appearance and other proceedings subsequent to such."

There are two other cases filed before this Court on the basis of maritime liens on the Global Natali. In case No 19 of 1997 filed on 27 January 1997, the Island Development Company Ltd in applying for an order authorising the release and transhipment of cargo of all owners who provided bank guarantees, averred in paragraph 1 of the petition thus –

> 'The ship Global Natali", its apparel and cargo were salvaged by the applicant and is now held at Victoria, Mahe under a maritime lien for salvage services rendered to it by the applicant after it was abandoned on the high seas by its Captain and crew, when a fire broke out on the ship.

Thus when the process officer of this Court served the warrant and the writ of summons on 28 February 1997 by affixing them on the ship, it was "unmanned", and hence although consistent with the rules was a meaningless exercise. The "res" in the instant matter was a "res derelicta" as Christopher Hill states in *Maritime Law* (4th Edition 1995) at page 114-

> The modem writ in rem has become a piece of legal machinery directed against the ship alleged

> to have been the instrument of wrongdoing in cases where it is sought to enforce a maritime or statutory lien or in a possessory action against the ship whose possession is claimed. A judgment in rem is a judgment against "all the world".
>
> This does not mean that the vessel itself is the wrongdoer but that it is the means by which the wrongdoer (its owner) has done wrong to some other party. It is also logically the means by which the wrongdoer is brought before the court as a defendant to what may thereafter turn into an action in personam…
>
> English legal theory has accepted that an action in rem is procedural, the purpose being to secure the defendant owner's personal appearance.

If that is the ultimate purpose of serving the warrant and writ by affixing them to the mast and a conspicuous part of the ship's superstructure, it must be taken that such procedure was meant to ensure that notice was not merely given to the "birds" but to those who were in privity with the owners. Hence as was done in *The Prins Bernhard* (supra), the circumstances under which the res in the instant matter was arrested and the writ was served necessitates this Court to consider any default in acknowledgement with circumspection.

Lord Penzance in the case of *Howard v Bodington* (1877) 2 PD 203 staled in this respect –

> I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter, consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the

> Act and upon a review of the case in that respect decide whether the matter is what is called imperative or directory.

In these circumstances should the court exercise its discretion to grant the defendant leave to file the defence out of time?

Under RSC or75 r 3, an action in rem must be begun by a writ and the writ must be in form no 1. The relevant provision in form no 1 is as follows -

> Within (14 days) after the service of this writ, counting the day of service, you must either satisfy the claim or lodge in the court office ... an acknowledgement of service.
>
> If you fail to satisfy the claim or to lodge an acknowledgement within the time stated, the plaintiffs may proceed with the action and judgment may be given without further notice to you and if the property described in this writ is under the arrest of the court, it may be sold by order of the court.

Paragraph 1304 *of* the *Supreme Court Practice* (Vol II) - 1995 contains the "directions for acknowledgement of service."

> *2. If in an action in rem a statement of claim is endorsed on the writ (i.e. words "statement of claim" appears at the top of the back) a defence must be served within 14 days after the time for acknowledgement of service of the writ.*

The stipulation of a time period is not in the rule but in a form prescribed thereunder. An acknowledgement of service is a mere notice to the plaintiff that the defendant intends to contest the claim. The penalty for default uses the word "may", which is directory. But any delay in filing an

acknowledgement or defence should not be unfair or unreasonable and must not prejudice the plaintiff. In the instant matter where the last day for the filing of the statement of defence was 28 March 1997, it was filed on 30 Mav 1997 together with the instant motion before the Court, two months out of time.

Mr Boulle, counsel for the defendants submitted that it was "almost by chance" that the defendants came to know about the action in rem. This is understandable due to the reasons I have adduced earlier in this ruling. It has been disclosed that Mr Boulle called for copies of the papers filed in the case from Mr Valabhji, counsel for the plaintiffs, by letter dated 3 March 1997. This confirms that the warrant of arrest and writ of summons with the statement of claim endorsed had not been recovered from the ship after the process officer had affixed them. Hence the 3 days delay in filing the acknowledgement of service is excusable. But the defendants should have filed a defence within 14 days thereafter. The reason adduced that the defendant was led to believe that a further statement of claim would be lodged is however untenable, as there was ample opportunity for them to file a defence raising those objections in time.

In deciding whether the defendants should be deprived of a right to defend consequent to the default in filing pleadings in time, the Court has to consider the subject-matter of the case in relation to the rule disregarded.

There is presently a motion for judgment by default filed by the Plaintiff under RSC or75 r 7. As by virtue of or 75 r 10 the normal provisions of or 13 and or 19 do not apply in admiralty actions in rem, the plaintiff must prove that his claim is well founded and he is entitled to judgment. Although this could usually be done by affidavit without leave, it cannot be done in a summary manner as in actions in personam.

The plaintiffs in opposing the instant motion aver that the owners of the vessel are "West Coast Marine Company Ltd"

as named in the statement of claim. They query the locus standi of Elpida Marine Company who claim to be the owners. It has been held in the cases of *The Gemma* [1899] PD 285, *The Dictator* [1892)] P304, and *The August 8* [1982) 2 AC 450 that where a defendant has entered appearance, he has submitted to the jurisdiction of the court and thereafter the action proceeded not only as an action in rem but also against the defendant personally. There is no necessity for a defendant who claims to be owner to apply for intervention, as has been submitted by the plaintiffs. Issues as to whether there has been a subsequent sale of the vessel and who the owners were at the time of service of the writ are all matters to be canvassed at the hearing orally or by affidavit. If the vessel is sold after the claim arises but before the writ is issued, the ship cannot be arrested because the relevant person is no longer the beneficial owner of the ship. The plaintiffs have averred that the ship is not worth US$500,000 while their claim alone is US$775,078. 26. They further aver that the privileged claim of the salvors is about US$300,000 and the port dues are also about the same amount.

Further in case no67 of 1997 another consignee of cargo claims a sum of US$104,184 in respect of consequential losses and expenses incurred as a result of cargo being damaged by fire on board the vessel.

The plaintiffs have filed a motion for judgment by default on the basis that, among others, West Coast Marine Company Ltd, whom they aver are the owners, had defaulted appearance. But Elpida Marine Company Ltd have come forward as owners and have raised objections as to the plaintiffs' right to maintain an action in rem. Further, the plaintiffs also delayed in filing the motion for judgment by default for almost the same period of the default of the defendants to file a defence Hence they cannot complain that such motion was dilatory, vexatious and an abuse of the process of court. In the circumstances, the plaintiffs have not been materially prejudiced to such an extent that leave should not be granted. Leave is therefore granted to the defendants

to file the statement of defence out of time. As the same has been already filed on 30th May 1997, it is accepted as a pleading in the case.

In paragraph 17 of the affidavit dated 3 July 1997, the attorney for the plaintiffs avers that -

> 17. If despite all the above, the Court is still inclined to grant leave to Elpida Marine Company Ltd to defend, I summit that it should be on terms that will do justice to the plaintiff and no justice will be done if the privileged claims of the salvors and the Port Authority are not also covered in the amount to be deposited ie that Elpida Marine Company Ltd be ordered to deposit US$775,078.26, free from the privileged claims of the salvors and of the Port Authority, plus interest at 17% per annum from the date of the writ and costs; within a delay to be fixed by the court; failing which judgment to be entered.

In the statement of claim, the plaintiffs claim a sum of US$775,078. 26 for loss of cargo contained in two bills of lading consisting of 1045 bales of cotton. The defendant avers that this cargo was not lost but transshipped to another vessel in February 1997. This is therefore a contested issue. There is no claim for salvage before this Court and further the consignees of cargo in the present case cannot seek to obtain security from the owners of the vessel to secure any claim of the salvors who are not parties to this action.

As was held by Ayoola J.A in the case of *Village Management Ltd v A Greers* (unreported) SCA 3/95

> It is difficult in the circumstances, even if the Supreme Court has jurisdiction, to accept that the learned Judge could have justifiably ordered security in the amount of damages claimed as security for costs. Although the amount for

> security for costs awarded is always in the discretion of the trial court, the amount is in practice based on an estimate of party and party costs usually up to the end of the proceedings. In a case as this in which a substantial portion of the damages claim would have to be determined at the discretion of the court after the evidence would have been gone into, it is inappropriate to order security in the entire amount claimed.

Mr Valabhji, counsel for the plaintiffs, cited the case of *Hughes v Justin* [1894] 1 QB 667 in support of his submission that the defendants ought to be ordered to deposit the full liquidated claim if leave is to be granted. With respect, that case has no relevance to the facts of the instant case. In that case, a writ of summons was issued endorsed for a liquidated sum. The parties settled the claim outside court for a lesser amount. The Court entered judgment for the full sum. In an application to amend the judgment, it was held that judgment ought to be entered for the amount actually due at the time when such judgment was entered. In the other case cited by Mr Valabhji, in *Re Hartley* [1891] 2 Ch 121, there was an issue of default of appearance. North J in granting the defendant leave to defend granted the plaintiff costs from the time of filing the writ down to and including the costs of the motion. In the present case, the plaintiffs have a maritime lien on the arrested ship. It has been averred that the value of the ship is less than the amount of the claim. This is not a factor that ought to be considered at this stage. Justice demands a consideration of the jural postulates of both parties.

As regards the submission that the deposit to be made should also include the port dues which it is averred amounts to US$2500 per day; in admiralty actions, deposits in the nature of security are provided when an arrested vessel is released from arrest. The arresting party cannot have the res under arrest and also seek monetary security for his claim. The plaintiffs cannot also claim the port dues already incurred

and continuing dues while the res is under arrest. "These will be for the account of the arresting party, although they will be paid first out of the proceeds of sale if the ship is sold by the court." On the other hand it is generally the policy that the arresting party should insure the ship against port risks for the amount of their claim.

In the circumstances, the Court being mindful that in an admiralty action the parties are usually resident abroad and that the normal counsel and client communications and the obtaining of documentary material would be expensive, order the defendants to deposit a sum of R100,000 in cash or by bank guarantee before the date of hearing of the case.

In view of the instant ruling, the motion for judgment by default filed by the plaintiffs is struck out. Ruling made accordingly.

Record: Civil Side No 59 of 1997

Rose v Monnaie & Or

Land – enclave – access – prescription – encroachment

The defendants owned enclaved land. The plaintiff bought contiguous land. They used the plaintiff's land for access. They also built a wall that encroached on the plaintiff's land. They had previously accessed their property by way of steps that now lie directly on the wall.

HELD:

(i) Right of way is not governed by prescription;

(ii) The land owner whose property is enclaved and who has no access can claim a right of way over the property of his neighbours; and

(iii) A property may be deemed to be enclave where the passage to the road is impracticable.

Judgment: Plaintiff's action in trespass dismissed. Judgment in favour of the plaintiff in regard to the encroachment.

Legislation cited
Civil Code arts 691, 1352, 2229, 2240, 2241

Cases referred to
Azemia v Ciseaux (1965) SLR 199
Mirabeau & Ors v Camille & Anor (1974) SLR 158
Payet v Labrosse (1978) SLR 222

Philippe BOULLE for the Plaintiff
Bernard GEORGES for the Defendants

Judgment delivered on 11 June 1997 by:

BWANA J: William Rose, the plaintiff, is the proprietor of parcel PR 319 at Baie Sainte Anne, Praslin. Sidney Monnaie, the first defendant, is the proprietor of parcel PR 320 which is contiguous to the plaintiffs' piece of land. Jude Monnaie, the second defendant, lives farther up the driveway and runs a taxi business. He is being sued jointly with the first defendant for continuous trespass on parcel PR 319.

It is not disputed that parcel PR 320 is enclaved. It has no means of egress.

The plaintiff states:

> The only way he (the first defendant) can get to his property it has to be via my property and to his property. There is no access at all from the main road in connection with his property. There is one big retaining wall from one boundary to the other (emphasis mine).

It is also not in dispute that when the plaintiff bought parcel PR 319 on 13th July 1982 (exhibit P1), the first defendant was residing there already. It was admitted in cross-examination by Aloise Rose, PW4, the father of the plaintiff and one who sold parcel PR 319 to him, that when he bought that land in 1969, the first defendant was living there already. He admitted that by then the first defendant "had completed constructing the wall and was building his house".

Furthermore, it is not in dispute that the title deed, exhibit P1, resulting from the transaction between the plaintiff and PW4, contains the following, namely that the plaintiff purchased parcel PR 319 of the extent of 2391 square metres:

> together with all rights, privileges, easements, servitude and appurtenances thereto belonging or in anywise appertaining to or used or enjoyed therewith or reputed or known as part and parcel thereof and all the estate right, title, property claim and demand …

Because of the foregoing quotation it cannot be disputed that when the plaintiff bought parcel PR 319, if there existed any easements etc thereon, then he is bound to accept and honour them unless the same have been lawfully terminated or prescribed.

The plaintiff's case, therefore, is based on two claims, namely-

1. That the first defendant has unlawfully constructed a retaining wall which encroaches on the plaintiff's land; and

2. That the defendants have continuously trespassed on parcel PR 319 by walking and driving motor vehicles thereon to reach parcel PR 320.

Insofar as claim 1 is concerned, and for the avoidance of doubt, the wall claimed against is not the entire retaining wall referred to above. It is, rather, the small part at the bend near where the existing drive way joins the main road to and from Baie Sainte Anne - as shown on the plan, exhibit P4. That small part, it is averred, was constructed to allow the first defendant have a gate which gives him access to the driveway. The total area of encroachment is given (by David G Lebon, PW2 a surveyor in Seychelles with 40 years experience) as being 60 square metres. As concerns "unlawfully causing works to be carried out on parcel PR 319" shown in the plaint, it is the plaintiff's case that the first defendant has constructed a motorable way on his land without his consent.

In so far as claim 2 is concerned, it is the plaintiff's case that the two defendants have repeatedly used the motorable way (the existing driveway as per exhibit P4) without his consent. In so doing, they disturb him and cause inconvenience. Initially he talked to the first defendant requesting him to remove this driveway, but had no success. The matter was reported to the police and ,only after failing to secure a

solution to the issue, he took legal action in 1994 - exhibit P2. The said exhibit P2, a letter written by the plaintiff's counsel to the first defendant, states inter alia:

> I am instructed by my client, Mr William Rose, to give you notice that you must cease using the road you have unlawfully built on my client's land ..... which you are presently using to have access to your adjoining property ..... Furthermore, you are also requested to remove all constructions you have made on my client's land including a wall you have erected along his boundary...
>
> Signed
> P Boulle
> 11th May 1994.

However, SP Andre Valmont of the Police force, PW3, deponed that sometime between 1986 and 1991 he had received a complaint from the plaintiff that a road was being constructed on his property. When he went to the site, the driveway was there already but found out that the plaintiff's complaint was based on an extension being built to the driveway to accommodate parking space (emphasis mine).

The first defendant admits to have constructed that portion of the wall that encroaches on the plaintiff's land. He estimates that the area of encroachment is only one metre. As to the area of encroachment caused by the drive way, he admits PW2's estimate of 60 square metres. It is this defendant's averment that he had offered the former owner - PW4 - to purchase the said area but that the latter declined the offer. Instead, PW4 allowed the defendant to go ahead with the construction. The defendant avers that he built that driveway in 1971, well before the plaintiff bought the land. This period of construction is supported by John Charles, DW2, who worked thereat as a labourer when the road was being built. During that period, it was deponed by DW2, PW4 was

present, stood by but never objected to the construction. Likewise, Gaetan Hoareau, DW3, a senior court process server since 1970, testified that he has been driving on that driveway (when he goes to Praslin on duty) for over twenty years now.

Initially the motorway was built by the defendant of earth and stone but later concrete was added. It is the defendant's averment that he was on good terms with PW4 and they met frequently. He never objected to the construction taking place.

I will, first of all, examine the issue as to when the driveway was constructed. As regards the wall, it was submitted by consent of both counsel - Mr Boulle for the plaintiff and Mr B Georges for the defendants thus:

> By consent only regarding the construction of the wall, five years ago. The road and everything will be on the evidence before the Court....

So, when was the driveway built? The plaintiff claims it was built after he had purchased parcel PR 319, that is after 1982. It was not there when he purchased PR 319. However this evidence is controverted by the defendant and his two DWs. They say it was built in 1971. As PW3 stated, he left Praslin in 1991. However when he was called by the plaintiff (sometime between 1986 and 1991), the drive way was there. The dispute was only on an extension of parking space. DW2 deponed that he had participated in the construction of the said motor way. That was in 1971. DWS, a well respected senior court process server, says he had been using that motor way for over 20 years. It has been there. I examined the demeanour of the first defendant and the two DWs and am satisfied that what they stated is the truth and correct version. The same credit cannot be given to Alois Rose, PW4, the father and vendor of parcel PR 319 to his son, the plaintiff. It appeared, particularly during cross-examination that

either he was not sure of his answers or was trying to hide some information. Therefore, it is my considered view that the said motorway was built by the first defendant in 1971 when PW4 was still the lawful owner of parcel PR 319.

The foregoing conclusion leads to the next issue namely, that of prescription. I would, however, first consider the issue of permission to build that motorway. Was it given? The defence case has shown that the construction was not objected to. PW4 stood by when construction work was going on. He never stopped it. Only the plaintiff in 1994 - some 23 years later - started raising objections.

To that, it is the defence case that the plaintiff took such steps following other misunderstandings that have occurred between the parties. His action is therefore prescribed. Be that as it may, it is, however, my considered view is that when construction was taking place, PW4 never objected to it. Does this validate the construction? In an earlier ruling of this Court on the issue, it was decided that permission to build on another person's land, be it a wall or driveway, is a judicial issue which should be proved by document. Citing Sauzier J in his booklet *Introduction to the Law of Evidence in Seychelles*, it is stated in chapter 2 that:

> Sometimes the two are mixed up. In that case oral evidence of the "fait material" is admissible, whereas the "fait juridique" must be proved by a document. Eg someone who builds on someone else's land with his permission. The fact of building without hindrance may be proved by oral evidence but the giving of permission to build must be proved by a document if oral evidence is objected to. One cannot presume permission from the fact of building without hindrance ... (emphasis mine).

The substance of this ruling forms, in part, the basis of Mr Boulle's submission, wherein, in addition, he cites arts 691;

1353; 2229; 2240 - 2241 of the Civil Code. He also cites the cases of *Payet v Labrosse* (1978) SLR 222 and *Mirabeau &Others v Camille &Another* (1974) SLR 158.

Indeed, I concur with Mr Boulle that art 691 of the Civil Code clearly states the law as it is in this country, namely that right of way is not governed by prescription. It states:

> Non-apparent continuous easements and discontinuous easements, apparent or non-apparent, may not be created except by a document of title. Possession, even from time immemorial, is not sufficient for their creation.

Thus, the right of way forming the substance of this suit is partly governed by this general provision of the law. However most important, it is my considered view that the issue of this motorable way is governed basically by the provisions of art 682(1) of the Code. The said article states:

> The owner whose property is enclosed on all sides and has no access or inadequate access on to the public highway, either for the private or for business use of his property, shall be entitled to claim from his neighbours a sufficient right of way to ensure the full use of such property, subject to his paying adequate compensation for any damage that he may cause.

The foregoing legal principle has been applied in several cases including in the case of *Azemia v Ciseaux* (1965) SLR 199 , where it was stated inter alia

1. The land owner whose property is enclaved and who has no access whatever to the public road can claim a right of way over the property of his neighbours ....

2. A property may be deemed to be "enclave"

> not only from the fact that it has no access to the public road but also in the case where the passage to the road is impracticable.

The same principles have been applied by this court in many cases. In addition thereto, in cases where such right exists, then the "assiette du passage" can be prescribed by use for at least 20 years (*Mirabeau v Camille* (supra)). The above cited authorities are in agreement with the facts of the instant case. First, it is not disputed - as stated above - that the first defendant's land is enclaved. Second, it is in evidence that the steps formerly used to reach the defendant's property lie directly on the major retaining wall (exhibit P3 and P4). It would therefore be "impracticable" to presume that a motorable access to the main road could be cut through that area. Third it has been established above, that the said access road used as an egress from the defendant's land was built in 1971. It was therefore in use for over 20 years when this suit was filed or when exhibit P2 was written to the first defendant. The defendant has raised the defence (and successfully so) of extinctive prescription. For the above reasons, I do agree with the defence case that this action relating to the construction of the motorable road on the plaintiff's land is prescribed. It follows therefrom that the plaintiff's claims against the defendants for trespass over the said land also fail.

Concerning the encroachment of the wall on the plaintiff's land as shown on exhibit P4, it was submitted by both counsel that the said wall was constructed about five years ago. As such the law governing prescription does not apply. Examining the evidence before this court, it is clear that in so constructing the encroaching wall (at the bend near where the drive way adjoins the main road from Baie Sainte Anne), the first defendant did not seek and obtain permission from the plaintiff. That was and still remains unlawful. On this aspect therefore, judgment is entered in favour of the plaintiff and I order that the first defendant remove the said retaining wall that encroaches on the plaintiff's land. He is also ordered to

compensate the plaintiff the sum of R2000 for the damage caused resulting from this encroachment.
In summary therefore-

1. The plaintiff's action against the two defendants with regard to trespass on his land - parcel PR 319 - is dismissed - it is prescribed.

2. Judgment is entered in favour of the plaintiff in respect of the encroaching retaining wall. The first defendant is ordered to remove the said wall and he is also ordered to compensate the plaintiff in the sum of R2,000 with interest from the date of this judgment.

3. Parties to bear their respective costs of this suit.

Record: Civil Side No 245 of 1995

Rose v Monnaie & Or

Trespass to land – evidence – documentary proof

The plaintiff sued the defendants for trespass. The defendant sought to prove in oral examination that he had consent. The plaintiff objected to the questioning, claiming that consent to build is a juridical fact that cannot be proved orally.

> **HELD:** Material facts can be proved orally. Juridical facts must be proved by a document; and where it is impossible to distinguish material from juridical facts, then documentary proof is required.

Judgment: documentary proof required.

Legislation cited
Civil Code of Seychelles, arts 688, 695, 1341.

Philippe BOULLE for the Plaintiff
Bernard GEORGES for the Defendants

Ruling delivered on 27 January 1997 by

BWANA J: The main issue before Court is that of trespass. The defendants are being sued for having trespassed to the plaintiff's land by firstly, unlawfully causing works to be carried out on parcel PR319 and constructing a retaining wall which encroaches on the plaintiff's land. Secondly, that the defendant has continuously trespassed on parcel PR319 by walking and/or driving motor vehicles thereon to reach parcel PR320.

In the course of examination in chief of the defendant, a question was raised as to whether he had trespassed into the land of the plaintiff by building a wall and a drive way on there without permission. To that, Mr Boulle, counsel for the plaintiff, objected on the ground that consent to build is a juridical fact or juridical event which may never be proved

orally. A number of authorities were cited, including article 1341 of the Civil Code.

In his reply Mr Georges, counsel for the defendant, submitted that article 1341 does not apply to cases of tort as in the instant case. Oral evidence is allowed in all cases of tort without exception.

It is my considered view that the principle governing the issue at hand is clearly discussed by Sauzier J in his booklet Introduction to the Law of Evidence in Seychelles. In chapter 2 thereof, it is stated:

> Sometimes the two are mixed up. In that case oral evidence of the "fait material" is admissible, whereas the "fait juridique" must be proved by a document. Eg someone who builds on someone else's land with his permission. The fact of building without hindrance may be proved by oral evidence but the giving of permission to build must be proved by a document if oral evidence is objected to. One cannot presume permission from the fact of building without hindrance. When it is impossible to distinguish "le fait material" from "le fait juridique" in a situation known as "fait complexe", then documentary proof is required ...

Also, I have taken note of the provisions of articles 688 to 695 of the Civil Code and come to the conclusion that at the present stage of examination-in-chief, should Mr Georges wish to proceed with the desired question, that the defendant was "given permission", then there is need for documentary proof.

Record: Civil Side No 245 of 1995