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CHIEF JUSTICE

Hon V Alleear (appointed on 1 May 1993)

OTHER JUDGES

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Hon CA Amerasinghe (Appointed on 13 February 1994)
Hon SJ Bwana (Appointed on 5 January 1994)

CITATION

These reports are cited thus:
(1998) SLR

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Republic v Georges

Criminal procedure – summary trials – constitutional law – human rights – jurisdiction of the Constitutional Court - right to a fair hearing – exhausting procedural remedies

The prosecution did not furnish a list of the prosecution witnesses or their statements to the defence. The accused claimed that he was unable to sufficiently prepare the defence and sought an order directly from the Constitutional Court claiming a contravention of articles 19 and 28 of the Seychelles Charter of Fundamental Human Rights and Freedoms. No application for an order for disclosure was sought from the sitting Court. The accused claimed that the direct application to the Constitutional Court for a ruling was to obviate a delay. The prosecution claimed that the disclosure procedure was not warranted in summary trials, that the issue should have been considered under the Criminal Procedure Code, and that the defence should have made a proper application to the Court to pursue the record. The defence could have submitted an application for a referral from the sitting Court to be heard by the Constitutional Court under article 46(7) of the Constitution.

HELD:

(i) Constitutional provisions are safeguards and are not meant to be invoked as supplementing statute law;

(ii) To "obviate delays" is not a sufficient ground to bypass criminal procedural law and to seek a declaration directly from the Constitutional Court under article 46(1) of the Constitution; and

(iii) The sitting Court can, even where there has been no express request by counsel,

make a referral to the Constitutional Court for constitutional issues to be heard under article 46(7) of the Constitution.

Judgment: for the Republic.

Legislation cited
Constitution of Seychelles, arts 19, 28, 46
Criminal Procedure Code, s 187
Constitutional Rules 1994, r 10

Cases referred to
Kate v R (1973) SLR 228
R v Murangira (1993) SLR 30
R v Pillay & Ors (1992) SLR 241
R v Wilby Robert (unreported) Criminal Side 8/1991

Foreign cases noted
Harrikissoon v The Attorney-General of Trinidad and Tobago [1980] AC 265

Romesh KANAKARATNE, Senior State Counsel, together with Ronny GOVINDEN, State Counsel, for the Republic
Anette GEORGES for the accused, together with
Pesi PARDIWALLA, Nichole TIRANT and A. HARJANIS
Bernard GEORGES

Ruling delivered on 3September 1998 by:

PERERA J: Before the trial in this case commenced, counsel for the prosecution moved under section 187 of the Criminal Procedure Code to amend the charges. The charges, as sought to be amended together with a summons had been served on the accused on 11 August 1998.

Particulars of the offence are as follows:
Mrs A Georges, counsel for the defence, submitted that in

view of a motion dated 1 September 1998 filed by her seeking a postponement of the trial, she would reserve her right to object until this Court makes a ruling thereon. She referred the Court to the correspondence she had with the prosecution (copies of which have been exhibited as AG 1 to AG 8 and annexed to her affidavit dated 1 September 1998 in support of the motion). She submitted that the prosecution had failed to furnish a list of prosecution witnesses and their statements and hence the accused was unable to prepare his defence. There is however no motion before this Court seeking an order for their disclosure. It must be stated that the accused had already pleaded not guilty on 2 July 1998 to the original charges, and hence it should be presumed that he did so after understanding the nature of the charges.

I allowed the application of counsel for the defence to stay the motion of the prosecution to amend the charges and to permit her to support her motion dated 1 September 1998 seeking to postpone the trial. That motion is distinctly for the limited purpose of obtaining

> an order that the trial herein be postponed pending the determination of the application to be filed on behalf of the defendant herein before the Constitutional Court seeking that Court's redress for an alleged contravention by the Republic herein of provisions of the Seychellois Charter of Fundamental Human Rights and Freedoms, namely the rights enshrined in articles 19 and 28 thereof.

Mrs Georges submitted that no application for disclosure was made to this Court as such application would have limited arguments only to issues relating to the "common law"; perhaps she meant the statute law as contained in the Criminal Procedure Code. She further submitted that if that course was adopted then at some stage the Court would have to be called upon to refer the wider Constitutional questions to

the Constitutional Court. She therefore submitted that the motion to postpone was not designed to delay the trial, but to obviate a possible delay by going directly to the Constitutional Court for a ruling on the matter.

The right of a person who claims there has been a contravention of a provision of the Charter of Fundamental Human Rights and Freedoms as contained in Chapter III of the Constitution to invoke the jurisdiction of the Constitutional Court is provided in article 46(1). In terms of article 46(7), any court, other than the Constitutional Court or the Court of Appeal shall, if it is satisfied that a constitutional question that arises is not frivolous or vexatious "adjourn the proceedings and refer the question for determination by the Constitutional Court". Mrs Georges, in answer to the Court, stated that she was not making an application under article 46(7) for a referral, but was seeking an adjournment of the present case to enable the accused to invoke the jurisdiction of the Constitutional Court under Article 46(1) directly. That indeed is the gist of the motion dated 1 September 1998.

The right contained in article 46(1) can be exercised by a person within 30 days of an alleged contravention. However if in the course of civil or criminal proceedings a party fails to comply with a procedural requirement, the aggrieved party should first seek to obtain redress before the court in which it arises, under the provisions of the Civil or Criminal Procedure Code; the existing statutory law. Applications for disclosure of a list of prosecution witnesses and their statements were made in the cases of *R v Wilbv Robert* (unreported) Criminal Side 8/1991, *R v Pillav* (1992) SLR 241 and *R v Murangira* (1993) SLR 30 following the procedural law.

Mrs Georges quite rightly reminded the Court that now we have a Constitution granting rights to a person charged with an offence. With respect, the constitutional provisions are safeguards and not meant to be invoked as supplementing the statute law. For example the provisions of article 18

relating to arrest, detention and bail are meant to safeguard the right to liberty. The Criminal Procedure Code deals with the specific procedural aspects. A person in custody applies for bail under the provisions of the Criminal Procedure Code and not under the provisions of the Constitution. The constitutional remedy may however be resorted to if bail is being refused on a ground which amounts to a contravention of that person's right to liberty. In such circumstances that person cannot bypass the procedural law and seek a declaration from the Constitutional Court merely on the ground that it is being done to obviate delays.

Lord Diplock delivering the judgment of the Privy Council in the case of *Harrikissoon v Attorney General of Trinidad and Tobago* [1980] AC 265 at 268 stated-

> The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms, but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action..... the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the sub-section if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of court as being made solely for the purpose of

> avoiding the necessity of applying in the normal way for the appropriate judicial remedy....."

In that case a teacher was transferred without 3 months notice being given or an inquiry being held as required by the terms and conditions of his contract. Without availing himself of the review procedure, he applied to the High Court for a declaration that human rights and fundamental freedoms guaranteed by the Constitution had been violated. The Privy Council held that the adoption of that procedure instead of pursuing the remedy given by the regulations was misconceived.

On the same basis, the motion of the defence to adjourn the present proceedings for the purpose of invoking the jurisdiction of the Constitutional Court under article 46(1) is misconceived as this Court has not been moved for an order for disclosure in the first instance.

Article 19(2) of the Constitution provides inter alia that –

> Every person who is charged with an offence -
>
> (a) .....
>
> (b) .....
>
> (c)..... shall be given adequate time and facilities to prepare a defence to the charge.

The complaint of counsel for the defence in this regard is contained in the final letter dated 31 August 1998 sent to the Attorney General (exhibit AG 8) as follows –

> The fact remains that less than 48 hours before trial we still do not know who is going to testify for the prosecution and consequently our preparation has suffered. May I humbly again

request your list of witnesses?

Mrs Georges reiterated her request to the prosecution at the commencement of her submissions in support of the motion. But the prosecution maintains that such a procedure is not warranted in the case of summary trials. This is a matter which this Court ought to have considered under the provisions of the Criminal Procedure Code, which is a law kept in force by the present Constitution. Mr Kanakaratne submitted that due to the late filing of the motion to postpone the trial some of the witnesses for the prosecution who were summoned had appeared in Court. In the circumstances the grounds on which the prosecution is withholding the list of witnesses would have diminished in merit. If, as the letter of 31 August 1998 stated, the preparation of the defence has been affected by the non-availability of the names of the prosecution witnesses, the defence ought to have followed the usual practice available in summary trials by making a proper application to this Court to peruse the record.

Sauzier J in approving that practice in the case of *Kate v R* (1973) SLR 228 at 233 stated –

> "Although defence lawyers have no right in law to be given access to or a sight of the record or to be given a copy thereof, every effort should be made by the courts and by court officials to allow defence lawyers to have reasonable access to and make notes from the record of a case in which they are engaged."

That option is still open to the defence, since counsel for the defence submitted that the intention to apply directly to the Constitutional Court was purely motivated by the desire to expedite proceedings.

On a consideration of the circumstances created by the application to amend the charges, this Court cannot compel

the accused to plead to the amended charges as it has been submitted that it contains major changes and that the decision to object would depend on the availability of the information sought from the prosecution. I am conscious that the right to a fair hearing also involves the hearing of the case within a reasonable time. The court cannot be a party to a delay. Hence with this view in mind and on the basis of the submission of the counsel for the prosecution that although the motion was being resisted on merits, the Republic had no objections to this Court considering the matters that have arisen as constitutional questions under Article 46(7), although the defence has not expressly sought such a course, I make a reference to the Constitutional Court in terms of article 46(7). In terms of rule 10(1) of the Constitutional Rules 1994, I state the following questions for determination by the Constitutional Court.

1. Does article 19(2)(c) of the Constitution in particular, and the right to a fair hearing as contained in Article 19 in general, oblige the prosecution to furnish a list of witnesses, their statements and the prosecution docket to an accused person in a summary trial before the Supreme Court under the provisions of the Criminal Procedure Code?

2. If an accused person is not entitled to the documents set out in question 1 above under procedural law, does a failure to furnish them by the prosecution amount to a contravention or a likely contravention of articles 19 and 28 of the Constitution?

The defence is, however, entitled to decide whether to peruse the record and take notes, as indicated above, or to canvass the referral before the Constitutional Court in view of the submissions made by counsel for the defence as regards the effect of a delay of the trial on the accused in this case whose

practice as a lawyer has been suspended.

The registrar shall forthwith list this referral for mention before the Constitutional Court with notice to the prosecution and the defence. The bail of the accused is extended on the same conditions.

ADDENDUM

Since writing the above ruling the defence has filed a motion dated 3 September 1998 supported by an affidavit of Mrs Georges, attorney for the accused, moving for an order of this Court ordering the prosecution to produced to the defence (1) a list of prosecution witnesses; (2) statements of those witnesses; and (3) any material in the prosecution docket having any bearing on this case, whether to be used by the prosecution or not, "in the event the motion dated 1st September 1998 heard yesterday is not granted." In view of the ruling made today, this motion does not arise for consideration.

Record: Criminal Side No 26 of 1998

The Republic v Rene & Ors

Penal Code - wounding with intent – grievous harm – evidential threshold in summary trials – proof of injury

In a summary trial, the three accused were charged in one count with committing a single offence with a common intention. The complainant's trousers and underwear were removed purposely to cut his penis. Medical evidence through testimony established that the injury was a purposeful act. The prosecution had to adduce evidence that the complainant was wounded as a consequence of the defendants forming a common intention. The prosecution did not produce further medical evidence beyond the medical practitioner's testimony to enable the Court to assess the result of the injury. At the end of the case for the prosecution, the defence made a submission of no case to answer.

HELD:

(i) The function of the judge in a summary trial is to be the judge of both facts and law;

(ii) In a summary trial, the judge must consider both whether the evidence adduced establishes the elements of the offence and whether the prosecution has made out a case against the accused sufficiently to require him to make a defence;

(iii) In summary trials the prosecution must adduce at least minimum standards of evidence to satisfy the Court that there is a prima facie case against the accused. If such evidence is available, irrespective of whether other witnesses had contradicted each other, the accused may have a case to answer;

(iv) The general presumption of law is that every sane person is presumed to intend the necessary or the natural and probable consequences of his acts. In a case of wounding, proof of injury is sufficient; and

(v) The discretion to call upon an accused to make a defence at the end of the prosecution case is entirely with the court. In exercising this discretion the court should not consider whether the prosecution evidence is sufficient to convict the accused or is so deficient that they should be acquitted. The only consideration at this stage is whether the evidence is such that a reasonable tribunal might, and not necessarily will, convict.

Judgment: for the prosecution.

Legislation cited
Criminal Procedure Code, ss 183, 249
Penal Code, ss 23, 219

Foreign legislation noted
Criminal Procedure Code of Tanzania, s 205

Cases referred to
Assary v R (1978) SCAR 464
R v Stiven (1971) SLR 137

Foreign cases noted
Moriarty v Brookes (1834) 6 Cr & Ph 684
Ramanlal Bhatt v R [1957] EA 332
R v Galbraith (1981) 73 Cr App R 124

Frank ALLY for the Republic
Pesi PARDIWALLA for the first accused
France BONTE for the second and third accused
The third accused present

Ruling delivered on 22 October 1998 by:

PERERA J: The three accused stand jointly charged with the offence of causing grievous harm, contrary to section 219(a) of the Penal Code, read with section 23 thereof. By a ruling dated 3 July 1998, I have held that this charge is not duplicitous.

Section 219(a) of the Penal Code is as follows –

> Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person –
>
> (a) unlawfully wounds or does any grievous harm to any person by any means whatsoever is guilty of a felony, and is liable to imprisonment for life.

Section 23 provides that –

> 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.

At the end of the case for the prosecution, counsel for the first accused, Mr Pardiwalla, and counsel for the second and third Accused, Mr. Bonte, made submissions that there was no

case to answer. In summary trials before the Supreme Court and the Magistrates' Court, section 183 of Criminal Procedure Code provides that -

> If at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.

However in the case of jury trials before the Supreme Court, section 249(1) provides that -

> If, when the case for the prosecution has been concluded, the judge rules, as a matter of law, that there is no evidence on which the accused could be convicted, the jury shall, under the direction of the judge, return a verdict of not guilty.

The function of the judge in the two types of cases is different. In summary trials, he is the judge of facts as well as the law. In a jury trial, facts are judged by the jury while the law is decided by the judge. Hence the former is a subjective consideration while the latter is an objective one. In jury trials therefore it would not be the function of the judge to weigh the evidence, decide who is telling the truth and stop the case merely because he thinks the witness is lying. That would be a usurpation of the function of the jury. Hence under section 249(1) a judge may rule "as a matter of law" that the evidence adduced by the prosecution did not establish an essential element in the alleged offence and direct the jury on the law for the acquittal. However in the case of summary trial, the judge can not only consider whether the evidence adduced establishes the ingredients of the offence but also, as a matter of fact whether the prosecution had made out a case against the accused "sufficiently to require him to make a defence". This is not a stage for the judge to weigh the evidence and

decide on the truthfulness of witnesses. That should be done after hearing the defence. However the court must be satisfied that there is reliably sufficient evidence to make out a case against the accused as charged.

The East African Court of Appeal in interpreting section 205 of the Criminal Procedure Code of Tanzania (which is the same as our section 183), in the case of *Ramanlal Bhatt v R* [1957] EA332 at 334 stated -

> Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one" which on full consideration might possibly be thought sufficient to sustain a conviction." This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is "some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence". A mere scintilla of defence can never be enough, nor can any amount of worthless discredited evidence.

In this respect, English decisions like *R v Galbraith* (1981) 73 Cr App R 124 which lays down guidelines to be followed in the case of a submission of no case to answer are not helpful as those guidelines apply to trials by jury. In summary trials the prosecution ought to have adduced even minimum evidence to satisfy the court that there is a prima facie case against the accused. If such evidence is available, irrespective of whether certain other witnesses had contradicted each other, the accused will have a case to answer. Witnesses can contradict themselves for a variety of reasons and motives.

What then is the evidence available against the three accused at the end of the prosecution case to satisfy this Court that a case has been made out against them.

The three accused are being charged in one count with committing a single offence with a common intention. Hence the prosecution basically had to adduce evidence that the complainant was wounded as a consequence of the three accused forming a common intention in conjunction with one another.

Section 219(a) of the Penal Code requires proof of an intent to cause grievous bodily harm. In the case of *Assary v R* (1978) SCAR 464, it was held that such intent could be inferred from the facts of the case. The complainant in his testimony stated that his right eye was punched by the third accused over his spectacles causing a bleeding injury near the eye, close to the bridge of his nose. He further stated that his neck was bruised in an assault which involved all three accused. He also stated that his head was bashed against a cargo container by the first accused, making him dazed momentarily and that while in that state, someone cut the skin of his penis circumferentially. Dr Layo Ayewole (Pw2) described the injury as a "circumferential laceration of the skin" at the base of the penis. He stated that it could have been caused by a sharp object like a knife or a razor blade applied to the skin "with a minimum or moderate force". He agreed in cross-examination that the person who caused that injury could have severed the organ if his intention was to cause grievous injury. That was the doctor's opinion. The Court has to consider that intent upon its own assessment. The doctor ruled out the possibility of an accidental cut in the course of a struggle and said that if that be so there would have been other injuries, and that the circumferential cutting indicated a purposeful Act. He further stated that the cut could have been made by pulling the penis forward. Hence the medical evidence establishes that the injury was caused

by a purposeful act. Dr Ayewole further testified that due to the laceration, the fore-skin had moved forward and hence he cleaned and disinfected the area and sutured the injury.

The complainant alleged that his right eye was punched causing an injury. P Sgt Edwin Labrosse (Pw8) who saw him soon after the alleged assault, and SI Maryse Labrosse, who went to his house about 6 hours later testified that they saw the injury. Dr Ayewole stated that he only treated the injury to the penis and did not examine any other part of the body. However for the purposes of the offence under section 219 (a) the most pertinent injury is the one to the penis. The complainant testified that the following day, his penis was swollen and he was in great pain. He could not wear trousers and hence went to the Les Mamelles clinic with a towel wrapped around his waist. From there he was transferred to the Victoria hospital where he was put in a ward. The prosecution did not adduce any other medical evidence to enable this Court to assess the resulting condition of the injury.

In the *Assary* case (supra) the learned Judge sought to draw a distinction between intention and the actual nature of the injury, the whole exercise being to consider the nature of the injury in determining the mental state of the accused. In the case of *Moriarty v Brookes* (1834) 6 Cr & Ph 684 it was held that to constitute a wound, the continuity of the whole skin must be broken. The medical evidence in the case establishes that the foreskin was separated and that it was sutured. In the *Assary* case (supra) and in the English case of *R v Wheeler* (1884) Cox CC 164, the injuries caused were severe. In the *Wheeler* case, a prisoner struck the prosecutor a blow with his fist which broke the prosecutor's jaw on both sides of his face. In both cases it was held that the intention to cause grievous harm had not been made out and consequently the accused were convicted on a lesser offence.

Where the legislature makes an offence dependant on proof

of intention, the court must have proof of facts sufficient to justify it in coming to the conclusion that the intention existed. Here the general presumption of law is that every sane person is presumed to intend the necessary or the natural and probable consequences of his acts. This necessarily involves the inference of intention from the conduct. Thus in a case of wounding, proof of the injury is sufficient. However in a charge under Section 219 (a) of the Penal Code the unlawful wounding or the causing of grievous harm should be done with an intention to maim, disfigure or disable a person. Thus as in *Assary* or *Wheeler*, kicking a leg or punching the face may not attract the inference that the causing of grievous bodily harm was intended. But where as in the instant case, the complainant's trousers and underwear were removed purposely to cut his penis, an intention to cause grievous harm by maiming, disfiguring or disabling him can be safely inferred. The word "maim" means to mutilate or disable, "disfigure" is to distort or disfeature and includes maiming or mutilation and disabling. The medical officer testified that the "dissolving stitches" applied in suturing the skin would have healed in three weeks. But the complainant testified that the wound got septic and that still he has been unable to have sex. Hence prima facie there is evidence sufficient to maintain the ingredients of the offence.

The next consideration would be whether there is sufficient evidence against the three accused that the act of wounding was done by them in pursuance of a common intention. The prosecution did not make any application to treat any of the witnesses as hostile witnesses for purposes of the proceedings. Hence it is open to this Court to believe one or the other. But this is not the proper stage to do so. The evidence of the complainant was consistent with the main facts of the prosecution case. The second and third accused are high ranking police officers and well known to the public. The firstaAccused is also a police constable by rank is the driver of the third accused. The complainant testified that he positively identified the three accused as his assailants that

night. He stated that someone shouted "there he is" and the third accused grabbed him by the collar of his t-shirt and dragged him near a container. Then he punched his right eye over his spectacles thereby breaking the lens and injuring his face. The second accused held his hands and the first accused bashed his head against the container. He also stated that all three accused assaulted him. The bashing of the head dazed him momentarily and he fell. But he saw the first accused removing his trousers and underwear and asked him "what are you doing to me". All three accused were struggling with him, so he could not state with certainty as to who actually cut his penis.

There is therefore prima facie evidence that all three accused participated in the assault on the complainant which culminated in the injury to his penis. The evidence of an eye-witness was that of Bernard Georges Labrosse (Pw9). He testified as to what he saw. He could not see what happened after the complainant fell after being hit against the container. He however saw all the accused in different positions before the alleged assault. That assault took place at a point marked "6" in photo no 2 of the album marked "PI". Pw9 was seated on the bench at Point "1" in photo no 6. On a preliminary assessment of those photographs on the basis of his testimony, it was not possible for him to see whether the second and third accused joined in the assault as was testified by the complainant. He however saw the third accused after the complainant came to the bench where he was seated. That does not necessarily impugn the evidence of the complainant that all the three accused were involved in the assault.

In a criminal case where the offence is one affecting a person, the best evidence is that of the complainant himself. In the instant case, medical evidence establishes that the injury to the complainant's penis had been deliberately inflicted. The photographs in the album marked exhibit PI show the maiming and disfigurement of that organ. The complainant's

evidence is consistent as to the identity of the three persons and their joint participation in the assault which resulted in the grievous harm.

It was held in the case of *R v Stiven* (1971) SLR 137 that a submission of no case may be properly be made and upheld

(a) When there has been no evidence to prove an essential element in the alleged offence.

As was seen by the foregoing, the essential elements of intent and causing grievous harm have been established by evidence.

(b) When the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it.

As I stated before, the witnesses may differ in their respective testimonies regarding the same incident for a variety of reasons. The evidence adduced by the prosecution cannot be said to have been discredited by cross-examination nor manifestly unreliable.

The discretion to call upon the accused to make a defence at the end of the prosecution case is entirely with the court. In doing so the court should not consider whether the prosecution evidence is sufficient to convict the accused or is so deficient that they should be acquitted. Such a decision can be made only after hearing the defence. The only consideration at this stage is whether the evidence is such that a reasonable tribunal might, and not necessarily will, convict.

On a consideration of the evidence on the basis of these guidelines, the Court is satisfied that the prosecution has made out a case sufficiently to require the accused to make a

defence. Accordingly there is a case to answer by the first, second and third Accused.

Record: Criminal Side No 28 of 1998

Republic v Magnan

Criminal procedure - insanity – fitness to stand trial

The defendant was charged with murder. It was suspected that he was of unsound mind, and thus perhaps not fit to stand trial. The prosecution proposed that the Court be guided by the Criminal Procedure Code.

> **HELD:** The unsoundness of mind of an accused person may only be determined by a psychiatrist after an examination.

Ruling: That the defendant be detained at a hospital for an examination by a psychiatrist who will report –

(a) whether at the present time the defendant is able to plead to the charge, that is, that he understands the charge levelled against him;

(b) whether he is in a position to instruct counsel; and

(c) whether he is in a position to follow the proceedings in Court.

Legislation cited
Criminal Procedure Code, ss 134, 193, 194

Frank ALLY for the Republic
Alexia ANTAO for the sccused

Ruling delivered on 10 August 1998 by:

ALLEEAR CJ: The accused, Laval Damas Magnan, has been charged with the offence of murder contrary to section 193 and punishable under section 194 of the Penal Code, Cap 158.

It is suspected that the accused may be of unsound mind. The Court therefore invited submissions from the prosecution and defence on that issue. The prosecution proposed that the Court should be guided by the provisions of the Criminal Procedure Code, namely sections 136 et seq on that matter. The defence did not make any submissions but agreed to abide by any decisions made by the Court.

At this stage the Court is not concerned with the criminal responsibility of the accused for the offence charged. The Court's main concern is to ensure that the accused is fit to plead, that is, that he understands the charge leveled against him and is in a position to instruct counsel on his behalf and is able to follow the proceedings in court.

Section 134(1) of our Criminal Procedure Code provides:

> When in the course of a trial or preliminary inquiry the court has reason to believe that the accused may be of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of such unsoundness and may for that purpose order him to be detained in a mental hospital for medical observation and report for any period not exceeding one month.

The accused's unsoundness of mind may only be determined by a psychiatrist after examining him. I therefore order that the accused who has been detained at Les Cannelles Hospital for some time be examined by one or more psychiatrists who will specifically state in a report - (i) whether at the present time the accused is in a position to plead to the charge, that is he understands the charge levelled against him; (ii) whether he is in a position to instruct counsel; (iii) whether he is in a position to follow the proceedings in court.

It must be emphasised that at this stage the Court does not

want a report as to the criminal responsibility of the accused for the alleged charge. The Court at this stage does not want a report which contains materials which go to show that the accused by reason of unsoundness of mind could not be responsible for the act or omission which constitute the offence charged.

I therefore direct the registrar of the Supreme Court to immediately write to the Director General of the Ministry of Health requesting that a report on the accused's state of mind at the present time be prepared for the Court to decide whether the accused is fit to stand trial. It is hoped that the report will become available before the lapse of 14 days.

Record: Criminal Side No 51 of 1998

Republic v Malbrook

Criminal procedure - failure to inform accused of right to counsel – voluntary statements – exclusion of evidence - evidential burden

At trial, a police officer had testified that the accused while still a suspect volunteered to accompany a group of police officers to point out where cannabis plants had been planted. The prosecution sought to rely on evidence obtained as a consequence of this action by the accused. The defence submitted that the defendant's right to counsel had been denied and that the evidence relied on was inadmissible.

HELD:

A suspect may make voluntary statements or accompany a police officer to the scene of the crime without consulting a lawyer provided that the suspect does so voluntarily.

Ruling: Evidence excluded as a precautionary measure.

Legislation cited
Constitution of Seychelles, art 19
Criminal Procedure Code, s 101

Frank ALLY for the Republic
Antony DERJACQUES for the accused
Accused present

Ruling delivered on 22 June 1998 by:

PERERA J: The instant ruling concerns the validity of an accused being accompanied by the police to the alleged scene of the crime without informing his counsel. According to the proceedings in case no 241/98 of the Magistrates' Court, the accused was produced before the Magistrate on 24

March 1998 at 9.30 am.

At the trial before the Supreme Court L/C Maxime Payet testified that the accused volunteered to accompany him, Det Constable Chantal Prea and some other officers to the plantation where he pointed out the area where the cannabis plants had been planted. The prosecution seeks to produce an album of photographs containing 18 photographs. Photographs numbered 1-15 show a plantation which L/C Payet testified were cannabis plants cultivated by the accused. He further testified that those photographs had been taken before the plants were uprooted, while photographs numbered 16, 17 & 18 were taken thereafter on 24 March 1998.

The right to be defended by a lawyer of the accused person's choice is contained in article 19(2)(d) of the Constitution. That right provides that "every person who is charged with an offence…has a right to be defended before the court in person, or, at the person's own expense by a legal practitioner of the person's own choice ....."

The accused was produced before the Magistrates' Court on 24 March 1998 for the first time upon an affidavit filed by L/C Maxime Payet, as a suspect. An application for remand for a period of 2 days was made under section 101(1) of the Criminal Procedure Code, inter alia, as investigations were not completed by that date. He was then a suspect and not an accused charged with an offence. Therefore during the period of remand, up to a maximum period of 7 days, the police officers are free to conduct their investigations. In the course of such investigations, the suspect, who has still not been formally charged, may make a statement or accompany the police officers to the scene of the crime without consulting his lawyer provided that he does so voluntarily. The burden of proving that those matters were done voluntarily remains with the prosecution.

In the instant matter, L/C Payet has testified that the accused, who was then a suspect, volunteered to accompany them. This must necessarily be tested on a voir dire in view of the objection raised. However, without deciding the constitutional implications, I rule that in order to provide the accused with a fair hearing, the photographs numbered 16, 17 and 18, taken on 24 March 1998 should be excluded from the album and that no evidence should be adduced by the prosecution as regards the circumstances under which they were taken.

Record: Criminal Side No 4 of 1998

Republic v Dubignon

Sentencing

The convicted person was 25 years old. He was convicted on two counts under the Misuse of Drugs Act. In this hearing he was sentenced to twenty two years imprisonment.

HELD:

(i) When passing sentence the court must take into consideration the damage that would have been caused to society if the convict had executed his plan;

(ii) The court takes into consideration the convict's young age of 25 years;

(iii) The offence under count 1 carries a minimum mandatory term of 10 years imprisonment and a maximum of 30 years imprisonment and a fine of R500,000. The offence under count 2 carries a sentence of 3 years imprisonment;

(iv) In sentencing the convict under count 1, consideration may be given to the current sentencing pattern of this Court for offences under the Misuse of Drugs Act;

(v) The quantity of the drugs alone is not a guiding factor for sentencing; and

(vi) The court must in appropriate cases take into account legislative policies and punish offenders so that the sentences may act as a deterrent to others.

Judgment: Convict sentenced to 22 years imprisonment.

Legislation cited
Criminal Procedure Code, s 283
Misuse of Drugs, s 32

Cases referred to
Ricky Chang TV Sing v R (unreported) Crim Appeal 10/1997
Jumbe v R (unreported) SCA 18/1997
R v Garry Albert (unreported) Crim Appeal 45/1997

Romesh KANAKARATNE Senior State Counsel for the Republic
John RENAUD with Frank ELIZABETH, for the accused

Sentence delivered on 27 October 1998 by:

PERERA J: This is perhaps the largest consignment of drugs ever seized in Seychelles.

In passing sentence this Court has to take into consideration the damage that would have been caused to the society had the convict been able to execute his evil plan.

I have considered that the convict is a young man who is only 25 years old. The offence under count 1 carries a minimum mandatory term of 10 years imprisonment and a maximum of 30 years imprisonment and a fine of R500,000.

The offence under count 2 carries a sentence of 3 years imprisonment.

In sentencing the convict on count 1 I have also taken into consideration the current sentencing pattern of this Court in respect of offences under the Misuse of Drugs Act. In the case of *R v Garry Albert* (unreported) Crim Appeal 45/1997 the Court of Appeal affirmed a sentence of 10 years imposed by this Court for an offence of trafficking 1kg 30g of cannabis

resin. In the case of *Ricky Chang TV Sing v R* (unreported) Crim Appeal 10/97, the Court of Appeal affirmed a sentence of 15 years imprisonment for trafficking in a quantity of 220g and 270mg of cannabis resin. In the case of *Jumbe v R* (unreported) SCA 18/1997) the Court of Appeal affirmed a sentence of 20 years imprisonment for trafficking in a quantity of 14kg 260g.

The instant case surpasses all previous drug cases in its gravity and sophistication. However the quantity of the drugs alone is not a guiding factor for sentencing. The legislature, in prescribing a minimum mandatory sentence of 10 years and a maximum of 30 years imprisonment and a fine of R500,000, indicated the seriousness of the drug problem in this country. The courts must, in appropriate cases, take heed of the legislative policies and punish the offenders so that the sentences may serve as a deterrent to others. This is a suitable case for such a sentencing.

On a consideration of all the mitigating factors on one side and the social abhorrence of this crime on the other, I sentence the convict as follows:-

Count 1 - I impose a sentence of 22 years imprisonment
Count 2 - I impose a sentence of 2 years imprisonment.

Sentences on Counts 1 and 2 are to run concurrently.

The convict admitted a previous conviction for possession of a controlled drug, wherein the Magistrates' Court had on 13 February 1997 imposed a term of 1 year imprisonment suspended for a period of 2 years. In terms of section 283(2) of the Criminal Procedure Code, I activate that suspended sentence of 1 year imprisonment, to take effect immediately so that it is concurrent with the present concurrent sentence of 22 years, as the length of the sentence imposed in this case provides a special circumstance to do so.

Time spent on remand will count towards the concurrent sentence imposed in this case.

In terms of section 32(1) of the Misuse of Drugs Act, I order that the entire quantity of cannabis resin exhibited in the case be destroyed by burning in the presence of the registrar of this Court after the lapse of 14 days in the event of there being no appeal, or after an appeal filed is finally disposed of by the Court of Appeal.

Record: Criminal Side No 3 of 1998

Republic v Dubignon

Evidence – hearsay

Evidence was taken by a police officer from a suspect under caution and recorded. The defendant sought to use the recorded statement as evidence because it was relevant to the defence.

HELD:

(i) The truthfulness and accuracy of a person whose words are spoken by another witness cannot be tested under cross-examination nor can that person's demeanour while giving their statement be assessed; and

(ii) The defence is not entitled to adduce hearsay evidence to establish facts which if proved would be relevant and would assist their case.

Judgment: Hearsay evidence not admissible.

Foreign cases noted
R v Turner and Ors (1975) 61 Cr App R 67
Teper v R [1952] AC 480

Romesh KANAKARATNE for the Republic
Frank ELIZABETH & John RENAUD for the accused

Ruling delivered on 25 August 1998 by:

PERERA J: The defence had called L/C Maxime Payet, who had assisted in the investigation connected with the case, to testify regarding the various aspects of that investigation in which he was personally involved. He testified that in the

course of the investigations he recorded a statement made under caution by one Kerer William, also known as Kamal William, on 16 December 1997. That statement was recorded by him after administering the caution. He further testified that the said William made the statement voluntarily and that it was read over to him and that he was given an opportunity to make any corrections or alterations before he signed it. L/C Payet stated that that statement duly recorded by him in his handwriting was witnessed by Inspector Percy Omath who was present at that time.

L/C Payet also testified that William made that statement when he was a suspect for importing 109 kg 689 g of cannabis resin, the same offence, the present accused Tony Dubignon is being charged with. It is a matter of record that the charges against William were withdrawn by the prosecution after the charges and been filed against him, and subsequently the present accused was charged with the same offence under count 1 and a different offence under count 2.

Mr Elizabeth, counsel for the accused, seeks to introduce the statement of Kerer William alias Kamal William through L/C Payet as evidence for the defence on the basis of relevancy. He contends that all relevant evidence is admissible unless there is an exception to that rule which does not allow evidence to be so admitted. Counsel stated the purpose of his application tersely as follows

> All we are saying is that this evidence is relevant evidence for the defence and this witness was present at the time that statement was given to the police. He is the one who recorded the statement and therefore, he can testify before this Court that he recorded the statement and that the statement was given to him by another person and it is admitted solely for that purpose.

L/C Payet has already testified regarding those matters except that the contents of the statement have not yet been

read out by him in court. Counsel for the accused applies for that statement to be read out so that the contents could be made evidence for the defence. That is where the issue of admissibility arises, and the issue of relevancy departs.

Basically, if the contents of the statement are admitted in evidence per se, it would amount to admitting hearsay evidence. William was a suspect at the time of making the statement and hence he alone could state whether he made that statement voluntarily and without any promise or threat being offered. As Lord Normand stated in the case of *Teper v R* [1952] AC 480

> The rule against the admission of hearsay evidence is fundamental. It is not the best evidence, and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination and the light with his demeanour would throw on his testimony is lost.

In this respect it is pertinent to note the following observations made in the case of *R v Turner & Ors* (1975) 61Crim App R 67:

> The idea which may be gaining prevalence in some quarters, that in a criminal trial the defence is entitled to adduce hearsay evidence to establish facts which if proved would be relevant and would assist the defence, is wholly erroneous."

The instant application is based on the same fallacy and hence I disallow the application of the defence to admit hearsay evidence under the guise of relevancy.
The defence may however adduce the evidence of Kerer William alias Kamal William for the purpose of testifying as to

the voluntariness and accuracy of the statement made by him and be subjected to cross-examination before being admitted as direct evidence for the defence.

Record: Criminal Side No. 3 of 1998

Republic v Dubignon

Criminal procedure - bail – right to fair hearing

The accused applied for bail towards the end of the prosecution case at trial.

HELD:

(i) The right of the prosecution and the defence to adduce evidence by any number of witnesses cannot be denied;

(ii) When considering the right to a fair hearing with a reasonable time, reasonableness depends on the nature and circumstances of each individual case. As long as there is no purposeful delay, the right to a fair hearing within a reasonable time is not violated;

(iii) An application for bail should be made under section 101 of the Criminal Procedure Code and not under article 18(7) of the Constitution;

(iv) When a bail application is made once a trial has begun, the court must decide each case in the light of its own circumstances and having regard to the likely risk involved;

(v) The court may refuse bail if there is a real danger that an accused will abscond, either because of the strength of the case against them or for any other reason the court may consider, or that the accused will interfere with witnesses or jurors; and

(vi) Generally the court will not grant bail after the "pinch" of the case has been felt.

Ruling: No change in circumstances of the accused. Application dismissed.

Legislation cited
Constitution of Seychelles, arts 18, 19
Criminal Procedure Code, ss 101, 133

Foreign Cases noted
Practice Direction (Crime: Bail During Trial) [1974] 2. All ER 794

Romesh KANAKARATNE for the Republic
Frank ELIZABETH & John RENAUD for the accused

Ruling delivered on 23 July 1998 by:

PERERA J: This is an application for bail made while the trial is in progress. Warrant of arrest of the accused was issued by this Court under section 69(1) of the Criminal Procedure Code on 10 February 1998 on an application made by the prosecution. It was submitted that the police were unable to serve charges on the accused who was absconding. On 19 February 1998, the Court being satisfied on the sworn evidence of ASP Ronnie Mousbe regarding the visiting of various places where the accused was known to reside, made an order under section 133(1) of the Criminal Procedure Code permitting the prosecution to adduce the evidence of witnesses in the form of depositions. The depositions of six overseas witnesses were duly recorded on 24 February 1998.

On 13 April 1998, the accused was produced before this Court. It was submitted by the prosecution that the accused had surrendered to the police in the evening of the previous day. Counsel appearing for the accused at that time, Mrs Antao, submitted that he surrendered as soon as he became

aware of a radio announcement that his presence was required. Be that as it may, the accused has been on remand since then.

Previous applications for bail were refused by this Court on the grounds of (1) the seriousness of the offence (2) the availability of substantial grounds for believing that the accused would fail to appear for the trial or will interfere with the witnesses if released. The trial in the presence of the accused commenced on 1 July 1998 and today is the fourteenth day of trial. The prosecution has already adduced the evidence of 27 witnesses. Counsel for the prosecution has informed the Court that he proposes to close the prosecution case tomorrow. However the witness who is presently testifying, ASP Mousbe, will be proceeding overseas on an official course and will not be available for one week. His cross-examination if not completed today will have to be adjourned to a date when he has returned.

Counsel for the accused has, in supporting the application for bail, emphasised the delay in the trial. It was submitted that the prosecution listed 27 witnesses originally but added 10 more after the trial commenced. It was further submitted that the defence too intended to summon certain witnesses from abroad and hence the trial would be further delayed. The right of the prosecution and the defence to adduce the evidence of any number of witnesses cannot be denied to either party. Article 19(1) of the Constitution gives the right to an accused person to a fair hearing "within a reasonable time." Reasonableness depends on the nature and circumstances of each individual case. As long as there is no purposeful delay, the right to a fair hearing within a reasonable time is not violated.

Counsel for the accused has also referred this Court to article 18(1) of the Constitution which gives every person a right to liberty and security of the person. Article 18(7) provides the derogations in cases where a person is produced in court on a criminal charge. Those derogations are now embodied in

section 101(5) of the Criminal Procedure Code as amended by Act 15 of 1995. An application for bail should therefore be made under section 101 of the Criminal Procedure Code and not under article 18(7) of the Constitution.

Counsel for the accused also referred to the cases of *R v Jumaye, R v N Padayachy,* and *R v Akbar* wherein this Court granted bail pending trial. In those cases where the charges were based on the Misuse of Drugs Act, bail was granted prior to the commencement of the trial. The accused in those cases were released on bail on strict conditions, and there was the possibility of their bail orders being cancelled if they defaulted any of the conditions imposed.

The accused in the instant case has passed that stage. Bail is now being sought after 27 witnesses for the prosecution have testified against him. The Practice Direction (Crime: Bail during Trial) [1974] 2 All ER 794, though not binding on this Court, provides good guidance for bail applications made once a trial has begun. It states that each case must be decided in the light of its own circumstances and with regard to the judge's assessment from time to time of the risk involved. As a guideline it is suggested that bail may be refused where the court considers that –

> (1) A point has been reached where there is a real danger that the accused will abscond, either because the case is going badly for him or for any other reason.
>
> (2) There is a real danger that he may interfere with witnesses or jurors.

As a general rule bail is not granted after the "pinch" of the case has been felt. Having those guidelines in mind, and on a consideration that the prosecution case is almost at an end, I find no change in

circumstances to justify making an order for bail at this stage of the case.

The application for bail is therefore refused.

Record: Criminal Side No 3 of 1998

Republic v Dubignon

Misuse of Drugs Act – duplicity – definition of "import" – controlled drug – constitutional law – extraterritorial jurisdiction

The accused was charged with counts of importation of a controlled drug and official corruption. The defence raised preliminary questions on the issues of duplicity and extraterritorial jurisdiction of the court, as well as the admissibility of evidence

HELD:

(i) "Import" must be taken in the broader sense of "to bring" or "cause to be brought" by air or sea;

(ii) If the prosecution succeeds in proving any preparatory act was done by the accused or through an agent then the offence of importation can be maintained and the charge is not bad for duplication; and

(iii) Where the procedure laid down in article 86 of the Constitution has been followed in enacting any Act, the National Assembly can validly pass law with extraterritorial operation.

Judgment: For the Republic. Accused convicted on both counts as charged.

Legislation cited
Constitution of Seychelles, art 86
Customs Act, 1950
Dangerous Drugs Act, 1971
Dangerous Drugs Act, 1974
Dangerous Drugs Ordinance (1950), s 2

Misuse of Drugs Act, ss 3, 10, 27, 29
Penal Code, ss 3, 6, 7, 10, 91, 312

Foreign legislation noted
Constitution of Mauritius, s 45
Customs Ordinance, 1950 (Mauritius)
Dangerous Drugs Act 1986 (Mauritius)
Dangerous Drugs Ordinance, 1950, s 2 (Mauritius)

Cases referred to
Donald Clarisse v The Republic (1982) SLR 75
R v Salim Ali Hamad El Mauley (1981) SLR 6

Foreign cases noted
Jeeawood v R 1989 MR 258
Jemmison v Priddle [1972] 1 QB 489
Mian and Or v The Queen 1981 MR 561
R v Bristol Crown Court ex parte Willets [1985] Crim LR 219
R v Hills (1987) 86 Cr App R 26
Warner v Metropolitan Police Commissioner [1969] 2 AC 256

Romesh KANAKARATNE Senior State Counsel for the Republic
John RENAUD with Frank ELIZABETH for the accused

Judgment delivered on 27 October 1998 by

PERERA J: The accused stands charged with two offences: count 1 with the importation of a controlled drug into Seychelles contrary to section 3 read with sections 10(b) and 27(c) of the Misuse of Drugs Act (Cap 133) and punishable under section 29 of the Second Schedule of the said Act; and count 2 with the offence of official corruption, contrary to section 91(b) of the Penal Code (Cap 158).

Particulars of the offence are as follows:

Mr J Renaud, counsel for the accused, has raised two

preliminary points of law which require initial consideration. They relate to an alleged duplicity in count 1, and a submission that this Court has no jurisdiction to try an offence alleged to have been committed in a foreign jurisdiction.

Is Count 1 bad for duplicity?
Section 3 of the Act provides that –

> Subject to this Act. a person shall not import or export a controlled drug.

Section 10(b) states –

> A person shall not –
> (a) .....
> (b) do any act preparatory to, or in furtherance of, an act outside Seychelles which if committed in Seychelles would constitute an offence under the Act.

Similarly section 27(c) states –

> A person who –
> (a) .....
> (b) .....
> (c) attempts to commit or does any act preparatory to or in furtherance of the commission of an offence under this Act is guilty of an offence and liable to the punishment provided for the offence and he may be charged with committing the offence.

Mr Renaud contends that the offence of importation contained in section 3 is disjunctive and independent from sections 10(b) and 27(c) and hence the prosecution has to prove beyond a reasonable doubt that the accused committed the offence of importation and not merely an act preparatory to importation

outside Seychelles.

The evidence for the prosecution to prove the charge of importation is primarily based on the evidence of Nassor Sultan (PW2), a businessman in Mombasa, Kenya. It was sought to establish through this witness that the accused made arrangements with him to send the quantity of cannabis resin exhibited in this case, to Seychelles; that the said quantity comprising 87 bars was handed over to the accused by him for that purpose and that the accused paid him, at least partly, for doing all acts necessary to packaging and exporting to Seychelles from Mombasa, Kenya.

Mr Kanakaratne, Senior State Counsel, contends that under section 10(b), an offence of importation envisaged in section 3 can be proved if any preparatory act which would constitute an offence under the Misuse of Drugs Act, is done outside Seychelles. Further he contended that all that the prosecution had to do under sections 10(b) and 27(c) was to prove such a preparatory act to establish the offence of importation under section 3.

There is a distinction between duplicity in a count and duplicity in a charge which consists of one or more counts. Basically, no one count of a charge should charge an accused with having committed two or more offences. However, by an exception to the general rule against duplicity, it is permissible to charge a number of separate offences in one count provided that the charges are conjunctive as opposed to in the alternative, and that the acts are so closely bound together that they can fairly be said to constitute a single activity. In the instant charge, count 1 charges the accused with the offence of importation prohibited by section 3 and, by the use of the words "read with", conjunctively with the offences under sections 10(b) and 27(c). In the Misuse of Drugs Act, the word "import" has not been defined. However, in the previous Dangerous Drugs Act (Cap 186) found in the 1971 enactment of the laws of Seychelles, the word "import" was defined as –

> Import with its grammatical variations and cognate expressions, in relation to Seychelles, means to bring, or cause to be brought into Seychelles by air or water, otherwise than in transit.

In Mauritius, section 2 of the Dangerous Drugs Ordinance 1950 defined the word "import" in identical terms. So also did the Customs Ordinance of 1950. However, the Dangerous Drugs Act 1974, which repealed the 1950 Ordinance, defined "import" as –

> "Import" does not apply to a dangerous drug in transit.

In the case of *Mian and Or v The Queen* 1981 MR 561, it was contended that by not reproducing the original definition, the legislature intended to restrict the meaning of the term to its ordinary meaning, namely "to bring" but not "cause to be brought". The Court agreed that the dictionary meaning of the word "import" is "to bring into a country from abroad", but held that it implied the bringing in of one's person, accompanying one's person or bringing in through the intervention of others. Otherwise the restriction of the term "import" to mean only "to bring", would not have made an import through an export agent an "import" for the purposes of the Drugs Act. Such an interpretation would lead to serious consequences.

In Seychelles, in the absence of any definition, the word "import" must be taken in the broader sense of "to bring" or "cause to be brought" by air or sea. Hence the prosecution alleges that the accused imported the quantity of cannabis resin from Mombasa, Kenya, in the sense of "caused to be brought", as stated in the particulars of the offence by "doing an act preparatory to importing to Seychelles 109 kilograms and 685 grams of cannabis resin by making arrangements with one Nassor Sultan of Mombasa, Kenya to send the drugs

to Seychelles, and by handing over the said drugs to the said Nassor Sultan for the said purpose, and being involved in a financial transaction with the said Nassor Sultan in respect of sending the said drugs to Seychelles." The preparatory acts envisaged in sections 10(b) and 27(c) are therefore conjunctive to the prohibition against importation in section 3. Section 10(b) prohibits the doing of any preparatory act outside Seychelles which would constitute an offence under the Misuse of Drugs Act, which in the present case is importation of a controlled drug. Similarly section 27(c) prohibits the doing of an act preparatory to the commission of an offence under the Misuse of Drugs Act, which again, in the present case is importation of a controlled drug. That section further provides that an offender could be charged with committing the offence (importing) and be punished for such offence. Section 27 in any event is not in itself a specific offence envisaged under section 29 read with the second Schedule to the Act. Count 1 therefore does not contain three separate offences but one offence of importation read with the offence of doing preparatory acts for the purpose of committing the offence of importation. There was therefore one criminal activity. In the case of *Jemmison v Priddle* (1972) 1 QB 489 the shooting of two deer by the same person with the same gun, the shootings occurring within seconds of each other, was considered to be one activity. That case was followed in the case of *R v Bristol Crown Court ex parte Willets* [1985] Crim LR 219 where it was decided that a count which alleges that an accused had in his possession five video tapes containing obscene material, was not bad for duplicity as the purpose was to publish them for gain. It was therefore one criminal activity. Similarly, importation involves preparatory acts of purchasing, packaging and processing the export documentation through customs and shipping authorities, which could be done solely personally, partly personally with the assistance of the agent, or solely though an agent. In this sense if the prosecution succeeds in proving any such preparatory act done by the accused himself or though an agent then the offence of importation charged in

count 1 can be maintained. Accordingly count 1 of the charge in the present case is not bad for duplicity.

The Territorial Jurisdiction to try Count 1

Mr Renaud also raised the issue of the jurisdiction of this Court to try an offence allegedly committed in Kenya. He referred the Court to section 6 of the Penal Code (Cap 159) which provides that-

> The jurisdiction of the Courts of Seychelles for the purpose of this Code extends to every place within Seychelles.

He contended that in this respect, section 10(b) was in conflict with section 6 of the Penal Code in that it violates the rule of territorial application of penal laws. He submitted that if an offence has been committed in a foreign country, it is punishable by the laws of that country and hence the legislature cannot consider such an offence committed abroad as an offence committed in Seychelles and punish the offender.

Section 34(b) of the Dangerous Drugs Act 1986 of Mauritius is similar to section 10(b) of our Act. In the case of *Jeeawoodv v R* 1989 MR 258, the Court held thus –

> "There cannot be any doubt that section 34(b) of the Dangerous Drugs Act 1986 makes it an offence to do anywhere in the world an act preparatory to the commission, in Mauritius, of an offence under the Dangerous Drugs Act, immaterial of the fact whether such act is an offence in the country where it is perpetrated or as a result of any international treaty. That law was duly enacted by Parliament which, under section 45 of the Constitution, is empowered to make laws for the "peace, order and good government of Mauritius."

> It is accepted that the laws enacted by a country are usually meant for its territory and its territory alone. There is however nothing to prevent Parliament, which is sovereign, to enact laws punishing acts done outside the jurisdiction if preparatory to the commission of an offence in Mauritius."

In Seychelles the legislative power is vested in the National State Assembly under article 85 of the Constitution. But such power has to be exercised "subject to and in accordance with the Constitution", which is the supreme law of the country. Hence, so long as the National State Assembly legislates within the framework of the Constitution, it is supreme. Where the procedure laid down in article 86 has been followed in enacting any act, the National State Assembly can validly pass any law even with extra-territorial operation.

Section 6 of the Penal Code limits the jurisdiction of the Courts in respect of offences under the Code to every place within Seychelles. Section 7, however, states as follows –

> When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction."

Section 3(b) of the Penal Code saves certain laws from the general territorial rule and provides that –

> Nothing in this Code shall affect –
> (a) .....

(b) the liability of a person to be tried or punished for an offence under the provisions of any law in force in Seychelles relating to the jurisdiction of the Courts of Seychelles in respect of acts done beyond the ordinary jurisdiction of such Courts.

There is however a general principle that a court will not enforce the penal or revenue laws of another country. In the case of *R v Salim Ali Hamad El Mauley* (1981) SLR 6, a Tanzanian National was charged under section 310 of the Penal Code for unlawful possession of traveller's cheques which admittedly were purchased in Tanzania, Kenya and Zambia in contravention of the foreign exchange regulations in those countries. At the trial the prosecution conceded that there were no such regulations in Seychelles and hence a person could lawfully purchase traveller's cheques. It was held that in terms of section 7 of the Penal Code, the acts done outside the jurisdiction not being an offence in Seychelles, this Court had no jurisdiction.

Section 10(b) of the Misuse of Drugs Act is not a strange enactment. For instance, section 312 of the Penal Code has a similar provision for receiving property dishonestly acquired outside Seychelles. Hence because importation of a controlled drug is an offence in Seychelles, any preparatory acts done outside Seychelles are offences under section 10(b).

Facts in Issue

The case for the prosecution is based primarily on the evidence of Nassor Sultan (PW2), who admittedly is an accomplice being charged in Kenya with the offence of trafficking in respect of the same offence the present accused is charged with. It is also based on circumstantial evidence, as apart from the evidence of Sultan (PW2) there is no direct evidence of the accused's involvement with preparatory acts alleged to have been done in Mombasa, Kenya. Before

considering the evidence in the case, I warn myself that the evidence of an accomplice must be corroborated in material particulars by independent evidence which not only confirms that the offence has been committed, but also that the accused committed that offence. Hence corroborative evidence should consist of relevant, admissible, credible and independent evidence which implicates the accused in a material particular. Implication, however, may be satisfied by a combination of items of circumstantial evidence, each innocuous on its own, which together tend to show that the accused committed the crime (*R v Hills* (1987) 86 Cr App R 26).

In the instant case, as the case for the prosecution involves the consideration of the evidence of an accomplice and also circumstantial evidence, I would additionally warn myself that the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of the guilt of the accused.

I shall now proceed to examine the evidence, mindful of the warnings as regards the need for corroboration and as regards the reception of circumstantial evidence.

The only direct evidence to implicate the accused with the offence of importation comes from Nassor Sultan (PW2) who is to be regarded as an accomplice as he is being charged in Kenya in respect of the same transaction. His testimony was that sometime towards the end of September 1997 he met one Kamal William, whom he had known since 1996, at the "Cowrie Shell" guest house in Mombasa, Kenya. Kamal introduced him to the accused who was there. Later in the absence of Kamal, the accused asked him whether he could arrange for about 100kg of cannabis resin to be exported to Seychelles. He told him that he would find out and inform him later. The following day, he went with his brother Rachid and met with the accused. He agreed to undertake the

exportation, and wanted US dollars 10,000 as his charges. The accused gave him US dollars 2,000 and 5000 French Francs as an advance payment. The accused gave the consignee's address as "Waterloo Factory, PO Box 294, Seychelles."
He then went to a scrap metal dealer in Mombasa to purchase empty gas cylinders which he intended to use to pack the drugs. George Maina (PW3), the yard assistant of the "Mama Rose Scrap Yard" testified that an "Arab looking man" came to the yard on three occasions and that on the third occasion on 4 October 1997, he purchased 12 empty gas cylinders for a sum of Kenyan Shillings 8,400 (receipt exhibit P160). He identified the 12 cylinders exhibited in the case as exhibits P120 to P131. He stated, however, that at the time of the sale, they were painted blue whereas they are now painted grey. Nassor Sultan admitted that he painted them grey and stenciled the letters CO2 and numbered them in blue paint (Photo exhibits P101 to P112 - numbered as 65689, 67556, 78689, 45897, 37867, 37867 (two cylinders numbered the same), 37896, 25767, 34689, 27867, 34585, and 36879 respectively).

In the meantime, receiving a telephone call from the accused, Nassor Sultan went to the "Cowrie Shell" guest house where he received the drugs packed in two travelling bags. He did not check the weight or the number of bars at the guest house, but he did so after taking them to his residence and found 87 bars of cannabis resin weighing about 108 or 109 kg. He cut the bottom portions of the cylinders to insert the bars inside. First he wrapped them in light brown coloured cellophane paper (P98), placed them in batches of about 8 bars in each cylinder and welded the inner sides to prevent shaking. The bottom portions of the cylinders were marked as exhibits P132 to P143. These portions were re-welded thereafter and the cylinders were painted grey and numbered and marked as stated earlier. They were then placed in three wooden pallets (exhibits P145 - P147) and made ready for export. The witness, Sultan, identified the 87 bars of cannabis

resin exhibited as P9 - P95, the cellophane wrapping (exhibit P98) and the 12 cylinders marked exhibits P120 - 131 and the bottom portions exhibits P132 - P144 as the items he personally handled for exporting the consignment to Seychelles at the instance of the accused.
The export documentation was to be handled by an agency run by one Peter Mwanzia (PW25) and one Patrick Omala. On 2 October 1997, Sultan agreed with Patrick, who was one of his colleagues in school, to process the documentation for a fee of Kenyan Shillings 10,000. Sultan testified that at his request, the agents prepared a fictitious invoice under the firm name of "Chemigas Limited" (exhibit P148). It relates to a sale of 12 empty gas cylinders in 3 pallets for Kenyan Shillings 294,000 to "M/S Waterloo Factory, P.O. Box 294, Victoria, Mahe, Seychelles" to be shipped from Mombasa to Seychelles on board the vessel "Nedlloyd Merwe" on 9 October 1997. Sultan admitted in evidence that the fabrication of this invoice was necessary in view of the illegal nature of the shipment. The prosecution produced a specimen invoice from the genuine firm "Chemigas Limited" in Nairobi, Kenya as exhibit P161, which corroborated Sultan's assertion. It was also observed that the calculation of figures in the fabricated invoice was incorrect.

Mwanzia identified the "application for shipping order" (exhibit P149) prepared by him in his handwriting on the basis of the particulars of the fictitious invoice (P148). He however changed the name of the vessel to "PO Nedlloyd Mombasa".

Samuel Tumbo (PW5), the Exports Supervisor of Mackenzie Maritime Limited, Kenya, testified that Mwanzia presented an application for a shipping order and an invoice as an agent for "Chemigas Limited" on 3 October 1997. On the basis of the particulars furnished, he prepared the "Standard Shipping Order" (exhibit P150), and the "Export Entry" (exhibit P151). The name of the Clearing Agent in the Export Entry was "Magutu Enterprises Ltd". Mwanzia in his testimony explained that his agency did not have a licence to practice although

they started business in July 1997. Hence he used the company name of Magutu Enterprises Ltd, whose Director John Wachira was known to him. The three pallets containing the 12 cylinders were stored inside a container bearing the number KNLU-3147418 (photo exhibit No. P158).
The "Standard Shipping Order" and the "Export Entry" were tendered to the customs and excise department, Mombasa on 6th October 1997. The port charges to be paid were left by Nassor Sultan with the Mwanzia's secretary. Sultan testified that the accused, who was still at the guest house, was in constant contact with him. According to the immigration documents produced by the prosecution the accused left Seychelles for Kenya on flight KQ 453 on 20 September 1997 and returned from Nairobi, Kenya on flight KQ452 on 11th October 1997 (exhibits P165 and P166). The passenger lists produced by the Manager of Kenya Airways in Seychelles (exhibits P208 and P209) contain the name of the accused as departing and arriving on those two flights.

Mwanzia (PW25), the Clearing Agent, stated that the goods for shipment were packed by Sultan and delivered at his office, and that he did not check the contents. In any event the consignment according to the invoice was 12 empty gas cylinders in three pallets. He testified that these items were passed by the Port Authorities and Police Security at the Port as they were consistent with the documents.

After handing over the container to the Port Authorities, Mwanzia took the documents to Mackenzie Maritime Ltd for the preparation of the Bill of Lading and the cargo manifest (P159). These documents were prepared on 28 October 1997 after the container was loaded into the vessel. Six copies were collected by Sultan and one of each of them (exhibit P158 and exhibit 159) were left at the office of the Clearing Agent.

Sultan testified that the accused instructed him to post the Bill of Lading and other documents needed for clearing by

registered post addressed to "Lina Palmyre, c/o PO Box 450, Seychelles International Airport, Mahe, Seychelles." He used a fictitious name of "M/S Al-Suuad, P.O. Box 83215, Mombasa" as the sender however as he feared that he would get involved if the letter was returned undelivered. The postal receipt issued by the General Post Office, Mombasa, Kenya has been produced as exhibit P156. Geoffrey Georges (PW4) a postal officer from the GPO in Mombasa identified his writing and the signature on the receipt and produced the letter bill (exhibit 25) which shows that this registered letter left Nairobi on 31 October 1997 and was received in Seychelles on 3 November 1997. Miranda Francourt (PW7), a Clerk at the Seychelles Post Office testified that consequent to a notice sent, Lina Palmyre, the addressee, who was personally known to her, came to the Post Office on 5 November 1997 and received the letter, after signing the receipt bearing No 08291 (exhibit P162). Geoffrey Georges (PW4) testified that the sender had used a "Post Officer cover" sold at the Police Office. The registered letter rate was "29 Kenyan Shillings per 10 g". Hence as 203 Kenning Shillings were charged, as per the receipt, the weight would have been about 70 g.

Lina Palmyre (PW9) the sister of the accused, testifying for the prosecution admitted that she received a "registered letter" addressed to her and identified her signature on receipt (exhibit 162). She stated she was expecting that letter as her brother, theAacused had told her to collect it for him, although addressed to her. She did not open it on receipt, but merely gave it to the accused. She further stated that it was an A4 size envelope.

The foregoing was a brief summary of the evidence for the prosecution to establish the preparatory acts done by the accused outside Seychelles. Section 10(b) implies that had the accused done those acts in Seychelles, it should be an offence under the Act. Section 3 prohibits both the exportation and importation of a controlled drug. Hence when those acts are done in Seychelles, they are done preparatory to or in

furtherance of the offence of exportation. If done outside Seychelles, they are done preparatory to or in furtherance of an importation to Seychelles. As both exportation and importation are offences under section 3, as has already been found, the charge of importation can be established by proving preparatory acts done or caused to be done outside Seychelles, both under sections 10(b) and 27(c).

Sultan testified that on 3 November 1997 the accused telephoned him and stated that the container had been seized by the police. He did not contact him thereafter.

ASP Ronny Mousbe (PW29) in his testimony stated that the police had information that the cargo ship P&O Nedlloyd Mombasa had on board a container containing hashish. He then obtained the cargo manifest of all cargo being offloaded from that vessel in Seychelles. He located the container addressed to the Waterloo Factory, purportedly containing 12 empty gas cylinders. He checked with Mr Hyacinth Payet, the General Manager of that factory and found that he had not ordered such a consignment from anywhere. On 3 November 1997 having received further information that certain persons were trying to gain entry to the container, he obtained the necessary permission and moved the container bearing No KNLU3147418, with a seal bearing No 1677815 intact to the Drug Squad premises and guards were placed. Patrick Barallon (PW22), Managing Director of Land Marine Ltd, testified that the container was offloaded on 31 October 1997 with seals intact. David Arrisol (PW23) the Tally Clerk attached to Land Marine Ltd, identified his handwriting on the tally sheet (exhibit P207) wherein the container in issue was itemised as item 11. He also certified that the seals were intact. The container was opened on 14 November 1997 around 11.30 am in the presence of ASP Mousbe, Gilbert Simeon (PW27), Trades Tax Officer, and Hyacinth Payet (PW20), General Manager of the Waterloo Factory, who all testified that the seals were intact at the time of opening. It has therefore been established that the container which was

sealed and loaded in Mombasa on 28 October 1997 was opened in Seychelles on 14 November 1997 and accordingly, on the basis of the evidence, the Court is satisfied that there had been no opportunity for anyone to tamper with the contents in the course of the voyage until it reached Seychelles and was opened.

ASP Mousbe further testified that the bottom portions of the 12 cylinders were cut open and that inside were bars of cannabis resin wrapped in light brown cellophane paper and secured with metal rods welded inside the cylinders. He seized 87 bars, which he handed over to ASP Ernest Quatre (PW28). The bars were put inside three black plastic bags, sealed and registered as CB 1095/97. ASP Quatre testified that on 17 November 1997 he handed them back to ASP Mousbe for the purpose of taking them to Dr Gobine, the analyst. Exhibit PI, the letterof request for analysis gives a detailed description of the wrappings of the bars. The report and the 87 bars were returned by Dr Gobine to ASP Mousbe on 19 November 1997. Dr Gobine (PW1) identified the seals placed by him when he handed over the drugs to ASP Mousbe and produced his report (exhibit P2) wherein he had certified that the 87 bars of resinous material are cannabis resin, weighing a total of 109kg 685g. On an application made by the defence, the 87 bars were weighed in Court by Dr Gobine. It was found that the total weight was 109kg 645g, which was 40g less than when they were originally weighed. Dr Gobine once being recalled, testified that there is always a permissible error of 5g. He also stated that the weighing scale was very sensitive and that due to the unevenness of the base, there was a "parallel lax" resulting in slight inaccuracies. He however maintained that when he weighed them at the laboratory, the total weight was 109kg 685g. On a consideration of the evidence of Dr Gobine I am satisfied that the weight given in the report (exhibit P2) is correct and that the slight discrepancy, considering the total weight of the drugs creates no doubt as to the nature, substance or identity of the exhibits. On 10 November 1997, four days before the

container was opened, the accused had offered a sum of R200,000 to PC Bradford Samedi (PW10) seeking his assistance to remove the gas cylinders from the container. ASP Mousbe testified that PC Samedi, an officer of the Drug Squad at Newport, was engaged on patrol duty as well as guard duty at night on shifts. PC Samedi in his testimony gave a detailed account of his meeting with the accused at Plaisance and Roche Caiman. He stated that the accused told him that the cylinders contained drugs belonging to him and that he had spent a considerable sum of money to import them from Kenya. Samedi and the accused had worked at the Fire Brigade before and knew each other well. Samedi informed ASP Mousbe about the conversation, and on his instructions, agreed to help him with the intention of setting a trap. ASP Mousbe stated that Samedi was asked by him to talk to the accused on his telephone regarding the agreement to help, and he listened on the speaker.

On 13 November 1997 at the request of the accused, Samedi met with him at his residence at Cascade. There was one Jean Francoise with him. Both of them then went to Anse Aux Pins where one Dave Benoiton joined them. From there they came to Bel Air, where the accused visited a house and brought a metal cutter (exhibit PI 63). He was told to use it to cut the lock of the container. They planned to enter the Drug Squad compound in the early hours of the morning of 14 November 1997. Samedi was asked to cut the lock in advance so that the removal of the cylinders could be done quickly. Samedi was on the night shift that night.

Being informed of the plan by Samedi, ASP Mousbe detailed 20 special support unit officers on watch duty at the Drug Squad premises. They lay concealed inside the office with lights switched off. Samedi telephoned the accused to tell him that everything was ready for them to enter. A short time later the accused arrived in a blue pickup and parked it away from the Drug Squad premises. He then came up to the fence near the office of ASP Mousbe and spoke with Samedi. Then he

went away stating that he would return with some men. Later he came back for the second time that night, but did not get into the compound as daylight was approaching. The next day, 14 November 1997, the accused telephoned Samedi once more and told him that he had lost a lot of money on the drugs and that he was serious about getting them back.

Before the break-in was planned for the night of 13 November 1997, the wire mesh fence behind the "bonded warehouse" had been cut. After ASP Mousbe produced a sketch of the Drug Squad premises (exhibit P210), the Court on a visit to the locus in quo observed that the cut was large enough to enable a person to come into the premises from the adjoining compound. The cutting could have been done without anyone observing from the office. The container was in front of that warehouse. It was observed that had Samedi been the only guard on duty that night, the cylinders could have easily been removed through the fence to be loaded to a vehicle parked in the adjoining compound. The sketch also indicated as point A the spot where the accused allegedly spoke with Samedi, watched by ASP Mousbe from his office, which was 12.9 metres away and had an unobstructed view.

Andoise Gustave (PWll) who was on guard duty at the new port entrance gate in November 1997 testified that the accused met him near the airport on 8 November 1997 and asked for his assistance to get the drugs in a container which was in the compound of the drug squad. He told him that he could not take the risk. Then he offered him a bottle of whisky, which he did not take. The next day he reported the matter to ASP Mousbe. ASP Mousbe in his testimony corroborated the evidence of Gustave.

Subsequent to the opening of the container and the seizure of the drugs on 14 November 1997, investigations commenced around 21 November 1997 in Kenya. Police Inspector Samuel Nguriathi of the Kenyan Police Force (PW8), testified that in the course of his investigations he interviewed Nassor Sultan

(PW2), George Maina, the scrap yard assistant (PW3), and Peter Mwanzia (PW24) and Patrick, the clearing agents. He stated that in the course of the investigation he took into custody the export documents, the postal receipt and the invoice. He further stated that of all the documents, including the invoice purportedly from "Chemigas Limited" (exhibit P148), were fabrications and that the name "Maguto Enterprises Ltd" in the export entry had been used without the consent of that company.

Charles Kinaro (PW6) a police corporal of the Kenyan Police testified that he assisted Inspector Nguriathi in the investigation. He seized the postal receipt (exhibit P156) from the possession of Nassor Sultan, who stated that he had posted the export documents to Seychelles. Nassor Sultan in his evidence stated the same. He further stated that Nassor Sultan is being charged with the offence of trafficking in dangerous drugs and that Peter Mwanzia and his partner are also being charged with similar offences and with the offence of forgery of documents. Hence Nassor Sultan and Peter Mwanzia who testified for the prosecution should be regarded as accomplices in this case. It must however be stated that in the instant case Mwanzia testified that he did not know the accused nor that Nassor was acting for him. Hence he is not per se an accomplice of the accused. The only evidence is that the invoice from "Chemigas" which was the basic document upon which the export documentation commenced, was fabricated by his clearing agency. The prosecution case against the accused is based primarily on the evidence of Nassor Sultan who is clearly an accomplice. Hence once again I warn myself that to convict the accused on the testimony of the accomplice, the Court must be satisfied that it can be corroborated by independent evidence which connects or tends to connect him with the offence. Evidence capable of amounting to corroboration has been defined as "evidence which is relevant, admissible, credible and independent and which implicates the accused in a material particular". I shall accordingly, for the sake of clarity, consider the foregoing

evidence under those various heads.

1. **Relevant** - The word "relevant" in the law of evidence means that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or nonexistence of the other.

In the instant case, the Court is satisfied that only relevant evidence has been admitted and where objections had been raised as regards the relevancy of any evidence they had been considered and ruled upon in the course of the proceedings.

2. **Admissible** - In the instant case, the prosecution relied on several photocopies of export documentation processed in Kenya. They were produced through Inspector Nguriathi (PW8) who testified that the originals were seized by him in the course of his investigations and that they were to be used in the criminal trial in Kenya. The admission of photocopies was not objected to by the defence in general, but where it was objected to rulings were made thereon. Further, computer processed documents were admitted upon obtaining certificates under section 15(5) of the Evidence Act and considering the relevant evidence as to the reliability and authenticity.

Hence the independent evidence adduced to corroborate Nassor Sultan's evidence has been both relevant and admissible.

3 **Credibility of Sultan's Evidence**

The defence suggested to witness Sultan that he was testifying for the prosecution on the basis of a promise of leniency in the trial in Kenya. He denied this, and stated that he is presently facing charges for trafficking there and that till the trial commences he has been released on bail. In the

instant case this witness admitted his entire involvement in the exportation of the drugs exhibited in this case on the instructions of the accused. He frankly stated that he knew that the consignment contained drugs and that in fact those drugs were handed over to him by the accused himself. He further admitted that he caused an invoice to be fabricated by the clearing agent and that he inserted a fictitious name in the postal receipt (exhibit P156) as the whole of the transaction was a "dirty deal."

This witness met the accused on two or three occasions at the "Cowrie Shell" guest house. In Seychelles he identified the accused from a photograph in an album shown to him at an identification parade held at the police station in the presence of ASP Mousbe and Inspector Nguriathi. Hence he claimed that he was certain about the identity of the accused as Tony Dubignon and no one else. The Court is satisfied that this witness was utterly truthful in his testimony. He was frank and clear, although he was inculpating himself. He had no motive to inculpate the accused without reason. But his evidence needs corroboration on material particulars to be admissible.

4. **Independent Evidence**

What then constitutes the independent evidence that corroborated Sultan's oral evidence which not only show that the offence had been committed but also that it was the accused who committed it?

Independent evidence must emanate from a source other than the accomplice. Hence I shall examine the evidence by classifying it under different sub-heads.

(a) Evidence of Surrounding Circumstances

The prosecution adduced the evidence of Marie Anne Bijoux (PW26) the manageress of Air Booking Ltd, an agent of Kenya Airways, and David Bastienne (PW17), a reservation assistant, to establish that the accused was issued an air ticket on flight KQ 453 for travel on 20 September 1997 to

Mombasa via Nairobi with the return date to Seychelles kept open (exhibit P204). Immigration Officer, Leon Bonnelame (PW13) produced the embarkation card (exhibit P165) and the disembarkation card produced by the accused on 11 October 1997 when he returned on flight KQ 452 from Nairobi. Documentary evidence in the form of embarkation and disembarkation cards was also produced as exhibits P170 to P177 to show that the accused had travelled frequently to Nairobi. It was also sought to be established that one Kearer William alias Kamal William, who witness Sultan stated introduced the accused to him, was also present in Mombasa during the relevant period and was also a frequent visitor to Nairobi about the same time that the accused visited Nairobi. An air ticket (exhibit P206) shows that this Kamal William travelled to Mombasa via Nairobi on flight KQ 453 on 6 September 1997 with the return date open. The embarkation card (exhibit P167) shows that he left Seychelles that day and the disembarkation card (exhibit P168) shows that he returned to Seychelles on 27 September 1997. Hence from 20 September 1997 to 27 September 1997, both the accused and Kamal Williams were in Mombasa. This independent evidence corroborates Sultan's evidence that sometime in late September 1997 he met with Kamal William, whom he had known before introduced him to the accused. This evidence also corroborates his oral evidence that the accused did in fact have the opportunity to arrange the exportation of the drugs by delivering them to him and being present in Mombasa till such time as the export documentation was complete.

Sultan also testified that after the accused left Kenya on 11 October 1997 he made telephone calls on 13 October 1997 and 16 October 1997 to the accused's telephone number 515554 (in Seychelles) from his home telephone number 227605 (in Mombasa). The September/October 1997 telephone bill was produced through Hezborn Agutu (PW14) the Manager (Investigations) of the Kenya Post and Telecommunications Corporation and exhibited (exhibit

P152)as proof of those two telephone calls. Telephone bills for the period 15 September 1997 to 15November 1997 (exhibit P153 and P154) produced by David Watson (PW11) the Chief Executive of Cable and Wireless (Sey) Ltd established that the telephone number of the accused was 515554. Exhibit P153 shows that a telephone call was made on 12 October 1997, two calls on 13 October 1997, one call on 15 October 1997, one call on 16 October 1997 and another call on 22 October 1997 to Sultan's telephone number 227605 (Mombasa) from the accused's telephone number 515554 (Seychelles). These telephone calls corroborate Sultan's evidence that the accused was getting worried about the delay in receiving the shipment. Sultan testified that he explained that the delay was due to the bad weather conditions in Mombasa. The ship left Mombasa on 28 October 1997, as per the bill of lading (exhibit P155) and the cargo manifest (exhibit P159).

(b) Implication of the Accused in Material Particulars

Sultan testified that the export documents were posted to Lina Palmyre, the sister of the accused, as instructed. Exhibit P156, the postal receipt, is dated 28 October 1997 and it was received by Lina Palmyre on 5 November 1997 (exhibit P162). She testified that she collected the envelope and handed it over to her brother the accused who had asked her to do so. This oral and documentary evidence connect the accused with the importation of drugs by independent corroboration of the testimony of Nassor Sultan that the accused caused the drugs to be exported in Mombasa to be imported in Seychelles by him and that he needed the export documents to clear them on arrival.

(c) Evidence of the Accused's Conduct as Corroboration

As has been seen, the prosecution sought to establish the identity of the accused by the evidence of Nassor who testified that he met him personally and received the instructions to export the drugs which he supplied and made

an advance payment. That witness also positively identified the accused at the identification parade by means of a photograph album containing over 50 photos, and also a dock identification. This identification was corroborated by the accused's own conduct subsequent to his return to Seychelles on 11 October 1997. Apart from the telephone calls he made to Sultan and the collection of the export documents through his sister, he sought to remove the consignment of drugs by unlawful means. The evidence of PC Samedi (PW10), and Andoise Gustave (PW11) regarding the assistance sought to remove the drugs on the promise of gratifications and the admission to Samedi that he had spent a good deal of money in importing the drugs which belonged to him, are relevant in this respect. The evidence of those two police officers was credible and the defence did not seek to attribute any motive as to why they should implicate the accused. Further ASP Mousbe testified that in the early hours of 14 November 1997 when the accused was expected to enter the Drug Squad compound to remove the drugs, he saw the accused, whom he knew very wel,l driving in a blue pickup in front of the Land Marine Division, which is opposite the Drug Squad office, and reversing. Later from his office window, he once again saw the accused accompanied by Dave Benoiton talking to PC Samedi near the fence. This evidence remains uncontradicted by cross-examination and hence should be considered as evidence relevant to the conduct of the accused for the purpose of connecting him to the commission of the offence.

ASP Mousbe further testified that in the course of the investigations several searches were made at the residence of the accused's mother with whom he usually resided at Cascade and at Petit Paris where he frequented, and at Mont Buxton where one Dave Benoiton lived. Having failed to apprehend him, charges were filed in this Court on 10 February 1998 and an open warrant was obtained for his arrest. Subsequently a police announcement was made over the radio and television informing that the police were

searching for several persons and that if they did not surrender by a particular date the search would be handed over to the army. ASP Mousbe testified that on 11 April 1998 around 7.15 pm he received a telephone call from Mrs A Antao, attorney-at-law, that one of her clients called "Chaka Zulu" wanted to surrender. He accompanied her to Cascade where the accused surrendered to him at his mother's residence. The accused has been on remand since then. Before the accused surrendered, but after the open warrant was issued this Court, being satisfied on the basis of an affidavit filed by ASP Mousbe that the accused was absconding, acted under section 31(1) of the Misuse of Drugs Act and seized the "realisable property" of the accused.

Hence the evidence of ASP Mousbe as regards the unsuccessful attempts made to apprehend the accused, and the subsequent surrendering to the police established that he was absconding arrest. In the absence of any reason as to why he was not available at the usual places where he resided or frequented, the court would infer that he was absconding due to the fear of being arrested in connection with the offence he has been charged in this case.

Another factor to be considered is the consigning of the container to the Waterloo Factory. Mr Hyacinth Payet (PW21) the General Manager, testified that he had never ordered CO2 gas for his soft drinks factory from Kenya, and that the consignment had been wrongly addressed to his company. Nassor Sultan testified that this address was given to him by the accused. Hence the fact that the container was consigned to a company fictitiously attracts the inference that it was done due to the illegal nature of the shipment. That conduct corroborates Sultan's evidence against the accused.

The Case for the Defence

The accused exercised his right to remain silent in terms of section 184 of the Criminal Procedure Code, but called witnesses in his defence. No adverse inference is drawn from

the accused's election to remain silent. I bear in mind that it is incumbent upon the prosecution to prove the accused's guilt beyond a reasonable doubt, and that the accused has no burden to prove his innocence. The defence called Kearer William alias Kamal William (DW3) to establish that the prosecution charged him with the same offence in respect of the same consignment of drugs imported from Mombasa, in case No Cr. 57/97 of this Court (exhibit D2). In that case, William was produced before this Court on 19 December 1997 and remained in custody. Charges were filed on 22 December 1997. On 10 February 1998, counsel for the prosecution informed the Court that subsequent to interrogating certain witnesses, the Attorney General had decided that although the evidence disclosed a degree of involvement, it was not sufficient to proceed against that accused, and hence sought to withdraw the charges in terms of section 178 of the Criminal Procedure Code. Accordingly William was acquitted. The Court was also informed that the new material available implicated a prime suspect who was being charged that day. It was in these circumstances that the charges were filed against the instant accused in this case on the same day. In his testimony Kearer William admitted that he made a voluntary statement to Lance Corporal Maxime Payet (DW2) on 16 December 1997 (exhibit D3). In that statement he stated that he went to Mombasa via Nairobi on 6 September 1997. He further stated thus (as appears in the translation from Creole):

> My reason for me to go to Mombasa, Kenya is because I had a good sum of money with me to buy some drug, hashish. Around 12 September 1997, I saw a man who I know him as Rashid but I do not know his surname. After I had question people on the subject for buying drugs hashish. Then I saw him and introduced myself to him and we talked for quite a long time in my guest house Octopusy where I was living. Around 9.00 on the same night I gave Rashid my money, I mean 5000 US dollars. Rashid assured me

> that he is going to bring my hashish around midnight. Then Rashid left my room and went away. Then I waited for him but did not see him until I returned back to Mahe. I knew Nassor very well he is also an African and he lived at Mombasa. I'm friend with him but I do not do any drug transaction with him.

Although in his examination-in-chief he admitted that the statement was made voluntarily, on being cross-examined he denied that he spoke to anyone about hashish. He also denied that he stated that he did not know the surname of Rashid, who according to the evidence was the brother of Nassor Sultan. He repudiated the statement and stated that Lance Corporal Payet had introduced statements which he never made. He however admitted that he signed that statement at five places. The Court is satisfied that the statement was made voluntarily and that the witness was trying to resile from its contents due to his admissions as regards purchasing of hashish. This witness had therefore made a voluntary statement previously which was inconsistent with his testimony before this Court thus impugning his credibility.

William however denied that he introduced the accused to Nassor Sultan. He was undoubtedly seeking to distance himself from the accused to prevent any suspicion that both of them travelled to the same destination for a common purpose and met with Nassor Sultan, who had admitted that the accused was introduced to him by William. Lina Palmyre, the sister of the accused to whom the export documents were posted on the instructions of the accused, admitted that during the time of the alleged importation, she was having an affair with Kearer William.

Hence at the time of institution of proceedings the prosecution had the voluntary statement of Kearer William to connect him with the importation of the drugs. Mr Renaud, counsel for the accused emphasised the averment in the affidavit dated 17

December 1997 (exhibit Dl), filed by Lance Corporal Maxime Payet, wherein he had averred inter alia that "the evidence so far available establishes direct involvement of the suspect in importing the said quantity of cannabis resin...."; and contended that the subsequent charging of Tony Dubignon on the same facts and for the same offence as the primary offender would cast a reasonable doubt on the prosecution case, which doubt must be resolved in favour of the present accused. As I have already stated, the Attorney General did not state that William was prosecuted in error. He stated that subsequent material elicited from witnesses showed the involvement of William but not to the extent of maintaining a charge before a Court. The evidence of Kearer William in the instant case showed that he was an unreliable witness who was guarding himself from disclosing any part in the transaction. Hence the decision of the Attorney General to withdraw the charges due to insufficient evidence cannot be used to the benefit of the present accused against whom there was substantial evidence.

The evidence of Sultan that he posted the export documents to the accused, addressed to his sister and received by her, was sought to be challenged by adducing the evidence of Therese Nora Dubignon (DW1), the mother of the accused. She testified that she was present when her daughter brought the envelope and gave it to her son, the accused. She stated that she had asked her son to purchase some hair dye but he had failed to do so. She further stated that the envelope contained two Muslim caps and two cassettes which were produced in court. It was clear that this was a desperate attempt to cast a doubt as to the contents of the envelope about which the only evidence was that of Sultan. This attempt failed as items such as caps and cassettes would have come as a parcel and not as a letter. The witness admitted that registered letters are issued from a counter inside the Post Office, while parcels are delivered in a different section outside. According to the evidence of the Postal Clerk Miranda Francourt, the letter was delivered as a

registered article through the counter inside the Post Office. Further the Kenyan Postal Officer Geoffrey-Georges (PW4) stated that what was posted in Mombasa was a registered letter and that the charges were calculated for a registered letter. Hence I reject the evidence of Nora Dubignon both on the facts she sought to establish, and as she was admittedly present in Court throughout the proceedings.

Mr Renaud also submitted that even a charge of importation required proof of knowledge and possession. It was submitted that the accused did not possess or have any control over the container nor the contents therein and hence the offence of importation had not been proved. It was also submitted on the basis of *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 that the accused did not even have the opportunity or right to open the container which the prosecution alleged contained drugs imported by him. He further submitted that the cargo was not collected by the accused and hence the process of importation was incomplete, and that in any event it was addressed to a different consignee.

In the case of *Donald Clarisse v The Republic* (1982) SLR 75 it was held that as importation could be done by causing the good to be brought, and that proof of possession by the accused was not necessary. Proof of possession was necessary only where a person himself brought drugs from abroad. A similar view was taken in the Mauritian case of *Mian & Ors* (supra) where the Court held that the offence of importing opium was proved where the acts of the accused showed that, although they had not personally brought the opium from abroad, they had caused it to be so brought.

Hence on a consideration of the totality of evidence in respect of count 1, the prosecution has established beyond a reasonable doubt that the accused imported the quantity of cannabis resin seized from the container shipped on vessel P&O Nedlloyd Mombasa, by causing it to be brought to Seychelles.

Accordingly I convict the accused on count 1 as charged.

The charge under count 2

In this charge, the prosecution alleges that the accused in November 1997 at Roche Caiman corruptly offered to give PC Bradford Samedi, a Public Officer, a sum of R200,000 for assisting him to have access and gain entry to the drug squad office in order to take away the controlled drugs stored in 12 gas cylinders kept inside a container.

Section 91(b) of the Penal Code is as follows-

> Any person who -
> (a) .....
> (b) corruptly gives, confers or procures, or promises or offers to give or confer, or to procure or attempt to any person employed in the Public Service, or to, upon, or for any other person, any property or benefit of any kind on account of any such act or omission on the part of the person and employed, is guilty of a misdemeanour and is liable to imprisonment for three years

The essence of a charge under section 91(b) is the act of giving or promising to give any person employed in the Public Service any property or benefit of any kind to do or omit to do an official duty. The word "property" is defined in the Penal Code as including "anything animate or inanimate capable of being subject of ownership". Hence money, in whatever form is property for this purpose. Admittedly PC Samedi, to whom the accused allegedly promised R200,000, is a Public Officer. He was also admittedly on guard duty at the drug squad premises and hence was in a position to omit to do his official duties and permit the accused to enter and remove the drugs from the premises and also illegally cut the lock of the

container with the metal cutter provided by the accused.

Mr Renaud submitted that a charge under section 91(b) could not be maintained purely on the evidence of an alleged recipient or would-be recipient of a gratification. He submitted that there was no proof that the accused paid R200,000 or that PC Samedi received that amount. That was not necessary as the case for the prosecution is that the accused "promised or offered to give", which acts are included in the offence under section 91 (b). He further submitted that at the point Samedi agreed to assist on the basis of the offer of money, he himself became liable to be prosecuted under section 91 (a) which makes it an offence to "agree to receive" a gratification. A similar situation arose in the case of *Uganda v Mukhalwe* (1968) EA 373. In that case a magistrate in Uganda solicited a bribe of 100 Shillings and two bunches of Matoke (cooking bananas) from a defendant in a case to give judgment in his favour. The defendant agreed, but reported the matter to the police. The police set a trap and gave the defendant 30 Shillings in marked notes which he handed over to the magistrate. The magistrate asked the defendant to deliver the Matoke to his residence. The police arrested the magistrate, and in a subsequent trial he was convicted and sentenced.

In that case, the agreement to give did not constitute an offence as it was done to set a trap through the police. Similarly in the instant case, the agreement to receive does not constitute an offence as it was done for the same purpose. According to the evidence PC Samedi agreed to permit his duties to be influenced with the intention of trapping the accused and not to benefit by the offer. ASP Mousbe testified that PC Samedi reported the matter to him immediately on his return to the office and that it was he who instructed him to proceed as if his agreement to assist was genuine. From that moment both PC Samedi and ASP Mousbe were performing their legitimate duties as police officers to apprehended the accused.

The offence however requires an overt act apart from the mere evidence of a person that someone has offered a gratification for the performance or non performance of a public duty within his scope of employment. The overt acts in the present case are the various telephone calls between the accused and PC Samedi monitored by ASP Mousbe either on the speaker or the parallel line and the fact that the accused, in reliance on the assistance promised by PC Samedi, came to the drug squad premises in the early hours of 14 November 1997 to execute the plan. There is also the evidence of Gustave, who was guarding the main port entrance, that he too was promised a bottle of whisky by the accused to permit entry to the drug squad premises. The latter offer is however not part of count 2, but provides additional evidence of an overt act independent of the evidence of PC Samedi. The Court is therefore satisfied beyond a reasonable doubt that the prosecution has established the charge under count 2. Accordingly I convict the accused on count 2 as charged.

The accused is therefore convicted on both counts 1 and 2 as charged.

Record: Criminal Side No 003 of 1998

Jensen v Hoareau

Evidence – examination on personal answers

The plaintiff sued for recovery of a loan. The defendant denied the loan but asserted that the money given was a gift. The plaintiff sought to examine the defendant on her personal answers.

HELD:

(i) A party to proceedings has a right to examine the other party on their personal answers. This right can only be taken away on strong grounds;

(ii) A defendant is called to give their personal answers for the purpose of obtaining admissions from them or evidence which would destroy their case or strengthen that of the party calling them;

(iii) The Court has a discretion to disallow a motion to call a party to give personal answers if the motion is unreasonable;

(iv) The parties to a civil action have a right to know the legal arguments of their opponents and specifically the claims on which the other party seeks to rely to prove their case; and

(v) Strong grounds to deny a party the right to examine a party on personal answers include where the physical attendance of the defendant is impossible or dangerous to life, or of it is proved that the person to be examined is not connected to the claim being made.

Legislation cited
Evidence Act, s 4
Seychelles Code of Civil Procedure, s 163

Cases referred to
Chez Deenu v Philbert Loizeau (unreported) CS 202/1986
Chez Deenu v Philbert Loizeau SCA Appeal 17/1987

Foreign cases noted
Re Kassamally Esmael (1941) MR 20

Ramniklal VALABHJI for the Plaintiff
Pesi PARDIWALLA for the Defendant

Ruling delivered on 9th day of March, 1998 by:

PERERA J: The plaintiff, who is a non–resident, sues the defendant for the recovery of US dollars 14,276 which he avers was granted as a loan while he was a visitor to Seychelles in 1993. The defendant in her defence has averred that that sum was given to her as a donation or gift.

The instant ruling concerns an ex-parte application made by Mr Valabhji, counsel for the plaintiff, under section 163 of the Seychelles Code of Civil Procedure (Cap 213). It has been averred that since the defendant has admitted the claim as a gift unsubstantiated by any document, summons should be issued on her to appear in court to be examined on her personal answers "concerning all aspects of the case and particularly the claim of US dollars 14,276".

Although the application was titled "ex-parte"it had been served on the attorney for the defendant as the attorney for the plaintiff had endorsed on the application "to be served on defendant's attorney Mr Pesi Pardiwalla, Victoria". Hence the matter was heard inter partes.

Section 163 provides that –

> Whenever a party is desirous of obtaining the personal answers not upon oath of the adverse party, he may apply to the judge in court on the day fixed for the defendant to file his statement of defence or prior thereto, or he may petition the court ex parte at any time prior to the day fixed for the hearing of the cause or matter to obtain the attendance of such adverse party, and the court on sufficient ground being shown shall make an order granting the application or petition. And the party having obtained such order shall serve a summons, together with a copy of the order, on the adverse party to appear in court on the day stated therein.

In the supporting affidavit to the application Mr Valabhji, attorney for the plaintiff. has averred –

> 2. That my client will not be able to travel to Seychelles for the hearing of the case on the 11 July 1997.
>
> 3. That it is necessary that the defendant be examined on her personal answers before we proceed with the case proper.

Mr Pardiwalla submitted that the only reason adduced for making the application was the inability of the plaintiff to attend court on a particular day for the hearing, and that was not a valid reason for ordering summons on the defendant.

Mr Valabhji in reply submitted that the plaintiff was a foreigner and that he cannot come to Seychelles for various reasons. He further submitted that on the basis of the pleadings the plaintiff has to prove that there was a loan and the defendant would have to rebut it on the basis of a gift. He therefore

maintained that he had a right to call the defendant on personal answers.

In the case of *Chez Deenu v Philibert Loizeau* (unreported) CS 202/86 the plaintiff, a merchant, claimed R17,449.13 in respect of goods supplied to the defendant. The defendant in his defence denied that he was indebted to the plaintiff in the sum claimed of at all. Counsel for the plaintiff in making an application to examine the defendant on his personal answers submitted that the defence was a total denial of indebtedness which indicated that there were no transactions between the plaintiff and the defendant and also that they did not know each other. The learned Chief Justice Seaton rejected the application on the basis that the plaintiff must first adduce some prima facie evidence before he could call on the respondent for his personal answers.

The Court of Appeal (SCA Appeal No. 17 of 1987) set aside that ruling. Goburdhun JA stated thus –

> The right of a party to examine his opponent on his personal answers should not be taken away from the party except on strong grounds …….
>
> The purpose of calling a defendant on his personal answers is to obtain admissions from him or evidence which would destroy his case or strengthen that of the party calling him. Of course if a motion to call a party on his personal answers is unreasonable the Court has a discretion to disallow it.

D'Arifat JA observed that –

> The parties to a civil action have a right to know the legal pretentions of their opponents and more specially the averments on which they rely to prove their case.

In the case of *Re Kassamally Esmael* 1941 MR 20 it was held that the right to examine a party on personal answer, being a legal right, could be denied only on strong grounds such as where the physical attendance of the defendant is impossible or dangerous to life, or if it is proved that the person to be examined is in no way concerned with the issue. There are no such grounds in the instant case.

The defendant had in her defence admitted receiving a total of US dollars 14,276 from the plaintiff as a donation, but not as a loan. The plaintiff in such circumstances has the right to call the defendant on her personal answers to obtain admissions from her or evidence which could destroy her case or strengthen his own case. Such a procedure is not unreasonable nor does it give any unfair advantage to the plaintiff as such evidence is not given on oath and as under section 4 of the Evidence Act, the defendant's counsel has the right to examine his own client to correct any ambiguity arising from the answers given. There are therefore sufficient grounds for ordering summons on the defendant. Accordingly, the Court makes an order that summons be issued on the defendant to appear in court at the next date of hearing, to be examined on her personal answers.

Ruling made accordingly.

Record: Civil Side No 379 of 1996

Husser v Larue

Civil Code - contract formation – contractual promise – reliance on promise

The plaintiff transferred 50,000 Swiss Francs to the defendant. The plaintiff claimed that the transfers were made on the promise of the defendant to give him participation in a guest house project for which the funds were required. The defendant claims that the transfers were in the form of gifts, free assistance and voluntary contributions.

HELD:

(i) The parties entered into a contract when the plaintiff agreed to transfer 50,000 Swiss Francs to the defendant on the defendant giving him participation in the business project, and the defendants accepting the offer; and

(ii) Although the parties had to agree to the specific terms of the defendant's participation, the defendant's contractual obligations were established once she accepted the offer which was acknowledged by the acceptance of the funds.

Legislation cited
Civil Code of Seychelles, arts 1341, 1347, 1356
Immovable Property (Transfer Restriction) Act

Cases referred to
Firma SAI etc and another v Hotel des Seychelles (1978 to 1982) SCAR 122

Judgment for the plaintiff in the sum of R21000 x 3.5839 (at R3.5839 per Swiss franc) with interest and costs.

Jacques HODOUL for the Plaintiff
Philippe BOULLE for the Defendant

Judgment delivered on 17June 1998 by:

AMERASINGHE J: The plaintiff sued the defendant to recover a sum of R103,181.40 for loss and damage on breach of contract, with interest and costs.

The defendant in paragraph 4 of the statement of defence, "admits that funds were transferred to her account in Seychelles. The defendant denies that it was on the basis of the alleged promise stated in paragraph 3 that funds were transferred. The defendant avers that the various transfers were in the form of gifts, free assistance, voluntary contribution for his stay at her Guest House, and that the plaintiff also gave her other things as gifts".

In paragraph 4 of the plaint the plaintiff avers that he transferred funds totaling Swiss Francs 26,000 to the defendant, and in paragraph 3 he avers that such transfers were made on the promise of the defendant to give him participation in a guest house project at Praslin known as "Colibri", for which the said funds were required.

After an earlier hearing, the learned Chief Justice on 29 July 1994 entered judgment for the plaintiff as prayed for with interest and costs of action. On an appeal by the defendant, the Court of Appeal by a judgment delivered on 18 May 1995 set aside the judgment and remitted the case for a rehearing. The Court of Appeal was unanimous in their finding that in reference to article 1356 of the Civil Code, the judicial admissions in the statement of defence is indivisible. Hence the admissions of the defendant in the statement of defence being all qualified admissions will not accrue to the benefit of the plaintiff in establishing his case. The laintiff’s case will be

considered only on the evidence of the only witness at the hearing, the plaintiff, and the documents produced as exhibits.

The plaintiffs' testimony in court to prove the payment of the sum of Swiss Francs 26000, which is equivalent to Seychelles Rupees 93,181.40, to the defendant was objected to by counsel for the defence on the provisions of article 1341 of the Civil Code in the absence of any writing.

This Court in a ruling delivered on 28 January 1998 recorded the reasons and permitted oral evidence in proof of the matter, the value of which exceeded R5000, admitted as providing initial proof required under article 1347 of the Civil Code, which makes article 1341 inapplicable.

The plaintiff in his evidence said that he knew the defendant when she was working for a bank in Switzerland for about 4 to 5 years from 1980. After she left Switzerland in 1991, when he was on vacation with his girlfriend in Mauritius, they had visited Seychelles during the month of April or May. While on Praslin he had seen the defendant’s telephone number in the directory and called the defendant on the phone, to learn that she has purchased a guest house called 'Colibri' in Praslin. She had then given him her telephone number and her address. When he returned to France the plaintiff had written a letter to her, to which he received a reply in exhibit P 1 of 20 May 1991.

At the hearing the efendant did not challenge the plaintiff’s evidence to the effect that the letter of 20 May 1991 (exhibit P1) was by the defendant.

The translation of P1 recorded in the proceedings without any objection is as follows;

> "Thank you for your charming letter. As I have told you before I am giving the photographs of

> that wonderful place. But what work! I do not know what to do. There is much work for me to do and I need some money. I have spent so much to invest. That has been very difficult and I am asking you, me, who has never asked you anything to help me financially if you please to finish the project. I am not asking you for more details. I will explain to you everything on the phone. If truly you can help me, I would require something between 7000 or 8000 Swiss Francs. I am praying you Michel that I am not joking. If you decide I will give you, my account number in Praslin, Barclays Bank Account No 301049536 Colibri Guest House. Thank you in advance. Even a thousand thanks. I will explain everything to you on the phone. I think we can do quite a few things with the Colibri. Hence, very soon and I kiss you and I think very often at this coincidence of having finding me by a mere chance like this. Big kiss" (Emphasis added)".

After the receipt of this letter the plaintiff said that he did not act upon it until he received a telephone call from the defendant. He had then agreed to give her money. In the first instance the defendant has asked for five thousand Swiss Francs to be returned, or for him to spend a month vacation at her guest house for the money advanced. The plaintiff thereafter had transferred 5000 Swiss Francs on 24 June 1991 and had visited the defendant in October 1991. This was followed by three further transfers, 10,000 Swiss Francs on 27 November 1991, , 8000 Swiss Francs on 13 December 1991, , and 3000 swiss francs on 13 January 1992. . With each transfer he says that he enclosed a letter stating the words, 'for our future working together'. On his visit in October the plaintiff has brought articles at her request to the value of 1000 Swiss Francs and had stayed at the defendant's guest house, for which he had made no payments. The witness had stopped making further remittances when he had

become aware of the sale of the guest house by the defendant.

The plaintiff under cross-examination revealed that he intended to invest half of the 100,000 Swiss Francs the defendant required to complete the project by building bungalows. He went on to say that he intended to be a share holder owning 50% of the shares. On his visit in October, when he had asked the defendant to obtain the services of a lawyer to execute a written agreement, she had informed him that her lawyer was out of the Republic. He also expressed that he continued to transfer funds to the defendant in spite of the written agreement not being executed, on account of his trust placed in the defendant.

Counsel for the defendant highlighted in his cross-examination that the plaintiff had stated at the earlier hearing contrary to the evidence given before this Court, that the plaintiff has attributed his refusal to remit any more funds to the defendants' failure to certify in writing the receipt of funds and the agreement to his participation in the guest house project.

The plaintiff under cross-examination vehemently denied that he had an amorous relationship with the defendant and that the transfer of 26000 Swiss Francs was a gift to her. The plaintiff, being confronted with the fact that on his visit to Seychelles in May 1991 he was accompanied by his girlfriend but not in October 1991, explained that it was due to his girlfriend not having any leave from work to join him. I can find no reason for the plaintiff to make a deliberate untrue statement in respect of his terminating the transfer of funds to the defendant. Even if the plaintiff acted on the refusal of the defendant to provide him with an agreement in writing,as requested by him, to cease transferring further funds, I consider that the contradiction is not material and does not affect the credibility of the witness on the ground that it could

be due to human error and lapses of memory. As the defendant never claimed a breach of contract on the part of the plaintiff the contradiction is of no material bearing to the plaintiff's case.

On the evidence of the plaintiff, uncontroverted by the defendant at the hearing, and on the consistency of the evidence with the relevant pleadings of both parties before the Court, the transfer of a sum of 26000 Swiss Francs to the defendant for her guest house project called 'Colibri' and that the letter dated 20 May 1991 was written by the Defendant (exhibit P1) are considered established on a balance of probabilities.

What is in issue and what was specifically denied by the defendant's pleadings is the assertion of the plaintiff that the aforesaid funds were transferred to the defendant on the promise of his participation in the said project.

In the absence of any evidence led for the defendant before the Court it is only in her pleadings and in cross-examination of the plaintiff that it was suggested that the amorous relationship between the parties caused the plaintiff to gift the 26000 Swiss Francs to the defendant. The plaintiff's visit to Seychelles without his girlfriend and staying with the defendant at the guest house is not conclusive evidence of the plaintiff's willingness to part with the money transferred without any conditions. The plaintiff disclosed in evidence that in addition to the transfer of funds, as referred to in paragraph 4 of the statement of defence he brought with him in October 1991 gifts for the defendant as well as for her friend to the value of 1000 Swiss Francs. He also testified that at his expense during his stay at the guest house he flew to Victoria from Praslin to do shopping for her. Such conduct on the part of the plaintiff cannot be consistent with the defendants' averment in her statement of defence of a friend who contributes a large sum of money only for his occupation of the guest house and for the hospitality extended to him by the

defendant free of charge. Although the defendant pleads that they were lovers from 1991 until March 1992, the evidence of the plaintiff only reveals that he stayed with her in the guest house in October 1991 for about 3 weeks, and he conceded that the 5000 Swiss Francs transferred in June 1991 was sufficient to meet the cost of lodging with full board at the guest house of the defendant. The plaintiff in fact admitted that the first transfer was made before the agreement for participation in the project, and that the defendant undertook either to provide him a vacation at the guest house free of charge or to refund the said amount. I therefore conclude that from the plaintiff's claim on the contact between the parties for the plaintiffs' participation in the project, the first transfer of 5000 Swiss Francs should be deducted, in view of the board and lodging provided to him at the guest house in October 1991, as well as for the reason that the transfer was prior to the alleged agreement.

The principal issue between the parties before the Court arose on the plaintiffs' assertion of a contract for participation in the guest house project for the contributions made by him after October 1991.

Apart from the plaintiffs' uncontroverted evidence before the Court, the letter written by the defendant on 20 May 1991 (exhibit P1) is considered for the determination of the issue. The letter P1 refers to the plaintiff having made contact with her by chance and that she has never asked him for anything in the past. In my view such references do not support the defendant's claim of the parties having had an earlier intimate relationship, which, if it happened at all, on the evidence was restricted to the period he spent at the guest house 'Colibri' in October 1991.

In the same letter (exhibit P1), statements of the nature of, "I am not asking you for more details", "I will explain everything on the phone" and "I think we can do quite a few things with the Colibri" in my view only suggest that neither the defendant

nor the plaintiff were dealing with a future donation. It is my considered opinion that the sentence "I am not asking you for more details" can only mean that the plaintiff has laid down conditions for funds to be made available, which may not have been fully agreed upon at that stage. Her assurance that "I think we can do quite a few things with the Colibri" convey the inference that the defendant was thinking of the plaintiffs' involvement in the 'Colibri' project. The sentence "I will explain everything on the phone" in exhibit P1 cannot arise in relation to the request of the defendant for funds, if as she avers that whatever transfers made were meant to be donations and to be set off against his visits to the guest house. I therefore conclude that the contents of exhibit P1 very clearly and very distinctly establish that neither the plaintiff nor the defendant was considering a pure and a simple gift to assist the defendant. According to the available evidence the plaintiff spent not more than 3 weeks in Praslin with the defendant and during the said period he had sought to formalise their agreement but with no success on account of the non-availability of the defendant's attorney. His answer to counsel for the defendant on cross-examination was that he left Seychelles in October 1991 without achieving his goal and continued to transfer funds, on account of the trust that he had in the defendant. In any event there is no evidence to suggest that the defendant changed her mind expressed on exhibit P1 after his visit to her guest house in October 1991. It is also observed that evidence has failed to establish that the plaintiff's visit to, and stay at the 'Colibri' was for any other purpose other than for his business interest in the intended joint venture. The defendant's contention that the parties were involved in an amorous relationship was never established before Court.

As rightly pointed out by counsel for the defendant, the plaintiff in his pleadings claimed that the funds were transferred to the defendant on the promise of his participation in the guest house project, but in answer to a request by the defence the nature of participation was described as a share

in the business and a proposal to join the defendant in December 1992. In cross-examination the laintiff expressed that he intended to hold 50% of the shares of a company to be formed to run the guest house. It was the contention of counsel for the defendant, in view of the Immovable Property (Transfer Restriction) Act, that for the plaintiff as a non-Seychellois to possess shares in a local company owning immovable property he had to obtain the sanction of the government. I cannot but agree with counsel for the Plaintiff that the parties had not reached that stage to seek government sanction before the guest house was sold by the defendant, and as a result giving any shares to the plaintiff in the project was put beyond any contention.

There is no doubt that the plaintiff had to establish a contract between the parties for him to succeed with his claim before court.

It is evidence that the parties never saw an attorney-at-law to discuss the terms of the contract for the plaintiff to participate in the guest house project, which explains the inability of the plaintiff to specifically state the nature of participation agreed upon. However as referred to earlier on evidence before this Court, the plaintiff's transfer of funds after his visit to Praslin in October 1991 amounting to 21000 Swiss Francs was made on the agreement that the plaintiff will have the right of participation in the guest house project. The evidence of the plaintiff and the intentions of the parties manifest in the defendant's letter (exhibit P1) establish that the offer and acceptance between the parties depict their consent to enter into a contract for the plaintiff to contribute the said funds and for the defendant to permit the plaintiff to participate in the business of the guest house project. The capacity of the parties to contract is not questioned by the defendant. The evidence of the plaintiff and the contents of the defendant's letter P1 reveal that the object of the contract was to make funds available to the defendant to complete her construction work and the plaintiff to participate in the guest house project

of 'Colibri'. In spite of the fact that even if the plaintiff, being a non–Seychellois, needed the sanction of the government to engage in business that involved immovable property under the Immovable Property (Transfer Restriction) Act (Cap 95), no grounds exist to rule that the agreement was against public policy or that the object was unlawful. As the agreement preceded the determination of the plaintiff's method of participation in the project, it is necessary to conclude that the parties were alive to the requirement of government sanction and the attendant uncertainty. I therefore find that it is inherent in the contract, the inference that if the plaintiff's participation in the project becomes impossible on account of the government refusing the necessary sanction, that the defendant was obliged to return the plaintiff's contribution of funds.

I therefore conclude that the parties to the action did enter into a contract when the plaintiff agreed to transfer 50,000Swiss Francs to the defendant on the defendant giving him participation in the business project of a guest house called 'Colibri', and the defendant accepting the said offer. In spite of the fact that the parties had to agree to the specific terms of the plaintiff's participation, the defendant having accepted the offer acknowledged by the acceptance of the funds, her contractual obligations were established. The defendant having offered the plaintiff participation in the project for his contribution of funds has bound herself to give the plaintiff participation in the project and in the event of failure to do so due to any statutory provisions, she was liable to refund the funds when the contract became impossible to perform. It is an implied term of the contract that if the defendant was unable to give the plaintiff participation in the guest house project for whatever reason, the defendant was obliged to return the funds in the absence of any express term to the contrary.

The defendant on the other hand as testified to by the plaintiff sold the guest house 'Colibri' in breach of the contract by

causing the performance of the contract to become impossible.

I therefore hold that on a balance of probabilities the defendant is in breach of contract by the sale of the guest house causing loss and damage to the Plaintiff in the said sum of R21,000.
The plaintiff is not entitled to any moral damages as the contract provides none. (See *Firma SAI etc and another v Hotel des Seychelles* (1978 to 1982) SCAR 122)

I therefore enter judgment for the plaintiff against the defendant in a sum of Seychelles Rupees 21000 x 3.5839 (at Rs 3.5839 per Swiss Franc) with interests and costs.

Record: Civil Side No 25 of 1993

Leonil v Leonil

Inheritance of land – matrimonial house – division of matrimonial property

The respondent husband inherited land. The petitioner and respondent established their matrimonial home on the inherited land. The home was substantially built with proceeds supplied by the petitioner. The petitioner claims a half share of the matrimonial property based on her direct financial contributions to the construction and upkeep of the matrimonial home. The respondent does not contest the petitioner's claim but makes no provision for the plaintiff in his will.

HELD:

(i) The petitioner, by contributing towards the construction of a building or for improvements or for maintenance of the building, acquires no legal right to any portion or share of the land; and

(ii) The title or a share of the title of any party will not be affected by the investment of the other party after the acquisition of its title in respect of the property.

Judgment: For the respondent. No costs ordered.

Legislation cited
Status of Married Women Act, s 21

Cases referred to
Andre Edmond v Helen Edmond (unreported) Civil Appeal 2/1996
Angelika Ursula Maurel v Marie Joseph Maurel (unreported) Civil Appeal 1/1997

Nichole Tirant for the Applicant

Judgment delivered on 26 October 1998 by

AMERASINGHE J: The petitioner has made an application in accordance with section 21 of the Status of Married Women Act (Cap 231), by petition and affidavit in respect of a question between husband and wife with regard to the title of parcel of land v 5147 on which their matrimonial home stands.

The parties were married on 5 August 1943 and the respondent husband inherited a portion of land on 22 March 1974, situated at Belvedere Mahe and identified as title v 5147 , passed on transmission by death to the respondent as registered on 14 February 1994.

It is averred by the petitioner and not disputed by the respondent that during the pendency of the marriage but prior to the inheritance by the respondent, the matrimonial home was built substantially with proceeds supplied by the petitioner. She claims that throughout her working life she has been gainfully employed and invested her earnings for the construction and maintenance of the said dwelling house. She therefore claims on account of her direct financial contributions to the construction and upkeep of the matrimonial home, that she has acquired one half share of the matrimonial property.

The respondent has not contested the petitioner's claim. At the hearing of the petition on 31 July 1998, the petitioner produced their certificate of marriage as P1, and a copy of a loan agreement between the petitioner and Seychelles Housing Development Corporation for a sum of R5,585.75 borrowed as P2. Receipts and statement of payments of the loan were produced as p3 and p4. A copy of the respondent's last will was produced as exhibit P5, to show that she does not benefit by it.

Pleadings, evidence and submissions of counsel signify that the petitioner claims and seeks an order of court for a declaration of the extent of the title of the parcel of land V5147, as owned by her. It is without dispute that at least by registration the title is indisputably owned by the respondent, her husband having inherited the title.

According to the evidence, title V5147 was never acquired by the parties to the marriage by any contribution of both or one of the parties. Whatever rights may have been acquired in respect of the building standing thereon, the petitioner has no way of establishing any legal right or claim to the said title.

In law if the registered proprietor is the respondent, which is not disputed, he alone is the owner of the immovable property title V 5147. (See section 20 of the Land Registration Act (Cap 107)). No doubt if the petitioner has contributed to the building of their matrimonial home and improvement or maintenance of it, she necessarily acquires a right to a share of the building or to benefit by her contributions by way of a claim against the respondent to the extent he has been unjustly enriched. However the Court in the instant proceedings is called upon to declare, "the extent of her title in the matrimonial property owned in the sole name of the respondent and granting the petitioner a half share therein".

It is my considered opinion that the petitioner, by contributing towards the construction of a building or for improvements or for maintenance of the building, acquires no legal right to the title to any portion or share of the land.

Article 815 of the Civil Code prescribes that "co-ownership arises when property is held by two or more persons jointly". By the petitioner's own admission the ownership of the entire property in question is held by the respondent.

Seychelles Court of Appeal in the case of *Andre Edmond v*

Helen Edmond (unreported) Civil Appeal 2/1996 delivered on 5 July 1996 held thus,

> Where a co-owner has discharged an obligation jointly incurred by the co-owners in respect of the property under co-ownership that the co-owner may recover what he has spent beyond his own share of liability from the other co-owner or co-owners would not affect the entitlement of the co-owners to equal shares……..

Although the parties in the instant matter are not co-owners, the conclusion drawn by the learned Judges is that the title or any share of the title of any party will not be affected by the investment of the other party after the acquisition of its title in respect of the said property.

The aforesaid conclusion appear to be strengthened by the finding of Adam JA in the case of *Angelika Ursula Maurel v Marie Joseph Maurel* (unreported) Civil Appeal 1/1997 when he pronounced thus,

> The Status of Married Women Act (Cap 231) provides that a married woman is capable of acquiring, holding and disposing any movable and immovable property and has remedies for the protection and security of her separate property. It follows that any assets acquired during the marriage does not necessarily mean that such assets are held by each spouse in co-ownership of half share each. Spouses can enter into pre-nuptial and post-nuptial contracts relating to property. But when this is not the case, assets owned in the name of each spouse must be regarded prima facie as such spouse's property unless it can be established, that was not the intention of the party or parties.

In the case of parcel title v 5147 the fact of inheritance by the respondent leaves no room to consider the intentions of the party, which can relate only to acquisitions by the parties during the subsistence of the marriage. It is also a fact that, the respondent being the registered proprietor of the said title by a transmission on death, there can be no question between the husband and wife as to the title of the property, which was so restricted by the petition, for the determination of the court under the aforesaid statutory provisions.

I therefore dismiss the petition, without costs.

Record: Civil Side No 151 of 1997

In the Matter of Global Investments and Business Corporation Limited and In the Matter of the Companies Act 1972

Companies Act 1972 – winding up of a company – plea in limine litis – locus standi as a creditor – privity of contract – court discretion

The petitioner filed an application for the winding-up of the respondent company based on its inability to pay its debts. The petitioner filed the application in the capacity of a creditor. The petitioner claimed that it advanced the respondent US$3,746,452 in consideration of a promise to assign the cable television project in Seychelles to Global Direct Television (Seychelles) Ltd and further to allot 75% of the shares of the company to the petitioner. The respondent claims that the petitioner lacks locus standi, that the petitioner was not incorporated at the time the agreements were made, and that there was no privity of contract between the petitioner and the respondent.

HELD:

(i) Where the petitioner company claims to be a creditor not in the sense of someone owing money, but as an alleged party to an agreement, the respondent does not become a debtor and the petitioner company a creditor unless the petitioner has successfully sued the respondent by an action;

(ii) The “debts” to be contemplated in sections 205(d) and 206(a) of the Companies Act are money debts; and

(iii) Where there is a bona fide dispute as to a debt, the company cannot be said to have

neglected to pay on a statutory demand if the company contends that it is not liable to the creditor for the whole or the unpaid part of the claim, and can satisfy the court that it has a substantial and reasonable defence to plead. In such circumstances the court will hold that the respondent is not in default, and will refuse to make a winding-up order.

Judgment: for the respondent. Plaintiff to pay costs.

Legislation cited
Civil Code of Seychelles, art 1139
Companies Act, ss 205, 206, 207

Foreign cases noted
Re A company [1984] 3 All ER 78
Re Capital Annuities Ltd [1978] 3 All ER 704
Re Lympne Investments Ltd [1972] 2 All ER 385
Mann v Goldstein [1968] 2 All ER 769
Stonegate Securities Ltd v Gregory [1980] 1 All ER 241

Ramniklal VALABHJI for the Applicant Company ("ZAKSAT")
France BONTE for the Respondent Company (GIBC)

Ruling delivered on 29 December 1998 by:

PERERA J: This is an application for the winding up of a company called Global Investments and Business Corporation Limited (GIBC) pursuant to section 205(d) of the Companies Act 1972, on the basis that the company is unable to pay its debts and that in such circumstances it is just and equitable that the said company be wound up. The Petitioner, Zaksat General Trading Company WLL (Zaksat) has filed this petition in the capacity of a "creditor" in terms of section 207(1)(b) of the Act. For the purposes of section 207 "a creditor" includes "any contingent or prospective creditor or creditors".

The petitioner in paragraph 5 of the petition avers that –

> 5. The company (Zaksat) is indebted to your petitioner in the sum of US$3,746,452 being the amount advanced by your petitioner to the company for the cable television project in Seychelles. The consideration for the said advance was the company's promise to assign the project to Global Direct Television (Seychelles) Limited; In addition compound interest at 8% per annum is due on said amount up to 25 October 1998 in an amount of US$295,435 to give a total debt of US$4,041,887.

The respondent company (GIBC) has filed a counter affidavit of one Mirza Masheed Ahmed Baig who holds the power of attorney from Mr Abdulla Ali Yousuf Al Shaibani raising in a plea in limine litis, the issue of locus standi of the petitioner company to institute winding up proceedings. It has also been raised in limine that the petitioner company had not been incorporated at the time those agreements were made. It is therefore being submitted that the petitioners inter alia, lacked privity of contract to sue the respondents.

Mr Valabhji, counsel for the petitioners, submits that questions of privity of contract and locus standi are irrelevant to the present proceedings. He further submits that the points raised in limine are based on evidence to be adduced and cannot be decided without hearing evidence. I agree with Mr Valabhji to the extent that on the basis of the various allegations, counter allegations and denial contained in the respective affidavits of the parties, this Court cannot make any determination purely on the basis of the pleadings. Such a submission however raises the question as to whether this Court can use its discretion under section 208 to order a winding up upon a disputed debt. The question of locus standi raised therefore

necessitates a finding in limine as to whether the petitioner as an alleged "creditor" has satisfied the provisions of the Companies Act 1972 relating to winding up.

For this Court to exercise its discretion to order a winding up there are three basic matters to be considered, namely –

(1) Is the Petitioner company a "creditor" within the meaning of section 207(1) (b) of the Act?

(2) Was there a demand by the petitioner from the respondent to pay a debt due as required by section 206(a) of the Act?

(3) Has the respondent company "neglected to pay" the sum so demanded?

Palmer on Company Law states that a "creditor" has the ordinary meaning of "any person to whom the company is owing money." He defines the "contingent or prospective creditors" in section 224 (section 207 (b) of our Act) as follows. "A contingent creditor means a creditor in respect of debt which will certainly become due in the future, either on some date which has already been determined or on some date determinable by reference to future events".

In considering whether the petitioner is a creditor, it becomes necessary to consider the nature of the debt alleged to be owed by the respondent. In paragraph 5 of the petition, it has been averred that the petitioner advanced to the respondent a sum of US$3,746,452 in consideration of a promise to assign the cable television project in Seychelles to the company Global Direct Television (Seychelles) Limited and further to allot 75 % of the shares of that company to the petitioner. The amount alleged to have been advanced is verified by a supporting affidavit of one Mr HT Pareed, the Financial Manager of the petitioner company, and a Financial Report from KPMG Masoud, a firm of accountants in Kuwait. The

accountants have certified that a sum of 1,142,667 Kuwait Dinars (equivalent to US$3,746,449), the amount of the debt in issue, has been transferred from the Al Ahli Bank of Kuwait account held by Global Direct Television and the Gulf Bank of Kuwait Account of Zaksat. The detailed statement shows that the payments were made to various companies in the USA for the purchase of equipment and materials, air freight to air cargo carriers, contract charges to a Chinese company for installation of cables, staff salaries and other miscellaneous charges such as immigration fees, travelling expenses, accommodation expenses etc. There is no direct evidence in this document that that money, or any part of it was paid to the respondent (GIBC). The respondent avers that the petitioner is relying on agreements to which they are mere strangers and that at the time they were entered into, the petitioner was not even incorporated. They further aver that in any event those agreements have now been terminated. They therefore aver that the petitioner has no locus standi to prosecute any claim against the respondent company on the basis of the agreements relied on by them, and that consequently there is no legally binding and enforceable obligation on the part of the respondent to pay any sums to the petitioner company.

The petitioner,on the other hand, admits that Zaksat was incorporated on 11 June 1997. The agreement they rely on is dated 1 May 1997. In that agreement it was agreed that "Zak", a different company, was to be entitled to 75 % of the shares and that “Zak” was to assign the agreement to Zaksat upon that companybeing formed under the laws of Kuwait. The petitioner challenges the authority of Monther Al Kazemi of "Zak" to cancel or terminate the original agreement of 1 May 1997 and alleges that those documents terminating the agreement are ante-dated frauds and therefore seeks an order of this Court to have confirmation from a qualified forensic scientist of the date of execution and the printing equipment used to prepare them.

Hence there is a substantial dispute as to the debt alleged to be owed by the respondent.

Buckley CJ stated thus in the case of *Stonegate Securities Ltd v Gregory* [1980] 1 All ER 241 at 243 –

> If the creditor petitions in respect of a debt which he claims to be presently due, and that claim is undisputed, that petition proceeds to a hearing and adjudication in the normal way. But if the company in good faith and on substantial grounds, disputes any liability in respect of the alleged debt, the petition will be dismissed or, if the matter is brought before a court before the petition is issued, its presentation will in normal circumstances be restrained. That is because a winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed

This principle was tersely stated by Ungoed -Thomas J in the case of *Mann v Goldstein* [1968] 2 All ER 769 at 775 thus –

> For my part, I would prefer to rest the jurisdiction directly on the comparatively simple propositions that a creditor's petition can only be presented by a creditor, that the winding-up jurisdiction is not for the purpose of deciding a disputed debt (that is, disputed on substantial and not insubstantial grounds) since, until a creditor is established as a creditor, he is not entitled to present the petition and has no locus standi in the Companies Court, and that therefore, to invoke the winding-up jurisdiction when the debt is disputed (that is, on substantial grounds) or after it has become clear that it is so disputed is an abuse of the process of the Court.

In the instant petition, the petitioner claims to be a creditor not in the sense of someone who has money owing to them, but as an alleged party to an agreement whereby the respondent agreed to perform certain obligations in consideration of payment of a sum of money. In the case of *Re Lympne Investments Ltd* [1972] 2 All ER 385 the Court dismissed a petition based on an alleged loan which the company contended was a payment made by the petitioner so that it might purchase an investment on his behalf as his agent. In that case, the petitioner could not be classified as a creditor to whom the respondent owed the sum of money advanced by him. Similarly, in the instant case, the respondent does not become a debtor, and the petitioner a creditor, unless and until the petitioner has successfully sued the respondent by an action. There is presently before this Court case CS 247/1998 wherein the petitioner is seeking a declaration that they are entitled to 75% of the shares in consideration of which they aver that a sum of US$ 3,746,449 was advanced.

The respondent denies any agreement with the petitioner (Zaksat), which they aver was not in existence at the time the agreement relied on by them was made and further deny any debt owed to them.

Buckley on the Companies Acts, 11th ed, states on pages 356-357 -

> A petition presented ostensibly for a winding up order, but really to exercise pressure, will be dismissed and under circumstances may be stigmatised as a scandalous abuse of the process of the court. Some years ago petitions funded on disputed debts were directed to stand over till the debt was established by action. If however, there was no reason to believe that the debt if established would not be paid, the petition was dismissed. The modem practice has been to dismiss such petitions.

In these circumstances the petitioner does not fall under the category of a creditor for the purposes of section 207(1)(b) of the Act, and therefore has no locus standi to present this petition.

Apart from the issue of locus standi the petition is otherwise incompetent procedurally.

Section 206(a) provides that –

> 206(a) A company shall be deemed to be unable to pay its debts -
>
> (a) If a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one thousand rupees then due, has served on the company, by leaving it at the registered office of the company, demand under his hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor.

Section 206(a) requires the creditor to make "a demand under his hand requiring the company to pay the sum so due". R Pennington, the draftsman of the Companies Act of Seychelles, states in his book *Company Law* that

> The demand must specify the amount of the debt claimed, must require payment of it, and not merely state that it remains unpaid.

In the instant matter the petitioner served a mise en demeure dated 30 June 1998 on 20 July 1998 on one Prem Kumar representing the respondent in Seychelles at that time. In Seychelles a mise en demeure is made in terms of article

1139 of the Civil Code, which reads thus –

> A debtor shall be placed under notice of default by a summons or other equivalent legal act or by a term of the agreement providing that the debtor shall be in default without the need of a summons and at the mere expiry of the period for delivery.

The mise en demeure served on the respondent is a notice to perform certain obligations in an alleged agreement and not a demand for payment of money as envisaged in section 206 (a) of the Companies Act. The notice states that the respondent agreed to issue 75% of the shares of a company formed to take over the Cable Television Project in Seychelles and that in consideration thereof "has substantially funded the project in Seychelles alone and has provided all the expert manpower therefore to a total project cost equivalent to approximately US$3.15 million up to 31 May 1998 and continues to do so". The notice further alleges that there has been a breach of such agreement and that the respondent has allotted 99% of the shares to Mr Al Shaibani. As a further breach the petitioner in the said notice alleges that the operating licence has been taken in the name of the GIBC when the project has been wholly funded by the petitioner , except for US$300,000 paid by the GIBC to finalise a land option.

Section 206(a) of the Companies Act, contemplates a demand to pay the sum due, and article 1139 of the Civil Code is a notice of default which implied that the sum due was to be paid within the stated period for delivery. What purports to be a mise en demeure served by the petitioner requires the respondent to -

> Take notice, you GIBC and you Mr Al Shaibani that unless my clients are issued their legitimate shareholding in the project within seven days

> hereof, my clients will have no option but to apply to the Supreme Court of Seychelles for specific performance of the agreement and/or a refund of all the moneys expended by them on the project plus substantial damages and will provisionally seize all the funds and assets of GIBC in Seychelles.

This notice dated 30 June 1998 was not a demand for payment of a sum due within three weeks as envisaged in section 206(a) of the Act, but a notice of action to be filed at the expiry of seven days in the event the respondent failed to comply with an alleged obligation in an agreement to issue 75% of the shares in a company. In pursuance of this notice, the petitioner filed action no C.S 247/1998 on 11 August 1998. In paragraph 5 of the petition in that case, the petitioner Zaksat avers that -

> 5. By a notice in writing dated 30 June 1998, the first and second defendants (Mr Al Shaibani and the GIBC) were duly called upon to fulfil their obligations, but the defendants have failed to do so.

In that case, counsel for the defendants has requested for further and better particulars of the plaint and this Court has fixed the case for mention on 29 February 1999 for a reply to be filed by counsel for the petitioner. It is clear that the "debts" contemplated in sections 205(d) and 206(a) of the Act should be money debts. The petitioner's substantial claim in case no CS 247/1998 is for a declaration that the shares should be allocated in consideration of the payment of US$3,746,452 as averred in paragraph 5 of the petition. That is a matter to be decided in that case. The petitioner relies on the same mise en demeure served on the respondent company before filing case no CS 247/1998 to satisfy the requirement of the notice of demand to pay as envisaged in section 206 (a) of the Companies Act. This is misconceived, and accordingly I hold

that there has been no proper notice to initiate the present proceedings.

Assuming that the notice was competent, has there been any neglect to pay by the respondent in the sense contemplated in section 206 (a). The respondent avers that the company is solvent and has and will continue to discharge all its debts contracted by itself. They however deny that any debt is due to the petitioner. In the case of *Re Capital Annuities Ltd* [1978] 3 All ER 704 it was held that -

> Mere evidence that a company has for the time being insufficient liquid assets to pay all its presently owing debts, whether or not repayment of such debts has been demanded, by itself does not prove inability to pay within sections 222 and 223 (that is sections 205 (c) and 206 (d) of our Act).

So also, where there is a bona fide dispute as to the debt, the company cannot be said to have neglected to pay on a statutory demand if the company contends that it is not liable to the creditor for the whole or the unpaid part of his claim, and can satisfy the court that it has a substantial and reasonable defence to plead, the court will hold that it is not in default, and will refuse to make a winding up order. (*Re a Company* (1984) 3 All ER 78). On the basis of the affidavits and the documentary evidence adduced in the case the Court is satisfied that the respondent has a substantial and reasonable defence which remains to be adjudicated in case no CS 247/1998. Hence the Court in the exercise of its discretion vested in section 208(1) of the Act hereby dismisses the petition, both on the ground of lack of locus standi, and on the ground that the petitioner has not satisfied the provisions of section 206 (a) to maintain this petition. The respondent will be entitled to costs.

Record: Civil Side No 229 of 1998

Albuisson v Fryars

Breach of contract – unlawful eviction – return of movables - injunction - damages

A contract dispute arose between the parties regarding the terms of a management and lease agreement of a business. The plaintiff maintained that the parties entered into a two year lease agreement, that the defendant unlawfully evicted the plaintiff and retained business equipment that belonged to the plaintiff. The defendant claimed that the plaintiff voluntarily handed the premises back to the defendant and claimed a lien as against arrears of rent due from the plaintiff. The plaintiff sought damages and the return of his property.

HELD:

The loss of equipment can be compensated by the award of damages, therefore the grant of an injunction cannot be considered necessary to prevent irreparable loss.

Obiter: If the plaintiff had been prevented from making a livelihood on account of a lack of equipment, that he could have suffered heavy loss and damage that would have been irreparable.

Judgment: for the defendant. No costs awarded.

Cases referred to
Phil Enterprises Ltd v Castle Peak (1973) SLR 327

Nichole TIRANT for the Plaintiff
Frank ELIZABETH for the Defendant

Judgment delivered on 16 December 1998, by:

AMERASINGHE J: On breach of contract the plaintiff sued the defendant to recover a sum of R98,442.50 as damages and for the return of movables retained by the defendant, with interest and costs. The plaintiff avers that a management agreement was entered into by the parties on 30 June 1998, for the management of "Sandy's Take Away" for a period of two years. He alleges that the defendant on 17 September 1998 unlawfully evicted the plaintiff from the said business establishment, while retaining equipment belonging to him. The plaintiff not only prays for the return of his equipment in the defendant's custody but also claim the value of such equipment estimated at R35,000. An amendment of the plaint dated 9 October 1998 moved to rectify the said duplication of claims but unfortunately resulted in the occurrence of the "Particulars of Damages and Loss", the retention of the value of equipment with an error in the total of the claims. What appear to have been required were only two claims on the same ground to have been made in the alternative.

The plaintiff by motion supported by an affidavit sought an interlocutory injunction to be issued by the court "restraining the respondent from continuing with the lawful detention of the applicant's property, more fully described in the list annexed – herewith and ordering that the defendant return to the applicant herein all the items and documents referred to in the said annex."

The defendant in opposition to the application pleads that the plaintiff voluntarily handed over the business premises back to her and the items of equipment referred to in paragraph 4 of the affidavit was left behind by the plaintiff, and in respect of which she claims a lien as against arrears of rent due from the plaintiff.

In the case of *Phil Enterprises Ltd v Castle Peak* (1973) SLR 327 it was held thus:

> The purpose of an injunction is to prevent

> irreparable injury which is substantial and could not be adequately remedied or atoned for in damages.

The plaintiff has valued the loss of equipment at R35,000, and it is obvious from the claim made in the original plaint that the plaintiff could be compensated for the loss of equipment by the award of damages. Therefore the grant of the injunction sought cannot be considered necessary to prevent irreparable loss. In view of the defendant's claim of a lien over the items of equipment acknowledged to be retained, circumstances do not warrant the issue of the injunction sought. There can be no doubt if the plaintiff is prevented from making his livelihood from a similar business venture on account of the want of equipment, and if his accustomed mode of livelihood is the running of similar ventures, the plaintiff could have suffered very heavy loss and damage, and the plaintiff's injury would be irreparable. However in his affidavit the plaintiff has made no such representations, hence it could be concluded that his injury would be adequately remedied or atoned for by way of damages.

An issue of an injunction as prayed for by the plaintiff will result in the defendant being compelled to return the items of equipment claimed by the plaintiff. The defendant in her affidavit admits that the plaintiff left behind only some of the listed items when he handed over the business to the defendant. Apart from the said uncertainty of whether the defendant after nearly three months from the date in question is in fact in possession of the said equipment, the plaintiff in his own affidavit has expressed in paragraph 5 that the defendant has continued to operate the take away by herself or through a third party. In an application for a mandatory injunction as prayed for by the plaintiff, it is the burden of the plaintiff to satisfy the injunction otherwise the application cannot succeed. In the instance matter the plaintiff has failed to do so.

In accordance with the reasons given above I deny the plaintiff's application. No costs.

Record: Civil Side No 304 of 1998

Ailee Development Corporation Limited v
Minister of Employment and Social Affairs

Employment law – unjustified termination – exercise of statutory power to grant compensation – ultra vires awards – writ of certiorari

The manager of a hotel initiated grievance procedures against the petitioner after it terminated his employment. The Competent Officer concluded that the termination of the services of the employee was not justified. The respondent directed that the petitioner make salary payments to the complainant including 6 months salary following the date of his unjust termination. An appeal was heard and decided by the Employment Advisory Board. The respondent was awarded R94,500 for the claimant; this was outside the Board's advice. The petitioner contended that the respondent was obliged to follow the advice of the Board on principles of natural justice.

HELD:

(i) The respondent was not bound to follow the advice of the Board to satisfy the rules of natural justice;

(ii) The legislature, by passing the Employment Act, has prescribed the relief available to an employee dismissed unjustly, and the terms of the contract, except where the Act provides for its application, have ceased to have any effect on the relief available to an employee; and

(iii) The respondent had no jurisdiction to award a 'salary' for any period after the unjust termination of the employee's services.

Judgment: for the petitioner. Writ of certiorari issued quashing the award of salary.

Legislation cited
Constitution of Seychelles, art 125(1)
Employment Act 1995, ss 57, 61, 62
Interpretation Act

Cases referred to
Antoine Rosette v Union Lighterage Company (unreported) SCA 16/1994

Foreign cases noted
Local Government Board v Alridge [1915] AC 120

Frank ALLY for the Respondent

Judgment delivered on 29 October 1998, by:

AMERASINGHE J: The petitioner sought to invoke the supervisory jurisdiction of the Court under Article 125(1) of the Constitution of the Republic of Seychelles for the issue of a writ of certiorari quashing the decision of the respondent dated 7 June 1996 on appeal.

The manager of the Plantation Club Hotel initiated a grievance procedure when relieved of his services by the petitioner, and the resulting decision of the Competent Officer was subject to appeals by both parties.

Both the Minister on the said appeals and the Competent Officer concluded that the termination of the services of the employees was not justified. The respondent's ruling on 7 June 1996 directed the petitioner to make the following payments to its former manager Van Frank:

i) 3 months notice R 47,250.00

ii)	Salary from 17 November 1995 to May 1996	R 94,500.00
iii)	Accrued leave from 8 January 1995	R 20,712.33
iv)	32 days compensation	R 19,384.62
		R181,846.95

At the hearing counsel for the petitioner restricted its challenge of the respondents' decision to the award under paragraph (ii) above, for the payment of salary from 17 November 1995 to 17 May 1996: a sum of R94,500.00. Although the written submissions of counsel for the petitioner included in the challenge the accrued leave and compensation calculated after the dismissal of the employee, the pleadings and the exhibits do not permit this Court to separate such awards into different categories. Hence the petitioner will be bound by the aforesaid restrictions indicated to the Court and recorded on the 15 June 1998.

The first ground on which the respondent's decision of 7 June 1996 was challenged, which state counsel seems to have lost sight of, is founded on the fact that although the appeal was heard by the members of the Employment Advisory Board, the respondent's decision was not made in accordance with such advice. It is contended that rules of natural justice dictate that the respondent was bound to follow the advice of the Board. The award of salary in a sum of R94,500.00 was undisputedly outside such advice.

Dr (Justice) Durga Das Basu in his book *Administrative Law* (3rd edition, 1993) commenting on the judgment in *Local Government Board v Arlidge* [1915] AC 120, at 225 states thus:

> This does not however mean that an administrative tribunal or quasi-judicial authority

> must hear every case personally. In the absence of any statutory requirement, the authority is free to determine its own procedure and, provided the decision is his, he can act upon evidence heard or materials collected by his subordinates and that strict judicial principle that a decision can be given only by the judge who heard the case, does not apply to administrative tribunals."
>
> …"Whether the quasi–judicial officer agrees with or differs from the report of the inquiry officer, he is bound to form his independent view and give his decision accordingly."

By his affidavit on 11 July 1997 the rspondent has sworn to the facts, that the decision of 7 June 1996 is his and that he has drawn his own conclusions. I therefore rule that the respondent was not bound to follow the advice of the Board in the instant matter to satisfy rules of natural justice.

The making an award of salary to the petitioner's former employee for a period after the termination of his services on 17 November 1995 appears to be, as commented by counsel, 'based on nothing.' The thrust of the petitioner's challenge is apparently founded on the argument that the respondent has exceeded his jurisdiction vested in him by statute.

As rightly pointed out by counsel for the petitioner, the respondent opted not to reinstate the employee, although he found the termination of services of the petitioner's employee to be unjustified, . Hence he has acted under section 61(2)(a)(iii) of the Employment Act 1995 (hereinafter referred to as the 'Act').

Section 62 of the Act provides for the payment of wages when a contract of employment is terminated by an employer, while 62(b)(iii) conditions such payments for, other than for a

serious disciplinary offence under section 57(4) of the Act.

The interpretation section of the Act (section 2) defines 'wages' to mean, "the remuneration or earnings, however calculated, expressed in terms of money payable to a worker in respect to work done under the contract of employment of the worker but does not include payment for overtime work or other incidental purposes." The definition doesn't include the term a 'salary' and the respondent's award was in fact of wages as prescribed by section 62 of the Act. There can be no doubt such as entitlement ends with the termination of services of an employee, and therefore the contract is thereby determined. State counsel, conscious of such implications on the award of the respondent, argues that the unjust termination of services is unlawful, hence the lawful termination of the employee's services became effective only with the determination of the respondent on 7 June 1996.

The legislature, by passing into law the Employment Act, has prescribed the relief available to an employee dismissed unjustly, and the terms of his contract except where the Act provides for its application to have ceased to have any effect in law on relief available to the employee. Ayoola JA in the case of *Antoine Rosette v Union Lighterage Company* (unreported) CA 16/1994 decided on 18 May 1995 was for the said reason prompted to pronounce that, "The remedy and relief which attend an unjustified termination of a contract of employment have been fully set out by the legislature in the Act." Hence any alternative interpretations or circumstances cannot be taken into consideration unless the statute provides so.

On the aforesaid definition of 'wages' in the Act, for an award of salary to arise the employee should have been entitled to remuneration or earnings. Such entitlement without doubt ends with the effective termination of his services. The respondent acted under section 61(2)(iii) of the Act when he decided that although the termination of services of the

employee was not justified he did not order the reinstatement of the employee in his position. Hence he was bound to give effect to the rest of the provisions of the said section.

Section 61(2)(iii) further provides that it is possible to "allow the termination subject" to certain payments. There can be no doubt the words "allow the termination" refer to the termination of the employee's services by his employer that is in issue, hence it cannot admit any other form of termination. The legality or the illegality of the termination of the employee's services will make no difference when the respondent acts under the provisions of section 61(2)(iii) of the Act. I conclude that the statutory provisions as referred to above prescribe that the termination of the employee's services on 17 November 1995, however unjust it was, should be allowed, and that this took away the respondent's jurisdiction to award a 'salary' for any period after the termination of the employee's services, found by the respondent to be unjust.

Therefore the respondent's award of salary for the period 17-11-95 to 17-05-96 in a sum of R94,500.00 is ultra vires the statute and has to be interfered with by this Court.

A writ of certiorari is hereby issued quashing the award of salary from 17 November 95 to 17 May 1996 in a sum of R94,500.00 by the respondent on 7 June 1996.

Record: Civil Side No 245 of 1996

Alcindor & Or v Alcindor & Or

Division of property – division in kind – transmission on death – immovable property – land registration – co-ownership – determination of heirs – succession

The co-owner of a portion of land died intestate. The petitioners claimed that they were the co-owners of a portion of the land as heirs of the deceased. The petitioners and the respondents concurrently apply for partition in kind.

HELD:

(i) Parties who claim undivided shares of land owned in common and the subject matter of the application for division in kind must satisfy the Court that they are entitled to such legal right. The agreement of parties before a Court alone cannot confer legal rights to the undivided shares of the land to be divided; and

(ii) The owners of property registered under the Land Registration Act are deemed to be entitled to such share or shares in the absence of claims to the contrary. On the death of a proprietor under the Act, compliance with the provisions of transmission on death under the Act should precede an application in kind under s 107 of the Land Registration Act.

Judgment division in kind granted.

Legislation cited
Immovable Property (Judicial Sales) Act, ss 72, 107
Land Registration Act, ss 20, 72

Cases referred to
Lesperance v Johnson & Or (1982) SLR 348

France BONTE for the plaintiffs
Charles LUCAS for the defendants

Ruling on the issues (i) whether the application for division in kind (section 107(2) of Cap 94) should be granted on the concurrence of the parties alone, without a hearing of Court; and (ii) whether the 'transmission on death' (section 71(1) of Cap 107) should precede an application by a co-owner (section 107(2) of Cap 94) for division in kind.

Ruling delivered on 21 December 1998 by:

AMERASINGHE J: The Immovable Property (Judicial Sales) Act (Cap 94) provides in section 107(2) thus: "Any co-owner of an immovable property may also by petition to a judge ask that the property be divided in kind or, if such division is not possible, that it be sold by licitation."

The petitioners plead that they are, "the co-owners of a portion of land situated at Machabee, Mahe, registered as title no H1953 as heirs of the late Maurice Alcindor." It is conceded that in accordance with article 816 of the Civil Code that, "co-ownership arises mortis causa when property devolves, whether on intestacy or by will, upon more than one person jointly." When application is made under section 107(2) aforesaid, section 108 requires the judge to, "make an order fixing a day when the several other co-owners, and any other parties, whom he may in his discretion order to be joined, shall cause before him." The Civil Code has made no provisions to determine the particulars of the heirs of a deceased person or to register the rights of the heirs in respect of immovable property. Whereas section 72 of the Land Registration Act (Cap 107) provides for transmission on death with the result the heirs in the capacity of co-owners shall be substituted in place of a proprietor who has died. The

effect of registration is to vest the ownership of land on the proprietor (see section 20(a) of Cap 107).

A Sauzier, legal consultant and former judge of the Supreme Court of Seychelles, in his opinion given at the request of the Land Registrar on 29 August 1994 declares thus:

> It is the duty of the executor under article 1027 to file the affidavit of transmission under section 71 of the chapter 97."

(A copy of the above opinion was supplied by Mr J Hodoul, attorney-at-law, for my information. His gesture is greatly appreciated.)

No doubt the conclusion is in accordance with the law on account of the fact that the executor or the fiduciary does not have the capacity to make an application for division in kind, for section 107(2) of Cap 94 has specifically vested the right in any co-owner.

A Sauzier J in *Lesperance v Johnson & others* (1982) SLR 348 held that:

> (iv) the fiduciary did not have the powers of disposition or alienation of the co-owned property;
>
> (vi) although a partition was not an act of disposition or acquisition it was akin to the acquisition of a right or ownership of land.

For an application for division in kind to be determined before the court as well as to invoke the jurisdiction of the court in accordance with section 107(2) of Cap 94, the Applicant it legally bound to satisfy the court that he is a co-owner as the statute requires so. A mere concurrence of the applicants and the respondents cannot satisfy the statutory requirement.

When a statute specifically provides for the registration of heirs who inherit the immovable property of a deceased proprietor (as provided in section 72(1) of Cap 107) a co-owner is bound to satisfy the court that "transmission on death" confers on him or her such status. "Transmission on death" enables a court to further determine the co-owners who are entitled to have notice of the application as among whom the division should take place. When the Civil Code makes no provisions for such determination by registration, the provisions of section 72(1) of Cap 107 will supersede the general provisions found in the Civil Code on the matter of co-ownership.

A copy of the Notice of First Registration dated 14 May 1990 of parcel H1953, the subject matter of the application submitted to the Court, reveals that section 72(1) of Cap 107 has not been satisfied for the reason that the registration therein is in the name of "Heirs Mr Maurice Alcindore." The said document also bears a legal charge of R500 in favour of the Government of Seychelles, which obliges such party to be noticed on account of the fact that a division in kind if granted creates new allotments of land in place of the parcel of land H1953 which is subject to the charge and the subject matter of the application. In the case of *Lesperance v Johnson and three others* (supra) Sauzier J has highlighted the above position as follows:

> (vii) a partition is the conversion of a claim to a share in the proceeds of sale of a whole property to the full ownership in a definite parcel of that property (emphasis added).

When a parcel of land owned by several persons is converted into definite and divided portions of land to take the place of the whole, the division replaces the whole, hence a party in whose favour a charge is registered is entitled to notice the application for division in kind.

I therefore rule,

(a) Parties who claim undivided shares of a land owned in common and the subject matter of the application for division in kind is required to satisfy the court that they are entitled to such legal right. The agreement of parties before the court alone cannot confer legal rights to the undivided shares of the land to be divided.

(b) Properties registered under the Land Registration Act (Cap 107) are deemed to be entitled to such share or shares in the absence of claims to the contrary. On the death of a proprietor under the Act, compliance with the provisions of transmission on death under the Act should precede an application in kind under section 107(2) of Cap 94.

(c) In respect of the charge in favour of the Government, notice is due. Issue notice on the Attorney-General, representing the Government, with a copy of this order for service.

Record: Civil Side No 61 of 1995

Cable & Wireless (Seychelles) Ltd v
Minister of Finance and Communications & Ors

Civil procedure - leave to appeal – supervisory jurisdiction – writ of certiorari

Leave to proceed with an application for a writ of certiorari was declined by the Court. The applicant appealed for leave to be granted in the interests of justice.

> **HELD:** The granting of leave to appeal is not a mechanical process. It is a procedural step to prevent frivolous and vexatious matters being canvassed in the appeal. Leave is not granted as a matter of course.

Judgment: for the respondent. Leave refused for non-compliance with rule 8 of the Supervisory Jurisdiction Rules and rule 24 of the Court of Appeal Rules. No order for costs.

Legislation cited
Constitution of Seychelles, arts 125, 136
Courts Act 1978, s 12
Constitutional Court Rules 1994, r 4
Seychelles Court of Appeal Rules 1978, r 24
Supervisory Jurisdiction Rules, r 15
Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules 1995, rr 6, 8

Cases referred to
Philip Simeon v The Attorney–General (unreported) Constitutional Case 5/1997

Foreign cases noted
Ratnam v Cumarasamy [1985] 3 All ER 933

Pesi Pardiwalla for the applicant
Francis Chang Sam for the respondents

*[*Appeal by the applicant was dismissed on 3 August 1998 in CA 12/1998.]

Ruling on motion delivered on 28 January 1998 by:

PERERA J: The petitioner invoked the supervisory jurisdiction of this Court under article 125(1)(c) of the Constitution, seeking writs of certiorari and prohibition and an interlocutory injunction against the respondents. There was also filed a motion to amend the petition. This Court, by an order dated 22 December 1997, allowed a partial amendment of the petition by consent of the respondents. The application for interlocutory injunction was impliedly refused, in view of the findings in the case, and leave to proceed, as required by rule 6 of the Supreme Court (Supervisory Jurisdiction Over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules 1995 was refused of the whole application.

The petitioner has now filed a motion dated 12 January 1998, seeking leave to appeal against "that part of the order" dated 22nd December 1997 "refusing leave to the Petitioner to proceed" in the case. In the affidavit in support however, the attorney for the applicant avers thus –

> 4. This applicant intends to appeal against the whole of the order of His Lordship Justice Perera and has on 5 January 1998 filed a Notice of Appeal against such order including that part of the part of the order refusing leave to proceed.

In paragraph 6 of the affidavit, the motion is supported directly by averring that in the interests of justice, it is necessary that the leave to appeal be granted against "that part of the order …. refusing leave to proceed ….". Counsel for the applicant, Mr Pardiwalla, in supporting the motion in court submitted that leave to appeal is sought only in respect of the part of the order relating to the writs of certiorari and prohibition which

alone, he submitted, required leave to proceed, and not in respect of the other part relating to the motion to amend the petition and the interlocutory injunction. With respect, the said motion to amend, and the application for an interlocutory injunction arose in the main application, seeking the exercise of the supervisory jurisdiction as ancillary matters. This Court considered them separately in view of the agreement by counsel for both parties in making separate submissions. Leave to proceed was refused after allowing certain amendments to the petition, and on a consideration of the petition so amended. In such circumstances an order in respect of an interlocutory injunction became obsolete. It is for that reason that the Court held –

> Hence in those circumstances the question of issuing a stay order on Bharti Global Ltd, nor an interlocutory injunction on the respondent does not arise for consideration.

Therefore, for the purpose of rule 6 aforesaid, the three matters referred to above cannot be considered in isolation. The greater therefore included the less and hence leave to appeal should have been sought against the whole of the order and not part of it, as is being done now.

Rule 8, under which the instant motion has been filled provides thus –

> Where the Supreme Court refuses to grant leave to proceed, the petitioner may appeal to the Court of Appeal within 14 days of the order of refusal with leave of the Supreme Court first had and received.

The word “first” admits of no ambiguity. The applicant has on 5 January 1998 filed a “Notice of Appeal” against the “whole of the order dated 22 December 1997”, thereby implying that leave is required only to a part of that whole order. This view

is untenable. Hence the "Notice of Appeal", which according to the appellate procedures in Seychelles is tantamount to the "filing of an appeal", was filed without leave of this Court "first had and received." Accordingly there has been non-compliance with the said rule 8.

Rule 8 of the Supreme Court (Supervisory Jurisdiction) Rules SI 40 of 1995 aforesaid, contains the special provisions relating to an appeal being preferred from an order refusing leave to proceed. Those Rules do not provide the procedure for the filing of an appeal from a judgment of this Court on merits after leave to proceed has been granted. Hence in such circumstances the general Rules contained in the Seychelles Court of Appeal Rules 1978 read with the Practice Direction dated 5 August 1997 apply. However the said Practice Direction, which sought to make transitional provisions pending the making of fresh Rules under article 136(1) of the Constitution, has made some of the previous rules contained in SI 124 of 1978 applicable to "all appeals" to that Court. Hence rule 24 thereof, which is one of those specific rules, should apply to appeals from decisions of this Court in the exercise of the supervisory jurisdiction whether they arise from orders refusing to grant leave to proceed or upon adjudication on merits at a stage thereafter. Rule 24 which falls under the heading "Proceedings in the Supreme Court" provides that –

> 24(3): In all other cases, application to the Supreme Court for leave to appeal to the Court shall be by motion which shall state the grounds of the application and shall, if necessary, be supported by affidavit. Such application shall be made not more than fourteen days after the judgment or decision complained of and shall be entitled and filed in the proceedings from which it is intended to appeal, and all necessary parties shall be served.

There is no conflict between rule 8 of the Supervisory

Jurisdiction Rules (Supra) and rule 24 of the Court of Appeal Rules insofar as the requirement to file an application for leave within 14 days of the order sought to be appealed against is concerned. Such application should necessarily precede the presentation or filing of a Notice of Appeal as such a Notice can be filed only if leave is granted. In the constitutional case of *Philip Simeon v Attorney-General* (unreported) Constitutional Case 5/1997 the petitioner failed to file the petition within 30 days of the alleged contravention of the Constitution as required by rule 4(1) of the Constitutional Court Rules 1994. Rule 4(3) however provides that "a petition…. may, with leave of the Constitutional Court, be filed out of time". The application for leave was filed, as in the instant case, after the petition was filed. The Court did not use its discretion to grant leave. In my ruling I stated

> Good faith and practicality in pleadings would require that where there has been a non-compliance with a time bar, an application seeking the discretion of the Court to accept the pleading notwithstanding the default should accompany or precede the presentation of the delayed pleading.

Mr Pardiwalla however urged the Court to consider exercising the discretion under rule 15 of the Supervisory Jurisdiction Rules which provides that –

> 15. Where the parties fail to comply with the requirements set out in the preceding Rules, the Court may, on the application of any of the parties, or ex mero motu make any suitable order.

In this respect, Mr Pardiwalla invited the Court to consider that the order sought to be appealed against contains matters of law and commercial practice which are of general or public importance and hence ought to be the subject of an appeal. Matters of general and public importance are no longer a consideration under section 12(2) (b) of the Courts Act (Cap 52) as amended by Act No 18 of 1978. Hence the only

consideration is whether the question involved in the appeal is one which ought to be the subject matter of an appeal.

Leave to proceed in this case was refused by this Court as the petitioner failed to show "good faith" as required by rule 6(1). The court concluded that –

> …….. The petitioner has a wholly unarguable case upon the unambiguous terms and covenants in the licence and the connected agreement they rely on to claim exclusivity in the sense of a monopoly in respect of certain services …….

The supervisory jurisdiction of this Court is exercised to determine whether a subordinate court, tribunal or adjudicating authority has acted ultra vires its powers or failed to follow the rules of natural justice. In the instant matter, the petitioners failed to satisfy the Court that they had an arguable case to proceed to a hearing to consider those aspects.

The granting of leave to appeal is not a mechanical process. It is a procedural bar to prevent frivolous and vexatious matters being canvassed in appeal, thus causing prejudice and delay to those benefiting by the decision sought to be canvassed in appeal. Hence under rule 8 of the Supervisory Jurisdiction Rules, or rule 24 of the Court of Appeal Rules, a person who wishes to file an appeal cannot file such appeal and seek covering approval or ratification. Leave is not granted as a matter of course. The applicant was found to have had a "wholly unarguable case". If, as they claim now, they have an "arguable appeal", they should have been more diligent in the following in the basic rules of court. The applicants had ample opportunity to advise themselves as to the practice and procedure to be followed when filing an appeal against the order of this Court. Rule 8, on which the instant ,otion is based, is clear and unambiguous. In this context the following dicta of Lord Guest in the case of *Ratnam v Cumarasamy* [1964] 2 All ER 933 would be relevant

–

> Rules of Court must prima facie be obeyed …. If the law were otherwise a party in breach would have an unqualified right to extension of time which would defeat the purpose of the Rules which is to provide a timetable for the conduct of litigation ….

In the circumstances, I find no grounds to make any order under rule 15, other than to refuse leave to appeal for non-compliance with rule 8 of the Supervisory Jurisdiction Rules as well as rule 24 of the Court of Appeal Rules which is now applicable as a general provision. Accordingly the Notice of Appeal dated 5 January 1998 has not been validly filed and hence there is no appeal before the Court of Appeal.

There will be no order for costs.

Record: Civil Side No 377 of 1997

Camille v The Seychelles Government

In limine litis challenge

The plaintiff was shot by the first defendant (deceased at commencement of these proceedings) who was employed by the second defendant, the Government of Seychelles. The name of the first defendant was unknown to the plaintiff until 13 years and 5 months after the incident occurred. In the statement of defence, the Government sought to rely on the defence of prescription, that the action must be brought within five years of the offence provided for in article 2271 of the Civil Code. The Government made the plea in limine litis at the end of the case. The plaintiff claimed that a plea in limine litis challenges the pleadings and not the evidence and should therefore be raised before trial.

HELD:

> As a general rule s 90 of the Code of Civil Procedure provides that any point of law should be disposed of "at the trial" and exceptionally by consent of the parties or by order of the Court. The evidence disclosed in the Plaintiff's case would assist not only the Second Defendant but also the Court to consider the plea of prescription both in substance and law.

Judgment for the Government.

Legislation cited
Civil Code of Seychelles, art 2271
Seychelles Code of Civil Procedure, s 90

Cases referred to:
AttorneyGeneral v Voysey (unreported) SCA 12/1995
Joseph Labrosse v Government of Seychelles (unreported) SCA 11/1998

Foreign cases noted
Galea v Autard 1869 MR 49
Pillay v Pillay 1940 MR 48

Philippe BOULLE for the plaintiff
Romesh KANAKARATNE for the defendant

Ruling on plea in limine litis delivered on 14 day of December 1998 by:

PERERA J: The plaintiff originally sued two defendants, one Francis Philoe as the first defendant, and the Government of Seychelles as the second defendant. It is averred that on 15 August 1983 around 8:10 pm the first defendant went to the shop and shot the plaintiff. Consequent to the injuries received, he claims a sum of R1,420,000 from the two defendants jointly and severally.

Pending the hearing of this case the first defendant died, and counsel for the plaintiff informed the Court that he would prosecute the action only against the second defendant as a joint tortfeasor on the basis of vicarious liability.

Counsel for the second defendant raised the following points in limine:

1. That the first defendant was not acting within the scope of his employment at the material time and the alleged act was not incidental to the service of employment of the first defendant.

2. That the question of vicarious and joint liability on the part of the second defendant does not arise in view of the denial by the second defendant of the incident itself.

3. That this action is prescribed under article 2271 of the Civil Code of Seychelles (Cap 33).

Article 2271(1) is as follows:

> All rights of action shall be subject to prescription after a period of five years as provided in articles 2262 and 2265 of this Code.

Article 2219 defines "prescription" as involving "loss of rights through a failure to act within the limits established by law." Hence by the operation of Article 2271(1), a plaintiff loses his accessory right of action or the judicial remedy for his grievance if such action is commenced after a period of five years from the date the claim arose.

Counsel for the plaintiff invited the Court to exercise the equitable jurisdiction of this Court under section 6 of the Courts Act to deprive the defendant of the defence of prescription. In this respect he cited the following of section 6 in relation to limitation of actions –

> Its liberal interpretation would however invest the Court with the power where there is an element of unfairness in the conduct of the defendant, in the interest of justice, and in the exercise of the general jurisdiction to administer justice, to prevent a party whose conduct has caused delay from pleading prescription.

The learned Justice of Appeal however added that –

> What must be considered in exercising that power is the conduct of the defendant. The power is not exercised on the basis of mere sentimental sympathy for the plight of the plaintiff.

Counsel also relied on the view expressed by Ayoola JA in that case that:

> The essence of the exercise of an equitable jurisdiction in this type of case is to avoid the deprivation of the plaintiff of an advantage which he would have had, had the conduct of the defendant been proper.

In the *Voysey* case (supra) one Mark Voysey, a helicopter pilot of the Air Force, died on 30 August 1987 when the helicopter he was piloting crashed off Praslin. The parents of the deceased corresponded with the Seychelles People's Defence Forces (SPDF), to which the helicopter belonged, for the cause of the accident. The SPDF replied to the correspondence but offered only vague reasons or calculated guesses. The closest reply the plaintiff received was on 9 December 1993, after the period of prescription had lapsed, in the following terms –

> … whilst there is no indication that there was a malfunction, it is not possible to say with absolute certainty that there was not, either.

There was therefore a qualified admission of a possible malfunction which if established would have made the government liable in damages. The plaintiff filed action and sought to defeat the defendant's defence of prescription on the ground that an action could not be filed without knowing the cause of the accident. The Court of Appeal held inter alia that -

> There is no statutory provision that confers power on the Court in this jurisdiction to postpone the accrual of a right of action by reason of ignorance of the plaintiff of the material facts relating to the cause of action.

As regards the application of the equitable jurisdiction, the Court held that there was "nothing of material significance that any delay in releasing information concealed" and that the Government had no information of any use to the respondents in relation to the cause of the crash. Hence the equitable powers were not exercised in that case.

Whereas the plaintiff in the *Voysey* case (supra) awaited the cause of the crash which gave rise to their action, the plaintiff in the instant case allegedly awaited the name of the person who inflicted the gun shot injuries, although admittedly he had knowledge of his identity. Ayoola JA stated, albeit obiter, in the case of *Voysey* stated that –

> Normally, a right of action accrues when the essential facts exist and, barring statutory intervention, does not arise with the awareness, for instance, of the attributability of the injury to the fault of the other party, unless there has been a fraudulent concealment of facts. The date of manifestation of damage may be specifically made the commencement of a right of action.

Hanbury on *Modern Equity* (8th edition) dealing with equity in relation to the Statute of Limitations states at page 307–

> The doctrines of laches and acquiescence in the case of purely equitable claims, substituted by equity for the statutes of limitation as deterrents to the tardy assertion of rights, unless one of those statutes had expressly included equitable claims within its orbit. In the case of legal claims, or even of equitable claims which it would regard as analogous to legal claims, equity rigidly enforced the observance of the statutory periods. But one important reservation equity permitted to itself. If there had been fraud on the part of the defendant, and the plaintiff did not discover it,

> through no fault of his own, until the statutory period had elapsed, equity would consider that the period had not begun to run until the date of its discovery.

Applying this test to the facts of the case, was the plaintiff ignorant of the name of his assailant, although he knew of his identity, and if so, was it due to fraud and concealment by the Government as alleged, or due to his own laches or acquiescence?

The plaintiff testified that he knew that it was an army officer on duty at Colonel Vidot's residence, which was close by, who shot him on 15 August 1983. He further stated that that person who shot him had looked at him in a strange manner the previous day. He did not know his name until in 1995 he heard from one Phililp Figaro, an ex-army officer who was also on duty at Colonel Vidot's residence at that time. Philip Figaro corroborated the plaintiff on this matter. Philip Figaro further testified that he met Francois Philoe at Colonel Vidot's after the shooting. He was excited and told him that it was the first time that he shot someone. He further stated that everyone in the camp knew who shot the plaintiff and that Philoe continued to perform guard duties at Colonel Vidot's residence thereafter.

The wife of the plaintiff, who rushed out of the house on hearing gun shots, also testified that she saw an army officer dressed in army uniform with a gun in his hand and another person without a gun, in civilian clothes. She further testified that as she was sure that her husband was shot by an army officer on duty, she met with Mr Berlouis (the then Minister of Defence) to ascertain the name of that officer, but was told that the information was confidential. Mr Berlouis, though listed as a witness, was not called by the plaintiff and hence her evidence on that matter remains to be hearsay.

Unlike in the *Voysey* case, the plaintiff did not produce any

documentary evidence to show that any meaningful attempts were made to ascertain the name of the army officer before the lapse of the period of five years prescription under the general law. In fact, as the plaintiff and his wife knew full well that the injuries were caused by an army officer on duty, the action was barred by the six month period of limitation under section 3 of the Public Officers (Protection) Act (Cap 192). Even in the circumstances alleged by the plaintiff, an action could have been instituted against the Government in its capacity as joint tortfeasor on the basis of vicarious liability within the period of 6 months.

In the recent case of *Joseph Labrosse v Government of Seychelles* (unreported) CA 11/1998) determined on 4 December 1998, the Court of Appeal unanimously held that the time bar contained in the Public Officers (Protection) Act applied to a Public Officer (tortfeasor) alone, against the Public Officer and the employer as joint tortfeasors, or against the employer on the basis of vicarious liability.

In the instance case, the Government has denied that the first defendant, the original tortfeasor, was acting within the scope of his employment as alleged. Hence there was no consideration of vicarious liability, and accordingly the Government, who alone is being sued in that capacity rightly relies on the general period of prescription.

The evidence adduced by the plaintiff does not establish any fraud or concealment on the part of the government. The tortfeasor was known to the plaintiff and his wife, although not by name. It is inconceivable that they were unable to ascertain the name of that person if they exercised due diligence. No formal requests were made to the Defence Forces, or the police. According to the evidence of Clement Potter and Jean Larue of the Port Glaud Police Station, the police conducted an investigation. Moreover there was the possibility of a direct action against the Government within the prescriptive period. Hence more than in the *Voysey* case this

case does not merit the exercise of the equitable jurisdiction of this Court to defeat the defendant's defence of prescription. The plea in limine litis is therefore upheld, and since this decision disposes of the whole cause of action, the action is dismissed, but without costs.

Record: Civil Side No 8 of 1997

Camille v The Seychelles Government

Civil Code - prescription – equitable jurisdiction – vicarious and joint liability

The plaintiff was shot by the first defendant (deceased at commencement of these proceedings) who was employed by the second defendant, the Government of Seychelles. The name of the first defendant was unknown to the plaintiff until 13 years and 5 months after the incident occurred. The Government claimed no liability on the basis that the first defendant was not acting within the scope of his employment at the time of the alleged offence. Further, the Government sought to rely on the defence that the action must be brought within five years of the offence.

HELD:

> Where the tortfeasor is known to the plaintiff, although not by name, and in the absence of due diligence to ascertain the name of the offender or evidence establishing fraud or concealment on the part of the Government, the general period of prescription applies.

Judgment: for the Government. Action dismissed.

Legislation cited
Civil Code of Seychelles, art 2271
Courts Act, s 6

Cases referred to
AG v Voysey (unreported) SCA 12/1995
Joseph Labrosse v Government of Seychelles (unreported) SCA 11/1998

Foreign cases noted
Galea v Autard 1869 MR 49

Pillay v Pillay 1940 MR 48 (Part II)

Philippe BOULLE for the plaintiff
Romesh KANAKARATNE for the defendant

[Appeal by the plaintiff was dismissed on 13th August, 1999 in CA 57/1998.]

Ruling delivered on 14 September 1998, by:

PERERA J: This is a delictual action filed by the plaintiff on 15 January 1997 in respect of an alleged faute committed by one Francois Philoe on 15 August 1983 in the course of his duties as a soldier in the employment of the Government of Seychelles.

On 4 May 1998, before the hearing commenced, it was revealed that the first defendant, the said Francois Philoe had died after the institution of these proceedings. Counsel for the Plaintiff however informed the Court that he would proceed against the second defendant, the Government of Seychelles, without amending his pleadings. Accordingly the first defendant was deleted from the proceedings, and Mr A Juliette, his counsel, withdrew from the case.

The second defendant in their statement of defence filed on 3 June 1997 pleaded inter alia as follows:

> 4. (i) That the first defendant was not acting within the scope of his employment at the material time and the alleged act was not incidental to the service of employment of the first defendant.
>
> (ii) That the question of vicarious and joint liability on the part of the second defendant does not arise in view of the

denial by the second defendant of the incident itself.

(iii) That this action is prescribed under article 2271(1) of the Civil Code of Seychelles (Cap 33).

Paragraph 4 (iii) constituted a "point of law" envisaged in section 90 of the Code of Civil Procedure (Cap 213). That section reads as follows –

> 90. Any party shall be entitled to raise by his pleadings any point of law; and any point so raised shall be disposed of at the trial, provided that by consent of the parties, on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

On a plain construction of this section, the disposal of a point of law raised in the pleadings "at the trial" is the rule and its disposal "at any time before the trial," the exception.

On 16 May 1998, counsel for the second defendant, Mr Kanakaratne, submitted inter alia that –

> It is the position of the second defendant that it would be more appropriate that the points raised in the plea in limine by the second defendant be argued upon and decided subsequent to the hearing of the evidence of this case, since there are certain factors which have to be clarified and the truthfulness of it ascertained before the second defendant could make certain submissions in respect of this plea.

On the basis of that submission, Mr Boulle stated that he would take it that the point in limine would be argued "at the end of the case." The Court thereupon made the following order –

> Counsel for the first and second defendants inform Court that they would not be arguing the point raised as plea in limine today and that they would do so at the end of the case after a hearing on the merits.

Accordingly, the plaintiff's case commenced on 4 May 1998 and after several adjournments was formally closed on 30 July 1998. Mr Kanakaratne thereupon moved to argue the point in limine raised in paragraph 4 (iii) of the second defendant's defence that the plaintiff's action was prescribed under article 2271 of the Civil Code. He submitted that having heard the evidence adduced by the plaintiff, he was now in a position to support his plea. The basis of the plea is that while article 2271 of the Civil Code provides that all actions are prescribed in 5 years from the time the cause of action arose, the present action which alleges a faute committed on 15 August 1993 has been filed 13 years and 5 months later. Mr Kanakaratne submitted that by not supporting the plea before the trial, the plaintiff was given an opportunity to adduce evidence to explain the delay. The plaintiff and his wife in the course of their testimonies have given the reason and adduced further evidence on that matter.

Mr Boulle objects to the plea being raised at the end of the plaintiff's case. He submitted that a plea in limine litis challenges the pleadings and not the evidence and hence should necessarily be raised before the trial. With respect, such an interpretation is contrary to the plain meaning in section 90, which, as I stated earlier, is that as a rule it should be disposed of 'at the trial", and exceptionally by consent of parties or by order of court be disposed of "at any time before the trial". Further, counsel for the second defendant did not abandon the plea, but specifically reserved his right to raise it after hearing the evidence in the case, and counsel for the plaintiff did not object to that procedure. Hence the plea could have been raised at the end of the case for the defence or at

any time before. Mr Kanakaratne cited *Stroud's Judicial Dictionary,* vol I, p 216 wherein the words "at the trial" have been judicially defined as "during or at the end of the trial."

Apart from the technical construction of section 90, the following Mauritian cases are of particular application to this matter. In *Galea v Autard* 1869 MR 49in an action concerning land, the wife sued as plaintiff authorised by her husband. After the merits had been heard, the defendant raised a point of law that in the absence of positive proof that the land in question was the property of the wife, the husband ought to have sued as administrator of the legal community of goods, of which the land must be presumed to form part.

Shand CJ held that this objection having being waived in limine of the discussion could not be renewed after the merits of the case had been entered into.

In the present case, counsel for the second defendant did not waive the plea but reserved it to be raised at the trial. It was not a challenge of the evidence, as Mr Boulle submitted, but a challenge of the pleadings. It cannot therefore prejudice the plaintiff in any way when it is being raised after he had been given an opportunity to rebut the provisions of article 2271 which imposes a time bar for instituting actions.

In the case of *Pillay v Pillay* 1940 MR 48 (Part II), the plaintiff as an assignee of a debt obtained judgment for R92 against the defendants who were guarantors of that debt. The defendants pleaded in limine that they had not been given notice of the assignment. The trial judge overruled that plea, proceeded to hear the evidence and gave judgment in favour of the plaintiff.

At appeal, it was held that the trial judge was right in refusing to dismiss the action in limine, as the action would have been dismissed on the plea later after it had been proved that absence of notification of transfer had caused prejudice to the

debtors or guarantors, and that such a consideration was not possible without hearing the evidence to that effect.

The present position of that instant case is somewhat similar. The evidence disclosed in the plaintiff's case would assist not only the second defendant, but also this Court to consider the plea of prescription both in substance and in law.

Accordingly, counsel for the second defendant is entitled to raise the plea of prescription as set out in paragraph 4(iii) of the defence as a point of law envisaged in section 90. If the plea succeeds, the Court will proceed to make any of the orders provided in section 91. However if the plea fails, the case will proceed to a hearing on merits, and in such circumstances, the second defendant will be entitled to adduce any evidence that may be considered necessary to substantiate the rest of the averments in their defence. Ruling made accordingly.

Record: Civil Side No 8 of 1997

Chang Tui Sing v Royle

Co-ownership – fiduciary – vendor's privilege – prescription

The plaintiff co-owner sold her share to the defendant co-owner who failed to pay the contract price on the due date. An inhibition was registered against the land by the plaintiff. The plaintiff remained in occupation and leased and repaired the property from time to time. The defendant claimed that the debt was time barred and that the occupation of the land by the plaintiff was illegal.

HELD:

(i) The sale was complete on registration notwithstanding the unpaid purchase price;

(ii) The vendor's privilege ended 10 years after registration of the sale;

(iii) The debt was prescribed 5 years after the due date; and

(iv) The prescribed period had not been interrupted by any admission by the defendant.

Judgment: for the defendant. Inhibition removed.

Legislation cited
Civil Code of Seychelles, arts 823, 825, 1589, 2271, 2275
Mortgage and Registration Act, s 15

Philippe BOULLE for the plaintiff
Serge ROUILLON for the defendant
Danny LUCAS for the intervener

Judgment delivered on 21 May 1998, by:

AMERASINGHE J: The plaintiff sued her sister the defendant to recover the balance sum out of consideration due on the sale of the plaintiff's one third undivided share in 1975 of two allotments of land V5410 and V5586 in Eau Claire Lane, Victoria, Mahe.

It is admitted that the parties are sisters, that they entered into an agreement on 4 August 1975 for the sale of the land, that a sum of £200 out of the consideration was paid and that the balance sum of £800 was due to be paid within 4 years from the date of the agreement. In answer to paragraph 4 of the plaint, the defendant, while admitting that the agreement granted a vendor's privilege, denies its validity for want of registration, and pleads that even if it had been otherwise the registration has lapsed.

The defendant in response to the plaintiff's claim of the failure to pay the balance of £800 only pleads that the claim is not due as it is time barred, but makes no assertion of the payment of the balance sum of £800. The defendant prays for the dismissal of the plaintiff's action to recover a sum of R70,272.53 subject to costs.

In the defendant's counterclaim she avers that the plaintiff without her authority or consent has occupied the said parcel of land title V5410 for a period of over 5 years. It is also alleged that the plaintiff without her authority or consent enjoyed the benefits or the parcel of land title V5586 by collecting rent and authorising the reconstruction of a house with a view to selling the title to the tenants and causing the said parcel to be encumbered with a legal charge in favour of the Seychelles Housing Development Corporation in a sum of R102,344.00.

The defendant claiming the ownership of two thirds of the aforesaid parcels of land prayed for judgment in a sum of

R94,000 as damages on the above grounds pleaded. The plaintiff in answer to the counterclaim raised a point of law to the effect that the defendant as a co-owner has no locus standi to sue the plaintiff. She further denied that the plaintiff's occupation of parcel of land title V6410 was without authority.

A fiduciary representing the co-ownership, on an application for intervention, filed a statement of demand on the application being granted. In the statement of demand made under section 120 of the Seychelles Code of Civil Procedure, the intervener making similar allegations as made by the defendant against the plaintiff, prayed for an order to withdraw an inhibition placed on title V5410, damages in a sum of R230,000 with interest, and for an order to compel the plaintiff to account to the fiduciary for all rents collected from third parties with interests and costs.

The plaintiff in her answer to the intervener's statement of demand stated that she occupied the house with the other co-owner's consent and that the fiduciary's consent was irrelevant as he had been appointed only on 12 December 1996. She further avers that the rent collected at R90 per month was spent on repairs to the rented house, and that the tenant Barallon ceased to pay rent a long time ago.

At the hearing, it transpired in the evidence of both the plaintiff and her sister Genevieve, who is the other co-owner of the balance of one third of the undivided share of the said parcels of land, that the plaintiff came into the occupation of the house in Au Claire Lane at the end of 1979 to help her and to attend to their sick and paralysed mother. The plaintiff's sister Genevieve left the said house when her mother died leaving the plaintiff to occupy the house and to look after the property. It is the evidence of the said co-owner that the plaintiff was expected to live in the said house and look after the property. According to her the plaintiff was not expected to pay rent, and that it was with her consent and approval that when the

house on the other parcel of land was given to Barallon to occupy, the rent of R90 was expended on repairs to the houses, and for the supply of electricity and water. The plaintiff and her witness under cross-examination, revealed that although they wrote to the other sister, the defendant, who was in England about the house and property that they never received a reply. The plaintiff's evidence was conspicuous by her uncertainty and inability to remember facts and figures, which she attributed to the lapse of time.

The intervener produced as I(1) and I(2) two documents in proof of his appointment as fiduciary in respect of parcels of land titles V5586 and 5410. It became evident from his testimony that he has never received any instructions directly from the defendant, the owner of two thirds of the undivided shares of the said parcels of land or her sister the other co-owner. In his evidence in chief he testified to the fact that to his knowledge the defendant never gave authority to the plaintiff to occupy the premises in suit or to act in relation to the two parcels of land.

Although the intervener is an accountant by profession, in the witness box under cross-examination by the counsel for the plaintiff, Mr Boulle, he found himself in an unenviable position. His evidence was neither cogent nor coherent and he displayed a great deal of uncertainty in respect of instructions given to him. The following question and answers very vividly displayed the witness' unfortunate performance.

Q. …….
Who gave you these instructions?

A. Yvonne Royle.

Q. Have you ever met Mrs Yvonne?

A. No.

Q. Neither have you corresponded with her?

A. No.

Q. How can you get instructions from somebody whom you have not ever met and you never correspond with him?

A. I got instructions through my counsel Mr S Rouillon.

Q. Have you ever sought instructions from the co-owner who is in Seychelles present and available?

A. I have been through my counsel Mr Rouillon.

There is no doubt that the intervener by exhibit I (1) and I (2) has been legally appointed as the fiduciary, and that his legal right to act under the circumstances will be necessarily restricted to the terms of his appointment specified in the said documents.

On the evaluation of evidence it is observed that the pleadings of both the plaintiff and the defendant along with exhibit P1 reveal, and that it is without dispute that the plaintiff has sold her one third undivided share of parcels of land titles V5410 and V.5586 to the defendant. The defendant in admitting paragraph 3 of the plaint by her answer, apparently admits the averments, that on the payment of £200 out of the consideration of £1000 there was a balance of £800 to be paid within a period of 4 years of the agreement.

The defendant in response to the specific plea in paragraph 5 of the plaint that she failed to pay and settle the said sum of £800 owed on the consideration, makes no denial of such a claim but pleads that in law no sum is due as the claim is time barred. I therefore conclude that the defendant has admitted the failure to pay the balance of £800 to the plaintiff. In the examination of the plea of prescription the exhibit P1 describes how the vendor's privilege referred to in paragraph

4 of the plaint operates. It is as follows:

> And as security for the payment of the sum of Eight Hundred Pound Sterling and interest as stipulated as and when they become due, the property hereby conveyed remains mortgaged and hypothecated by special privilege until satisfaction thereof agreeable with the law.

The exhibit I (3) reveals as inscription on the registrar of a change in favour of the plaintiff in respect of the said parcels of land, for a sum of £800 made on 29 July 1975. As rightly pointed out by counsel for the defendant in accordance with section 15(1)(a) of the Mortgage and Registration Act (Cap 134) the said inscription shall have legal effect only for a period of 10 years, as it was made before the commencement of the Civil Code of Seychelles on 1 January 1976. Hence the vendor's privilege ended in July 1984. On the application of the provisions of article 1589 of the Civil Code the sale between the parties by exhibit P1 is complete with the registration of the agreement in spite of the fact of four fifths of the consideration not being paid by the defendant. The right to sue for the recovery of the said £800 by the operation of article 2271 of the Civil Code was time barred after the lapse of 5 years, from the end of 4 years stipulated in exhibit P1 for payment. Therefore the plaint filed on 20 February 1995 is time barred, as the action was prescribed at the end of July 1984.

Counsel for the plaintiff, to overcome the aforesaid bar, had sought recourse to the provisions of article 2275 of the Civil Code and called upon counsel for the defendant to submit the defendant to "swear an oath on the question whether the thing has in fact been paid for."

Counsel cites paragraph 693 on the possibility of administering an oath to a debtor from the *Treatise on The Civil Law*, vol 2, part 1, by Marcel Planiol (eleventh ed, 1939),

which reads thus:

> Art 2275 contains a similar restriction regarding the ordinary effects of prescription in certain cases, which will be considered later, it authorizes the creditor to administer an oath to his adversary to determine whether the debt has been paid …. And if he refuses he will be cast despite the fact that prescription has accrued.

What transpired in Court in respect of the oath was that counsel for the plaintiff, Mr Boulle, before calling evidence for the plaintiff made a demand as follows:

> On top of that, as prescription is pleaded I am making a demand on the defendant to come on oath and swear to the effect that question. I am making that demand under article 2275 (quote) I am now making a demand that the defendant swears on oath though I could have been satisfied with an admission.

(No doubt the counsel's submission has not been accurately recorded.)

The proceedings thereafter in Court only reflect counsel for the defendant informing the Court that the defendant will not make an oath. It is my considered opinion if there is a demand, it was never made to the defendant in accordance with article 2275 of the Code, and the reply of counsel for the defendant in the negative with no prior notice to the defendant cannot be considered as a refusal by the defendant. The defendant was not present at the hearing and never gave evidence in Court. A demand made in her absence, and never made to her personally, cannot burden her to suffer the consequence of being cast with liability, "despite the fact that prescription has accrued" in accordance with the authority cited by counsel for the plaintiff from the *Treatise on the Civil*

Law by Planiol. It is also observed that prescription against the claim of the plaintiff was never interrupted by an acknowledgement by the defendant by any admission.

I therefore dismiss the plaintiff's action on the ground that the plaintiff's claim is prescribed, with costs to the defendant for the reasons stated above.

The evidence of both the plaintiff and her sister Genevieve uncontroverted by the defendant established that the plaintiff came into occupation of the house at Au Claire Lane at the request of her sister Genevieve to assist her to look after their mother. Genevieve being a co-owner of the said property was legally entitled to authorise the Plaintiff not only to occupy the said house but also to act in respect of the co-owned properties by letting out to a tenant a house and to authorise the reconstruction of the house. There is no evidence to conclude that the defendant at any time was opposed to the other co-owners' management of the co-ownership by herself or by the plaintiff, her sister. Hence her silence is construed to be evidence of tacit approval of the decisions made by her co-owner and the occupant ,the plaintiff, who acted as an agent of the co-owner Genevieve. Although the defendant has claimed in paragraph 7 of the counterclaim that parcel of land title V5586 is encumbered with a legal charge in the sum of R102,344.00, the evidence only reveals that the parcel of land title V5410 is subject to a legal charge of R500 (exhibit I, 5). The exhibit D1 bears testimony to the fact that the plaintiff by an endorsement on a letter dated 6 November 1985 gave permission for the reconstruction of the house referred to therein. The said document refers to the fact that the house was in a very poor condition. I therefore conclude, that even if the plaintiff acted without the authority of the defendant, her actions were never unlawful as she had the approval of a co-owner and because she in no way caused damage to the interests of the co-ownership. Her actions on the other hand have contributed towards the maintenance and preservation of the buildings. The defendant failed to adduce any evidence

to prove her assertions that the plaintiff authorised the re-construction of the house on parcel of land title V5586 with a view to selling the same or that she negotiated a sale of the said land. A co-owner has the legal right to act independently to secure her personal interests and recover any personal loss caused to her by the occupation or letting out of any buildings on, or any part of, the co-owned land. Hence I hold that the defendant had the locus standi to sue the plaintiff on the cause of action pleaded.

For the aforesaid reasons I therefore dismiss the defendant's counterclaim with costs to the plaintiff.

Exhibits I (1) and I (2) are evidence of the intervener's appointment as fiduciary in September and December 1996, while the plaint was filed in February 1995. It is reflected in the question and answers reproduced earlier in this judgment that by the admission of the intervener fiduciary that he received all instructions through his counsel and that he has never received instructions from the co-owners personally.

Counsel for the defendant claims, quoting article 825 of the Civil Code that the fiduciary "should act as if he were sole owner and not according to the whims of a co-owner who has appointed him and now disagrees with the action he has taken." Strong language indeed, and unfortunately counsel is mistaken. The same article imposes on him the following restrictions:

> He shall be bound to follow such instructions, directions and guidelines as are given to him in the document of appointment by the unanimous agreement duly authenticated of all co-owners or by the court.

Exhibits I (1) and I (2) by which he was appointed fiduciary reflect that his appointment was made under article 823 of the Civil Code. The said article circumscribes his powers to the

terms of his appointment, which reads thus:

> A fiduciary who is not appointed by the court shall be appointed by a duly authenticated notarial document which shall contain the terms of his appointment.

Therefore it is clear that by the provisions of the said two articles of the Civil Code that the fiduciary is authorized to hold, manage and administer the property, and in the execution of his duties he is called upon to do so with the diligence, honesty and in a businesslike manner of a sole owner of the property. He is not empowered to act as sole owner in disregard of the co-owner's advice directions.

Article 825 of the Civil Code lays down the obligations of the fiduciary, "to follow such instructions, directions and guidelines as are given to him in the document of appointment …."

The appointment of the fiduciary by the two co-owners is by exhibits I (1) and I (2) and the instructions, directions and guidelines given in the two documents are identical and are as follows:

> With power to sell, transfer or charge the above titles and with all the powers, rights and privileges and duties under the Code.

It is seen from the above that the fiduciary has no instructions from the co-owners to claim damages or arrears of rent that constitute the intervener's demand, when one of the co-owners in open court has expressed her objection to the said claim before the court.

The Court has already held that the co-owner who did not testify before the Court, that is the defendant, is not entitled to the claims made by her in her counterclaim. As the claim pertains to the co-ownership in relation to which the fiduciary

is before the Court, there can be no claims that can be made by the fiduciary for periods before his tenure of office commenced.

There is no evidence before the Court that since he assumed the office of the fiduciary of the co-ownership that any rents have been paid to the plaintiff for any claims to arise.
Where the future is concerned it is for the fiduciary to act and demand rent in the ordinary course of business from tenants before he could claim rent for past periods.

The order of the Court for an inhibition to be registered in respect of parcel of land title V5410 was made on the basis of the plaintiff's claim. Hence with the dismissal of the plaintiff's case, the intervener becomes entitled to an order for the withdrawal of the inhibition. I therefore make the order accordingly.

However subject to the aforesaid order for the withdrawal of the inhibition for the reasons stated earlier, the intervener's demand is also dismissed.

Record: Civil Side No 142 of 1995

Confiance v Allied Builders Seychelles

Civil Code - negligence – personal injury - damages

The plaintiff sued the defendant for damages for injuries suffered in the course of employment. The plaintiff claimed damages of R561,000 for suffering, anxiety, distress and discomfort, permanent disability and loss of future earnings. The defendant continued to employ the plaintiff.

HELD:

> In awarding damages for personal injuries, the court has to maintain a certain amount of consistency in respect to particular types of injuries and, at the same time, be flexible when the circumstances and nature of the injuries in a particular case demand a deviation from the general pattern. Previous awards in comparable cases are an important and useful guide.

Judgment: for the plaintiff. Damages awarded in the sum of R51,000.

Cases referred to
Rene Youpa v Y Jupiter (unreported) CS 28/1992
Ruiz v Borremans (unreported) Civil Appeal 22/1994
State Assurance Corporation v Gustave Fontaine (unreported) Civil Appeal 41/1997
Sedwick v Government of Seychelles (unreported) CS 138/1989
Simon Maillet v France Louis (unreported) SCA 177/1990
Sinon v Kilindo (unreported) SCA 255/1992
United Concrete Products (Sey) Ltd v Albert (unreported) Civil Appeal 19/1997

Foreign cases noted
Singh v Toong Fong Omnibus Co [1964] 3 All ER 925

Philippe BOULLE for the plaintiff
Kieran SHAH for the defendant

Judgment delivered on 21 July 1998, by:

PERERA J: The plaintiff sues the defendant Company for damages consequent to injuries suffered by him in the course of employment. It is averred that on 15 April 1996, the plaintiff was requested by an employee of the company to unload a container of glass panels and that while unloading, the panel fell and injured both of his legs. He avers that the accident occurred due to the fault and negligence of the company in failing to provide adequate assistance and protection to him.

According to the medical certificate issued by Dr Alexander Korythicov, the injuries were as follows:

- Three cut wounds at the front of the right thigh;

- a cut injury to the patella tendon penetrating to the joint of the right knee;

- cut injury to the muscular quadriceps and muscular vastus medialis in the middle;

- laceration over right patella; and

- four cut injuries to the left ankle and foot.

The defendant admits liability and hence it remains for this Court to determine the quantum of damages. The plaintiff claims the following –

1.	Pain, suffering, anxiety, distress and discomfort	R 80,000
2.	Permanent disability, infirmity	

	and loss of amenities of life	R120,000
3.	Loss of future earnings R1000 per month for 30 years	R360,000
4.	Cost of medical report	R 1,000
		R561,000

As regards the injuries suffered, the medical report (exhibit P1) states that the various injuries mentioned therein were repaired and the laceration sutured in the course of a surgical operation performed on 15 April 1996, the day he was admitted to the hospital. His right leg was cast in cylinder plaster of paris for four weeks. He was discharged on 1 May 1996, and the plaster cast was removed on 28 May 1996. Thereafter physiotherapy treatment was commenced. Dr Alexander in his testimony stated that the plaintiff now had muscle wasting on his right thigh and that the diameter of his right thigh is less than that of the left thigh. As a prognosis, he also stated that the injury to the joint may cause osteo-arthritis. Assessing the disability, Dr Alexander stated that there was a residual disability of about 10% on the right leg, and consequently the plaintiff would not be able to use that leg as before. This, he stated, was due to the severing of the patella tendon which has to be sutured, and the injury to the muscular quadriceps and muscular vastus medialis which was the same main muscle of the leg. Hence there was an injury to both muscle and tendon of the right leg.

The injury to the left leg however was limited to a laceration of the skin. Photograph (exhibit P3) shows the laceration marks. The photographs exhibits P2 and P4 taken with the plaster cast before it was removed on 28 May 1996 show that the plaintiff was using his left leg normally and that the injuries mentioned by Dr Alexander were mainly to the right leg.

On the basis of the medical report, the plaintiff, who is 35 years old, was hospitalised for a period of 2 weeks. His right leg was in plaster cast for about 1½ months. ThepPlaintiff in his testimony stated that he could not stand for a long time.

He further stated that he had played football for the Baie Lazare football team for 15 years, but could not play now. He further stated that in his spare time he did metal work for private contractors and earned around R3,500 – R5,000 per month in addition to his monthly income from the defendant company, or around R2,079 per 21 working days. He also claimed that he could not climb trees to pick breadfruit or jack fruit for the pigs he reared.

Mr Benji Kouki Patel, the director of the defendant company, testified that the plaintiff was employed by his company as a steel fixer and bender for about 9 to 10 years and that after his accident and the consequent hospitalisation and treatment, he has resumed work. He further stated that it was the intention of his company to continue to employ him.

The plaintiff himself admitted that subsequent to the accident he did his normal work from 7.30 am to 4 pm and sometimes on Saturdays as well. He also worked overtime.

Philip Rath, (PW2) a building contractor for whom the plaintiff worked in his spare time as a sub–contractor, testified that the plaintiff continued to work after the accident, but that this work was slower than before.

Witnesses Jimmy Philoe (PW3) and Michel Benoit (PW4) testified that the plaintiff played football for the Baie Lazare team, and that in his spare time he reared pigs.

In awarding delictual damages for personal injuries, this Court has sought to maintain a certain amount of consistency in respect of particular types of injuries and at the same time been flexible when the circumstances and nature of the injuries in a particular case demanded a deviation from the general pattern. In this respect, previous awards in comparable cases remain to be an important and useful guide. Lord Morris in the Privy Council case of *Singh v Toong Omnibus Co* [1964] 3 All ER 925 stated thus –

> If, however, it is shown that cases bear a reasonable measure of similarity, then it may be possible to find a reflection in them of general consensus of judicial opinion. This is not to say that damages should be standardised, or that there should be any attempt at rigid classification. It is but to recognise that since in a court of law compensation for physical injury can only be assessed and fixed in monetary terms, the best that court can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion. As far as possible, it is desirable that two litigants whose claims correspond should receive similar treatment, just as it is desirable that they should both receive fair treatment.

In the case of *Ruiz v Borremans* (unreported) Civil Appeal 22/1994 and *State Assurance Corporation v Gustave Fontaine* (unreported) Civil Appeal 41/1997, the Court of Appeal considering awards made without any basis or justification emphasised the need to consider awards in comparable cases in assessing damages in personal injury cases, and stated that such conventional figures could serve as a starting point for assessments. Accordingly I would proceed to consider a cross section of awards made by this Court in respect of injuries caused to limbs.

In the case of *Sedwick v Government of Seychelles* (unreported) C S 138/1989), the plaintiff sustained injuries to his knee and ankle, dislocation of the knee and rupturing of the lateral popliteal nerve. He developed a permanent foot drop deformity and had to use a spring appliance to assist his mobility. The permanent disability was assessed at 10%. Georges J awarded him R15,000 for pain and suffering and R20,000 for permanent disability, inconvenience and loss of amenities.

In *Simon Maillet v Francis Louis* (unreported) CS 177/1990the

plaintiff suffered a fracture of the left tibia and fibula resulting in incapacitation for a period of about 6 months and a permanent disability of 25% in the use of his left leg. He had been engaged in sports, especially boxing, but could not pursue these activities any longer. I awarded him R30,000 for pain and suffering and the 25% permanent disability and R10,000 for loss of amenities and enjoyment of life.

In *Sinon v Kililndo* (unreported) CS 255/1992 the plaintiff suffered a compound comminuted fracture of the right tibia and fibula. He was 20 years old and was an active sportsman. As trial judge I awarded R15,000 for pain and suffering and R20,000 for loss of amenities of life.

In *Rene Youpa v Y Jupiter* (unreported) CS 28/1992 the plaintiff was a reputed sportsman in the field of body building and weight lifting and was also a physiotherapist. He suffered a fracture of his leg which required the insertion of a metal pin. After the plaster cast was removed he fractured the same leg again while walking. He was later treated abroad.

Alleear CJ awarded him R20,000 for pain and suffering and R10,000 for the permanent disability and R15,000 for loss of amenities, prospects and enjoyment of life.

In the case of *Ruiz v Borremans* (supra) the plaintiff suffered a fracture of the left third metatarsal bone. On a medical assessment he had a partial permanent invalidity of 5% and a further permanent invalidity of 5%. Bwana J awarded R50,000 for pain and suffering and R30,000 for permanent disability, making a total of R80,000 for moral damages alone. Adam JA in reducing the awards stated –

> Since his judgment in silent as to the criteria he applied in his assessment of the damages that he awarded, and as the aim in arriving at the figure is to see that "justice meted out to all litigants should be evenhanded instead of

> depending on idiosyncrasies of the assessor", the Court can only come to the conclusion that the learned Judge did not seek guidance from comparable cases.

Ayoola JA also stated –

> There is really on the totality of the circumstances of this case nothing extraordinary to justify an award which in its side is much out of time with the level of awards in comparable cases.

Goburdhun P also observed that the injuries sustained by the plaintiff were not of a serious nature and that the permanent incapacity was also very low. Therefore the Court of Appeal unanimously reduced the sum of R80,000 for moral damages to R40,000 to keep in line with the comparable awards.

In the case of *Gustave Fontaine v S A Cos* (Supra) the plaintiff suffered a fracture in the right third lower part of the humerus. Details of the injuries sustained were; a deformed right upper arm, puncture wound with mild bleeding at 1/3rd distal area of the posteror side of the upper arm, 1 cm x 3 cm. The plaintiff claimed a total sum of R307,000 which included a sum of R60,000 for pain and suffering, R18,000 for loss of future earnings – the defendant corporation defaulted appearance, and the case proceeded ex parte – Bwana J awarded the full sum of R307,000 against the defendant. On appeal, the Court of Appeal, in Civil Appeal 41/1997 delivered on 9 April 1998, once again considered the comparable cases and reduced the award for pain and suffering to R15,000 and loss of earnings to R25,000.

Jurisprudence in Seychelles is now well settled that save in cases where there are exceptional reasons to deviate, the Court must maintain consistency in making awards. It would be only then that justice would be meted out to all litigants.

On a comparison of the cases considered above, the instant case does not fall into any extraordinary category to permit an award beyond the level of awards made in comparable cases. The residual incapacity of 10% on the right leg has, on the basis of the evidence, not affected the plaintiff to any appreciable extent as he is still engaged in the same occupation, earning about the same income both from the defendant company and from work done in his spare time. As regards his sports activities, namely playing football for a team, witness Mitchell Benoit (PW4) stated that the Baie Lazare team is not composed of younger players. However, the inability of the plaintiff to play football for pleasure or as a recreation cannot be discounted. Further as regards his ability to rear pigs due to his inability to climb trees to pick breadfruit and jack fruit, it must be considered that he could get the assistance of someone even if it involves payment for such a service.

As regards the prognosis that the plaintiff may develop osteo-arthritis on his right leg, Dr Alexander himself stated that such a condition could be avoided if that limb was exercised. In any event damages become payable for prospective prejudice only where the occurence of such prejudice is certain.

I agree with counsel for the defendant company that the claims are excessive. The instant case is comparable with the injuries suffered by the Plaintiff in the *Borremans* case (supra). On a consideration of the awards made in all comparable cases discussed above, I make the following awards.

1.	Pain and suffering, anxiety, distress and discomforts	R15,000
2.	Permanent disability, infirmity and loss of amenities of life	R25,000

As regards loss of future earnings, on the basis of the evidence, the plaintiff is able to continue his occupation at the defendant company without any loss or reduction of wages. The claim for future earnings has been made however on a reduced rate of R1,000 per month, but for 30 years. The amount of R1,000 was an assessment of the income from the piggery and extra work done by the plaintiff.

In the cases of *United Concrete Produces (Sey) Ltd v Albert* (unreported) Civil Appeal 19/1997 and *State Assurance Corporation v Gustave Fontaine* (supra), the Court of Appeal viewed the multiplicand and multiplier method of computing loss of future earnings with disfavour and stated that such a method should be avoided. In this respect Ayoola JA stated:

> In determining what the plaintiff would have earned but for the injury and what he is likely to earn, and also in determining the multiplier, a host of factors which may appear speculative make the task of qualifying the plaintiff's loss one which cannot produce a mathematically accurate result.

In assessing loss of future earnings, the primary consideration is the income received from the main, stable source of income from one's chosen occupation or profession. Income from other sources, for the purpose of assessing delictual damages for loss of future earnings, should be considered as purely ancillary as a person may terminate that source of income at any time for reasons unconnected with any injury suffered by him. The only certain factor is therefore the main source of income from one's profession or occupation which he would in the normal course of events pursue until he retires.

However, taking into consideration the fact that due to his residual incapacity his income from all sources would necessarily be affected to some limited degree, I award a sum of R10,000 under that head. In addition the Plaintiff will be

entitled to a sum of R1,000 paid for the medical report.

Judgment is accordingly entered in favour of the plaintiff in a sum of R51,000 together with interest and costs.

Record: Civil Side No 226 of 1997

Confait v Allied Builders Pty Ltd

Civil Code - negligence – nuisance - damages

The plaintiff is a co-owner and occupier of a guest house. The defendant was a building contractor carrying out construction work from December 1996 to May 1997 on an adjoining guest house about 10 metres away from the plaintiff's guest house. The plaintiff claims that the defendant has wrongfully caused or permitted noxious and offensive asbestos fumes and dust to pollute the surrounding atmosphere, and also caused undue noise when engaged in construction work at night causing his health to deteriorate and his business to be adversely affected. The plaintiff claimed damages for R210,000. The defendant denied causing any nuisance and claimed that whenever work was carried out after 5pm it was limited to work that did not cause any noise capable of disturbing a reasonable person.

HELD:

> There has to be a certain amount of reciprocity, especially when businesses of a like kind are sited close to each other. The "measure of ordinary obligation" must be considered. The defendant is liable to the extent of the faute.

Judgment: for the plaintiff. Damages for R13,437.50 together with interest and costs.

Cases referred to
Desaubin v United Concrete Products (Seychelles) Limited (1977) SLR 164

Foreign cases noted
Halsey v Esso Petroleum Co Ltd [1961] 2 All ER 145

Frank ELIZABETH for the plaintiff
Kieran SHAH for the defendant

Judgment delivered on 11 December 1998, by:

PERERA J: The plaintiff is a co-owner and occupier of a guest house in Praslin. The defendant was a building contractor carrying out construction work from December 1996 to May 1997 on an adjoining guest house called the "Indian Ocean Lodge" which, admittedly, was about 10 metres away from the plaintiff's guest house. The plaintiff avers that the defendants wrongfully caused or permitted noxious and offensive asbestos fumes and dust to pollute the surrounding atmosphere, and also caused undue noise when engaged in construction work at night thereby causing his personal health to deteriorate and his business to be adversely affected. He therefore claims a sum of R210,000 as damages.

The defendants denied that they caused any nuisance as alleged either by themselves, their servants or agents. They further averred that whenever work was carried out after 5 pm, such work was limited to work that did not cause any noise or was capable of disturbing any reasonable person. It was further averred that work had to be done after 7 pm to keep to the stipulated period, and that such work was done furthest away from where the plaintiff's guest house was located.

The plaintiff produced a letter dated 27 January 1997 (Exh P1) whereby he complained to the managing director of the defendant company about the noise which affected his clients who could not "sleep and relax in the early hours of the morning" consequent to work being done between 7 am and 7 pm He further complained that due to this noise, most of his clients had left the guest house. In his testimony however he stated that work started around 7:30 am and went on till 7 pm in the beginning and later, as the work progressed, the time was extended to 9 pm and later to 11 pm He further stated

that he complained to the police and the member of the National Assembly for relief, but to no avail. He claimed that this disturbance he complained of lasted about five months ending on 3 or 5 May 1997. In his examination-in-chief he admitted that tourists who had made bookings through travel agents continued to occupy his guest house, but those who made individual bookings left after a few days. He produced a bundle of letters allegedly from some of the clients complaining about the noise and their consequent decisions to leave (Exh P2). He also produced a medical certificate dated 4.5.97 from Dr K S Chetty certifying that he had high blood pressure since 1995 and that for the last 2 – 3 months (March-May 1997) it had been difficult to control, "probably because of stress and insomnia". Neither the writers of the letters (P2) nor Dr Chetty were called to testify regarding the contents of their documents.

The plaintiff testified further that during the period complained of, he lost about 10% of his clients. In answer to the Court he stated that the usual bed and breakfast rate at that time for a double room was R375 per day but he received less from clients coming through tour operators.

On being cross-examined, the plaintiff stated that the guest house consisted of 9 rooms, and that the guests usually left after breakfast around 8 am and came back around 5 pm. He further stated that he did not complain about the noise during the daytime, but it was the noise of hammering, wood cutting and electric planing done in the night that affected him and his guests. In his letter of 27 January 1997 (P1) however he complained of early morning noise, He claimed that the noise at night came towards the end of April and beginning of May 1997 when the workers working overtime to complete the job in time.

ASP Eugene Poris of the Praslin Police Station testified that about seven complaints were made by the plaintiff regarding the noise emanating from the building construction site of the

Indian Ocean Lodge. He stated that on each occasion the building supervisor was warned, but he stated that they had to complete the work in time. The witness stated that these complaints were made during the period January – March 1997.

A Denousse (PW3), the tax agent of the plaintiff, stated that the gross annual income of the business in 1996 was R435,663 and in 1997 it was R381,519, a diminution of R54,144. He was, however, unable to give the actual loss of earnings from the guests. In any event the income for the year 1997 was for a period of 12 months ending in December, while the period relevant to the instant case is January to May 1997.

Georges Norah (DW1), the project manager of the Indian Ocean Lodge at the relevant time, stated that the plaintiff complained about the noise at night and the obstruction of the view of the sea front from his guest house. As regards the obstruction of the view, he constructed a "chain-link fence" to minimise the effect. As regards the noise, he advised the contractors, the defendants in the case, to adjust the timing of work done so that there would be less noise at night. He further testified that he told the plaintiff that Masons Travels whom he represented, would compensate at their expense any relocations needed consequent to complaints of guests. He stated that to his knowledge there was only one such complaint. Mr Norah further testified that January – May was considered a "low season" for tourists. He however admitted that there would have been some noise on some days as the contractors were working behind schedule. The work was due to be completed on 15 April 1997, but the first phase was opened only on 3 May1997. It was the first phase that involved concrete work and hence, according to him, woodwork done at night may have cause undue noise.

B K Pater (DW2), a director of the defendant company, testified that work had to be expedited to be completed before the scheduled date and hence work progressed up to 9 pm or

even midnight on some days. He denied that noisy types of jobs were performed at night for about five months. He however admitted that for about one week in the final stages, there would have been noise. He corroborated Mr Norah that all complaints were to be directed to Masons Travels through Mr Norah. He further stated that there was no intention to annoy the plaintiff and that the noise, if any, was common to all building construction work. He further stated that his company had completed about six other projects in Praslin without any complaint.

The law applicable in the instant matter was tersely summarised from the dicta of Sauzier J in the case of *Desaubin v United Concrete Products (Seychelles) Limited* (1977) SLR 164, 166-167 as follows:

> Under the Civil Code, the jurisprudence was settled in France, Mauritius and Seychelles. The principle evolved in cases where the plaintiff complains of noise, smoke, smell or dust is that the defendant is liable in tort only if the damage exceeds the measure of the ordinary obligations of neighborhood…. It is not necessary that the author of the nuisance should have been negligent or imprudent in not taking the necessary precautions to prevent it. Liability arises even in cases where it is proved that the author of the nuisance has taken every permissible precaution and all the means not to harm or inconvenience his neighbours and that his failure is due to the fact that the damage is the inevitable consequence of the exercise of the industry.

In English law, which is very similar, it was held in the case of *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145, 151 that:

> The character of the neighbourhood is very relevant and all the relevant circumstances have to be taken into account. What might be a nuisance in one area is by no means necessarily so in another. In an urban area everyone must put up with a certain amount of discomfort any annoyance from the activities of neighbours, and the law must strike a fair and reasonable balance between the right of the plaintiff on the one hand to the undisturbed enjoyment of his property, and the right of the defendant on the other hand to use his property for his own lawful enjoyment.

It is an undisputed fact that tourists come to the country to enjoy the sun and sand and also the peace and tranquility of the islands. This is more so in the case of the islands of Praslin and La Digue. In this respect, both the plaintiff's guest house and the Indian Ocean Lodge which adjoins it have the right to undisturbed enjoyment of their premises especially from the point of view of their guests. But the expansion of the tourism industry and the consequent need for hotels and guest houses to expend to cater to increased tourism needs necessarily entails renovation of existing buildings, refurbishments and even reconstructions. Noise is a concomitant factor in all such works. There has to be a certain amount of reciprocity, especially when two businesses of a like kind are sited close-by. The liability of an author of an alleged nuisance such as smell, smoke or dust may be strict, as such deleterious substances could be arrested or channeled. So also from noises as from music sets etc which can be controlled. But how could a carpenter muffle his hammering and sawing if such work was needed to be done at night due to an exigency? Hence in such cases, the "measure of ordinary obligation" must be considered in the proper perspective. In the present case there is an admission that noise beyond the measure or ordinary obligation was caused for a short time. Hence the defendant company is liable in damages to the extent of their faute.

Counsel for the Plaintiff abandoned the claim in paragraph 3 of the amended plaint. Hence the claim for damages is limited to the following –

1.	Loss of business	R 75,000
2.	Nuisance, annoyance, disturbance and agitation	R 50,000
3.	Moral damages for anxiety, distress and discomfort	R 25,000
4.	Loss of reputation and good name of business	R 50,000
5.	Rapid deterioration of health	R 10,000
		R210,000

As regards item (1), the diminution in the gross income in 1997 was R54,144 for a period of 12 months. Hence the monthly loss was R4512, and for the period of five months complained of it would be R33,560. The loss should necessarily involve commissions, operating costs, increased prices of food and drinks etc. It must also involve the vagaries of the tourist arrivals and the actual bookings at the plaintiff's guest house. The plaintiff has failed to produce any details on those matters. The plaintiff testified that normally he had about 60% occupancy of his 9 rooms, that is about 6 rooms, but due to the nuisance he lost about 10% occupancy. Hence he had occupancy of about 5 rooms. He further stated that it was only the guests who booked individually who checked out after a few days. Mr Norah testified that to his knowledge only one guest complained. In the absence of statistics, I would consider that one guest checked out every week, so that the 6 room was left vacant off and on. At the rate of R375 per day for a double room, the plaintiff would have lost R11,250 for 30 days. This gross amount must be further discounted by about 25% to permit allowable expenses. Hence less R2812.50 would be R8437.50. In the absence of particulars of the actual loss, and on the basis of Mr. Norah's evidence that there could have been noise only on certain days, and also on

the admission of Mr Patel that towards the end of the first phase work progressed towards midnight, I would consider the sum of R8437.50 to be adequate compensation for any loss of business.

As item (2) has been considered under item (1) no award is made.

As regards item (3), the plaintiff, who is 73 years old and suffering from high blood pressure, undoubtedly would have been affected by the noise at night. Consequently on the basis that he suffered distress, anxiety and discomfort, I award a sum of R5000.

As regards item (4), there is no proof that there was loss of reputation and good name of the business. The plaintiff testified that the guests who booked through tour operators continued to arrive and that he had 50% of the usual 60% occupancy throughout. Hence no award is made under this head.

Item (5) was also unsubstantiated by medical evidence to any appreciable degree to warrant damages. The blood pressure may have been affected by insomnia as Dr Chetty had certified. Compensation for that aspect was considered in making the award under moral damages.

Accordingly, judgment is entered in favour of the plaintiff in a sum of R13,437.50 together with interest and costs taxed on the Magistrates' Court scale of fees and costs.

Record: Civil Side No 100 of 1997

Delpeche v Gregoretti & Or

Succession – division in kind – powers of executor

An application for division in kind was filed by the executrix of the estate. The testatrix bequeathed the estate to six heirs. The respondents are purchasers for value from a vendor who had qualified title over the land of the estate. The respondents raised a joint preliminary objection to the petitioner's acting without the apparent consent of the heirs. The respondents claim that because the testatrix died before the Civil Code came into operation there was no necessity to appoint an executor to administer the will as the heirs at that time became seized of their rights upon the death of the testator. The petitioner seeks to partition a portion of land purported to have been reserved. The respondents deny claims that the land is subject to a reserve. They further claim that the petitioner cannot apply for partition of land to which the deceased had no title or without first establishing the title of the deceased by principal action.

HELD:

Upon the death of a testator, the heirs become legatees under the will. The appointment of the petitioner as executrix was superfluous but the petitioner has locus standi as the legal heir and legatee to seek a division.

Judgment: for the petitioner. Order for a division in kind.

Legislation cited
Civil Code of Seychelles, arts 2224, 2262

Foreign legislation noted
Code Civil (French), art 724

Cases referred to
Sedgwick v Sedgwick (1974) SLR 84
Lesperance v Lesperance (1976) SLR 64
Lesperance v Lesperance (1977) SLR 139

Philippe BOULLE for the petitioner
Ramniklal VALABHJI for the first respondent
Nichole TIRANT for the second respondent

[Appeal by the petitioner was dismissed on 4 December 1998 in CA 25/1998]

Judgment delivered on 28 May 1998 by:

PERERA J: This is an application for a division in kind filed by the executrix of the estate of one Donald Delpeche who died on 31 January 1974 leaving a notarially executed last will dated 26 January 1974. In this will (exhibit P2), he bequeathed all his estate jointly to the following persons –

(1) Linda Marie-Antoinette Delpeche (natural child) - 1/6 share

(2) Harold Delpeche – brother (now deceased) - 1/6 share

(3) Daniel Delpeche – nephew (now deceased) - 1/6 share

(4) Ralph Andre Delpeche – nephew - 1/6 share

(5) Ms. Marinete Cecile Bernadette Ah-Time nee Delpeche – niece - 1/6 share

(6) Monique Denis, nee Delpeche – niece - 1/6th share.

The said Monique Denis nee Delpeche, the petitioner, was appointed the executrix, purportedly under article 1026 of the Civil Code, in case 134/1995 of this Court. The appointment was consented to by the fourth and fifth above named persons. However the first[t] named person objected to the appointment on the basis that there was no estate to be administered as the deceased had disposed and transferred all his properties before his death. That objection was later withdrawn prior to the order of appointment being made on 22 April 1996.

Both Mr Valabhji, counsel for the first respondent, and Mrs Tirant, counsel for the second respondent, have raised a joint preliminary objection to the petitioner acting without the apparent consent of the heirs. As a matter of law,it was contended that Donald Delpeche, having died before the Civil Code of Seychelles came into operation, there was no necessity to appoint an executor to administer the will as the heirs at that time became seized of their rights upon the death of the testator.

Admittedly, the two properties parcel V712 and V772 owned by Donald Delpeche had been disposed of prior to his death in 1974. The petitioner seeks to partition a portion of land purported to have been reserved when he transferred parcel V772 to one Gunther Bongers on 6 November 1973. That reservation is now identified by the petitioner as parcel V1112, presently registered in the names of the first and second respondents. Both these respondents deny that their purchases were subject to any such reservation. This position raises the second objection that the executor cannot apply for partition of a land to which the deceased had no title, or without first establishing the deceased's title by a principal action before this Court.

The second respondent raised a further objection that having purchased the rights in parcel V112 on 16 June 1986, she has acquired a prescriptive right under article 2265, having

acquired title for value and in good faith. The first respondent has raised no plea of prescription, as her objection to the application for division in kind is based on an absolute ownership by virtue of an unreserved transfer of title by Bongers on 6 March 1981.

As the second and third objections are based on facts to be ascertained on a close consideration of the various transfers of title as evidenced by the deeds and the connected survey plans, I shall presently deal with the first objection, which is purely a matter of law.

Under the French Code Civil, as applicable in Seychelles prior to the promulgation of present Civil Code of Seychelles on 1 January 1976, there was a system of direct succession; the successors becoming seized of the property as of right upon the death of the testator. The petitioner, as one of the heirs in succession, thus became entitled to a 1/6 share of the estate of the deceased. Prof Chloros states that –

> The old system of direct succession with the benefit of inventory was retained in all cases in which the estate of the deceased did not include immovable property. In these cases property vests as of right in the heirs of the deceased. However where immovable property is involved, an executor must be appointed. He also acts as fiduciary of such property and may pass title to property in his capacity as agent of the heirs, which is not burdened by any rights of succession.

Article 724 of the French Code Civil which applied at that time, provided that –

> The legitimate and illegitimate heirs are seized ipso of the property, the rights and the rights of action of the deceased, subject to having to pay all claims against the succession …

Hence upon the death of Donald Delpeche on 31 January 1974, the petitioner as the niece, as well as Linda Marie-Antoinette Delpeche, the natural child, and the other heirs by descent became legatees under the will. The appointment of the petitioner as executrix in 1996 was therefore superfluous, but the petitioner has locus standi as a legal heir and legatee to seek a division and an "action en partage" is not barred by the 20 year period of prescription laid down in article 2262 of the Civil Code.

A further consideration is whether, when a question of ownership arises in the course of summary proceedings for a division in kind or for licitation, such question could be decided in those proceedings or whether there should be a stay of proceedings to enable the parties to settle the dispute in a regular action. In the case of *Sedgwick v Sedgwick* (1974) SLR 84 such a course of action was taken as the question of ownership depended upon the validity of a deed of sale under private signatures.

In the case of *Lesperance v Lesperance* (1976) SLR 64, the legitimate children of the testator filed a petition for partition more than 30 years after the death of the testator. By then the property was possessed by the natural children of the deceased testator and a person who had purchased one of the parcels of land from them. A plea of prescription was raised against the petitioners.

Sauzier J held that although the petitioners had made out a prima facie case of co-ownership, the respondents should be given an opportunity to establish their exclusive rights based on prescription in a regular action as the summary procedure involved in the Immovable Property (Judicial Sales) Act was inadequate for the Court to deal with such objection. It was however held obiter that:

> If the respondents prove that they have acquired the sole right to the ownership of the parcels of

> land by prescription as against the petitioners, then the petitioners have lost rights to bring this action. On the other hand if the respondents have not acquired such exclusive rights to ownership as against the petitioners, the petitioners are still entitled to bring this action although more than 30 years have elapsed since the death of Armand Lesperance.

The natural children of Armand Lesperance filed a regular action to settle the issue of prescription. Sauzier J in the second case of *Lesperance v Lesperance* (1977) SLR 139 on a consideration of the evidence adduced came to the conclusion that the natural children of the deceased had failed to establish prescription. According, even after 30 years, the co-heirs were entitled to seek a division in kind.

In the present case, the petitioners and the respondents are not co-heirs. The respondents are purchasers for value from a vendor who had a qualified title over land with a portion reserved by his predecessor in title. The petitioner had identified the portion of land to be divided as parcel V1112 presently possessed by the first and second respondents. The only question to be decided is whether the reservation made by Donald Delpeche in transferring parcel V772 to Bongers was the portion of land parcel V712 which he had previously sold to one Raymonde Fernandez or whether it was another equivalent portion from the remaining portion of land. Both parties have in the present proceedings adduced oral and documentary evidence to enable this Court to make a determination. Hence I shall proceed to consider such evidence before me.

By deed of transfer dated 6 November 1973 (exhibit P3) the late Donald Delpeche transferred to Gunther Bongers “a portion of land situated at Beau Vallon, Mahe Seychelles, of the extent of 1.854 acres (7504 square metres), registered as parcel V772 as per survey of Mr Yvon Savy, surveyor, dated

25 May 1973…" (exhibit P7). This transfer was however subject to three reservations, the relevant one for present purposes being the following:

> There shall be reserved to the vendor from the remaining portion of plot V772 lying to the west of the new road a portion equivalent in area to plot V712 (a plot formerly surveyed under this parcel number but now incorporated in the large area registered under plot V772). The location of the area reserved to be by agreement between the parties.

According to survey plan dated 6 October 1972 (exhibit P8), parcel V712 referred to in the reservation consisted of 0.1503 acres (608.2 sq meters) within the area of 1.854 acres which comprised the entire land bearing parcel no V772 sold to Bongers. On a comparison of the two plans exhibits P7 and P3, parcel V712 can be identified as a portion of land situated on the south-western portion of parcel V772. Parcel 712 was sold to Raymonde Fernandez on 8 July 1972 (exhibit 1D1).

As stated earlier, Donald Delpeche died on 31 January 1974, less than 3 months after the transfer of parcel V772 to Bongers with the aforesaid reservation. There is no evidence that the reserved portion was located by agreement between the late Donald Delpeche and Bongers as stipulated. However the transfer was encumbered with the reservation.

On 18 June 1974, parcel 772 was subdivided into three plots; plot V1112 consisting of 0.416 acres (1683 square metres) located in the south-western portion of parcel V772, plot V964 consisting of 0.276 acres (1117 square metres), located in the central portion diagonally from north to south portion of parcel V772, and plot V968 consisting of 1.168 acres (4725 square metres) located in the north-eastern and south-eastern portion of parcel V772; the total average being 1.860 acres (7525

square metres). These subdivisions were however approved by the Chief Surveyor only on 26 December 1984.

On 6 March 1981, Gunther Bongers transferred to Marie Ange Gregoretti, the first respondent, parcel V772 (subdivisions still unapproved). Under the heading "reference to title deeds" it was stated inter alia –

> It is also stated in the vendor's title deeds that the previous vendor Donald Delpeche made the reservation from the remaining portion of plot V772 lying to the west of the new road a portion equivalent in area to plot 712 (a plot formerly surveyed under this parcel number but now incorporated in the large area registered under plot V772.)

Thus with the approval of the sub-divisions, the first respondent was the registered owner of parcels V969, V965 and V1112.

On 4 February 1982, parcel V965 was sub-divided into parcel V4197, consisting of 3698 square metres. Parcel V965 was 4725 square metres in extent. There was therefore a balance portion of 1027 square metres. The survey plan to parcel V4179 was however approved on 22 March 1985.

On 19 August 1985, the first respondent transferred to Sylva Ah-Time and Nicole Ah-Time 400 square metres extracted from the land she had purchased from Bongers. The description of the portion transferred corresponds to a portion of parcel V1112 as it has the stream as its western boundary. However, it could not be the whole of parcel V1112 as that parcel consisted of 1683 square metres, whereas only 400 square metres thereof was transferred.

By deed of transfer dated 16 June 1986, Sylva Ah-Time and Nicole Ah-Time transferred the 400 square metres they had

purchased from the first respondent to Mrs Mary Morel, the second respondent.

The first respondent on being cross-examined stated that she knew that her sister Raymonde Fernandez had a share in the property, parcel V772, which she purchased from Bongers on 6 March 1981 (exhibit P4). She was however referring to the portion of 0.1503 acres which Raymonde Fernandez purchased as parcel V712, which by 1981 formed part of the large land parcel V772. She denied that there was a second reservation of an equivalent portion in the land she purchased from Bongers in 1981.

The question arises as to why or how Donald Delpeche, having sold parcel V712 to Raymonde Fernandez on 7 July 1972, could on 6 November 1973 reserve to himself an equivalent portion in parcel V772 which by then had been consolidated into one land. Mr Valabhji, counsel for the first respondent submits that it would have been done to exclude parcel V712 which had already been sold from parcel V772. But if that be so, why did Donald Delpeche state in the deed "there shall be reserved to the vendor"? Further it is clear that the reservation did not relate to parcel V712 already sold but to "the remaining portion of plot V772 lying to the west of the new road, a portion equivalent in area to plot V712". Thus if parcel V772 in consolidation consisted of an area of 7504 square metres (1.854 acres), with the portion of 608.2 square metres (0.1503 acres) being the extent of parcel V712 (now forming part of parcel V772) and an equivalent extent of 608.2 square metres from the reservation being excised, the first respondent would have become entitled only to the extent of 6287.6 square metres by virtue of her purchase from Bongers. From that extent she sold 400 square metres to Sylva Ah-Time and Nicole Ah-Time (exhibit P5), thus leaving a balance of 5887.6 square metres. Mr and Mrs Ah-Time sold that portion of 400 square metres to the second respondent, Mrs Mary Morel.

Where the second respondent is concerned, she has an undivided portion of 400 square metres in parcel V1112. Hence as evidenced by exhibit P12, she has a qualified title as a co-owner of that parcel with the first respondent. As regards the first respondent, Bongers could only transfer what he lawfully owned. Hence, as stated above, the property passed was subject to the reservation. The heirs of Donald Delpeche therefore did not lose their right to a reservation of 608.2 square metres, which by various subdivisions of parcel V772 to the first respondent without reserving the portion withheld by Donald Delpeche, but merely giving notice to such reservation in the recital "reference to title deeds" makes no difference to the position that the First Respondent received the land subject to that reservation.

The question which arises is whether the petitioner has lost the right to seek a division in kind by prescription as over 20 years have elapsed since the death of Donald Delpeche. Where the second respondent is concerned, she is a bona fide purchaser for value of 400 square metres in parcel V1112 within well defined boundaries. She purchased the land on 16 June 1986 and the present case was filed on 8 October 1996. The petitioner admitted that she has been in undisturbed and uninterrupted possession during this period, and accordingly she has acquired prescriptive title as against the petitioner in terms of article 2265 as pleaded. Hence the defined portion she holds has to be excluded from any partition of parcel V1112.

The first respondent however identified the reservation on the deed of transfer from Donald Delpeche to Bongers as parcel V712 which he had already sold to Raymonde Fernandez prior to his death. But as has been seen, the plain words used in the deed do not support such a view. In a vain attempt to ignore the reservation of a portion equivalent to parcel V712 which the vendor, Delpeche retained, Bongers sought to transfer the whole land, however taking care to give notice of a reservation to the first respondent. The first

respondent therefore possessed the whole and with the knowledge of the reservation in favour of the heirs of Delpeche. The first respondent has not pleaded prescription against the petitioner's right to institute this case. Hence in terms of article 2224, prescription should be presumed to be waived.

In the result therefore the petitioner can maintain the application for a division in kind of parcel V1112 in respect of the reserved portion of 608.2 square metres (portion equivalent in area to plot V712). However in any appraisement made, the second respondent shall be entitled to her 400 square metres falling within the metres and bounds described in the schedule to her title deed, by right of purchase and by prescription.

Accordingly order is hereby made for a division in kind of parcel V1112 by an appraiser in terms of the findings of this Court.

Costs of the petitioner and of the second respondent to be paid by the first respondent.

Recorded: Civil Side No 305 of 1996

Durup v Adam & Or

Evidence – oral evidence of land transaction – moral impossibility

In relation to the purchase of a house, the plaintiff led oral evidence. The defendants objected on the grounds that the value of the transaction exceeded R5000. The plaintiff claimed moral impossibility.

HELD:

(i) Oral evidence is admissible, whatever the amount involved, when it has not been possible for the creditor to obtain written proof of the obligation contracted towards them;

(ii) What constitutes impossibility is not defined by law and the court is allowed complete freedom in deciding each case having regard to all the circumstances including the relationship between the parties or whether it was possible for a party alleging a certain transaction to obtain written proof;

(iii) No distinction should be made between transactions for the purchase of immovable property and for the purchase of movable property;

(iv) What constitutes moral impossibility under article 1348 of the Civil Code is dependent on the facts of each case that affect the relationship of the parties involved; and

(v) There was moral impossibility on the facts.

Judgment: for the plaintiff.

Legislation cited
Civil Code of Seychelles, arts 1341, 1348

Cases referred to
A Esparon v S Esparon (1991) SLR 59
Rene Francoise v Raymonde Herminie (1992) SLR 111
Lewis Victor v The Estate of Andre Edmond (1983) SLR 203

Foreign cases noted
Nunkoo and Ors v Nunkoo 1973 MR 269

Kieran SHAH for the plaintiff
Philippe BOULLEE for the defendants

Ruling on the objection to the admissibility of oral evidence on a matter, the value of which exceeds R5000, delivered on 6 February 1998, by:

AMERASINGHE J: In the examination-in-chief of the plaintiff, to a question by her counsel: "did you pay for the house", objection was taken by counsel for the defendant to the answer: "I paid for it. It was arranged that I buy from him at R35,000". The ground of the objection was that oral evidence is inadmissible in accordance with article 1341 of the Seychelles Civil Code as the matter in question exceeds the value of R5000. Counsel, Mr Boulle, submitted that as the matter concerns the purchase of immovable property no exception will apply and the production of a written document is necessary to prove such a fact.

Counsel for the defendant relies upon the judgment of Alleear J as he was then, in the case of *Rene Francoise v Raymonde Herminie* (1992) SLR 111delivered on 22 July 1992. The learned Judge in the said case held thus:

> Besides, the sale or purchase of immovable property does not fall into the category of obligations where the insistence by one party for a written document could be interpreted as a méfiance or mistrust by the other. On the contrary, the insistence of writing is proof that the party or parties is/are indeed serious in his or their enterprise.

Counsel for the plaintiff on the other hand insisted that, although the plaintiff in evidence referred to the purchase of a house, his intention was only to adduce evidence to establish the payment of money. The question put to the plaintiff and the averments in the plaint appear to be consistent with the submissions of counsel. The question "did you pay for the house" need not necessarily be construed to mean payment of a purchase price or consideration, when the plaintiff has not pleaded any purchase of immovable property.

There is no dispute between the parties that the matter in question exceeds R5000 in value and the plaintiff is bound by article 1341 of the Civil Code that prohibits oral evidence and requires a document drawn up by notary or under private signature.

The plaintiff, however, claims that on the ground of moral impossibility for her to produce proof in writing of the payment of money that the prohibition in article 1341 is inapplicable in accordance with article 1348 of the Civil Code.

Article 1348 provides thus:

> They shall also be inapplicable whenever it is not possible for the creditor to obtain written proof of an obligation undertaken towards him.

It is commonly accepted by courts that the specific provision of the said article 1348 is not exhaustive and the

jurisprudence has developed to include moral impossibility to effectively remove the application of the provision of article 1341 even when the matter exceeds R5000 in value.

According to the testimony of the plaintiff, the first defendant is her sister and the second defendant is her nephew. In narrating the circumstances under which she made the payment, she adduced in evidence that when she and her husband returned to Seychelles in 1967 the first defendant, her sister, and the first defendant's husband, Boris, received them and provided them with the opportunity to stay with them in their own house. After some time, when the plaintiff and her husband has shifted to a house in Mont Fleuri and were living on their own, the first defendant's husband Boris and the defendants decided to move out of the house at Pointe Conan. It was then the plaintiff is alleged to have paid the sum of R35,000.

Counsel for the plaintiff submits that the very close ties that the existed between the parties and the fact that the first defendant's husband Boris and the first defendant had received them on arrival in Seychelles, provided them with their immediate requirements and ultimately gave them the house she now occupies, contributed to the circumstances that created a moral impossibility to demand for a document in proof of payment.

Counsel for the defendants in response argued against the contention of the plaintiff that there was a material impossibility for the plaintiff to obtain a document for payment. Although counsel for the defendants relied upon the judgment of *Rene Francoise v Raymonde Herminie* (supra) on the ground that different considerations apply when the payment was made for purchase of land, the learned Judge however gives no specific reasons for a distinction to be drawn. He only expressed the view, "that the sale or purchase of immovable property does not fall into the category of obligations where the insistence by one party for a written

document could be interpreted as a méfiance or mistrust by the other". The said finding suggests that the real reason for the learned Judge to deny the existence of an impossibility to obtain a document in proof was that the circumstances did not permit a conclusion that the seller would consider that a demand for a document would be interpreted as a mistrust by the purchaser. It would appear that the basis for applying article 1348 according to the learned Judge was the existence or non-existence of an intimate relationship of the parties concerned.

As submitted by counsel for the plaintiff, and as is evident by the pleadings, although the plaintiff in answer admitted that the payment was for the purchase of a house, there can be no occasion in these proceedings to establish such a fact. In any event there can be no reason why oral evidence on the ground of moral impossibility to obtain a document should not be admitted for the limited purpose of establishing on evidence that in fact the alleged payment was made.

To consider the circumstances that could constitute a moral impossibility and permit oral evidence, the following part of the judgment in the case of *Nunkoo and Ors v Nunkoo* 1973 MR 269 is of relevance:

> Under article 1348 of the Civil Code, oral evidence is admissible, whatever the amount involved, when it has not been possible for the creditor to obtain written proof of the obligation contracted towards him. What constitutes impossibility is not defined by law and the court is allowed complete freedom in deciding each case, having regard to all the circumstances, including the relation between the parties, whether or not it was possible for a party alleging a certain transaction to obtain written proof thereof.

I fail to see why any distinction should be made between transactions for the purchase of immovable and transactions for the purchase of movable property.
In the case of *Lewis Victor v The Estate of Andre Edmond* (1983) SLR 203 decided on 7 December 1983, Chief Justice Seaton found that a close and loving relationship between two half brothers would cause any demand for an agreement under notarial deed or private signature to be interpreted as lack of trust, hence he accepted the existence of a moral impossibility. Alleear J, as he then was, in the case of *A Esparon v S Esparon and L Gabriel* (1991) SLR 59 decided on 27 September 1991 that the relationship between the plaintiff and his nephew's concubine, the second defendant, who had looked after the plaintiff and also his house for a while, created such circumstances of trust that made it impossible for the plaintiff to obtain a written document from the second defendant for the money owed to the plaintiff.

It is therefore concluded from the reasoning of the learned Judges as referred to in the aforesaid cases that what constitutes a moral impossibility in relation to article 1348 will be dependent on the facts of each case that affect the relationship of parties concerned.

On the evidence of the plaintiff, despite the fact that the property in question was owned by her brother-in-law Boris and the transaction was with him, the plaintiff no doubt had to consider that on her return to the Republic with her husband, they were welcomed by both her brother-in-law and her sister. The love between the plaintiff and her sister under normal circumstances would have necessarily given rise to a relationship of affection and trust that would have extended to her sister's husband as well, considering that they for a time lived with the plaintiff's sister, the first defendant, and her husband. It must be also taken into account that if not for the brother-in–law, who was the owner, she would not have been given the house. Another factor to be reckoned with is that for the money paid by the plaintiff to her brother–in-law, she in

return got possession of a house, which would have caused a demand for a document extremely difficult and embarrassing in the face of the circumstances itself creating the acknowledgement of their deal.

I therefore conclude the oral evidence to establish the payment of R35,000 for the purchase of the house is admissible on the ground that the moral impossibility of obtaining a document in proof thereof causes article 1341 to be inapplicable to the said matters in issue.

Objection is overruled.

Record: Civil Side No 346 of 1997

Durup v Radegonde Adam & Or

Civil Code - droit de superficie

The plaintiff erected a house at her own cost on the defendants' land. The plaintiff sought to assert a droit de superficie in perpetuity over the land the house was erected on. The defendants denied giving consent to the erection of the building but did not submit that they lacked knowledge. The defendants denied the plaintiff's claim of droit de superficie but argued that if it did exist it was a life interest only.

HELD:

Consent to building on another's land will be sufficient for a droit de superficie where the parties to the contract have intended to create such a right. Consent can be expressly or impliedly given. Consent can be implied through attitude, conduct, and through the absence of an objection to the erection of a structure on the land.

Judgment: for the plaintiff.

Legislation cited
Civil Code of Seychelles, arts 552, 553, 1341
Seychelles Code of Civil Procedure, s 75

Cases referred to
Albert v Stravens (No 1) (1976) SLR 158
Coelho v Collie (1975) SLR 78
Etheve v Morel (1977) SLR 251
Mussard v Mussard (1975) SLR 170
Pouponneau v Janish (1978 to 1982) SCAR 290
Tailapathy v Berlouis (1978 to 1982) SCAR 335

Foreign cases noted
Pillay v Camille and Ors 1975 MR 167
Tulsi v Tulsi 1981 MR 493

Kieran SHAH for the plaintiff
Philippe BOULLE for the defendant

Judgment delivered on 30 July 1998, by:

AMERASINGHE J: In the suit before the Court, the plaintiff, who built and occupied a house that cost her substantially on the land owned by the defendants, has sought to assert her alleged legal rights, and to acknowledge the same by registration.

The plaintiff claims in her pleadings that in 1992 she, "with the knowledge and consent of the defendants, erected or made, at her own cost, a house, buildings or works" on the parcel of land H230 situated at Pointe Conan, Mahe, belonging to the defendants.

She prays for the Court to declare and order:-

1. That the plaintiff has a droit de superficie in perpetuity over parcel H 230;

2. That the said house, buildings or works belong to the plaintiff; and

3. The Registrar General to enter the declaration under paragraphs 1 and 2 of the prayer on the Land Register in the relevant file and register concerning Parcel H230.

The statement of defence admits that the defendants inherited parcel H230 from Boris Adam for half share each and that the second defendant is the fiduciary of the co-ownership in respect of parcel of land H230. Although the defendants in

their pleadings denied paragraph 4 of the plaint to the effect that the house, buildings or works constructed on the said parcel belongs to the plaintiff, the second defendant, fiduciary of the co-ownership, in his evidence conceded the said fact and admitted the plaintiff's said claim. The first defendant thought fit not to refute the plaintiff's claim before the Court in evidence. In paragraph 4 of the defence, while denying the plaintiffs' claim of a droit de superficie in perpetuity over parcel H230, the defendants aver by an amendment to the answer, in the alternative, if such right exists, it is limited to the duration of the plaintiffs' lifetime. The defendants move for the dismissal of the action with costs.

In her testimony the plaintiff disclosed that the first defendant is her sister and the second defendant is her nephew. She said that when she and her husband returned to Seychelles in 1967 the first defendant and her husband, the late Boris Adam, received them into their house at Pointe Conan, which they shared until they found a house for occupation. According to her evidence, the late Boris Adam, at the time when he moved out of the house at Point Conan, invited her to buy his house. Her oral evidence in respect of the said purchase was objected to by counsel for the defendants. On the order of the Court of 6 February 1998, oral evidence was admitted on the ground that moral impossibility of obtaining a document in proof of the payment of the purchase price of R35000 caused article 1341 of the Civil Code to be inapplicable. It was revealed under examination-in-chief and in cross-examination that the plaintiff asked the late Boris Adam, the owner, for a deed in acknowledgment of the transfer of the house, but she was unable to obtain it in writing. The second defendant under examination-in-chief admitted by implication that the said house belonged to the plaintiff by his answer in Court as follows:

> ……..she went to stay at Saint Elizabeth Convent for a while and at the same time, <u>she was having the house she used to live in</u> on

> Mahe was in ruins and so she broke it down and built a new one, on our piece of land,…….. (emphasis added).

It is common ground between the parties that the subject matter of this suit is the house that the plaintiff built, as above referred to by the defendant in his answer. The parties are also in agreement that such construction was made by the plaintiff after the sale of her property at Praslin. The construction of the new house, according to the plaintiff, cost over R600,000, and according to the contractor, Donald Ernesta, over R500,000.

The plaintiff claims a droit de superficie in perpetuity over parcel of land H230. Amos and Walton in the *Introduction to French Law* (second ed, 1963) describe superficie as the right of an owner of the building or plantation on another's land, and it is said to be a form of immovable property.

Counsel for the defendants has submitted that Sauzier J in the case of *Albert v Stravens* (No 1) (1976) SLR 158, 159 described the circumstances under which a party acquires a droit de superficie. To confer such right the learned Judge has held that the parties to the contract should expressly or impliedly intend the creation of such a right. He conceded that "a droit de superficie may be conferred in perpetuity or for a period of time according to the intention of the parties".

Although tacit consent to the building on anothers' land is not sufficient to create a droit de superficie, Sauzier J in the case of *Coelho v Collie* (1975) SLR 78, considers that the consent "must be positive although not necessarily express".

In the proceedings before this Court, the plaintiff never claimed that the two defendants at any time expressed their consent by word of mouth to her building on their land. The second defendant stated in evidence that he did not see any reason why he should not allow the plaintiff to build her house

on their land. The evidence of the plaintiff revealed that the construction of the house was discussed by the parties at the relevant time, and not objected to by the two co-owners. It is observed that the defence did not object to the leading of oral evidence to establish consent and intention, although an objection was taken against the leading of such evidence to establish the purchase of the old house, that was later demolished, from Boris Adam for R35000.

In answer to paragraph 3 of the plaint, the defendants did not specifically deny that "in 1992 the plaintiff, with the knowledge and consent of the defendants, erected or made at her own cost, a house, buildings or works on Parcel H230", but generally denied each and every allegation contained therein. The failure of the defendants to deny material facts 'of knowledge and consent' alleged in the plaint, in accordance with section 75 of the Seychelles Code of Civil Procedure, will lead to the said facts to be considered admitted. In any event both defendants, according to the evidence, have never denied that the plaintiff had their consent to construct on their land. The second defendant's testimony revealed that the parties were on good terms with each other at the time of the construction, and hence the circumstances give no reason to exclude that the defendants not only acquiesced in the construction by the plaintiff but also gave all the encouragement needed to construct her house on their land. In considering the close relationship of the two families going back to the period of the plaintiff's arrival in Seychelles in 1967, and the second defendant's admission that the plaintiff was his bank whenever he required loans, the circumstances could not have been otherwise.

It was the unchallenged evidence of the plaintiff that even after the house was completed and it was being rented out for R8000 per month, that for two years the plaintiff continued to occupy a flat belonging to the defendants at R6000 per month. Even when the plaintiff returned from Praslin to live in Mahe, she exercised her independence and sought lodgings

at St Elizabeth's Convent. The said events not only demonstrate that the plaintiff enjoyed her independent rights, but the defendants in turn respected her rights. The plaintiff's conduct has demonstrated that when it came to financial matters she maintained a business-like relationship with the defendants. Therefore the claim of counsel for the plaintiff that the plaintiff would not have spent over R500,000 for the construction of a house, only to give away the house to the defendants in the end was justifiable.

When the plaintiff was receiving a sum of R8000 by way of rent for the construction, the defendants never demanded any return for the land occupied by her house.

A sister of both the plaintiff and the first defendant, Clarisse Jeanne Adam, and a witness, Robert, testified to the fact that the plaintiff has expressed on many occasions that the house should pass on after her lifetime to the second defendant and his heirs. Even if the plaintiff at times may have entertained such an intention, it was never said to be a term of any agreement on which the defendants consented to the construction, or for the renunciation of their rights of accession according to articles 552 and 553 of the Civil Code. The said second defendant expressed that he never entertained a wish to inherit the house from the plaintiff. In my view such an attitude reflects the state of mind of the second defendant at the time when he acquiesced in the construction and as to what should happen to the construction after the lifetime of the plaintiff. No doubt if the first defendant's state of mind was otherwise, she would have testified to the said fact. The defendants, unlike the owners of the land in the case of *Coelho v Collie* (supra)never protested or complained to the plaintiff, or to any other, that the plaintiff has constructed her house on the land owned by them against their wish. It is my considered opinion that the aforesaid circumstances taken together manifest a positive, although not expressed except by their conduct, their consent and acquiescence, consent to

the plaintiff constructing at her expense a house on their property and their renunciation of their rights of accession.

The second defendant was appointed by the Court as the fiduciary of the co-ownership of the said parcel of land by exhibit P3, long after the construction of the house. Counsel for the defendants questioned the validity of the consent of a single co-owner for the said construction similar to the want of capacity of one co-owner to transfer any interest in land without the services of a fiduciary. Once the Court has admitted that the plaintiff possessed the implied positive consent of the defendants to her construction, and to their acquiescence with such act, I accept that the defendants are estopped from benefitting by their failure to comply with the law, of acting through a fiduciary and denying such consent. The reasoning of Sauzier J in the case of *Etheve v Morel* (1977) SLR 252 by analogy supports the above contention of the counsel for the plaintiff.

Lavoipierre JA, with Lalouelle JA concurring, in the case of *Pouponneau v Janish* (1978 to 1982) SCAR 290,300 with reference to the acquisition of 'droit de superficie commented thus:

> "The rebuttal of the presumption of article 553 of the Civil Code is one of the means of acquiring a 'droit de superficie' which gives ownership of the 'dessus' of land to a party, other than the owner of the land, and which can be acquired inter alia, by agreement, waiver of the right of accession or prescription (see Encyclopedie Dalloz-Droit Civil (2nd Edition), Vo. Superficie, notes 1 – 24)" (emphasis added)

In the instant case the presumption arising under article 553 of the Civil Code is rebutted on the contradicted evidence of the plaintiff that the building on parcel of land H230 was constructed by her at her expense and owned by her, and

unchallenged by the owners, the two defendants. Sauzier J declared in *Mussard v Mussard* (1975) SLR 170, that:

> Where an owner authorises a construction on his or her land, the owner, in the absence of contrary stipulations, renounces her right to accession derived from the Civil Code, and confers upon the constructor a right of use of that part of her land on which the construction stands, which right comes to an end when the constructor wants to rebuild or is bound to do so.

After carefully weighing the evidence before the Court I find the defendants by their attitude, conduct, and in the absence of any objection to the construction of the plaintiff's house on their land at Pointe Conan have acquiesced to and authorised such construction. In *Tulsi v Tulsi* 1981 MR 493 the learned Judges held that "to establish a 'droit de superficie' against the owner, the defendant must show not merely knowledge, but acquiescence on the part of the owner". Hence in accordance with the aforesaid findings of the last two judgments cited in the absence of anything to the contrary, by the waiver of the defendants of their right of accession the plaintiff has acquired a droit de superficie over parcel of land H230 owned by the defendants.

Such a right was found by Sauzier J to end, in the case of *Mussard v Mussard* (supra), only when the possessor of the right 'wants to rebuild or is bound to do so'.

Counsel for the plaintiff, Mr Shah, submits that when such a right is not limited in time by agreement as in the case of a ground lease, it is perpetual.

The Seychelles Court of Appeal in *Tailapathy v Berlouis* (1978 to 1982) SCAR 335 commenting on the duration of a droit de superficie, tend to agree with the submission of counsel. When the rights of the parties are subject to a lease, the droit

de superficie terminates with the determination of the lease. The Court held thus:

> Any building constructed on the land during the lease would remain the property of the lessee for the duration of the lease. At the expiry of the lease such buildings would become the property of the lessor by accession.

As rightly pointed out by the Mr.Shah, the plaintiff's droit de superficie is neither subject to a lease nor to any agreed period of time, hence it has to be perpetual so long as the possessor of the right does not "want to rebuild or is not bound to do so".

The third item of relief prayed for by the plaintiff leads to the examination of the legal capacity of the Land Registrar to enter the declarations in the relevant register that the house on parcel of land H230 belongs to the plaintiff and that the existence of droit de superficie is in perpetuity in favour of the plaintiff over the said land.

The reason and the necessity for the specific relief is better appreciated when the consequence of acquiring a droit de superficie is examined.

The judgment of *Pillay v Camille* 1975 MR 167 decided the consequences as follows:

> In such a case, the former enjoys what is called a 'droit de superficie,' that is to say, a right of ownership of the building independently of and separable from the ground upon which it stands. One consequence of such a situation is that the owner of the building may dispose of this right in it without any restriction resulting from the fact that it is on another's land. A further consequence is that the owner of the building

> and the owner of the land are not in indivision, so the neither can ask for partition or licitation of the two properties (*Neerpath v Bearjo and ors* 1965 MR 84)

Section 75 of the Land Registration Act (Cap 107) obliges the Land Registrar to register the entitlement of a person to any land, lease or charge by virtue of any judgment, decree, order etc, as the proprietor, and to file the said instrument. I find that the plaintiff's declared rights of a droit de superficie as well as the ownership of the house is a privilege over immovable property, hence amounts to a legal charge, that under section 2 of the said Act qualifies the plaintiff to be a proprietor in respect of the said rights in relation to parcel of land H230. (see the definitions of "legal charge" and "proprietor" in section 2 of the said Act).

I therefore hold that the plaintiff is entitled to the relief prayed for under item 3 of the prayer to the plaint.

I therefore declare and order:

1. That the plaintiff has a droit de superficie in perpetuity over parcel H230.

2. That the house, buildings or works on parcel H230 belongs to the plaintiff; and

3. The Land Registrar is hereby directed to enter the above declarations in the land register, concerning parcel of land H230, and in the relevant files.

Judgment is entered accordingly with costs.

Record Civil Side No 346 of 1997