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## Republic v Bibi

*Criminal procedure - bail*

The accused sought bail on the grounds that an earlier trial was aborted while in progress and an appeal is not likely to be heard until April 2000, thus amounting to a special circumstance to be considered in granting bail.

**HELD:**

> The provisions as to bail are consistent with the fundamental right to liberty provided in the Constitution but with a proviso on the seriousness of the offence. The offence of murder is a serious, if not the most serious, offence in the Penal Code. There is a Constitutional justification for depriving the right to liberty to a person committing a serious offence.

**Judgment**:application for bail refused due to the seriousness of the offence and the absence of undue delay in this case.

**Legislation cited**
Constitution of Seychelles, arts 18, 19
Criminal Procedure Code, ss 100, 101

**Cases referred to**
*Jean Baptiste Serret v R* (unreported) SCA 12/1996
*R v Joachim Florentine* (unreported) Criminal Side 167/1997

**Foreign cases noted**
*DPP v District Magistrate of Port Louis and another* (1997) SCJ (Mauritius)
*Ngui v Republic of Kenya* [1986] LRC (Const) 308

Wilby LUCAS for the Republic
Frank ELIZABETH for the accused

[Appeal by the accused was dismissed on 13 August 1998 in CA 23/ 1998]

**Ruling delivered on 6 December 1999 by:**

**PERERA J:** This case has been assigned to me for trial with a jury consequent to the earlier trial being aborted while in progress.

Mr Elizabeth, counsel for the accused, making an application for bail submitted that his client proposed to appeal against an order of the trial judge in the previous proceedings, and as there was no likelihood of such appeal being heard until April 2000, it would be a special circumstance to be considered in granting bail.

However, the proceedings before me for a trial de novo must continue. Hence whatever order that has been made in the previous proceedings would have no bearing on an application for bail made in these proceedings.

Section 100(1) of the Criminal Procedure Code (Cap 54) which provided that "when any person, other than any person accused of murder or treason is arrested or detained ..... may be admitted to bail" was repealed by the Criminal Procedure Code (Amendment) Act No 15 of 1995. There is no distinction now between offenders for murder or treason, and others. As was held by the Court of Appeal in the case of *Jean Baptiste Serret v R* (unreported) CA 12/1996 that "section 100(3) gives the Supreme Court the discretion to admit persons to bail including where the offence is murder or treason".

The provisions as to bail are now consistent with the

fundamental right to liberty as contained in article 18 of the Constitution. However one of the limitations of that right, as provided in article 18(7)(b) is “the seriousness of the offence”. The legislative counterpart of that restriction is contained in section 100(5)(b) of the Criminal Procedure Code (as amended by Act No 15/1995).

Undoubtedly, the offence of murder is one of the most serious, if not the most serious, offence in the Penal Code. There is constitutional justification for depriving the right to liberty of a person arrested or being detained for allegedly committing any serious offence.

In the case of *DPP v District Magistrate of Port Louis and another* (1997) SCJ (Mauritius) the Court observed that –

> The established practice of our courts hasbeen consistently to refuse bail to an accused who is formally charged with murder unless there are compelling reasons to decide otherwise ..... such a compelling reason existed, it is noted, in the case of *The Police v G Duval* since the late Sir Gaetan Duval was prosecuted in 1989 for the offence of murder which had allegedly been committed since 18 years back in 1971.

A similar view was expressed by Simpson CJ in the case of *Ngui v Republic of Kenya* [1986] LRC (Const) 308 -

> The practice in Kenya, as in England, is that bail should not as a general rule be granted in cases of murder, particularly since in Kenya, unlike in England, that offence carries the death penalty and the accused may be subject to the temptation to abscond or "jump-bail".

> ……. In all cases such as the present, lengthy adjournments should be avoided and undue consideration should not be given to the convenience of advocates when the accused is facing a possible death penalty.

In Seychelles the offences of murder and treason were brought under the general category of "serious offence" so that those offenders would not be singled out for discrimination in terms of the right to equal protection of the law. Hence the Court is now able to use its discretion generally. But although the death penalty has been abolished in Seychelles, the possibility of an accused faced with a possibility of a sentence of life imprisonment absconding cannot be underestimated.

In the exercise of its discretion a factor the Court may also consider is the right of the accused to a "fair hearing within a reasonable time" as contained in article 19 of the Constitution. The offence the accused is charged with was allegedly committed on 28 September 1999. The trial commenced on 22 November 1999 and was aborted on 26 November 1999. Counsel for the accused submitted that the reason for stopping the trial was not attributable to any default on the part of the accused and hence this Court ought to consider the prejudice that would be caused to him consequent to any delay that would ensue. Although the term "reasonable time" has not been defined in the Constitution, for the purpose of exercising judicial discretion, what is a reasonable time between arrest and trial must depend on the circumstances of each case. In the case of *R v Joachim Florentine* (unreported) Criminal Side 167/1997 the accused, who was charged with the offence of murder, was on remand from 27 April 1997 until the trial was concluded on 17 July 1997 and was sentenced to life imprisonment. However the Court of Appeal set aside the conviction and sentence and ordered a re-trial. This Court, on a consideration of the prejudice

caused to the accused consequent to the delay, granted bail on 6 April 1998.

However that order was subsequently vacated as the accused could not find two sureties to sign the bail bond. Hence he continued to be in custody until the trial de novo was concluded on 15 June 1998 and was once again convicted and sentenced to a term of life imprisonment.

In the present case, state counsel vehemently opposed the application for bail mainly on the ground that the order of the trial judge in the aborted trial was not appealable. That order is not in the case file before me, and in any event the appealability is a matter to be considered if and when an appeal is filed.

In the meantime, this Court would make necessary arrangements for the trial to commence within a reasonable time. On a consideration of the seriousness of the offence and on a consideration of the fact that there has not been any undue delay in this case, I refuse the application for bail.

**Record: Criminal Side No 38 of 1999**

## Republic v Yuan Mei Investment (Prop) Ltd

*Criminal procedure – company Law – inherent jurisdiction – stay of prosecution – abuse of process – right to fair trail – right to liberty of life – double jeopardy – trading company name*

The applicant was charged with an offence punishable by a fine of R20,000 and imprisonment of 2 years. The prosecution laid and dropped charges three times against the applicant, who was charged in both his personal capacity and as the director of the company, and charged him finally for a fourth time, on the same facts. The applicant applied for a stay of proceedings on the grounds of abuse of process. In absence of a statutory provision for a stay of proceedings in criminal proceedings, the application sought consideration on the basis of the inherent jurisdiction of the Court. The applicant submitted that due to the prosecution errors, he had been awaiting trial for an unreasonable period of time and that he was being moved from court to court.

**HELD:**

The delay has been occasioned by the negligence or incompetence of the prosecution to draft a proper charge in respect of a purely technical offence which presents no difficulty. Abuse of process however must involve more than simple unfairness to the accused. The consequential delay of 4 months cannot amount to something that is so unfair and wrong that the court should bar a prosecutor from proceeding with what is in all other respects a proper proceeding. The reluctance on the part of courts to grant a stay in criminal proceedings, except in exceptional circumstances, should not serve as a licence to the prosecution to adopt a trial and error method when prosecuting.

**Ruling:** Application for stay of proceedings dismissed.

**Legislation cited**
Constitution of Seychelles, arts 10, 19
Licences Act, ss 16, 19
Criminal Procedure Code, ss 60, 65

**Foreign legislation noted**
Constitution of Mauritius, s 10

**Foreign cases noted**
*Connelly v DPP* [1964] AC 1254 (HL)
*Doyle v Leroux* [1981] RTR 438
*DPP v Humphreys* [1977] AC 1 (HL)
*Hunter v Chief Constable of the West Midlands* [1982] AC 529
*Hui Chi-Ming v R* [1992] 1 AC 34
*Hussainara Khatoon v Home Secretary, State of Bihar* (1979) AIR 1360
*Jago v District Court of New South Wales* (1989) 168 CLR 23
*R v Derby Magistrates' Court, ex parte Brooks* [1985] 80 Cr App R 164
*R v Forbes, ex parte Bevan* (1972) 127 CLR 1
*R v Oxford City Justices, ex parte Smith* (1982) 75 Crim App R 200
*R v Watford Justices, ex parte Outrim* [1983] RTR 26
*R v Sang* [1980] AC 402
*The State v Hussain Sheik and Ors* (1993) SCJ 406

Ronny GOVINDEN for the Republic
Pesi PARDIWALLA for the accused
Accused – Present

**Ruling delivered on 2 July 1999 by:**

**PERERA J:** This is an application for a stay of proceedings on the ground of "abuse of the process of court". There is no

statutory provision for such an application in criminal proceedings, as in civil and admiralty proceedings. However, as Menzies J pointed out in *R v Forbes, ex parte Bevan* (1972) 127 CLR 1

> Inherent jurisdiction is the power which a court has simply because it is a court of particular description, it is not something derived by implication from statutory provisions conferring particular jurisdiction.

It is therefore under the inherent powers of this Court that this application falls to be considered.

The offence that is being prosecuted is an alleged violation of section 16(1)(a) read with section 19(4) of the Licenses Act (Cap 113). The particulars are that the company "Yuan Mei Investment (Proprietary) Limited" trading under the registered business name of “Oriental Services (Seychelles)”, during the period 11 to 15 December 1996 engaged in or carried on trade as a hirer of three omnibuses to Mahe Shipping Company without being granted a licence as a hirer of vehicles by the Seychelles Licensing Authority. This offence is punishable by a fine of R20,000 andimprisonment for two years.

The prosecution commenced before the Magistrates' Court "B" in case no 406/97 on 4 June 1997 against Mr Patrick Liu-Chit Chon in his personal capacity. The charge contained only one count which included the alleged offence in respect of all three vehicles. The prosecutor himself later expressed doubts as to the validity of the charge as presented and stated that it needed amendment. He therefore on 19 January 1998, on the instructions of the Attorney-General, withdrew the charge in terms of section 65 of the Criminal Procedure Code.

Section 65 is as follows-

> In a trial before any court a prosecutor may, with the consent of the court or on instructions of the Attorney-General, at any time before judgment is pronounced, withdraw from the prosecution of any person; and upon such withdrawal –
>
> (a) If it is made before the accused person is called upon to make his defence, he shall be discharged, but such discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.
>
> (b) …….

Accordingly, Mr Patrick Liu-Chit Chon was prosecuted in his personal capacity once again in Magistrates' Court "A" in case no 245/98 on 27 March 1998. This time the charge contained six counts, which involved the same facts, but count 1, 3 and 5 charged a company called "Yuan Met Investment (Proprietary) Limited" trading under the business name of "Oriental Services (Seychelles)" while counts 2, 4 and 6 charged Mr Chit Chon as a director of that company. Mr Pardiwalla, counsel for the accused, submitted in that Court that the charge was bad in law as it offended the rule of double jeopardy in that Mr Chit Chon was being charged in his personal capacity as well as a director of his company. The prosecutor thereupon withdrew the charge under section 65 of the Criminal Procedure Code for the purpose of filing a proper charge. The accused was thus discharged for the second time.

The third prosecution was instituted in the Supreme Court on 20 May 1998. There were two accused on the charge, (1) Yuan Mei Investment (Proprietary) Limited represented by its director Patrick Liu-Chit Chon, and (2) Patrick Liu-Chit Chon.

The charges were substantially the same as in Magistrates' Court case no 245/98 but in counts 1, 2, 3 and 4 the business name of the trading company was stated as "Oriental Services (Seychelles)" but in counts 5 and 6, it was stated as "Hong Kong Hotel".
Once again Mr Pardiwalla informed the Court that he would be raising preliminary objections to the charge, before the accused took the plea. But before those objections were raised, the prosecution filed the fourth amended charge against the said company represented by Mr Chit Chon as director. Counts 5 and 6 were also amended changing the business name from "Hong Kong Hotel" to "Oriental Services (Seychelles)". Mr Pardiwalla informed the Court that in view of the latest amendment he could not maintain his objection on the basis of double jeopardy, but restricted himself to the application for stay of proceedings on the ground of an abuse of the process of court.

Mr Pardiwalla relied on the general principles set out in paragraphs 4-40 to 4-42 in Archbold *Criminal Pleading, Evidence and Practice* (vol 1,1992) under the sub-heading "Limited discretionary power to prevent prosecution proceedings". He submitted that the accused was first summoned to court in Magistrates' Court case no 406 of 1997 on 20 June 1997 in respect of this alleged offence and that due to the fault of the prosecution he is still awaiting trial and being tossed from one court to another. He also referred the Court to article 19(1) of the Constitution under the Charter of Fundamental Rights, which provides that-

> 19(1) - Every person charged with an offence has the right, unless the charge is withdrawn, to a fair hearing within a reasonable time by an independent and impartial Court established by law.

The Supreme Court of India, in the case of *Hussainara*

*Khatoon v Home Secretary, State of Bihar* (1979) AIR 1360, emphasising the importance of speedy trial of criminal offences stated -

> No procedure which does not ensure a reasonably quick trial can be regarded as reasonable, fair or just; an expeditious trial is an integral and essential part of the fundamental right to life and liberty.

Ingrained in this view is the principle that, in the administration of justice, unnecessary delays must be avoided. In this respect it must be considered that prisoners on remand may be in incarceration when they may be acquitted, and that even those on bail are subject to anxieties and inconveniences pending trial.

Section 60 of the Criminal Procedure Code vests the Attorney-General with the right to prosecute all crimes and offences committed within the country. Section 65 empowers him to withdraw such prosecutions without a bar to subsequent prosecutions on the same facts.

In the instant matter, two prosecutions instituted and withdrawn, and the amendment of the indictment for the third time in this Court, were statutory permissible. As Lord Salmon stated in the case of *DPP v Humphreys* [1977] AC 1 at 46 -

> ..... A judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. <u>It is only if the prosecution amounts to an abuse of the process of court and is oppressive and vexatious that the judge has the power to intervene</u>.

Lord Diplock further clarified this power of the court in the case of *Hunter v Chief Constable of the West Midlands* [1982] AC 529 at 536 when he stated –

> ..... this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right - thinking people."

The abuse alleged may arise in different forms. In the case of *Connelly v DPP* [1964] AC 1254, Lord Devlin, considering the duty of a judge to prevent an abuse of process, stated –

> The fact that the Crown has .... and that private prosecutors have ..... generally behaved with great propriety in the conduct of prosecutions, has up till now avoided the need for any consideration of this point. Now that it emerges, it is seen to be one of great constitutional importance. Are the courts to rely on the executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment from those who come or are brought before them?

In the instant case, the delay has been occasioned by the negligence or incompetence of the prosecution to draft a proper charge in respect of a purely technical offence which presents no complexity. In *R v Oxford City Justices, ex parte*

*Smith* (1982) 75 Crim App R 200, the prosecution was stopped because the summons had not been served on the accused until some two years after the offence had been committed, purely due to incompetence. Lord Lane CJ thought that the proceedings should be stayed because the delay was unconscionable and had caused the accused prejudice in so far as his recollection of events was diminished, and as he would have difficulty in tracing witnesses, who may not recall the incident.

Ormrod LJ in *Doyle v Leroux* [1981] RTR 438 expounded the principle that an abuse of process covered anything done "deliberately or by accident by the prosecution which has seriously prejudiced the possibility of the accused defending successfully". Similarly Donalson LJ in *R v Watford Justices, ex parte Outrim* [1983] RTR 26 held that where delay has been caused by inefficiency or even by a failure of the system, judges have a discretion to decline to hear the summons. The relevancy of inefficiency for a stay order was again emphasised in *R v. Ex parte Turner*, where the divisional court said that delay would normally need to be accompanied by mala fides or efficiency "or at its lowest .... the court must be able to draw an inference that something has gone wrong with the prosecution process."

An "abuse of process" was defined in *Hui Chi-Ming v R* [1992] 1 AC 34 by the Privy Council as "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceedings".

The foregoing cases of abuse based on delay were summarized by Lord Lane CJ Sir Roger Ormrod in the case of *R v Derby Magistrates' Court, ex parte Brooks* [1985] 80 Cr App R 164 where two circumstances in which an abuse of process can occur. They stated thus-

In our judgment, bearing in mind Viscount Dilhome's warning in *DPP v Humphreys* [1977] AC 1 at 26 that this power to stop a prosecution should only be used "in most exceptional circumstances," and Lord Lane CJ 's similar observation in *R v Oxford City Justices*, *ex parte Smith* (1982) 75 Cr App R 200 at 204, which was specifically directed to Magistrates' Courts, that the power of the justices to decline to hear a summons is "very strictly confined," the effect of these cases can be summarised in this way. The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable: for example, not due to the complexity of the inquiry and preparation of the prosecution case, or to the action of the defendant or his co-accused, or to genuine difficulty in effecting service. We doubt whether the other epithets which are sometimes used in relation to delay, such as "unconscionable," "inordinate," or "oppressive," do more than add an emotive tone to an already sufficiently difficult problem.

The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, for, as Lord Diplock said in *R v Sang* [1980] AC 402 at 437:

> "... the fairness of a trial ... is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted." It is, as Lord Diplock also said in that case "no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them." Or, we would add, in regard to the preparation of the case, unless this has prejudiced the defendant in this way, lengthy inquiries into the reasons for the delay should not be necessary.

The staying of prosecution is a drastic encroachment on the prosecuting powers of the state, exercised through the Attorney-General. Prosecution is stayed in exceptional circumstances not merely because serious prejudice may be caused to the accused, but also because if the trial were to continue, it would subvert the judicial process. Therefore abuse of process would involve more than simple unfairness to the accused. In the Mauritian case of *The State v Hussain Sheik & Ors* 1993 SCJ 406, abuse of the process of court on the basis of delay, was considered in relation to section 10 of the Constitution. That section is the same as our article 19(1). In that case two accused were charged for the unlawful importation of heroin before the Intermediate Court. The case was called pro forma on 20 May 1993. No plea was recorded from the accused as there was no interpreter available. The case was then postponed and fixed for trial on 20 July 1993. On that day a nolle prosequi was filed by the Director of Public Prosecutions. A fresh charge was filed on 2 August 1993. The Court considered section 10 of the Constitution and held that "the time which elapsed between the date that the nolle prosequi was filed, and the date of the present indictment, (was) not such as to amount to an abuse of process."

In the present case the initial prosecution in case no 406/1997 before the Magistrates' Court was withdrawn on 19 January 1998. The second prosecution filed in that Court on 27 March 1998 was withdrawn on 15 May 1998. The third prosecution on the same facts was filed in this Court on 20 May 1998. Article 19(1) of the Constitution requires that a fair hearing be given within a reasonable time "unless the charge is withdrawn." Hence for purposes of a stay application based on an alleged abuse of process, the delay must be reckoned from the day the charge was withdrawn initially or when, for some reason attributable to the prosecution, a delay commences. The time which elapsed between the date the initial charge was withdrawn and the filing of the charge in this Court was four months. The case was called on 1 July 1998 for the taking of the plea, but was postponed as counsel for the accused informed the Court that he had preliminary objections to raised before the plea was taken. The delay thereafter has been consequential. In those circumstances I do not consider that there has been an abuse of the process of court as to amount to what was defined in the *Hui Chi-Ming* case (supra) as "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding."

As Brennan J stated in the case of *Jago v District Court of New South Wales* (1989) 168 CLR 23 –

> Stays imposed on the ground of delay or for any other reason should only be employed in exceptional circumstances. If they were to become a matter of routine, it would be only a short time before the public, understandably, viewed the process with suspicion and mistrust.

I would however add that the reluctance on the part of courts to grant a stay in criminal proceedings, except in exceptional

circumstances, should not serve as a licence to the prosecution to adopt "trial and error" methods when prosecuting.

The application for stay of proceedings is accordingly dismissed.

**Record: Criminal Side No 24 of 1998**

## Republic v Savy

*Criminal law – sexual assault – failure to specify offence – evidence – fair trial*

The defendant was charged with committing a sexual assault. The defence contended that 'sexual assault' as constituted by statute includes the doing of any of four possible acts. The defence claimed that the prosecution failed to give reasonable information as to the nature of the offence charged and because of that the charge lacks certainty. The prosecution claimed the four acts included in section 130 of the Criminal Procedure Code are merely four examples of the several assaults that constitute the offence of sexual assault.

**HELD:**

(i) The four examples of sexual assault described in section 130 of the Criminal Procedure Code are not the ingredients of the offence. They are merely four of several assaults of a sexual nature that could constitute the offence of sexual assault. The complainant reported the incident 5 hours after it happened;

(ii) A charge of sexual assault sufficiently conveys to the accused the nature of the offence in accordance with the statute, and the facts relating to the charge are disclosed to the accused as the prosecution presents its evidence; and

(iii) The delay in disclosure was not because of the refusal or reluctance of the prosecution but due to a delayed application and by oversight. A delay under the

circumstances cannot be construed to be a denial of fundamental rights under article 19 of the Constitution or a miscarriage of justice.

**Judgment** for the Republic.

**Legislation cited**
Constitution of Seychelles, art 19
Criminal Procedure Code, s 186
Penal Code, s 130

**Cases referred to**
*Mousmie v The Republic* (1978-1982) SCAR 543
*Pragassen v R* (1974) SLR 13
*Republic v Harikrishnan Paramesvaran*
*Republic v Richard Riaze*
*Vidot v Republic* (1981) SLR 79

**Foreign cases noted**
*R v Leeson* (1968) 52 Cr App R 185

Anthony FERNANDO for the Republic
Jacques HODOUL for the accused

[Appeal by the accused was dismissed on 10 April 2000 in CA 14/1999.]

**Judgment delivered on 5 February 1999 by:**

**AMERASINGHE J:** Paddy Michel Savy is charged with the offence of committing, "sexual assault contrary to and punishable under section 130 of the Penal Code as amended by Act No 15 of 1996" (hereinafter referred to as 'section 130 as amended').

**Particulars of offence are as follows:**

The particulars of the offence provided to the accused in the formal charge are as follows:

> "Paddy Michel Savy on 1 November 1998 at Intendance sexually assaulted A."

It is considered pertinent and appropriate to deal with the several points of law raised by counsel for the accused in his submissions to Court, at the commencement of the judgment.

1 Right of reply to the submissions of counsel for the accused

Counsel objected to the written reply of the Attorney-General dated 21 January 1999. He relied on the provisions of the Criminal Procedure Code (Cap 54) (hereinafter referred to as the 'Code') to exclude such right. On the examination of section 186 of the Code it is found that subsection 3 restricts the addresses to court after the recording of evidence in the order that the prosecutor is followed by the accused or his counsel. The said provisions are seen to be regulated by the calling of witnesses or evidence that constituted a basis. It is my finding that provisions of the Code have no bearing on addresses on law by counsel when it is made at the instance or with leave of court. However as neither counselhas had the benefit of addressing court on the said aspect of the law, in an abundance of caution the said written reply of counsel will be disregarded and will remain unperused for the final determination of matters in issue in these proceedings.

2. The inadequacy of the particulars of offence given to the accused “as may be necessary for giving reasonable information as to the nature of the offence"

Information given by the formal charge contained the name of the accused, date, the place and the name of

the victim in respect of the offence, along with the specific offence as described in section 130 as amended.

The accused complains that the prosecution has failed to comply with the requirements in section III of the Code to give reasonable information as to the nature of the offence charged. It is the contention of tcounsel for the accused that "The offence of "sexual assault", as constituted by the statute, includes the doing of any four possible acts in the alternative. Section 130 (2)(a)(b)(c) or (d) ranging from "indecent assault", to "penetration" in increasing degrees of gravity, each bearing a commensurate sentence (section 130(4)." Counsel cannot be further from the correct interpretation of Section 130 as amended. Section 130(2) prescribes that "for the purposes of this section sexual assault includes" the four different acts. The four examples of sexual assault described therein are not the ingredients of the offence. They are merely four of several assaults of a sexual nature that could constitute the offence of sexual assault. With reference to the case of *R v Leeson* (1968) 52 Cr App R 185 "an indecent assault" as referred to by the Attorney-General could include numerous specific acts that could constitute the offence of sexual assault.

When counsel for the accused submits that "in the 'particulars of offence' the accused is not given the slightest indication as to which of the 4 acts is alleged against him" it appears that counsel envisages the prosecution to be restricted to one of the four acts described therein.

To support such a conclusion there is neither statutory provision nor known practices. Hence the prosecution need not be confined to any particular act that constitute the charge of sexual assault.
Counsel for the accused very correctly quotes from

*Archbold*, 36th ed, para 122 that, "the indictment ought to follow the language of the statute". In my view unlike the original section 130 of the Penal Code which defined the offence of rape, 'section 130 as amended' provides no such definition of sexual assault. The offence of sexual assault includes indecent assault, which is general in nature and includes very many different acts, one of which is described in the particulars of the offence of the case of *Republic v Richard Riaze* cited by counsel. Such a charge of sexual assault justifies the statement in respect of the very act that constituted the offence, but in the case of *Republic v Harikrishnan Paramesvaran*, the other case referred to by counsel, where the offence is sexual assault of penetrating the anal orifice of another for sexual purposes, specific reference in the particulars of the offence was not obligatory.

Counsel, with reference to *Vidot v Republic* (1981) SLR 79 submits that an "autrefois" test on the instant charge before the court of sexual assault shall fail. His contention is that the failure of the prosecution to specify the particulars of the act that constituted the sexual assault in accordance with section 130 (2) a, b, c and d aforesaid is devoid of certainty as to what offence the accused is charged with. The said section 130(2) only provides a few examples of acts that constitute sexual assaults which are not exhaustive, hence the offence is 'sexual assault,' and the statute does not provide the definition of sexual assault unlike the offence of rape before the amendment. Therefore a plea of "autrefois convict" or "autrefois acquit" will apply precisely to all subsequent prosecutions in respect of all acts that amount to offences of sexual assault.

Counsel for the accused finds that in respect of the different kinds of acts included in subsection 130(2) "each [bear] a commensurate sentence in section 130

(4)". Amendment to the Penal Code Act 16 of 1996 in section 130(1) stipulates only a sentence common to all offences of sexual assault, which is a prison sentence not exceeding 20 years.

The two Mauritian Cases cited by counsel for the accused have no bearing on the instant action as the charges were made on provisions that described the ingredients of the offence like in the case of the offence of rape before the amendment. In the case of *Samson v The Republic* Criminal Appeal No 11 of 1995 section 2 of the Dangerous Drugs Act (Cap 186) defined "cannabis" as distinct from "cannabis resin" which led the Judges of the Court of Appeal to rule that "a person cannot be expected to answer a charge that has not been made against him." There can be no doubt a charge of sexual assault sufficiently conveys to the accused the nature of the offence in accordance with the statute, and facts relating to the charge were left to be disclosed as the prosecution witnesses testify in his presence. The accused never complained that he was not certain what the charge was until the evidence was concluded.

I therefore decide that particulars of the charge given were sufficient to inform the accused of the nature of the offence, and that he was not prejudiced and the information was according to law, including the provisions of article 19(2) of the Constitution.

3. Delayed disclosure and the right to a fair hearing

It is without dispute that the statement made to the police by the alleged victim and a few other witnesses were not available to the accused before they testified before the Court. The said statements were subsequently delivered to the counsel for the accused by the prosecution. Any delay was not occasioned by the refusal or reluctance on

the part of the prosecution but due to a delayed application, and by oversight. A delay under the said circumstances cannot be construed to be a denial of a fundamental rights enshrined in article 19 of the Constitution, and it need not necessarily cause a miscarriage of justice. If, on the application of the accused, the Court had found that the alleged victim's testimony is contrary to the statement made by her and the contradictions were proved, it would have directed the witness to be recalled, notwithstanding the inconvenience and delay. The defence had the option to prove such contradictions if any when the police officer Stella Francoise, who recorded the statement of A, was called by the prosecution and gave evidence. In such a statement, if facts stated contradicted the complainant's testimony before the Court, the accused had the right to make the necessary application to the Court to have the witness recalled or for the Court to act on the proved contradictions in the statement of the witness. Counsel, however, did not have recourse to the said procedure and instead attempted to comment on the contents of an unproved document on 25 November 1999 as seen in the record of proceedings at page 6 and 7. In the absence of such proof of contradictions in respect of the virtual complainant's testimony and her statement, counsel's claim of such contradictions on material facts cannot be entertained by the Court.

In respect of other witnesses called by the defence and the denial of the choice of refraining from calling any of them, if in fact their evidence was adverse to the accused, once again on application the Court could have considered to act in an appropriate manner if such facts were proved.

I find that the defence has not made out a case to establish that any prejudice has been caused to the

accused or that he has been deprived of benefitting by any statement to his advantage, hence I decide the aforesaid delays in the disclosure of statements have not affected the course of these proceedings or resulted in a miscarriage of justice.

4. Complaint

Counsel submits that the complaint is inadmissible for the reason that it was not made on the first opportunity available and that it was made after a considerable delay. He therefore questions “whether the statement is voluntary, spontaneous in the sense that it is an unassisted and unvarnished story of what happened".

On the evaluation of evidence by counsel the statement has been made at least five hours after the alleged commission of the offence. The evidence revealed that the complainant was a foreigner with a small child with her. She was not expecting her taxi until 4 pm on 1 November 1998. Her evidence suggests that she was waiting in expectation of the arrival of her acquaintances from a previous day. If she preferred known persons to unknown tourists or picknickers on the beach to confide, she cannot be blamed. It was not clear from her evidence that she recognised Esther and Samson to be police officers as they were not in uniform according to officer Octobre, leave alone that they were beach wardens. It is relevant to note that there is no evidence to conclude that the complainant at any time had any reason or did intend to falsely implicate the accused in the commission of the offence of sexual assault on her. Even if she was not the first to inform the police of the assault on her, there is nothing in the evidence before the Court to suggest that she had an ulterior motive to make a complaint of sexual assault without reason or proper ground, or that she was compelled to do so to

save face under the circumstances.

The circumstances under which the complaint was made cannot be considered to be delayed considerably, or that it was not made at the first opportunity which reasonably offered itself to the complainant.

5. Was the complainant sexually assaulted on 1 November 1998 at Intendance Beach?

A, a German national, mother of four children, married, 40 years old, had arrived in Seychelles on 25 October 1998 with her 4½ year old child B. In addition to the aforesaid particulars, she revealed that she enjoyed being in the nude when she visits the Takamaka end of the Intendance beach, where the words "NUDIST BEACH" are found painted in white on a rock. Early on Sunday 1 November 1998 she has gone to the said part of the beach with B as she had done on previous days and had found the beach completely deserted. After she had undressed and had a short sea swim she was seated and playing with her daughter when the accused approached her wearing blue jeans and a white T-shirt with a red and pink coloured square in the middle, which she later identified as the production in the Court obtained by the police from the accused. According to her, he spoke to her, stating that he is a teacher of French. He then removed his swimming suit and after a little while in the sea went away. According to Athe accused, in the course of his conversation with her, had assured her that her friends will come later.

Thereafter for about 1½ hours she was on her guard and kept an eye on the part of the jungle from which, according to her, the accused had entered the beach on the four days that she had seen him. When she thought she had nothing to worry about she had resumed playing

with her daughter. At that time she had heard a soft noise behind her, which she took to be of her daughter, when a person whom she later identified as the accused has grabbed her from behind with both his hands so that both her hands were locked in his grip. She said that when she turned her head a little bit she recognised the face of the accused. As she felt he was wearing his jeans and fearing that he could have a knife she refrained from resisting. She did not shout for help as there were no people in the vicinity and also because of the presence of her daughter. He had dragged her on the beach while she was attempting get up when she recognised that the zip fastener of the trouser was open.

Although she tried to press her legs together she had not been able to do so and the accused had succeeded in penetrating her vagina partially with his penis. When he had ejaculated he put on his trousesr and ran away. On being questioned by counsel she said that the accused was not wearing any underwear, which was later confirmed by Constable Octobre, and the said fact was admitted by the accused himself in evidence. The accused also admitted in evidence that the jeans that he wore that day belonged to his brother, the zip fastener was broken and it could not be closed.

As against her testimony of sexual assault committed by the accused, the medical evidence of two doctors has to be dealt with. Dr Dilip Hajarnis, the gynecologist who examined A at 5.30 pm on Sunday 1 November 1998 found no injuries on her body and found no spermatozoa on three swabs taken from her. His evidence revealed that the washing of the victim's genitalia with sea water, want of resistence at the time of the attack, partial penetration and premature ejaculation could be reasons for the absence of spermatozoa and injuries on the victim.

Dr Tsultrim Tenzin examined the accused on the day of the alleged incident at 3.55 pm and his finding was no different from that of Dr Hajarnis, that is that there was no evidence of sexual assault with penetration resulting in sexual intercourse. Dr Tenzin found smegma present under the accused's prepuce and commented that sexual intercourse or washing would have removed same. He conceded that if penetration was partial and ejaculation premature the smegma could remain undisturbed. He concluded that urination and washing could have removed spermatozoa from the genitalia of the accused.

After a careful consideration of the medical evidence before the Court it is necessary to conclude that the said evidence alone neither proves nor disproves the alleged sexual assault on A.

There was no evidence to hold that the victim's version of the sexual assault was a figment of her imagination or that there was any reason for her to pretend that she was sexually assaulted. There was evidence on her own admission that she was once drunk at the Blue Lagoon Hotel and that she drinks beer with lemonade for breakfast. Although Dr Tenzin did examine the victim and did not receive any smell of alcohol from her, he had got the impression that she had consumed alcohol. The reason adduced for such impression was his observation of the way she got up from her chair and her slow speech. Dr Harjanis who examined her at about 5.30 pm on the said date specifically stated that she was not under the influence of alcohol. Dr Harjanis' evidence on the said matter should rule out the reliability of the observations of witness Jean Baptist Orter.

The two taxi drivers Kitson Burca and Carl Lablache

testified to the drinking habits of the victim. Kitson Burca had seen A with a bottle of beer on Wednesday evening and on Friday as admitted by the victim, he had seen her drunk. That was the day that she was made to leave Blue Lagoon against her wishes, which according to her upset her, and her reason for her inebriated state on that date. The witness, in his examination-in–chief, tried to make out that he did not want to offer his services on the next date on account of his previous day's experience, but under cross-examination he disclosed that in any event he did not have a car on the said date. On his evidence, she had been under the influence of alcohol only on one day.

Lablache, on the other hand, took the victim in his taxi from the hotel to Intendance Beach on the day of the incident. He described that the victim was already drunk when she boarded the taxi and that he discovered when he tried to assist her with the bag inside the car that she was carrying four pints of beer. On account of the alleged incident that day he had not been able to get his taxi fare that evening and thereafter he had to go twice to the hotel Lazare Picault, where she stayed, to collect his fare of one hundred rupees. He volunteered to express the demeanour of the victim who was at tea on the day he received his taxi fare through a waitress at the hotel. Lablache had known the accused for three years and had been a visitor at his mother's house. As pointed out in cross-examination that, in spite of the fact that Lablache was unhappy with the state of his passenger that day and noticed that she was drunk, he said that when the victim offered him the fare that morning he left it with her to be collected on the return trip that evening.

It is my considered opinion that his uncorroborated evidence of the discovery of four bottles of beer with her while she was travelling in his vehicle and the

postponement of collecting his fare when he was said to be disgusted with his passenger on account of her conduct are not credible.

The accused admitted meeting the victim and speaking to her on the day of the alleged sexual assault, but he never said that she ever smelled of alcohol. Police officers Octobre and Stella Francoise in evidence specifically stated that she did not smell of alcohol and that she was not under the influence of alcohol.

I therefore find that her allegation of being sexually assaulted on 1 November 1998 was not in any way influenced by her consumption of alcohol or due to a drunken state. Other than her own evidence the only other evidence even suggestive of sexual assault is the expression of B to the effect "he pushed on her legs". The commission of any act with the consent of A was never in issue as the defence was virtually an alibi, and on mistaken identity.

In respect of the uncorroborated evidence of A on the charge of sexual assault I am inclined to give expression to the quotation from the judgment of *Mousmie v The Republic*, (1978-1982) SCAR 543 as follows:

> In this case it was unthinkable that the account given by the complainant had been concocted and there was no indication that the complainant was suffering from delusions or hallucinations. The "part of the prosecution case which dealt with the commission of the offence could have been believed on the uncorroborated evidence of the complainant.

On the evidence of A I find that the alleged act was intentional and it caused her to apprehend immediate

and unlawful violence by the penetration of a body orifice of her for a sexual purpose, thus constituting the offence of sexual assault in accordance with section 130(4) of the Penal Code as amended.

I therefore conclude that the complainant A was sexually assaulted on 1 November 1998 at the Intendance beach.

6. **Identification on days previous to the assault**.

Atestified that the accused was seen at the Intendance beach on three consecutive days immediately prior to the alleged offence, that is on Thursday October 29, Friday 30 Saturday and 31. If in fact the victim had seen the accused on the said dates, the identification of the accused on the date of the assault is considered to be made easier and the fact bears witness to the state of mind of the accused by his interest in those frequenting the specific section of the beach.

However for the prosecution, only the evidence of A is available to establish the presence of the accused on the beach on the dates prior to the assault. Kitson Burca testified to the fact that he drove the complainant to the beach in his taxi at least on two days of the said week. There is no reason for Ato lie about the rest of the days on the beach if she has not been there, but she may be mistaken with the specific days of the week or that they were consecutive.

The accused led substantial evidence to establish that he was elsewhere, on the said days, but to prove the charge against the accused beyond a reasonable doubt what is relevant is that on the day of the incident he was on the beach at the time of the assault. On the evidence of Marie Confait, Maxime Leqeune, Teddy Desaubin, Philip Monthe, Clifford Mondon, Alma Didon, Michel Marie and

Veronique Gerello there can be no doubt that on several days immediately before the date of the alleged assault the accused was very much involved in the preparatory activities of the Creole Festival, and his work at the NYS at Port Launay. The witnesses understandably could not be specific as to the hour and minute of the time that the accused was with them on the said days to rule out the possibility of the accused visiting the said section of the beach on the three days before the incident. I therefore decide that the lone evidence of the complainant in respect of three days prior to the date of the alleged assault should be ignored and not acted upon to prove the charge against the accused.

7. **Identification of the assailant of A on Sunday 1 November 1998 at Intendance beach.**

It was concluded earlier that the complainant's capacity to identify her assailant on the said date was not in any way impaired by a state of inebriation. There is no dispute about the presence of the accused on the Intendance beach on the said date and that he was taken into police custody just after 3 pm on 1 November 1998 at the beach. The case of the accused is that he was at his mother's place at the relevant time and that he arrived on the beach much later.

According to the complainant on 1 November 1998 she had breakfast at the hotel at about 7.30 am and arrived at the beach by taxi. Taxi driver Lablache said that he went to Lazare Picault to pick her up at 9.00 am. None of them spoke of the time they arrived at the beach. The complainant was unable to state the time when the assault took place. The accused, after being up the whole night, returned to his mother's place with Teddy Desaubin at about 8.30 am. He left for the beach with Teddy Desaubin, , at about 10.15 am or 10.30 am he first said in evidence-in-chief but immediately thereafter he changed the time to 11.15 or 11.30 am (page 31

of the evidence of th December 1998 at 9.00 am). Teddy Desaubin confirmed that he gave a lift to the accused about 11 or 11.30 am. The evidence of the accused was that Teddy Desaubin came to fetch him by prior arrangement, but Teddy in cross-examination said that it was without any previous arrangement that he met the accused at about 11.00 or 11.30 am that morning to give him a lift. It was disclosed in evidence that Teddy Desaubin and the accused were close friends and according to the evidence of Teddy Desaubin's mother, Mirena Belle, and Marcel Belle, Teddy Desaubin and the accused are close relations as well. Marcel Belle, not without reluctance, admitted that the accused mother is his uncle's daughter and that he and the accused's mother are cousins. Teddy Desaubin's mother Mirena Belle revealed that Marcela Belle's mother and her mother are sisters and that they are cousins. Jean Baptiste Bonne, Regis Monthe and Brian Morel were all neighbours of the accused's mother, who frequented her place to play dominoes.

On 1 November 1999 Jean Baptiste Bonne left his home at 9.30 am to play dominoes and had seen the accused from time to time at his mother's place until he left at 11.00 am. The witness under cross-examination disclosed that he generally goes to play dominoes on Sunday at 2.00 or 3.00 pm and continues to play till late evening. The reason he gave for the departure from the accustomed practice of playing dominoes and playing on the Sunday morning in question was because he had been to the shop, although there was nothing special on the said date. Regis Mothe was another dominoes player who saw the accused at his mother's place on Sunday 1 November between 8.30 and 8.45 am until he left at 10.15 am. He had attended the celebrations at the Kreol Institute and had gone home only at 7.15 in the morning. On Friday night he had participated in Kreol Festival competitions, and had left the Reef Hotel at 1.00 am or 1.15 am. The witness had not given a statement to the police.

Brian Morel was at the accused's mother's house at 10.30 am to play dominoes and had met the accused. He is the only witness out of the witnesses who were at the accused's mother's place to play dominoes who saw the accused leave with Teddy Desaubin. It was his evidence that when Teddy Desaubin was on his way from Anse Forban to Intendance, the accused stopped him and asked for a lift. He contradicted both the accused and Teddy Desaubin when he claimed that Teddy's mother was in the vehicle when it was stopped to pick up the accused. Unlike the other two dominoes players who gave evidence he did not know about the accused making and serving soup or frying eggs for breakfast.

Bonne and Morel displayed under cross examination that their ability to recollect was more prominent in respect of matters pertaining to the morning of Sunday 1 November than happenings of other days of the year.

After hearing the three witnesses whose testimony was directed to establish that accused did not leave for the beach until at least 11.00 am, I find that their evidence cannot be believed on account of the observations made earlier. It is my conclusion that the accustomed gathering for playing dominoes was in the afternoon, and their testimony of witnessing the movements of the accused on the said Sunday morning was fabricated to assist the accused in his defence. The accused's relative and close friend Teddy Desaubin's performance as a witness was no better. He contradicted himself on his own evidence in respect of his movements on the afternoon of Sunday 1 November. In answer to counsel for the prosecution he said that he slept from 12.00 to 3.30 pm but his evidence-in-chief was that he went to the beach to see the accused between two and three in the afternoon. It was previously noted in this judgment that the evidence of the accused and the witness Teddy Desaubin was at variance in respect of whether the picking up of the accused was by design or by accident. I have no doubt that the witness

conspired with the accused to establish that the accused's arrival on the Intendance beach was much later than what the prosecution sought to establish.

On the evidence of the complainant she was unable to offer any particular time at which the assault took place. In considering her evidence of eating her breakfast at 7.30 am and thereafter going to Intendance, and leaving a period of 1½ hours for the period between the appearance of the accused and the happening of the assault, it is probable that the assault took place before 11 am when the beach was almost deserted by humans.

Egide Suzette, according to his testimony had left home at 10.00 am on 1 November 1998, had met the accused at about 11.15 am walking away from the 'nudist beach' area on the foot path close to the beach at a distance of about 100 metres with a T shirt on his shoulders and wearing blue jeans. He has known the accused for a period of about 20 years and had noticed that the accused at the said time walked a "bit quickly". He had again seen him at about 3 pm walking towards the so-called 'nudist beach'.

Daniella Adeline called by the prosecution testified to the fact that she went with others to the Intendance beach at about 12.00 in the afternoon and thereafter had seen the accused who was known to her, coming from the direction of the 'nudist beach' shortly thereafter. According to her evidence the accused had spent time with Daniella and others and had lunch, cooked on the barbecue.

The evidence of William Belle about the man looking like an Arab, "behaving very suspiciously and apparently trying to hide himself in the bushes near a rock" as well as Daniella seeing an Indian looking person entering the sea for a swim can have no bearing on the case even if they had looked similar to the appearance and physical features of the

accused, for want of evidence of their involvement. Daniella's contradiction in evidence of the time of her arrival as recorded in the statement can make no difference to the prosecution case. She could have had no reason to utter a deliberate lie, in any event her evidence is more consistent with the accused's claim of his arrival at about 11.30 am. Daniella's evidence does not establish that it was Egide Suzette that she referred to when she said that she saw two boys passing with palmist on their shoulders.

The accused in his testimony described how he walked towards the far end of the beach and when he was returning the complainant had stood up from where she had been sleeping or sitting, walked towards him naked and told him that she was afraid of thieves. He had then reassured her that there are no thieves and that there are police officers who guard the beach. According to the complainant and the accused they had exchanged a few words about themselves. He later said the following:

> "I remember just after she had seen me after she had asked me if I was a thief she went back to where her things were and she covered himself with a T-shirt".

The complainant's evidence on the said encounter was as follows:

> When I was playing he came totally close with blue jeans and a white T-shirt…….....
>
> He began to speak to me and came closer..... he told me he was a French teacher.
>
> Q. "When he came close to you did you continue to be naked?"

A. "No, I protected my naked special point with a towel, because I could not find my T-shirt very quick, but I protected it with a towel".

On the version of the accused it is obvious that the complainant had not displayed a desire to engage herself in a friendly conversation with the accused but expressed her fear when she said according to the accusedeither "she told me something like she was afraid of thieves"or "she asked me if I was a thief".

It is extremely strange and appears to be illogical for a foreign national on a beach with a small child to approach an unknown male naked, and express her fears. She could not have had any good reason to do so, and worst of all in the nude. I consider the version of the complainant is rational and the statement of true facts. The complainant's evidence is cogent and forthright, and I therefore find that the accused has lied under oath deliberately to prevent the interest she has shown in the complainant being established before court.

It is unfortunate that the complainant was never afforded the opportunity of identifying the accused at a parade. In *Pragassen v R* (1974) SLR 13, the Court held: ,

> The identification of an accused party by a witness in Court when the accused is in the dock, without an identification parade having previously been held is improper, unsatisfactory, and should be avoided whereever possible. Such evidence is admissible although suspect, but is of little, and, in some cases, of no weight. It must be taken into account with the rest of the evidence. Failure by the Magistrate to warn

himself in that respect amounts to a non-direction.

Other than the dock identification of the accused by the complainant and her daughter, both of them had pointed out the accused at the time he was taken into custody according to the evidence of police officer Weston Michel Esther and Constable Octobre. According to the evidence of police officer Stella Francoise on 6 November 1998 when the complainant and her daughter accompanied by her was near the entrance to the court room no 1, B has again pointed out the accused.

The fact that the complainant recognised at the time of the sexual assault that the assailant had the zip fastener open and was without underwear, later to be confirmed by the accused himself and Constable Octobre, is considered a relevant fact in the identity of the accused.

B, the daughter of the complainant in unsworn evidence before the Court, pointed to the accused and said, “he pushed on her legs” which is consistent with the account of the complainant of the sexual assault, and demonstrates the child witness’s ability, even though of tender years, to give intelligible evidence.

I warn myself that in the case of the charge of sexual assault that it is unsafe to convict the accused upon uncorroborated testimony of the complainant.

In the present case I find corroboration of the complainant's evidence of identification by the evidence of B and the deliberate false testimony of the accused that the complainant in the nude approached him and engaged in a conversation with him about thieves.

Even in the absence of corroboration I find that on account of

the earlier encounter with the accused on the same day the complainant has properly and correctly identified the accused by the features she witnessed when she "turn[ed] her head around a little bit" as the person who committed the offence of sexual assault on her.

It is of significance that the accused was taken into custody very close to the scene of the incident. He has, for an inexplicable reason,not left the area where the crime took place. The reasons for his conduct are only open to conjecture. At the time he was arrested due to a period of about five hours have lapsed, he could have felt safe and inquisitive to find out whether the complainant was going to act. The delay could have given him a false sense of confidence and his impatience was his undoing.

On the totality of the admissible evidence referred to in this judgment I find that the charge that Paddy Michel Savy on 1 November 1998 at Intendance committed sexual assault on A was proved beyond a reasonable doubt.

I convict the accused Paddy Michel Savy of the offence of sexual assault as charged.

**Record: Criminal Side No 51 of 1998**

## Benker v Government of Seychelles & Or

*Judicial review*

The applicant is a foreign national. She entered Seychelles on a visitor's permit. She extended her permit with the support of a guarantor. A week before her permit expired, the guarantor advised the second respondent that he was withdrawing his guarantee. He also provided a statement regarding the nature of his relationship with the applicant and alleged disreputable behaviour by her. The respondent advised the applicant her permit would not be renewed beyond the expiration date. The applicant was given a period of grace to settle her affairs before returning to her homeland. The applicant did not depart but instead she and the guarantor married. The now husband applied to renew the applicant's permit. The application was declined. The respondent then gave a final notice for the applicant to leave Seychelles. The applicant applied for judicial review of that decision and sought a writ of certiorari and also a writ of mandamus. The applicant claimed that the respondent had failed to give any reason for the decision, that the decision was unreasonable, and that the result would break up the family unit. The respondent resisted the application on various grounds. The primary issue before the Court was whether the decision was irrational or unreasonable.

**HELD:**

(i) A decision by a public authority is irrational or unreasonable if the decision-maker took into account any matter that should not have been considered and did not take into account matters that should have been considered;

(ii) A foreigner has no right to a visitor's permit. The grant of a permit is at the discretion of an immigration officer; and

(iii) The discretion conferred under section 14(1) of the Immigration Act is an administrative discretion not a quasi-judicial one.

**Judgment:** Application for judicial review dismissed.

**Legislation cited**
Immigration Decree, ss 14, 19

**Cases referred to**
*John Desaubin v MESA & Anor* (unreported) Civil Appeal 52/1998
*R v Passport Officer, ex parte Kathleen Pillay* (1990) SLR 250
*R v Superintendant of Excise & Anor; ex parte Confait* (1947) SLR 154

**Foreign cases noted**
*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 1 KB 223
*Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935
*R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] 1 All ER 655

Antony DERJAQUES for the applicant
Lucy POOL for the respondent

**Judgment delivered on 1 December 1999 by:**

**KARUNAKARAN J:** The applicant Gordana Benker is a national of Yugoslavia. She is a young woman and an artist by profession. She first entered Seychelles on 6 July 1995 as a visitor. She remained in Seychelles as a visitor until she left

the Republic on 7 September 1995. Again she returned to Seychelles on 17 September 1995. On both occasions of her entry into Seychelles she was granted a visitor's permit by the second respondent, hereinafter called "the respondent", namely the Seychelles Immigration Authorities, in respect of her stay in Seychelles.

On 5 October 1995, when the applicant was in Seychelles she went to the Immigration Office at Independence House, accompanied by one Mr Jimmy Contret, a Seychellois national, and applied for extension of her visitor's permit. Following a guarantee/security bond executed by Mr Jimmy Contoret she got her visitor's permit extended until 17 December 1995. On 11 December 1995, during the extended period of her permit, the guarantor Mr Contoret went back to the Immigration office. He told them that he was withdrawing the guarantee he had furnished in respect of the applicant's visitor's permit. He also informed the respondent that the applicant was his girlfriend and they had been living together for some time in Seychelles. Besides, Mr Contoret gave a statement to the immigration authorities in writing alleging that the applicant was then using dangerous drugs and also going about with some people who were not of good character. In support of the drug allegations Mr Contoret produced to the Immigration Officers two photographs of the applicant with potted plants similar to marijuana in the background. Following the withdrawal of the guarantee by Mr Contoret, on 13 December 1995 the respondent notified the applicant in writing that her visitor's permit would not be renewed upon its expiry on 17 December 1995. On 19 December 1995 the applicant requested a further extension of her visitor's permit. Again on 20 December 1995 Mr Contoret also supported her request and asked for a further extension of her visitor's permit until 31 January 1996 in order to allow her time to sort out her affairs before leaving the Republic. Considering the final request by the applicant, the respondent eventually gave her time until 15 January 1996 extending her visitor’s permit until then.

In the mean time on 3 January 1996 a third party, one Mr J Jeremy wrote to the respondent in support of the applicant's request for a further extension of her visitor's permit. This request was turned down by the respondent. The applicant was given a grace period of about two weeks i.e. until 27 January 1996 for her to leave Seychelles. During the grace period of her stay in Seychelles, that was on 19 January 1996, the applicant got married to Mr Jimmy Contoret and on 26 January 1996 Jimmy Contoret applied for her dependant's permit under section 14 of the Immigration Decree. His application for the dependant's permit was turned down. The applicant thus continued to dodge the requests of the immigration authorities. In view of all of the above and the surrounding circumstances the respondent, by its final letter dated 19 February 1996, conveyed its decision to the applicant that she should leave the Republic on or before 28 February 1996. Aggrieved by the said decision of the respondent, the applicant has come before this Court now for a judicial review of the said decision. In this application she prays for a writ of certiorari quashing the said decision and also seeks a writ of mandamus compelling the respondent to review his decision.

Counsel for the applicant, Mr Derjaque, in essence submitted as follows -

(a) The respondent has failed to give any reason for his decision.

(b) The said decision of the respondent is unreasonable and irrational in terms of the *Wednesbury* principles. See *Associated Provincial Pictures Limited v Wednesbury Corporation* [1947] 1 KB 223 as applied by the Seychelles Court of Appeal in the case of John Desaubin v MESA and Competent Officer (unreported) Civil Appeal 52/1998.

(c) The order made by the respondent against the applicant to leave Seychelles is draconian in nature as it breaks up a stable Seychellois family and hurts a Seychellois man by taking away his legally wedded wife from him. Mr Contoret has a right to have a family and to stay with a woman whom he loves. Moreover, Mr. Derjaques submits that if the applicant is sent back to Yugoslavia she might end up in Kosovo. In the circumstances, he contends that the decision of the respondent to deport the applicant from Seychelles is unreasonable and irrational.

On the other side counsel for the respondents, Miss L Pool, submitted that the respondent has acted rationally or reasonably in the circumstances. The decision in question is not arbitrary but grounded on valid reasons. According to her since drug offences are on the increase in the country no foreigner can be allowed to come in and get mixed up with drug dealers. The sudden marriage of the applicant to a Seychellois national was only intended to continue her stay in Seychelles. Therefore, she contended that the respondent has taken the decision to deport the applicant as he is empowered to do so in the national interest in terms of section 23(1) of the Immigration Decree. By the way, with due respect to the views of counsel I do not think the Court is now reviewing any deportation warrant issued under the hand of the Minister concerned in terms of section 23(1) of the Decree. It is also not the case of the applicant. In any event, counsel submits that the impugned decision of the respondent is reasonable and rational in the circumstances. Therefore, she seeks dismissal of the instant application and to uphold the decision of the respondent in this matter.

**Judicial Review in the new age**

It is pertinent to note here, that the law in the field of judicial review has witnessed considerable development since the time Lord Denning stated - nearly 50 years ago- at the end of his little book *Freedom under the Law* thus:

> Our procedure for securing our personal freedom is efficient, but our procedure for preventing the abuse of power is not. Just as pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari and actions on the case are not suitable for the winning of freedom in the new age…. We have in our time to deal with changes which are of equal constitutional significance to those which took place 300 years ago. Let us prove equal to the challenge.

This challenge has been met today with considerable development of law evolved over several decades in the field of judicial review. In the present century of the welfare Ssate, the Government has concerned itself with every aspect of individual's life from womb to tomb. Consequently, the administrative action of the executive is proliferating. They increasingly affect the life of the ordinary man. There is always a danger to his rights and to the rule of law. Hence, the administrative actions are now increasingly and effectively being scrutinised and controlled by judicial review. This development is inevitable in order to meet the changing needs of time and society. This is evident from the classic statement on the scope and range of judicial review in Lord Diplock's speech in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at 950 where he says:

> Judicial review has I think developed to a stage today when, without reiterating any analysis of

> the steps by which the development has come about, one can conveniently classify under three heads the ground on which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". That is not to say that further development on a case by case basis may not in course of time add further grounds.

**The impugned decision**

Obviously the matter herein involves a judicial review of the respondent's decision contained in his letter dated 19 February 1999 in which the applicant was asked to leave Seychelles on or before 28 February 1996. The letter reads as follows:

> Dear Ms. Benker,
>
> **APPLICATION FOR DEPENDANT'S PERMIT FOR SELF**
>
> I refer to your above application dated 25th January 1996.
>
> After careful consideration has been given to the application, I regret to inform you that it has not been approved.
>
> Consequently, it has been decided that you make necessary arrangements to leave Seychelles on or before 28th February 1996.
>
> I wish to point out that no further appeal on your part will be entertained and this decision is final.

Yours faithfully,
Sd B. Potter
For. Director of Immigration

In fact, this is the decision which the Applicant is complaining of and constitutes the subject matter in the instant case for judicial review. The applicant alleges that the said decision is irrational or unreasonable. Applying the yardstick of Lord Diplock (supra) it is clear that the ground alleged herein by the applicant falls under the second ground of classification. That is "irrationality". Therefore, the fundamental question before this Court for determination is this -

> Whether the said decision of the Immigration authority in this matter is tainted with irrationality or unreasonableness?

To find an answer to this question of what the Court should do, Lord Greene gives the answer in the case of *Wednesbury Corporation* (supra) which stands as guiding principle, if I may say so. This runs as follows -

> In considering whether an authority having so unlimited a power has acted unreasonably, the Court is only entitled to investigate the action of the authority with a view to seeking if it has taken into account any matters that ought not to be taken or disregarded matters that ought to be taken into account. The Court cannot interfere as an appellate authority to override a decision of such an authority, but only as a judicial authority concerned to see whether it has contravened the law by acting in excess of its powers.

In the light of the above guiding principles now let us investigate the entire facts and circumstances surrounding the impugned decision in order to see If the authority has taken

into account any matter which ought not to be taken and the vice versa.

**Administrative Discretion**

Basically a visitor's permit granted to any foreigner is only a privilege accorded to him or her to enter and to remain within Seychelles until such permit expires. In fact, no foreigner can claim it as a right. Granting a visitor's permit obviously falls within the discretion of the Immigration Officer. This is evident from section 16(1) of the Immigration Decree. It is couched in the following terms:

> 16. (1) On application being made in writing, an immigration officer **may,** (emphasis supplied) subject to such conditions as he may deem necessary, issue a visitor's permit to any person who-
>
> *(a)* is not a prohibited immigrant; and
>
> *(b)* is not the holder of a dependant's permit or a residence permit or a gainful occupation permit.
>
> *(2)* A visitor's permit….
>
> *(3)* The director of immigration may revoke a visitor's permit if there has been breach of any condition attached thereto or he considers it in the public interest so to do.
>
> *(4)* Any person aggrieved by the revocation of a visitor's permit under subsection (3) may appeal to the Minister whose decision shall be final and shall not be challenged in any Court.

*(5)* Subject to this Decree, a visitor's permit shall authorise the holder to enter and to remain within Seychelles until such permit expires.

Here it is pertinent to note that the discretion conferred on the immigration officer under Section 16 subsection (1) above regarding the issuance of visitor's permit is an administrative discretion not a quasi judicial discretion. I find it so, because the Decree itself does not specify the ground upon which the discretion of the immigration officer is to be exercised. Hence, this is an absolute administrative discretion conferred on the Immigration officer. This is what Woodman C. J had to say in his judgment in *R v Superintendent of Excise & Anor; ex parte Confait* (1947) SLR 154 at 161:

> There are cases in which the very nature of the discretion conferred excludes the possibility of it being an absolute discretion. There are other cases in which the Act itself specifies the ground upon which the discretion of the competent authority has to be exercised. Where the Act itself so limits the discretion of the competent authority it is clear that that discretion is not an absolute discretion and the Court have readily held in such cases that the competent authority was under an obligation to act judicially.

In this particular case, section 16(1) does not limit the discretion of the Immigration officer by specifying any grounds upon which the discretion of the authority has to be exercised. Therefore, this Court tends to view this discretion per se as administrative and so not subject to review. The authority is under no obligation to act judicially in this respect. On the other hand if the Decree had specified the grounds limiting the discretion, then any decision taken on the basis of that discretion would of necessity, be judicial and subject per se to judicial review by the courts. Therefore, I find the decision of

the Immigration officer on the issuance of visitor's permit under section 16(1) of the Decree is not subject to judicial review.

For similar reasons given above, I find the discretion conferred on the authorities under section 14(1) in respect of dependant's permits is also an administrative discretion and is not subject to judicial review. Therefore, in summing up, any decision of the executive based on his administrative discretion is simply an administrative decision. They are not judicial or quasi-judicial decisions. In that case, the executive is under no obligation to act judicially. Hence they are not subject to judicial review.

Having said that I have to statefor avoidance of doubt, that the above proposition should not be misinterpreted as meaning that the Court has no jurisdiction to correct the decision of the Immigration Officer or executive when he falls into an error of law while exercising that discretion or acts ultra vires or out of his jurisdiction. In other words the courts have no control over or cannot interfere in his administrative discretion so long as he exercised his discretion in accordance with law and kept it within his jurisdiction.

**Prohibited Immigrant**

Turning to the facts of the case, undisputedly the final extension of the visitor's permit granted to the applicant expired on 15 January 1996. However, the applicant, despite notice, chose and continued to remain in Seychelles without any legal status after the said permit had expired. Therefore, she became ipso jure, a prohibited immigrant. Indeed, a "prohibited immigrant" in Seychelles is defined and listed under section 19 of the Immigration Decree, which reads as follows:

19(1) The following persons, not being citizens of

Seychelles, are prohibited immigrants:
*(a)* …
*(b)* …
*(c)* …
***(d)*** any person in Seychelles in respect of whom a permit under this Decree has been revoked or has **expired (emphasis supplied)**

Therefore, the applicant, not being a citizen of Seychelles, became a "prohibited immigrant" as from 16 January 1996 since she was in Seychelles and the visitor's permit issued under the Decree had expired.

In the circumstances, it is evident that the applicant got married to Mr Contoret in Seychelles on 19 January 1996 when she was, in fact, a prohibited immigrant in the Republic.

**Dependant's Permit**

The law governing dependant's permits is laid down under section 14 of the Immigration Decree. It reads as follows:

> 14(1) On application being made in the prescribed manner, the Minister **may** issue a dependent's permit to any spouse or minor child of a citizen of Seychelles who is not -
>
> *(a)* a prohibited immigrant; or
>
> *(b)* a holder of a residence permit or a gainful occupation permit (emphasis added).

In fact, on 26 January 1996 Mr Contoret, being a citizen of Seychelles, applied for a dependent's permit for his spouse, namely for the Applicant. On that day undoubtedly the applicant had no status or at the least was a prohibited

immigrant. Therefore, she was not eligible nor had any legal right to obtain or cause to obtain a dependant's permit by virtue of section 14(1)(a) of the Decree. The respondent therefore rightly refused the application for a dependant's permit in accordance with the law. In the circumstances, I find the decision by the respondent refusing a dependant's permit for the applicant is legal, rational and proper.

**Reason for decision**

It is a settled position of case law that in an administrative action when the decision is a quasi-judicial decision and amenable to judicial review then the decision-making authority ought to give other parties the reasons for their decisions. This is evident from the English case *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] 1 All ER 655. The same position is maintained in the case of *R v Passport Officer, ex parte Kathleen Pillay* (1990) SLR 250.

Coming back to Mr Dejacques' contention that no reason was given for the decision of the respondent in this matter I find it is not supported by facts. On the face of the letter of 19 February 1996 to the applicant it is clear that the respondent has communicated the basic reason for its decision to the applicant. In fact, that decision consists of two parts namely,

*(a)* The application for the dependant's permit was not approved; and

*(b)* The applicant should leave Seychelles.

As regards part (a) above, I have already found supra that the decision to grant or not to grant a dependant's permit squarely falls within the administrative discretion of the respondent. It is not a quasi-judicial decision. Therefore, the decision-maker is under no obligation to give the reason/s for his decision in this respect.

In any event, an application for a dependant's permit can be made only by a citizen of Seychelles. See section I -14 of 1983. If at all any reason required to be given by the respondent as to any decision on that application, it should be communicated only to that citizen of Seychelles who did apply for the permit, not to any other person or foreigner whose name has been mentioned in that application. Therefore, the respondent is under no obligation to communicate the reason if any, to the present applicant, that too when she was a prohibited immigrant.

As regards part (b) of the decision above, the reason explicitly precedes the decision. The applicant has been asked to leave Seychelles because her application (sic) for a dependant's permit was not approved. Impliedly, she had no legal status to remain in Seychelles, leave alone the fact that she was a prohibited immigrant at the material time. Therefore, in my considered view the respondent has communicated the reason to the applicant as to why she should leave Seychelles. Hence the decision cannot be faulted on this ground as well.

**Return to Kosovo**

The applicant entered Seychelles as a visitor. She was granted a permit to remain in Seychelles as a visitor under section 16 of the Immigration Decree. She never applied for political asylum under art 32(1) of the 1951 Geneva Convention on refugees on the grounds that if she was returned to Yugoslavia or Kosovo she was likely to be killed because of her religious or political beliefs. The immigration authority cannot reasonably be expected to presume a visiting guest as a refugee. They equally cannot and should not take into account Kosovo matters, which are in my view irrelevant to the issue of visitor's or dependant's permit. This is what *Wednesbury* (supra) precludes, as matters ought not to be taken in to account. The respondent rightly excluded those

matters from consideration, as it was not an application for political asylum.

**Protection of Family**

Mr Contoret has every right to marry any woman he loves. As Mr Dejaques argues, no one can deny his right or take his wife away from him. At the same time no one can deny the fact that Mr Contoret had a right to choose. Unfortunately for him he chose to marry a prohibited immigrant in Seychelles. That was his deliberate choice and no one forced him or violated his right to choose. He knew at the time of marriage that his spouse was a national of Yugoslavia. He knew that she had no permit to remain in Seychelles. He knew that she got a grace period to sort out her affairs and was ordered to leave Seychelles on 27 January 1996. Having known all these circumstances, if he had genuinely married her, though I find otherwise, he cannot now complain against the immigration laws for the inescapable, draconian consequences of his deliberate act or choice. Of course, family should always be protected being the basic unit of the society, provided that unit is a genuine and lawful union of members under the same roof. Nevertheless, the laws of the country should be protected still more as it involves the interest of the entire society. No one can be allowed to flout the immigration laws for any reason whatsoever.

**Is the decision irrational or unreasonable?**

In the final analysis:

*(a)* It is evident that the applicant had been authorised to remain within Seychelles until her visitor's permit expired on 15 January 1996. In fact, she had no authorisation to remain beyond that expiry date in terms of section 16(5) of the Decree.

*(b)* As from 16 January 1996 the Applicant

became ipso jure a prohibited immigrant. Still she continued to stay in the country applying several delay tactics and dubious means.

*(c)* When the applicant was a prohibited immigrant in Seychelles she married Mr Contoret knowing - at the least - that she had no permit to continue her stay in Seychelles.

*(d)* By a letter dated 11 December 1996, Mr Contoret withdrew his guarantee he had furnished for the applicant's permit. This resulted in the applicant likely becoming a charge on the Republic.

*(e)* The applicant was given first notice in mid December 1995 stating that her permit, which expired on 17 December 1995, would not be renewed. However, she simply ignored the notice and was buying time for no plausible reason.

*(f)* In the circumstances, one can reasonably and safely infer that the sudden marriage with Mr Contoret at the time when she was about to be deported is undoubtedly a ploy intended to defeat the immigration orders and to circumvent the immigration laws.

*(g)* The complaint of Mr Contoret against the applicant about her association with people of questionable character and the alleged drug use and the photographs cannot be given much weight on their own. In any event, the fact remains that the respondent did not revoke or refuse any permit to the

applicant on this ground. At any rate, there is no evidence on record to show that applicant was required to leave Seychelles because of this reason.

*(h)* The dependant's permit was also refused to the applicant who was obviously a prohibited immigrant at that time.

*(i)* The applicant had no other legal status to remain in the Republic.

*(j)* Any person who fails to comply with any notice issued to him or her under this Decree shall be guilty of an offence under section 28(1)(i) of the Decree.

In the circumstances, what is the immigration authority expected to do legally and reasonably? Undoubtedly they should require the applicant to leave the Republic. This is exactly what has happened in this case. In view of all the above and having regard to all the relevant circumstances which existed then, I find the decision of the respondent contained in its letter dated 19 February 1996 requiring the applicant to leave Seychelles on or before 28 February 1996 is not irrational or unreasonable. Having examined the decision in question in the light of *Wednesbury* principles, I am of the view that the respondent has not taken into account any matter that ought not to be taken into account or disregarded matters that ought to be taken into account when it decided that the applicant should leave Seychelles on or before the stipulated date. Therefore, I find the answer to the fundamental question is in the negative. That is that the decision of the respondent in this matter is not tainted with irrationality or unreasonableness and so cannot be faulted.

In my final analysis, in the light of Lord Diplock's speech

(supra) this Court can only interfere if the decision was illegal, irrational or improper and the like. In my judgment it is not shown to be any of those things. Therefore, I decline to grant the writs sought by the applicant in this matter. The application is accordingly dismissed.

There will be no order for costs.

**Record: Civil Side No 58 of 1996**

## Adonis v Larue

*Civil Code - breach of contract – back-letter – evidence*

A mother claimed damages for breach of contract by her son (the defendant). When the plaintiff sought to adduce oral evidence of the contract, the defendant objected on the basis of article 1341 of the Civil Code. He also argued that the agreement was a back-letter.

**HELD:**

(i) The alleged unwritten transaction is a back-letter; and

(ii) Oral evidence is not admissible to prove a back-letter.

**Judgment** for the defendant.

**Legislation cited**
Civil Code of Seychelles, arts 1321, 1341, 1347
Seychelles Code of Civil Procedure, s 71

**Cases referred to**
*Andre Esparon v Serge Esparon and Or* (unreported) SC Civil Side 157/1990
*Sidna Ruddenklau v Timm Adolf Botel* (unreported) SCA 4/1995

**Foreign cases noted**
*Nunkoo and Ors v Nunkoo* 1973 MR 269

Frank ELIZABETH for the plaintiff
Philippe BOULLE for the defendant

**Ruling delivered on 8 October 1999 by:**

**KARUNAKARAN J:** The plaintiff in this matter sues the defendant for loss and damages in the sum of R365,000 which the plaintiff allegedly suffered as a result of a breach of contract by the defendant.

The plaintiff is the mother and the defendant is her son. It is averred in the plaint that at all material times the plaintiff was residing in Italy and the defendant in Seychelles. On 19 August 1994 the defendant agreed to purchase a parcel of land title no B858 situated at Barbarous, Mahe for the plaintiff and to have the same registered in the defendant's name temporarily until the plaintiff returned to Seychelles. By the way, it is pertinent to note that the plaint hereof does not disclose the material fact whether the plaintiff paid any sum to the defendant in pursuance of the said agreement. See section 71(d) of the Seychelles Code of Civil Procedure in this regard as to what a plaint must contain.

The plaintiff upon her return to Seychelles requested the defendant to transfer the land into her name. However, the defendant refused to make the transfer in breach of the alleged agreement.

Consequently, the plaintiff claims that she suffered loss and damages and hence the action herein.

At the outset of the hearing in this matter whilst the plaintiff was giving evidence-in-chief in support of her case, she attempted to adduce oral evidence to establish the alleged agreement between the parties. Counsel for the Defendant Mr Boulle swiftly objected to the admission of evidence in this respect. He argued that no oral evidence should be admissible in terms of article 1341 of the Civil Code as the value of the subject matter exceeded R5000. On the contrary, counsel for the Plaintiff Mr Elizabeth submitted that this case falls as an exception to the rule under article 1341 of the

Code. According to him, the blood relationship between the parties being the mother and son, it was morally impossible for the plaintiff to obtain from the defendant a written proof of the obligation. Hence, he contended that oral evidence is admissible in this case as it falls under exception to article 1341. Having heard both sides on this issue the Court in its ruling overruled the objection of Mr Boulle and allowed the plaintiff to adduce oral evidence despite the value of the subject matter exceeding R5,000 In fact, the Court held this case as an exception to article 1341 in view of the said moral impossibility due to blood relationship between the parties relying on the Mauritian case law in *Nunkoo and others v Nunkoo* 1973 MR 269. It is relevant to note here that the same position of case law has also been reiterated by Chief Justice Alleear in the case of *Andre Esparon v Serge Esparon & Anor* (unreported)–SC Civil Side 157/ 1990.

Following the said ruling the plaintiff continued giving evidence and attempted to testify in order to establish the alleged agreement. Again Mr Boulle objected under article 1321 of the Civil Code alleging that the agreement which the plaintiff is trying to prove is nothing but a back-letter. It is one of simulation in which the apparent and ostensible agreement namely Exh-P1, that is the registered title deed in favour of the defendant in respect of the land in question, is destroyed, in effect, by a secret contract. In law such back-letter should be in writing and registered within 6 months from the date of the making of the deed. In the absence of such writing as has happened in this case, he contended that the said secret contract is void. Therefore, no evidence shall be admissible to prove a void contract. In support, Mr Boulle cited an authority. He quoted the relevant excerpts from the judgement of the Seychelles Court of Appeal in *Sidna Ruddenklau v Timm Adolf Botel* (unreported) Civil Appeal 4/1995. Hence, he objected to the admission of evidence to prove the alleged back-letter, a void contract in law.

On the other hand Mr Elizabeth contended that the authority cited by Mr Boulle is not relevant to this case. He attempted to distinguish the instant case from the other on facts and in substance. Further, he submitted that the alleged transaction between the parties is not a back- letter or simulation or secret agreement. Therefore, he urges the Court to allow oral evidence to prove the transaction in question.

I carefully analysed the points raised by both counsel in their submissions. I also perused the relevant provision of law as to back-letters. Indeed, article 1321(4) of the Civil Code provides that:

> Any back-letter or other deed, other than a back-letter or deed as aforesaid which purports to vary, amend or rescind any registered deed of or agreement for sale, transfer, exchange, mortgage, lease or charge or to show that any registered deed of or agreement for, or any part of any registered deed of or agreement for sale, transfer, mortgage, lease or charge of or on any immovable property is simulated, shall in law be of no force or avail whatsoever unless it shall have been registered within six months from the date of the making of the deed or of agreement for sale, transfer, exchange, mortgage, lease, or charge of or on the immovable property to which it refers.

Obviously, the issue herein raises two important questions.

1. Is the alleged transaction a back-letter in law?

2. If so, is oral evidence admissible to prove this back-letter?

As regards the first question, on the face of the pleadings in the plaint it is clear that the parties allegedly entered into an

agreement for the transfer of the land in question to the plaintiff. This fact was not disclosed in the actual transfer deed executed in favour of the defendant. In pursuance of this hidden or undisclosed agreement, the defendant allegedly made a sham transfer of the land in his name. This sham transfer was duly executed and registered with the land registry. In fact, this registered deed is the apparent and ostensible transfer. However, this deed was ultimately intended to implement the hidden agreement between the parties. In the circumstances, it is understood that the unceremonious agreement which the parties originally entered into, is nothing but a back-letter whereas the registered deed a simulation. Therefore, I find the answer to the first question in the affirmative. That is "yes, the alleged unwritten transaction is a back-letter in law" and so it should be treated as such for all legal intents and purposes.

Now let us move on to the second question. In this respect, I carefully analysed the points raised by both counsel particularly, on the issue as to admissibility of oral evidence to prove a back-letter.

In this case, obviously the plaintiff is trying to prove a secret contract, which in effect destroys the apparent and ostensible transfer deed i.e. Exh Pl. This deed is duly executed and registered. However, the alleged secret contract was never reduced into writing nor registered. In terms of article 1321(4) if a back-letter is not registered within six months from the date of the making of the deed, in law it shall be of no force or avail.

As quotably stated in the case of Botel (supra) "while the requirement of writing in other cases be merely evidentiary pursuant to article 1341 of the Code albeit subject to the exception provided by article 1347 of the Code, the requirement of writing in cases provided for in article 1321(4) is formal. The consequence is that such secret contract is void

by reason of the absence of writing."

In the circumstances, I quite agree with the submission of Mr Boulle that no oral evidence shall be admissible to prove the terms of a back letter in law which is nothing but a void contract. Therefore, I find the answer to the second question in the negative. That is "no oral evidence is admissible in law to prove this back-letter".

For these reasons, I uphold the objection raised by Mr Boulle and rule that the plaintiff cannot adduce oral evidence to establish the back-letter that is the alleged secret contract between the parties as no oral evidence in this respect, is admissible in law.

**Record: Civil Side No 399 of 1997**

## Philoe v Allied Builders Seychelles

*Health and safety - employment injuries – damages*

The plaintiff sued his former employer for injuries suffered during the course of his employment. The defendant admitted liability and sought a determination by the Court as to the quantum of damages.

**HELD:**

The Court must be consistent in making awards for personal injury except in cases where there are exceptional circumstances for doing otherwise.

**Judgment** for the plaintiff. Damages of R31,500 awarded for partial permanent injury to face and legs.

**Cases referred to**
*Confiance v Allied Builders* (unreported) CS 226/1997
*State Assurance Corporation v Gustave Fontaine* (unreported) Civil Appeal 41/1997

Charles LUCAS for the plaintiff
Kieran SHAH for the defendant

**Judgment delivered on 8 October 1999 by:**

**JUDDOO J:** The plaintiff has filed a claim against the defendant company claiming damages for injuries suffered by him in the course of his employment. The defendant admitted liability and the determination before this Court is to ascertain the quantum of damages.

The incident occurred on 15 April 1996 whilst the plaintiff was unloading glass panels from a container. The glass panels

broke and injured him. According to the medical report issued by Dr Ken Barrad (Exhibit P2) the plaintiff was admitted at the emergency unit on 15 April 1996. He was cut on his left face and neck and left lower leg. Because of the profuse hemorage he was rushed to the operation theatre where the haemorrhage was stopped. Major lesions to the 'left masseter, left sternocleidomastoid and left trapezius muscles' were sutured. In his left leg all the 'extensor tendons' to his toes were cut twice and they were repaired. Multiple lesser lessions to his knees and right shoulder were also sutured. His left ankle and toes were kept in plaster for 6 weeks in total.

The plaintiff claims damages for:

| | |
|---|---|
| "Hypertrophic, Cosmetic and asthetic disfiguration | R45, 000 |
| Pain and suffering | R50, 000 |
| Loss of earnings, future loss of earning capacity | R75, 000 |
| Loss of amenities | R15, 000 |
| Medical and transport expenses | R5, 000 |

The plaintiff was examined by Dr Barrad on 29 May 1996 (exhibit P2) and it was observed that "all his wounds are well healed although his major neck wound is hypertrophic and some of the chin wounds have scarred badly because of vein loss. He had a droop at the corner of his left lower mouth due to injury to the mandibular branch of the facial nerve. I expect this to be permanent .... It seems his tendon repair is working. However, he will probably not regain full power of dorsiflexion of the foot."

The plaintiff testified that as a result of his injuries he was admitted to hospital for 19 days and had followed further treatment for three months. The injuries have left scar marks on his left chin down to the rear of his neck, on his left

shoulder, his knee and tibia and his toes. He feels that the nerves on the left side of his mouth are dead and he has a disorder disability in eating and drinking. Additionally, he has difficulty to stand on his feet for long and cannot put strain on his right arm.

A further medical report produced as Exhibit P2(a) confirms that the plaintiff had attended to medical examination on 10 December 1996. The left side of his face was swollen and he was investigated for a possible blood disease. It was found to be a high red blood cell count. The report added that -

> the facial scar has thickened and there is numbness around the neck arising from the cutaneous nerve damage which should be less troublesome with time. No joints have been damaged and no long term arthritis should result. The plaintiff's left leg has recovered very well with minor loss of dorsiflexion power. Plastic surgery can be considered for the facial scars but a cosmetic blemish will remain. The mouth drop and drinking difficulty are from his injury and may not recover. There is loss of symmetry but in fact the plaintiff's shoulder move fully and her good power although slightly reduced.

The final analysis of the medical examination estimated the permanent disability to be at 15%.

I agree with Perera J, in *Confiance v. Allied Builders* (unreported) CS 226/1997 that "save in cases where there are exceptional reasons to deviate the Court must maintain consistency in making awards." In that case which concerned another worker in the same incident the plaintiff was hospitalised for 2 weeks and his leg remained in plaster for 1½ months. His permanent disability was estimated at 10% and the Court, after a review of similar cases awarded

R15,000 for pain, suffering anxiety, distress and discomfort and R25,000 for permanent disability infirmity and loss of amenities of life. Taking into account the medical evidence on record in the instant case including the "troublesome scar on the neck", the partial facial nerve palsy, facial scar and mouth drop and drinking difficulty and the overall resulting disability at 15%, I award the following damages:

| | | |
|---|---|---|
| – | Pain and suffering | R15,000 |
| – | Loss and amenities (including hypertrophic, cosmetic and asthetic disfiguration) | R35,000 |

As regards loss of future earnings, the defendant has admitted under cross-examination that he had remained in employment with the same employer, although as a handyman. He earns R1600 to R1800 per month and with extras and the figure would reach R2300. In *State Assurance Corporation v Gustave Fontaine* (unreported) Civil Appeal 41/1997 the Court of Appeal found that in assessing loss of future earnings the Court has to take into account the main source of income from one's chosen profession or occupation. Income from other sources should be considered as purely ancillary as a person may terminate that source of income at anytime for reasons unconnected with the injuries suffered. In *Confiance v Allied Builders* (supra) the trial Court took account that the residual incapacity for income from all sources would necessarily be affected to some limited degree and awarded a sum of R10,000 under that limb. The circumstances of the present case are similar and I award a sum of R10,000 for loss of future earnings. No evidence has been led as to whether the plaintiff did not obtain any salary during the time he was admitted to hospital and following treatment. Accordingly no award can be made on loss of earnings.

Finally under the head 'Medical and Transport Expenses' I

take into consideration the receipt produced by the plaintiff (Exhibit PI) for the sum of R1000. The plaintiff testified that he had to attend hospital regularly for his treatment. He had to use a taxi because of the injuries to his leg. However, he does not stay far from the hospital and was charged R40 to R50 for every trip. Accordingly I award the plaintiff a sum of R1500 under this head.

The plaintiff admits that he had been paid R30,000 from the defendant company as moral damages pertaining to this incident. The present award by this Court is one which includes moral damages. Accordingly the plaintiff cannot be compensated twice by the defendant company for the same loss. The total award sum of R61,500 should be deducted in the amount of R30,000 already paid to the plaintiff.

In the end result, I enter judgement for the plaintiff in the sum of R31,500 with interest and costs.

I certify as to counsel.

**Record: Civil Side No 272 of 1998**

## Public Utilities Corporation v Vista Domar Ltd

*Debt recovery – plea of no case to answer – calling of evidence*

The plaintiff is a public corporation engaged in domestic and industrial supply of water and electricity to all of Seychelles. On 1 May 1997 the defendant was indebted to the plaintiff for use and supply of electricity and water in the sum of R183, 911.80. The amounts owed were unpaid due to irregular payments made by the defendant. The defendant submitted there was no case to answer on the basis that no contract was pleaded hence evidence relating to any contract should not have been allowed. The defendant also averred that there was a lack of documentary evidence to prove the amount owed to the plaintiff.

**HELD:**

(i) If there is no cause of action or case to answer the pleadings should be struck out;

(ii) Regardless of the imperfections in the plaint, there was sufficient disclosure of a cause of action in contract. The supply of electricity and water for the defendant's consumption suggested the existence of a contract; and

(iii) The defendant failed in their pleading to plead a submission of no case to answer. That failure to succeed on a no case to answer plea precluded the defendant from adducing evidence.

**Judgment** for the plaintiff. R183,911.80 awarded with interest at commercial rates.

**Legislation cited**
Civil Code of Seychelles, art 2271
Seychelles Code of Civil Procedure, ss 71, 72, 73, 74, 75, 76, 77

**Cases referred to**
*Albest v Stravens* (1976) SLR 158
*Bessin v Attorney-General* (1936-1955) SLR 208
*Charlie v Françoise* (1995) SCAR
*Mullery v Stevenson Delhomme* (1936-1955) SLR 283
*Oceangate Law Centre v Monchugy* (1984) SLR 111
*Tirant v Banane* (1977) SLR 219

**Foreign cases noted**
*Alick v Central Motors Ltd* 1981 MR 388
*Ramjan v Kaudeer* 1981 MR 411

John RENAUD for the plaintiff
Pesi PARDIWALLA for the defendant

**Judgment delivered on 7 June 1999 by:**

**ALLEEAR CJ:** In the present action, the plaintiff, Public Utilities Corporation, popularly known by its acronym PUC, sues the defendant, Vista do Mar Ltd, represented by Bernard Etzin, for a total sum of R183,911.80 with interest at a commercial rate from 1 January 1997 and costs.

The plaint is dated 17 August 1997 but the action was lodged on 26 August 1997 in the Registry of the Supreme Court.

The plaintiff is a public corporation, the sole provider of domestic and industrial water supply and electricity power to the whole of Seychelles. The defendant was at all material times owner of Vista Bay Club Hotel having changed its name from Vista Do Mar Ltd.
It was averred in the amended plaint that during the years

1988 and 1996 the defendant consumed water and electricity and made remittances on its accounts. On 1 May 1997 the defendant was indebted to the plaintiff in the sum of R183,911.80.

It is the plaintiff's case that despite repeated requests to pay the above outstanding sum, the defendant has failed or neglected to do so. Hence the institution of this action and claim for the amount allegedly owed to the plaintiff.

The defendant had on 2 March 1998 requested the plaintiff to provide further and better particulars.

Of paragraph 1 of the plaint the defendant sought the following clarification - "please clarify who was the consumer of water and electricity? The defendant or the hotel."

Of paragraph 2 of the plaint -

(a) please state whether the defendant consumed water and electricity between the years 1988 to (sic) 1996 or during the years 1988 and 1996.

(b) please state whether the defendant was invoiced monthly or yearly and in any event please provide details of either monthly or yearly invoices.

(c) please state if and when water and electricity were disconnected by the plaintiff.

Of paragraph 3 of the plaint - "please state in what manner the relationship between the plaintiff and the defendant was a commercial one".

The plaintiff acceding to the request for further and better particulars from the defendant filed a reply to request for further and better particulars on 27 March 1998.

(i) Under paragraph 1 of the plaint - the hotel;

(ii) Under paragraph 2 of the plaint -

(a) The defendant consumed water and electricity from about 1988 until the system (sic) were disconnected in April 1997. The defendant fell default (sic) during the years 1995 and 1996;

(b) Monthly;

(c) April 1997;

(iii) Under paragraph 3 of the plaint - Yes.

On 15 June 1998 the defendant filed a statement of defence and raised two points in limine litis.

(i) In answer to particulars the plaintiff identified "the hotel" as the consumer of the water and electricity. In these circumstances, there is no claim against the defendant company and the action should be struck off.

(ii) In answer to particulars, the plaintiff stated that the defendant consumed water and electricity from 1988 to 1997, any claim prior to August 1992 is time barred and prescribed by virtue of article 2271 of the Civil Code of Seychelles and that part of the claim should be struck off.

**On the merits**

(1) Save for the fact that the plaintiff was a public corporation, the defendant denies paragraph (1) of the plaint.

(2) The defendant denies paragraph 2 of the plaint and puts the plaintiff to strict proof thereof.

(3) The defendant denies paragraph 3 of the plaint.

(4) The defendant denies paragraph 4 of the plaint, wherefore the defendant prays the honourable Court to dismiss the plaintiff's claim with costs.

The pleas in limine were heard by Justice Bwana who gave his ruling with regard thereto. When this action came up for hearing on 5 May 1999, no new work was being assigned to the said judge as he was about to depart the Republic after the completion of his five year contract.

The pleas in limine litis were recanvassed before me at the Court's request.

I find no merits in the first point raised in limine litis. All that it amounts to is nit picking. It goes without saying that the owner of the hotel could not personally have consumed all the water and electricity supplied to the hotel. However the guests and employees of the hotel did consume the electricity and water supplied. The defendant, as owner of the hotel must therefore be held responsible for the payment of all bills for electricity and water supplies to the hotel. In any event the defendant or someone delegated by him must have applied to the PUC for the supply of the vital source of energy to his hotel.

The second point raised, namely that part of the claim is prescribed, is dealt with in the course of this judgment.

In support of the amount claimed in the plaint, the plaintiff called one witness, namely its Financial Controller, Wingate Mondon. The latter tried to convey to the Court that he was aware of all the accounts of consumers of PUC. He deposed that the defendant was a consumer of electricity and water supplied by the plaintiff until mid-April 1997 when water and electricity supplied to the hotel Vista Bay Club was disconnected for non-payment of sums due on its account.

Mr Mondon explained that there were two water and two electricity meters at the hotel. The first water meter bearing no. 891178628 and the second one no. 88163347. The first electricity meter bore no. 261 and the second one no. 911468. Mr Mondon stated that as at mid-April 1997, in respect of the first water meter, there was an outstanding balance of R22,368.85 owing. With respect to the second water meter there was an outstanding balance of R10,724.30. With respect to the first electricity meter no. 261, there was an outstanding balance of R100,146.85 and in respect of the second electricity meter the outstanding balance was R50,671.80. Penal interest at the rate of 2% per month was charged on the said outstanding balance until mid-April 1997 when supplies of electricity and water were disconnected to the hotel.

The evidence is clear that the defendant who was represented by Bernard Etzin made periodic but irregular payments in respect of its electricity and water bills. Mr Mondon explained that Mr Etzin had, before the said disconnection referred to above had occurred, had a meeting with the Executive Chairman of PUC in order to discuss the problem of non-payment of bills.

The cross-examination of Mr Mondon proceeded on the footing that there existed no contract between the plaintiff and Vista Do Mar for the transaction of supply and consumption of

water and electricity between the plaintiff and the defendant. This is not the case of the defendant as pleaded in his statement of defence.

Mr Mondon clarified that the claim for unpaid bills against the defendant did not go as far back as 1988. He said 1988 was the year that the hotel was connected with water and electricity by the plaintiff corporation. With regard to the claim for unpaid water supplies to the hotel, he said the claim dated back to January is in regard to consumption for water for November 1996 and the payment was received in January 1997.

In respect of the second water meter, namely no. 89178528 the outstanding unpaid amount as at 1997 was R22,368.25.

With regard to the issue of prescription, Mr Pardiwalla put the following questions in cross-examination to Mr. Mondon.

> Q: Why does your claim go back to 1988.? You are claiming for electricity consumed in respect of 1988 onwards. Why is that?
>
> A: The claim is not for 1988. What we are saying is that the supplies to the premises was (sic) connected from 1988 onwards until the date that it was disconnected. The claim is for water and electricity consumed during that period.
>
> Q: That is my point. During 1988 and 1997 you are claiming about R150,000, which is the equivalent of four months consumption. That is my point?
>
> A: We are claiming outstanding (amount) as at 1 May 1997, not within that period.

Q: What is this amount? It is in respect of which month and which year?

A: I have got details here, witness refers to document. Before that this witness had stated that the hotel used an average amount of R10,000 worth of water per month and the higher average for electricity was R40,000 per month and the lower average for electricity was R21,000 per month.

At the close of the case for the plaintiff, Mr Pardiwalla indicated to the Court that he would be making a submission of no case to answer. He was duly put to his election. He was advised that should he fail on his submission, he would not be entitled to call evidence. He elected to address the Court on a submission of no case to answer.

Mr Pardiwalla submitted that the present action was supposedly one grounded on contract. He said that as no contract has been specifically pleaded, the Court "should not allow any evidence to be admitted relating to any contract." In Mr Pardiwalla's view, the plaint disclosed "more an action in the nature of unjust enrichment, i.e., quasi-contract." He said even on that basis the action of the plaintiff should fail because in an action of unjust enrichment the final paragraph of the pleading "should specifically state that one party has been enriched to the detriment of the other." Mr Pardiwalla correctly stated that when one has a cause of action in contract, one is precluded from bringing an action under unjust enrichment.

The second point raised by Mr Pardiwalla was that the plaintiff's action should fail as no documentary evidence has been produced in support of the claim of R183,911.80. Lastly, Mr Pardiwalla said he would rely on the point raised by him in

limine.

Mr Renaud, replying to the third point raised by counsel for the defendant, said that the "plaint clearly links the defendant and the hotel particularly in paragraph 1 of the plaint." With regard to the issue of documentary evidence not having been produced, Mr Renaud said that "it was not essential for any documentary evidence to be produced when oral evidence has been adduced in support of the claim from books kept by the corporation." On the question that the pleadings fail to disclose a cause of action grounded on contract, Mr Renaud stated that it was too late for the point to be taken as it was neither raised as a point in limine litis nor in the defence.

Section 71 of the Seychelles Code of Civil Procedure requires the following particulars to be contained in a plaint -

(a) the name of the Court in which the suit is brought;

(b) the name, description and place of residence of the plaintiff. (In the present case no address for the plaintiff has been given in the plaint)

(c) the name, description and place of residence of the defendant, so far as they could be ascertained;

(d) a plain and concise statement of the circumstances consisting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action;

(e) a demand of the relief which the plaintiff claims;

(f) if the plaintiff has allowed a set-off or has relinquished a portion of his claim, the amount so allowed or relinquished.

Section 72 provides as follows:

> If the plaintiff seeks the recovery of money, the plaint must state the precise amount, so far as the case admits.

Section 73 states:

> If the plaintiff sues, or the defendant or any of the defendants is sued in a representative character, the plaint must state in what capacity the plaintiff or defendant sues or is sued.

Section 74 states:

> If the plaintiff sues upon a document other than a document transcribed in the Mortgage of Seychelles, he shall annex a copy thereof to his plaint. If he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall annex a list thereof to his plaint and shall state where the same may be seen a reasonable time before the hearing.

Section 75 states:

> The statement of defence must contain a clear and distinct statement of the material facts on which the defendant relies to meet the claim. A mere general denial of the plaintiff's claim is not sufficient. Material facts alleged in the plaint must be distinctly denied or they will be taken to

be admitted.

Section 77 states:

> If the defendant intends to produce any documentary evidence, he shall annex a list thereof to his statement of defence and shall state where the same may be seen a reasonable time before the hearing.

When one looks at the plaint in the present action one cannot fail to discern that it is a piece of very loose drafting. No contract either oral or written is specifically pleaded although by implication it can be said that the action is grounded on contract.

It is a procedural requirement that each party must state the whole of its case in the pleadings. The material facts on which a party intends to rely must be pleaded. If a defence is not raised in the pleadings, it may not be considered. In civil litigation each party must state its whole case and must plead all facts on which he intends to rely. Otherwise he cannot at the trial give evidence of facts not pleaded. For instance, the defence of an act by a third party in a motor vehicle collision case not having been pleaded, could not be considered: *Tirant v Banane* (1977) SLR 219.

There is a need for the plaintiff to establish his case according to the pleadings. In *Charlie v Françoise* 1995 SCAR**,** the facts were that the respondent had based her case against the appellant at the trial on the averment that she had a half share in the house in which they had cohabited by way of her own contribution. All that she sought was the entire property or the equivalent in money of half the share. The judge found that there was no property to share and that the respondent had no material status on which to found a claim for property settlement. He went on, however, to make the award on the

basis of an action for unjust enrichment. Held, reversing the decision that the system of civil justice does not permit the Court to formulate a case for a party after listening to the evidence and to grant relief not sought in the pleadings.

In the Mauritian case of *Ramjan v Kaudeer* 1981 MR 411, it was held -

> Where the pleadings aver a "faute" and the action for damages is thus based on article 1382 Code Nap., the Court cannot go outside the pleadings and award damages under article 1384-1 Code Nap., on the ground of "responsabilité du fait de la chose."

In *Alick v Central Motors Ltd* 1981 MR 388, it was held:-

> “Even if the pleadings are vague, if an issue is fully canvassed without any objection before a District Court, the parties are entitled to adjudication on that issue.”

Where an allegation of material fact is not specifically denied in the statement of defence it will be taken as admitted. In a claim for damages for defamation, the appellant had averred that he was a graduate, a material fact which was not specifically denied by the respondent, the trial judge stated that the appellant was not a graduate. On appeal it was held that as the respondents in their pleadings had not denied the allegation they had put the appellant to the proof of the averment which should have been taken to be proved: *Mullery v Stevenson Delhomme* (1936-1955) SLR 283.

In the case *Bessin v Attorney-General* (1936-1955) SLR 208 the facts were that the appellant had leased an island from the respondent. During the course of the lease and with the written consent of the respondent, the appellant had

developed and improved the island. At the expiry of the lease, the appellant had instituted proceedings to recover compensation for the improvements to the island. The respondent had brought an application under section 97 of the Civil Code of Procedure for the action to be dismissed on the basis that it discloses no cause of action.
The trial judge had called for the lease and basing himself on a clause in it which precluded the appellant from claiming indemnity, it dismissed the action. It was held:

> The Court hearing such an application must limit itself to the allegations contained in the pleadings and no extraneous evidence was admissible to support the application. When the non-existence of a reasonable cause of action or answer was not beyond doubt ex facie the pleadings, the pleadings ought not be struck out.

The motion for striking out pleadings under section 97 of the Code of Civil Procedure has to be decided solely on the pleadings, and when the non-existence of a reasonable cause of action is not beyond doubt ex facie the pleadings, the pleadings ought not to be struck out. *(*See *Albest v Stravens* (1976) SLR 158 and *Oceangate Law Centre v Monchugy* (1984) SLR 111).

In the present case it cannot be said that ex facie the plaint a reasonable cause of action is not disclosed. Although as stated, the plaint is far from perfectly drafted, it however discloses a cause of action in contract.

When a technical or legal objection is taken in relation to a plaint or statement of defence, this must be pleaded specifically and raised as a preliminary point of objection and not after the case for the plaintiff or defence is closed. The statement of defence never raised the issue that the plaint disclosed no cause of action. It did not raise the point that the

action is not grounded on contract. Paragraph 1 of the statement of defence consists of a general denial of paragraph 1 of the plaint save for the fact that the plaintiff was a public corporation.

Paragraphs 3 and 4 of the statement of defence are general denials of paragraph 3 and 4 of the plaint and therefore deemed to have been admitted in law on the basis of the cases cited above in the judgment.

In fairness it cannot be said that the plaint discloses no cause of action. It can reasonably be deduced from a reading of the plaint that the plaintiff supplied electricity and water to the defendant which consumed same over a period of time. The defendant failed to pay for part of the power and water consumed.

The only witness for the plaintiff was allowed to refer to the financial book of PUC. It is the duty of counsel to be more attentive and to make proper objections at the right time. Once evidence has been admitted in a civil case without objection, same cannot be ignored for the purposes of judgment unless it can be said that the said evidence is irrelevant or immaterial or not based on the pleadings.

I find there is no merit at all in the pleas in limine litis raised. It is clear that Vista Do Mar Ltd Co which owned the hotel must be responsible for water consumed by those who run the hotel for the benefit of the company. Secondly, I do not think that the debt claimed is in any way limited or prescribed by the Limitation Act. The debt dates back to 1996 and conforms with article 2271 of the Civil Code of Seychelles.

The defendant having opted, after being put to election to make a submission of no case to answer at the end of the plaintiff's case, is precluded from adducing any evidence.

On the evidence adduced by the plaintiff which was consistent with the averments in the plaint, I find that the sum of R183,911.80 is owed to the plaintiff by the defendant. Judgment is accordingly entered in favour of the plaintiff in the sum claimed with costs. This was a transaction of a commercial nature between a corporation and a company. It was not in the nature of a private transaction; therefore commercial rate of interest ought to be paid from the date of the filing of the plaint.

**Record: Civil Side No 294 of 1997**

## Pool v Loizeau & Or

*Defamation*

The plaintiff claimed damages for defamation by the defendants. The defendants denied having said the words alleged by the plaintiff, however during trial the first defendant admitted having said the defamatory statements. The second defendant continued to deny that she said the defamatory words.

**HELD:**

(i) The evidence adduced by the plaintiff and her witnesses has established the case against the defendants; and

(ii) The words uttered by the defendants are defamatory since they impute the commission of theft by the plaintiff. The publication was limited to persons who were present at the material time but has affected the plaintiff in the small community where she resided.

**Judgment** for the plaintiff for R12, 200.

**Legislation cited**
Code of Civil Procedure, s 75

John RENAUD for the plaintiff
Antony DERJACQUES for the defendant

**Judgment delivered on 21 October, 1999 by:**

**JUDDOO J:** The plaintiff has filed a plaint against the defendants claiming damages in the sum of R75,000 for

defamatory words uttered by both the defendants concerning her at Green Estate, Anse Aux Pins. Both defendants have filed a defence denying that they had 'alleged or said the said words or at all and were duly represented in Court. The parties were neighbours at the material time.

It is averred in the plaint that ‘on or about 5 April 1998 the defendants said of the plaintiff, at Green Estate, Anse Aux Pins, within the hearing of several persons' including Mrs Irene Figaro and Mr Michel Figaro the following words:

> "Ou vol R30,000- pou SPPF pou ou donn sak dimoun R300- e ou'n osi vol 40 kret labyer" translated to mean:
>
> "The plaintiff has stolen R30,000 for the Seychelles People Progressive Front in order to share it with its supporters by giving them R300 each and the plaintiff has also stolen forty crates of beer".

The plaintiff averred that the said words refer to and are understood to refer to the plaintiff and either by their innuendo or in their natural and ordinary meaning are understood to mean that the plaintiff is a ‘thief’. Mrs Henderson (PW5), sworn interpreter, gave evidence that the English translation of the words in creole in the plaint were correct. She maintained her version under cross-examination.

The plaintiff testified that she lived at Anse Aux Pins at the material time and both defendants were his neighbours. On 5 April 1998, she was in her yard at her residence when the two defendants called out to her that she was a person who steals and had stolen R30,000 from SPPF and crates of beer. There were several persons around and the plaintiff felt ashamed. As a result she was labelled as a ‘thief’ by others and had to leave the vicinity to reside at her daughter's place.

A second witness Jose Hollander (PW3) was called on behalf of the plaintiff. He is a police officer and was stationed at Anse Aux Pins on 5 April 1998. He testified that he received a complaint from the laintiff at about 15.30 on that day. He called to the plaintiff's house was informed by the latter that both defendants had accused her of stealing SPPF money and drinks. The witness added that he approached both defendants and they agreed to having made the allegation against the plaintiff. He called upon all parties to behave in a peaceful manner as they were neighbours.

Mr Daniel McGaw (PW4) gave evidence that he was present on 5 April 1998 in the area at the material time. He saw Mr Loizeau, the first defendant, who was swearing about and who alleged that the plaintiff had stolen R30,000 and 40 crates of beer from SPPF. Under cross examination he explained that he was with a group of four persons playing dominoes and there in addition there were four to five persons standing around. He clarified that he heard the two defendants saying the defamatory words as the allegation was distinct. The defendants came from the public road and swore at the plaintiff. He admitted that he was living with the plaintiff's daughter, one Mirenda.

Mrs Irena Figaro (PW5) gave evidence that she is acquainted with the plaintiff and the defendants and that she lives at Green Estate. On 5 April 1998, she heard the argument whereby the defendants averred that the plaintiff had stolen R30,000 and 40 crates of beer. She believed as true the allegation that the defendants had laid against the plaintiff. Under cross-examination, the witness verily maintained having heard both defendants uttering the remarks. She added that she had seen a police officer walking up and down in civilian clothes whom she identified as the police witness who deponed. The latter looked a bit everywhere and went away.

The first defendant, Mr Thomas Loizeau testified that he lives at Green Estate. On 5 April 1998, the plaintiff had an argument with him and he said to her "as your daughter Aviva Pool said you have stolen R30,000 and 40 crates of beer". He explained that he had heard this allegation from the plaintiff's daughter, Aviva, who had uttered such allegation against the plaintiff in public. Under cross-examination he added that he only repeated what he had heard. He denied that any police officer had called upon him after the incident.

The second defendant, Elisa Fred, testified that she lives at Green Estate. She explained that she did not utter the alleged defamatory words and added that she and other persons in general, were aware that the plaintiff's daughter Aviva Pool, had alleged on 1 April 1998 that the plaintiff had stolen money from SPPF.

Hansel Pothin, (DW3), another defence witness, was called. He testified that he lives at Green Estate, Au Cap, and he was aware that Aviva Pool had said that the plaintiff had stolen money. However, under cross-examination, he added that the time of the alleged incident involving the plaintiff and the defendants, he was at work.

Gilly Fred (DW4) father of the second defendant, testified that he lives at Green Estate, Anse Aux Pins. On 5 April 1998, he was present when the incident occurred. He heard Aviva, the plaintiff's daughter uttering that the plaintiff had stolen R30,000 and 40 crates of beer from SPPF. When queried, under examination-in-chief as to whether he heard anything between the plaintiff and the first defendant he candidly replied: "I did not hear anything, they quarreled and swore at each other and I left them alone." Under cross-examination he added that he did not know whether his daughter, the second defendant; had also uttered the defamatory words.

A last defence witness, Lisette Pool (DW5), sister of the

second defendant gave evidence she lives at Green Estate. She was present when there was an exchange of words between the plaintiff and the first defendant but added that it was Aviva Pool who said "mother you a thief you have stolen R30,000 from the SPPF and 40 crates of beer".

Both defendants have under paragraph 2 of the defence pleaded that 'they never alleged or stated the said (defamatory) words or at all." This plea is further maintained under paragraph 4 of their defence which states that the "defendants never uttered the said words or implied directly or by innuendo that the plaintiff was a thief." Under section 75 of the Code of Civil Procedure (Cap 213) "the statement of defence must contain a clear and distinct statement of material facts on which the defendant relies to meet the claim." It is a cardinal rule that parties must plead all the material facts they wish to rely upon at trial. Any material fact not pleaded is ultra petita and cannot be relied upon by the Court in its determination. Accordingly, the alleged material fact that the defamatory words were first published by Aviva Pool, daughter of the plaintiff, is clearly and distinctively outside the pleadings.

The plaintiff testified in Court in a straightforward and consistent manner as far as the fact that the two defendants uttered the defamatory words to her address. She was thoroughly cross-examined and verily maintained her version. I find her to be a witness of truth. Her version is supported by the testimony of Mrs Irena Figaro a neighbour and also by Mr Daniel Mcgaw. The latter admitted that he has a relationship with the plaintiff's daughter. However, his testimony in Court was as a witness to the incident rather than an interested party. I find him to be a witness of truth.

The first defendant admitted having uttered the defamatory words to the address of the plaintiff. His added averment that it was a second publication is outside the pleadings. The

second defendant maintained her denial that she had uttered the defamatory words. She added that she had heard the defamatory remarks from Aviva Pool on 1 April 1998 and that she has had no argument with the plaintiff other than what she referred to as a "chicken problem" between neighbours whereby the police interfered. To some extent defence witness Gilly Fred stated that he heard the defamatory remarks from Aviva Pool on 5 April 1998 at the time of the incident. This is inconsistent with the version of the second defendant.

Overall, I find that the evidence adduced by the plaintiff and her witnesses has established on a balance of probabilities the case against both defendants. Accordingly, I shall proceed on the next issue of quantum of damages sought.

The essence of the defamatory remarks made in public were that the plaintiff had stolen S30,000 from SPPF and 40 crates of beer. The evidence shows from the testimony of witness Mcgaw, that at the material time there were some eight persons playing domino and some of the neighbours around. I am not convinced by the evidence adduced by the plaintiff that she had left Green Estate to reside at her daughter's place at Barbaron as a result of the incident. As she stated under cross-examination "I love to stay at my daughter's house because she is the one to stay with me." It has also not been established that the plaintiff has closed her shop as a direct result of the defamatory remarks.

I find that the words uttered by the defendants are defamatory since they impute the commission of theft by the plaintiff. The publication has been limited to persons who were present at the material time but has affected the plaintiff in the small community that she then resided at Green Estate, Anse Aux Pins. However, I find the claim of S75,000 to be on the high side. Taking all the circumstances of the case into account I find that the sum of S12,500 would represent a reasonable

amount for the prejudice suffered. Accordingly, I enter judgment in favour of the plaintiff against both defendants for the sum of S12,500 with costs.

**Record: Civil Side No 312 of 1998**

## Rose v Valentin

*Family law – adulterous relationship – delict – matrimonial causes act – constitutionally sound – grounds for divorce – damages*

The plaintiff claimed damages from the defendant on the ground that he committed adultery, or alternatively that he commenced an adulterous relationship which caused an estrangement with his wife and children. The defendant claimed that the action was bad in law.

**HELD:**

(i) To say that the term "affair" means a sexual relationship between persons who are not married to each other but does not include anything as serious as adultery is a perverse interpretation of the word adultery and an evasion of the prohibition contained in section 26 of the Matrimonial Property Act;

(ii) What is delictual is not the physical act of adultery, but the injury, loss or damage it causes to the innocent party by way of mental and moral suffering and loss of consortium;

(iii) The Matrimonial Causes Act prevails over all other written laws which provide an action for damages in matrimonial matters; and

(iv) There is no distinction between "adultery" and "adulterous relationship".

**Judgment** for the defendant. Action dismissed with costs.

**Legislation cited**
Constitution of Seychelles, arts 31, 32
Civil Code of Seychelles, arts 1382, 1383
Matrimonial Causes Act 1992, s 26

**Cases referred to**
*Donald Regis Celestine v Abel Charles* (unreported) CS 192/1994
*Cosgrow v Cosgrow* (unreported) SCA 12/1992
*Francis Hoareau v Emmanuel Joubert* (1995) SLR 95
*Julita Joseph v Marie Gregoretti Moustache* (unreported) Civil Appeal 26/1990
*Daisy Micock v Marie Andre Albert* (unreported) Civil Appeal 14/1993
*Bernadette Racombo v Jancy Marianne* (unreported) Civil Appeal 2/1994
*Tamboo v Monthy* (1989) SLR 150

**Foreign cases noted**
*PK Garg v The Union* (1981) RSC 2138
*Resenbaum v Margolis* [1944] WLD 147

Antony DERJACQUES for the plaintiff
France BONTE for the defendant

**Ruling delivered on 29 September 1999 by:**

**PERERA J:** This is a delictual action wherein the plaintiff claims damages from the defendant on the ground that he allegedly committed adultery with his wife, or alternatively that he commenced an adulterous relationship which caused an estrangement with his wife and children. The ruling arises from a plea in limine litis raised by counsel for the defendant that the action is bad in law and that it cannot be sustained.

The law prevailing before the Matrimonial Causes Act 1992 (Cap 14) came into operation was different. A party to a marriage who obtained a decree of divorce on the ground of adultery could claim damages in the same suit against the third party adulterer cited as a co-respondent.

In addition, a delictual action under the provisions of the Civil Code was available to the innocent spouse against such third party adulterer, although no action for divorce was filed by him. In the case of *Tamboo v Monthy* (1989) SLR 150, Abban J (as he then was) upheld the decision of the Magistrates' Court awarding R7000 as damages claimed in a delictual action. He stated thus –

> The claim for damages for adultery, as in the present case, can be therefore maintained irrespective of the Matrimonial Causes Act (Cap 72). I must emphasise that a claim for damages for adultery does not always stand or fall with a petition for divorce even if joined with it.

Abban J reiterated this position in the appeal of *Julita Joseph v Marie Gregoretti Moustache* (unreported) Civil Appeal 26/1990 which was an appeal from my judgement in the Magistrates' Court in my capacity as Senior Magistrate then. Abban J upholding the award of R7000 as damages stated –

> The submission that the action could not be maintained was also a misconception. A claim for damages for adultery has always been recognised at the suit of a spouse and such a claim does not need to be brought under the Matrimonial Causes Act (Cap 72). It is a distinct cause of action.
>
> Furthermore, the action could also be maintained

> under article 1382 of the Civil Code. The respondent had a cause of action which could be founded in delict; and this was precisely what she did. It was fault to entice your friend's husband from her, give him shelter and cause him to neglect your friend and in consequence of which your friend was compelled to undergo untold hardship and distress.
>
> The appellant by her imprudent conduct caused damage to the respondent and her behaviour fell squarely within the provisions of articles 1382 and 1383(1) of the Civil Code.

The Matrimonial Causes Act (Cap 72) which had been enacted in 1948 came up for revision by a committee appointed by the late Dr Earle Seaton, the then Chief Justice of Seychelles. The recommendations of that committee are now embodied in the Matrimonial Causes Act 1992 (Cap 124). However the prohibition of an action for damages arising from the adultery of a party to the marriage as contained in section 26 of the Matrimonial Causes Act (Cap 124) was not one of the recommendations of that committee.

In the case of *Bernadette Racombo v Jancy Marianne* (unreported) Civil Appeal 2/1994 the question as to whether the prohibition contained in section 26 extended to a delictual remedy under the general law contained in article 1382 of the Civil Code came up for consideration. It was contended that that section applied only to claims made on a petition for divorce and that adultery as a faute under the Civil Code survived. It was further contended that the state, by virtue of article 32(l) of the Constitution had undertaken inter alia "to promote the legal, economic and social protection of the family" and hence section 26 of the Matrimonial Causes Act should not be interpreted in a manner permitting a third party to wreck a marriage by committing adultery with one of the

parties to the marriage, without being liable to be sued for damages. I held that article 32(2) of the Constitution contains a derogation to the right created in article 32(1) when it provides that such right "may be subject to such restrictions as may be prescribed by law and necessary in a democratic society….." and that unless and until section 26 is declared by the Constitutional Court to be inconsistent with article 32(1), it should be regarded as a "law" which restricts that right.

In the case of *Daisy Micock v. Marie Andre Albert* (unreported) Civil Appeal 14/1993 where again the constitutional point was canvassed in relation to section 26 Bwana J, though obiter, characterised section 26 as "a bad law which does not reflect public policy, the expectations of this country and the provisions of article 32(1) of the Constitution". He however agreed that it was not the province of a court of law to question the morality of a statute, and hence set aside an award of damages made in the Magistrates' Court.

The case of *Donald Regis Celestine v Abel Charles* (unreported) CS 192/94 provides a novel interpretation of section 26 in relation to article 1382 of the Civil Code. In that case the husband sued the person who allegedly had "an extramarital affair" with his wife, for loss and damage caused to him consequent to depression, anxiety and stress suffered. Although he avoided the word "adultery" in the plaint, it was in evidence in that case that in an action for divorce he obtained a decree on the ground of adultery of his wife. Amerasinghe J took the view that as the dictionary meaning to the word "affair" was, inter alia, a sexual relationship between two people who are not married to each other, that word did not "include anything as serious as adultery as it is beyond doubt that sexual relations between parties within the definition of an "affair" could exist without adultery". With respect, I would consider that as a perverse interpretation of the word "adultery", and as an evasion of the prohibition contained in

section 26. What was considered as delictual was not the physical act of adultery, but the injury, loss or damage it causes to innocent party by way of mental and moral suffering and loss of consortium.

Hence, the position prior to the enactment of the Matrimonial Causes Act 1992 (Cap 124) was that adultery was a ground for divorce, and was actionable as a delict both under the former Matrimonial Causes Act or under article 1382 of the Civil Code. The reason for the enactment of section 26, as set out in the Matrimonial Causes Bill 1991, is as follows-

> Clause 26 seeks to do away with a claim for damages by the petitioner against a co-respondent in a case of divorce based on adultery.

Section 26, as enacted however is as follows -

> Notwithstanding any other written law, the adultery of a party to a marriage shall not give rise to a claim for damages.

Interpreting this section in the light of the object disclosed in the Bill, could it be said that the right of a party to a marriage to bring a delictual action under article 1382 of the Civil Code on the ground of adultery survived? In the *Racombo* case (supra) I expressed the view that the phrase "the adultery of a party to the marriage" in section 26 should be interpreted in its generic sense to include all effects or consequences to the marriage or to the innocent spouse. *G C Thornton on Legislative Drafting* (11th edition) at page 88, explaining the use of the "notwithstanding" clause in enactments, states that "where one provision is inconsistent with another provision in the same law or some other law, the draftman ought to make it clear which provision is to prevail" …….. but if for any reason the inconsistent provision cannot be specified, the use

of the phrase "notwithstanding any law to the contrary" is acceptable. In section 26, the phrase "not withstanding any other written law" has the same connotation. Hence section 26 prevails over all other written laws which provide an action for damages arising from the adultery of a party to a marriage. *Maxwell on Interpretation of Statutes* (12th edition) at page 137, under the heading "construction to prevent evasion" states -

> ….The office of the judge is to make such construction as will suppress the mischief, and advance the remedy, and to suppress all evasions for the continuance of the mischief.
>
> To carry out effectively the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined.

In the instant case, the plaintiff bases his cause of action on adultery, and alternatively on the adulterous relationship the defendant allegedly had with his wife resulting in estrangement with his family, and the consequent loss and damage caused to him. These two alternatives cannot be separated. As the Roman Dutch Jurist Johannes Voet states of adultery in (Bk 48. Se: 5. Sub-Section7)-

> Its vileness is manifest from the fact that, while almost all other delicts are confined within the limits of their own baseness, adultery entails a troop of evils.

The Court cannot entertain any claim for damages under any "written law" where the claim arises from the adultery of a party to a marriage although it may be presented in an indirect or circuitous manner to defeat the object of section 26. Hence the usage of terms like "marital affair" as in the *Celestine* case

(supra) or "making love" as in *Francis Hoareau. v. Emmanuel Joubert* (unreported) CS 74/1993 are masquerades for the conceptual term "adultery" and are therefore not actionable in delict.

It may be contended that section 26 of the Matrimonial Causes Act puts a premium on immorality. But as Bhagwati J stated in the Indian case of *RK Garg v The Union* (1981) RSC 2138 -

> …….Immorality by itself is not a ground of constitutional challenge, and it obviously cannot be, because morality is essentially subjective in value, except in so far as it may be reflected in any provision of the Constitution, or may be crystallised into some well accepted norm of special behaviour.

If, as is being contended, section 26 should be interpreted in a way that the undertaking given in article 31(1) to promote the legal, economic and social protection of the family becomes meaningful, the remedy would lie with the legislature to amend that section or for the Constitutional Court to consider whether section 26 is inconsistent with the article 31(1) of the Constitution.

The basic difference between the Matrimonial Causes Act 1992 (Cap 124) and the earlier law is the removal of the "fault" principle. In this respect Venchard JA in the case of *Cosgrow v Cosgrow* SCA 12/1992 stated thus –

> The evolution of the law within commonwealth jurisdictions over the last decade or so demonstrates that there is no longer any turpitude attached to adultery. Thus in New Zealand, the no fault concept has been introduced for the severance of the marital link.

In South Africa, as far back as 1944 Blackwell J in the case of *Rosenbaum v Margolis* (1944) WLD 147 at 158 stated thus -

> There is something, in my opinion, to be said for the view that an action for damages against an adulterous third party is out of harmony with the modern concepts of marriage and should be abolished.

In Seychelles these modern concepts were adopted in the Matrimonial Causes Act in 1992. The Matrimonial Causes Act, being the special legislation governing matrimonial matters and matters arising therefrom, prevails over all other written laws in respect of those matters.

Accordingly the plea that the action is bad in law and that it cannot be sustained is upheld. As this ruling substantially disposes of the whole cause of action, the action is dismissed with costs.

**Record: Civil Side No 288 of 1998**

**Talma v Henriette**

*Defamation – special damages – spouses*

The claim is for damages in defamation by a husband against the defendant wife. The plaintiff alleged that the defendant had said degrading words which adversely affected him. The defendant denied saying the words.

**HELD:**

(i) Libel or slander is any assertion which would lower the reputation of the plaintiff in the opinion of right-thinking members of the society generally, isolate the plaintiff from society, or expose the plaintiff to hatred, contempt or ridicule;

(ii) Every person has an inherent right to enjoyment of peace of mind, free from violence to their person, against harm to their character for social or moral standing claimed by them, to the respect and esteem that others may hold them in, and against humiliating and degrading treatment. There is a corresponding obligation on all others to refrain from infringing that right;

(iii) Publication is a pre-requisite to every claim for defamation;

(iv) The law of defamation applicable in Seychelles is the law in force in the United Kingdom on 31 October 1975;

(v) There are 4 types of actionable cases for defamation without proof of special damages:

(a) where the words attribute to the plaintiff a crime for which there is physical punishment

(b) where the words attribute to the plaintiff a contagious or infectious disease

(c) where the words are calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on at the time of publication

(d) By the Slander of Women Act 1891, where the words impute adultery or inchastity to a woman or girl

(vi) Where spoken words do not come within one of the above types of actions, the plaintiff can only maintain an action of slander if they have suffered special damages as the natural and probable result of the publication, regardless of the extent that the plaintiff has been discredited or the likelihood of humiliation suffered; and

(vii) A spouse cannot sue defamation of their spouse unless they have suffered special damage as the direct and natural consequence of a libel or slander of their spouse.

**Judgment** – case dismissed with costs. Insufficient evidence to prove the allegations.

**Legislation cited**
Civil Code of Seychelles, art 1383
Criminal Procedure Code, s 31

**Cases referred to**
*Kim Koon v Wirtz* (1976) SLR 101

Frank ELIZABETH for the plaintiff
Antony DERJACQUES for the defendant

**Judgment delivered on 28 October 1999 by:**

**PERERA J:** This is an action for defamation wherein the plaintiff alleges that on or about December 1994 and 18 February 1995, the defendant uttered the following words to him in Creole:

> Tir sa lakord lo mon miray e al amar li kot fes ou fanm. Ou en pilon e ou fanm i en fanm sal. I annan en lot zonm e ler ou al travay I anmenn sa zonm dan lakaz. I annan en piti pou sa zonm.

These words translated into English appear in the plaint as follows:

> Remove the rope from my wall and go and tie it at the cunt of your wife. You are a homosexual and your wife is a dirty woman. She has another man and whenever you go out to work she brings a man at home. She has a child by another man.

The sworn interpreter called by the plaintiff confirmed the correctness of the translation, save for the last statement, which she said should read as "she has a child by this man" instead of "by another man."

The parties are admittedly neighbours. It is the case for the plaintiff that he had been given permission by one Leon Adrienne, the father-in-law of the defendant, to tie his boat to the boundary wall near the sea. He alleged that sometime between December 1994 and 18 February 1995, the defendant uttered the words complained of when he was tying the boat as usual.

The instant action was filed on 4 November 1996. The plaintiff produced a certified copy of a judgment dated 17 June 1996 (exhibit Pl) wherein in a complaint made by the wife of the instant plaintiff under section 31 of the Criminal Procedure Code in respect of substantially the same defamatory words alleged in the present plaint, the learned Magistrate had held that the words allegedly uttered by the defendant were on the basis of the complaint, directed to her husband, the present plaintiff, and accordingly dismissed the complaint.

By definition, libel or slander is :

> Any imputation which may tend to lower the plaintiff in the estimation of right-thinking members of the society generally, to cut him off from society, or to expose him to hatred, contempt or ridicule. (*Gateley on Libel and Slander* - page 6, paragraph 4).

The South African Judge, De Villiers, had this to say in an action for defamation

> Every person has an inborn right to the tranquil enjoyment of his peace of mind, secure against aggression upon his person, against the impairment of that character for social or moral worth to which he may rightly lay claim, and of that respect and esteem of his fellow men of which he is deserving and against humiliating and degrading treatment; and there is a corresponding obligation incumbent

> on all others to refrain from assailing that to which he has such right"

It is a pre-requisite that for any defamatory statement to be actionable, there should be publication, in the sense that the words complained of were bought to the actual knowledge of some third person, that is a person other than the person defamed. If the plaintiff proves facts from which it can be inferred that the words were brought to the knowledge of some third person, he would have established a prima facie case. The plaintiff testified that the words complained of were heard by his wife and one Mr Leon Adrienne, the father-in-law of the defendant who was seated in the sitting room of his house which was about 3 metres away from the wall. He however stated that Mr Adrienne is now dead and that his house has also been demolished. Hence the only evidence of publication adduced by the plaintiff was that of his wife, Julita Talma. In her testimony she stated that the defendant has always insulted her but on that day she insulted her husband. On being questioned by counsel as to why she filed the case in the Magistrates' Court, and not her husband, she replied -

> I brought the matter before the Court because I was affected by the words uttered by the defendant, maybe my husband did not feel the same and believe in what the defendant had said."

However, she further testified that consequent to what the defendant had alleged, her husband took it seriously and started to consume alcohol regularly and wanted to know who the real father of the child was and who was visiting her in his absence. She also stated that on several occasions she was assaulted and about two years ago she obtained a non-cohabitation order from the Magistrates' Court. That could have been in about 1997. She however stated that the defendant has since returned to her stating that he was mislead and that he now believed that the allegations made

about her were false. The present action was however filed on 4 November 1996 on the basis of alleged defamatory words concerning him as well as his wife.

The defendant denies that she used the words complained of. Assuming that the words were uttered by her in the course of an altercation between neighbours, has the plaintiff established publication to third persons? A libel or slander does not require publication to more than one person. However, the uttering of a libel to the party libelled is no publication for the purposes of a civil action. Hence a defamatory statement made to a husband about his wife, or to a wife about her husband is a sufficient publication, although it may not be actionable at the suit of one of the parties.

The tort of defamation as laid down in article 1383(3) of the Civil Code is governed by English Law. It was held in the case of *Kim Koon v Wirtz* (1976) SLR 101 that the law of defamation applicable in Seychelles is the law in force in the United Kingdom on 31 October 1975.

English law recognizes four types of cases which are actionable per se, without proof of special damages. They are:

1. Where the words impute a crime for which the plaintiff can be made to suffer physically by way of punishment.

2. Where the words impute to the plaintiff a contagious or infectious disease.

3. Where the words are calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of publication.

4. By the Slander of Women Act 1891, where the words impute adultery or unchastity to a woman or girl.

In the words allegedly complained of in the present case, there is an allegation of adultery against the wife of the plaintiff and a direct allegation of homosexuality against the plaintiff. It is only the allegation of adultery that falls under the fourth head, that would be actionable per se. But that would be in an action brought by the wife of the plaintiff. As Gatley states at page 93 (paragraph 201)-

> Where spoken words do not fall under one of the four heads set out…. the plaintiff can only maintain an action of slander if he has suffered special damages as the natural and probable result of the publication. And this is so, however disgraceful the slanderous imputation maybe, and however certain it is that it will injure the reputation of the plaintiff.

The wife of the plaintiff, who was the sole witness for the plaintiff, when questioned by counsel for the defendant whether it was true that the plaintiff was a homosexual, stated "I do not think so. I have never heard or seen him." Therefore, she did not believe in that allegation and hence the plaintiff had failed to establish special damages.

Apart from the allegation of homosexuality against him, the plaintiff sues in respect of a defamation of his wife. The words complained of allege that she had an adulterous relationship with another man and that the plaintiff is not the biological father of one of the children. Admittedly the plaintiff was married to his wife at the time of the alleged defamation. In Roman law, as well as in Roman Dutch law, the plaintiff could bring a defamatory action on the basis of injuria per consequential merely due to the special relationship he has

with his wife and child. However the position in English law is somewhat different. Gatley states at page 406 (paragraph 939) that –

> A husband cannot sue for defamation of his wife. But where a husband has sustained special damage as the direct and natural consequence of a libel or slander on his wife he may be able to maintain an action on the case in respect of such damage. In such a case both husband and wife can joint their respective claims in one and the same action. The damages recovered by the wife will belong to her, and special damage recovered by the husband will belong to him.

The instant action has however been filed only by the husband. Cross-examined specifically by counsel for the defendant, the plaintiff stated that his wife was not having any adulterous relationship with anyone and that neither his brother, father nor any other member of his family, or his neighbours, or anyone else had ever told him about or discussed any such behaviour on her part. On the basis of such evidence it could not be held that the plaintiff as husband has gone down in the estimation of members of the society. As regards his claim that due to the suspicion created by the alleged utterance of the defendant he and his wife obtained a non-cohabitation order and separated for three months, there was no documentary evidence adduced to ascertain the grounds on which such order was obtained. Moreover in the breach of the peace case filed by her in the Magistrates' Court, she alleged that the defendant uttered the alleged defamatory words to her. In the present action she states that they were uttered to the plaintiff. This creates a doubt as to whether those words were uttered at all.

The defendant in her evidence, denying that the words complained of were uttered by her, stated that the plaintiff

often fought with his wife and children and also with the neighbours. She referred to two specific incidents, first where the plaintiff chased one Mr Naidoo with a dagger in hand, and another which involved one Mr Coopoosamy. She also stated that the plaintiff cut her water line and she had to complain to the PUC. In view of the contradictory nature of the evidence, I prefer to accept the denial of the defendant.

If the instant claim of the plaintiff is based on special damages suffered as a direct and natural consequence of the slander of his wife, the only ground available to him was the alleged separation by a non-cohabitation order. The plaintiff and his wife were unable to give the date of filing the non-cohabitation application in the Magistrates' Court for this Court to assess whether that application was actuated by any misunderstanding that arose after the alleged defamatory words were uttered, as claimed by the plaintiff. In the absence of the reason for such an order, the Court is unable to determine that the plaintiff has suffered consequential damages.

The plaintiff has therefore failed to establish his case on a balance of probabilities. The action is accordingly dismissed with costs.

**Record: Civil Side No 338 of 1996**

## Swiss Reinsurance Company Ltd v General Insurance Company of Seychelles

*Civil Code - contract – duress – insurance – failure to pay*

The plaintiff is an insurance and reinsurance firm incorporated in Zurich, Switzerland. The defendant is an insurance company incorporated and registered in Seychelles. Both parties entered into numerous insurance and reinsurance contracts and policies agreed upon for fees to be paid by the defendant to the plaintiff. The defendant, by its director, agreed to pay the plaintiff a set monthly instalment and when it failed to so the defendant would pay the total sum plus interest at 10% per anum. The defendant made only 2 monthly instalments. The plaintiff sought to enforce his contract and obtained an acknowledgement of debt from the defendant. The defendant's director, amongst other things, claimed he was under duress when he entered into the contract.

**HELD:**

(i) The mere filing of a Court case does not amount to duress even if at the time the person claimed that his age (67) and health (a skin disease) amounted to duress; and

(ii) A director who enters into an agreement on behalf of a company binds the company to that agreement.

**Judgment** for the plaintiff, with interest at 10% per annum from the date of filing plus costs.

**Legislation cited**
Civil Code of Seychelles, arts 1111, 1112, 1326, 2262, 2265, 2271

Companies Act, ss 32, 33, 34, 35, 39, 50, 51, 53, 165, 172
Antony DERJACQUES for the plaintiff
Pesi PARDIWALLA for the defendant

**Judgment delivered on 4 May 1999 by:**

**BWANA J:** The plaintiff is an insurance and reinsurance firm incorporated in Zurich, Switzerland. The defendant is an insurance company incorporated and registered in Seychelles. Both parties entered into numerous insurance and reinsurance contracts and policies agreed upon for fees to be paid by the defendant to the plaintiff. The former carried out this obligation for some time.

It is averred by both parties that on 15 March 1995, the defendant - through an acknowledgement of debt signed by Mr Etzin, exhibit P9 - agreed to pay the plaintiff the accumulated amount and interest in monthly instalments of R15,000 as from 31 March 1995. It is admitted by both parties that thereafter the defendant made payment in two instalments only, each of R15,000, then stopped. The said acknowledgment of debt was entered into by Mr Etzin in terms of art 1326 of the Civil Code which states:

> Art 1326(1):
>
> > A note or promise under private signature whereby only one party undertakes an obligation towards another to pay him a sum of money or something of value shall be written in full, in the hand of a person who signs it; or at least it shall be necessary that apart from his signature he adds in his own hand the formular "valid for" or "approved for" followed by the amount in letters or the quantity of the thing...

It is averred that Mr Etzin complied with the requirements of

art 1326(1) as shown in exhibit P9 by adding the following words in his own handwriting: "valid in the sum of nine hundred sixty thousand rupees, seven hundred twelve and 47 cents". He then signed over the title: "DEBTOR, GENERAL INSURANCE COMPANY OF THE SEYCHELLES hereby represented by its Director, Mr Bernard Jacob Etzin".

In his amended defence as well as in his evidence, Mr Etzin says that he signed that exhibit P9 under duress and pressure from Mr Derjacques, counsel for the plaintiff. He cited his letters (exhbit P3, 6, 7 and 8) wherein he states that "he signed under extreme duress" to support that averment. However, in his submission, Mr Derjacques has denied that allegation, citing the following articles of the Civil Code: 1111 and 1112.

It was further agreed upon by the parties (as per exhibit P9) that if any of the installments were not paid within time or the date it falls due, the said Swiss Reinsurance Company would have the rights to immediately bring an action before the Seychelles Supreme Court for the entire amount. Further, it is stated in exhibit P9 that any single installment unpaid shall incur an interest at 10% per annum which shall also fall due for payment within this expressly agreed period with no extension of time whatsoever. As stated above, the defendant made only two payments each of R15,000. Because of the defendant's failure to honour his commitment as contained in exhibit P9, this action was filed on 14 September 1995 whereby the plaintiff prays for a total sum of R960,712.147 minus R30,000 that is paid already, plus interest at 10% per annum and costs.

The following issues are important for the determination of this suit-

1. Whether or not the suit is prescribed;

2. Whether or not Mr Etzin signed exhibit P9 under duress;

3. Whether or not Mr Etzin alone could bind the defendant company in his dealings with the plaintiff; and

4. The exact amount of money owed.

In so far as the issue of prescription is concerned, it is the defence case that the alleged debt became prescribed in 1989 and cannot be reactivated by an acknowledgment of debt in 1995. Between 1981 and 1995, it is admitted that the parties did not carry out any meaningful business due to changes that had taken place in Seychelles, introduced by the Government, concerning the insurance business. The defence therefore argues that the plaintiff should have taken Court action within five years, in terms of art 2271 of the Code. The said article states, inter alia:

> Art 227(1):
>
> All rights of action shall be subject to prescription after a period of five years except as provided in arts 2262 and 2265 of this Code.

The said articles 2262 and 2265 are not relevant in the instant case. The main issue in this case is not the lapse of time between 1981 and 1995. Rather, it is the failure, on the part of the defendant, to honour the acknowledgement of debt as per exhibit P9. The cause of action arises from the day Mr Etzin signed that exhibit P9, that is, 15 March 1995. His failure to honour that obligation led to the filing of this suit on 14 September 1995. Therefore, it cannot be successfully argued that this suit is prescribed.

The next issue for consideration is whether or not Mr Etzin

was under duress when he signed exhibit P9. I must state at the outset that the format of exhibit P9 is within the prescribed requirements of art 1326(1) supra. In his letter, Mr Etzin makes reference to matters such as –

1. "When I received summons to appear in Court in November issued by Mr Derjacques, I became so depressed that I have simply not been able to function as a normal person" (exhibit P3) (emphasis mine). It must be noted however that the summons referred to were issued well after the 15 March 1995 signing of exhibit P9. Therefore such summons are irrelevant to the issue under discussion.

2. "However, faced with an impending Court action (which I took as a pistol aimed at my head) I had very little option but to go along with the pressure exerted on me" (exhibit P6). This letter is written on the same day - March 1995 - after signing exhibit P9.

3. "I am saying here in order to have a meaningful discussion notwithstanding what I signed under extreme duress" (exhibit P7). This letter was written one year after exhibit P9.

4. In exhibit P8, Mr Etzin blames the plaintiff for "raping him financially" while it continues to trade with SACOS. No direct mention of duress in connection with the signing of exhibit P9.

In his evidence before this Court, Mr Etzin, aged 67 at the time, suggested that the acknowledgment of debt was obtained through duress. He stated in cross-examination:

> When I walked into your office you had a piece of paper that said Seychelles Government... was the receipt. You put that on the table, you said this morning we filed a suit against you, just out of blue. And then produced the acknowledgment which I have never had a chance to read and you told me to sign right there and then I signed there and then .... (emphasis mine)

However, Mr Etzin's evidence shows elsewhere that there had been "discussions" before signing. He had discussed with both Mr Derjacques (for the payment of R15,000 in installments) and in the presence of both Mr Derjacques and Mr Mumenthaler. This is reflected in exhibit P6 wherein he states:

> This afternoon I had a meeting with your locally appointed lawyer and your travelling representative, Mr Jan P Mumenthaler .... when the meeting commenced this afternoon. I was shown proof that your lawyer had commenced a Court action .... At no point did I deny responsibility for this debt and the main point at issue was to arrive at a formulae which had been agreed, in correspondence. However faced with an impending Court action I had very little option. (emphasis mine)

There is therefore no threat to his person or property. He only considers the said "piece of paper" (summons) and the words by Mr Derjacques (waving the paper) that this morning I have filed a suit against you to be duress. I consider this not to be so, in terms of art 1112 of the Civil Code, which states:

> There is duress when it is of a kind to impress a reasonable person and put him in fear of

> substantial harm in respect of his person or property (emphasis mine).

There is no evidence of any form of harm to his property. As to his person, I do not find one, be it substantial or in any other form. Mr Etzin tried to impress upon the Court that his skin disease is a result of that duress(!). There was, however, no medical proof of that. Furthermore, my impression of Mr Etzin is that of an intelligent, stable man and outstanding businessman, very knowledgable of many issues. He could have not, therefore, been put under pressure or duress by a mere presentation of a Court document/summons or words that a case has been filed against him in Court. He admits to have had other four cases in Court around that time (including CS 7/87; 160/95; another against Timbertec - to mention some). So, he was not a newcomer to Court proceedings. A mere presentation by a lawyer and in the presence of another person, could not, it is my considered view, have put Mr Etzin in fear of substantial harm, as required by the law.

In addition to the foregoing, Mr Etzin admitted in cross-examination that he signed exhibit P9 in good faith. He stated:

> Q: When you signed the acknowledgment of debt, it is stated clearly there: I Bernard Jacob Etzin, Director of General Insurance Company of Seychelles
>
> A. Yes.
>
> Q. When you signed the document, did you sign it in good faith as an honest man?
>
> A. Yes.

The second part of art 1112 states:

> With regard to this matter, the age and condition of a person shall be taken into account in the sense that the wrongdoer must take the victim as he finds him.

I have stated above that together with his age of 67, Mr Etzin seems to be stable, intelligent and an outstanding businessman. I am of the view that mere presentation of a Court case being filed against him would have not amounted to duress, his age and condition at the time notwithstanding.

It is equally important to take note of the provisions of art 1113-1 of the Code, which states:

> If the duress consists of a threat to do what a person is lawfully entitled to do the contract shall not be null, unless the promise obtained by the threat is irrelevant to that threat or unless the promise obtained is excessive having regard to the nature of the offer. (emphasis mine)

It is my view therefore that even if there was duress - which I find to be absent - then it was legitimate in terms of art 1113-1 to enable the defendant meet his obligations to the plaintiff. However, Mr Pardiwalla seems to rely on the second limb of the article by arguing that the sum claimed is excessive. He shows that the sum owed is only R320, 000 but not over R900,000 as stated in exhibit P9.

The sum of R320,000 was owed in 1981 when the defendant company "went out of business" (exhibit P6). How subsequent negotiations/discussions ”for a better formula of repayment" that sum had arisen to R600,000 (if the defendant would pay R50000 per month) and R900,000 plus (if as it were agreed - the defendant paid R15,000 per month). The increase in the amount payable clearly takes into

consideration interest and the period it would take. Thus, R600,000 was to be payable within one year (Exh P7) and SR900,000 plus, was to be payable up to the year 2004 (Exh P8). Mr Etzin himself wrote in Exh P8:

> If you will speak with Mr. Mumenthaler, he will confirm to you that the sum of circa 900,000 rupees includes interest charges till the year 2004.

The foregoing therefore shows the willingness and understanding reached by the parties for the settlement of the debt as signed in exhibit P9. There is thus an absence of duress, pursuant to the second part of art 1113-1 (supra).

All in all, the above discourse taken into consideration I am of the view that Mr Etzin was not under duress or pressure when signing exhibit P9 - the acknowledgment of debt. His subsequent reference to duress may be said to be an afterthought.

I will now consider whether Mr Etzin alone as director of the defendant company could bind it in his dealings with the plaintiff. It should be borne in mind at the outset that all the transactions between Mr Etzin and the plaintiff company were official. In exhibit P9, Mr Etzin clearly identified himself as the director of the General Insurance Company of Seychelles. Likewise he signed so. His non-use of the title ‘director’ in his subsequent correspondence (exhibit P6-8) may be said to be, again, an afterthought. In fact in exhibit P6 he refers to himself as ex-chairman of the defendant company. Daniel Bonte - PW4 - who also at one time worked for the defendant company as director, deponed that Mr Etzin was both chairman and director who would "give all directions and instructions". Therefore as director, could he alone bind the company? PW 4 says he could and he did so.

The 1972 Company Law of Seychelles is very elaborate on the issue. I will examine some of its relevant provisions. I am mindful of the general provisoes of section 172(1) (b) that directors have the duty to obtain the authorisation of a general meeting before doing any act or entering any transaction for which the authorisation of the general meeting is required. However, this general and broad provision should be read together with the provisor to that section thus:

> Provided that nothing in this section shall affect the operations of sections 33, 34 and 39 .

The said section 34 empowers directors to act on behalf of the company. It states:

> (1) The directors of a company shall have powers to do all acts on its behalf which are necessary for or incidental to the promotion and carrying on of its business …… (emphasis mine)

These general powers may be carried out by a single director "without the concurrence of any other director" (s 32(2)) and may even bind the company in those matters specified in the third schedule to the act (s 34(3)). The said schedule refers to implied powers of directors which include:

> (1) To enter into, agree to modification or termination of, perform and accept performance of contracts in the company's name …..(emphasis mine)
>
> (2) ……..

In this regard, therefore, it is my view that Mr Etzin alone, could transact business on behalf of the defendant company and bind it without prior authorisation of a general meeting. It

is also important to note that there is no evidence of shareholders taking action against Mr Etzin for his dealings with the plaintiff, starting with exhibit P9 and followed by exhibit P6, 7 and 8, pursuant to sections 28 and 165 of the Act. There has been no application for the expulsion of Mr Etzin from the company because of the above dealings (s 28). Nor have there been any steps against him in terms of section 165. To the contrary, there is evidence by Mr Scholl, PW2, that during the material period the plaintiff company continued to correspond with Mr Etzin in his capacity as a legitimate representative of the defendant company. Therefore, Mr Pardiwalla's reliance on sections 50, 51 and 53 of the first schedule to the Act does not affect or change the meaning behind the clear provisions cited above.

It is further evident that in terms of section 33 of the Act, the defendant company did have power (through its directors) to enter into contracts such as the ones between it and the plaintiff, including exhibit P9. Section 33(1) states inter alia-

> A company shall have the same capacity to enter into contracts, incur liabilities and may sue or be sued in its corporate name.

S 33(2) The capacity of a company shall not be limited by any provision of its memorandum or articles as to its objects, powers…… or as to the powers of its directors……. (emphasis mine).

S 33(3) Nothing in this section shall relieve a director or officer of a company from liability....or for entering into transactions unconnected with the promotion or carrying on the company's business (emphasis mine).

Thus, a director who enters into an agreement on behalf of a company binds the said company to the extent of the contents of that agreement. Section 35(2) of the Act states:

> A contract made according to this section shall be effectual in law in point of form, and shall bind the company and all other parties thereto (emphasis mine).

In view of these clear provisions of the law and the evidence before this Court, it is apparent that Mr Etzin could carry out transactions on behalf of the defendant company and in so doing the said company became bound by these transactions. In the instant case, he bound the company by his acknowledgment of the debt - exhibit P9. The defendant company is therefore bound by the contents of that document.

Lastly, in so far as the issue of how much money is owed, it is admitted by Mr Etzin in exhibit P8 dated 26 October 1996 that it was the equivalent of GBP40,000. However the figure of R600,000 has also been raised in defence but unsubstantiated. According to exhibit P7, that figure of R600,000 would have been possible if the defendant were prepared to pay R50,000 per month - a sum which was not possible. Mr Etzin wrote on 1 November 1996:

> When your representative, Mr Mumenthaler, was here the discussion started off with a request to sign a document to pay R50,000 per month for twelve months. Had I been able to do so, it would have been the end of the whole thing.... Mr Mumenthaler then recalculated and said that he would lower the monthly payment to R15,000 per month which lengthened the life of the agreement and took it up to R900,000 plus …… (emphasis mine). Signed B ETZIN

Furthermore, in the said exhibit P8 (para 6) Mr Etzin wrote:

> "If you will speak with Mr Mumenthaler, he will confirm to you that the sum circa R900,000 includes interest charges till the year 2004. There is also a letter …… in your files in which he says: "the sooner you pay, the less the amount……."

No doubt the two letters clearly give an indication that Mr Etzin had agreed to the sum of "R900,000 plus " after calculations and discussions with Mr Mumenthaler. It is the same sum which was acknowledged in exhibit P9. Therefore it cannot be successfully denied now.

To sum up, I enter judgment in favour of the plaintiff in the sum of R930,712.147 with interest at 10% per annum from the date of filing of this suit. I also award costs in favour of the plaintiff.

**Record: Civil Side No 327 of 1995**

## Sinon v Ward

*Control of rent and tenancy – eviction of employee*

The appellant appealed against an order of eviction by the Rent Board. He argued that the Rent Board did not have jurisdiction to determine the case. He also asserted that by oral agreement he and his wife were given the right to occupation of the dwelling house for life in return for services rendered by looking after and caring for the aged parents of the respondent. The Board did not find evidence that the respondent's mother intended to permit the appellant and his wife to occupy the premises. At the death of the parents, the respondent claimed there was no justification for the appellants' continued occupation. Eviction was sought from the Rent Board on the ground that the dwelling house was required for occupation by a person with whom a contract of employment had been entered conditional upon housing accommodation being provided.

**HELD:**

(i) The appellant failed to prove the life tenancy agreement. The agreement amounted only to a service tenancy; and

(ii) The essence of section 10(2)(f) of the Control of Rent and Tenancy Agreements Act is to enable a lessor who is an employer to obtain possession of a house that was let to an employee whose employment has since been terminated. In order for relief to be granted the contract condition should link employment to the provision of housing. In such situations, the tenancy contract ends when the employment terminates, and the employer should be able to obtain vacant possession

of the premises to accommodate a succeeding employee with a similar contractual provision.

**Judgment:** Appeal dismissed with costs.

**Legislation cited**
Civil Code of Seychelles
Control of Rent and Tenancy Agreements Act, s 10

**Cases referred to**
*Dubel v Bossy* (1973) SLR 385
*Sidna Monnaie v Manoharan Pillay* (unreported) SCA 6/1994
*May Emilie Richard v Joseph Pillay* (unreported) SCA 4/1996

Antony DERJACQUES for the appellant
Philippe BOULLE for the respondent

**Judgment delivered on 26 April 1999 by:**

**PERERA J:** The respondent applied to the Rent Board under section 10(2) of the Control of Rent and Tenancy Agreements Act (Cap 47) for eviction of the appellant. It was averred that the respondent was the proprietor of a portion of land situated at Bougainville and that the dwelling house standing thereon was "let" to the appellant who was engaged as a "General Supervisor of the property". Eviction was sought on the ground that the said dwelling house was required for occupation by a person with whom, conditional upon housing accommodation being provided, a contract for employment had been entered.

The appellant denied that he was engaged by the respondent as a "General Supervisor", and averred that consequent to looking after and caring for the respondent's aged mother, he was granted a life tenancy to occupy and enjoy the premises during his lifetime and that of his wife.

John Ward, the husband of the respondent testifying on the basis of a power of attorney admitted that the appellant and his wife looked after and cared for the respondent's sickly and aged mother until her death in September 1995 and also looked after the property. In a last will dated 5h June 1995 (P 2 B) she bequeathed all her movable land and immovable property to the respondent, her daughter. He denied that he was aware of any usufructuary right granted to the appellant by his deceased mother-in-law over the dwelling house in dispute.

The appellant continues to be in occupation of that house. On 20 May 1996, the respondent transferred parcel T 1636 which adjoins parcel T 1637, whereon the dwelling house in dispute is situated, to the appellant for a sum of R29,000, which admittedly is a nominal figure. The deed of transfer recites inter alia as follows.

> This transfer is being effected in complete and total settlement of Mr and Mrs Sinon's care and kindness to the late Mrs Herta Nazari .

The Rent Board did not find on the evidence that the mother of the respondent had an intention to permit the appellant and his wife to occupy the premises until her death in consideration of the services rendered. There was nothing in her last will to that effect. Hence the transfer of parcel T 1636 by the respondent as executrix of the estate operated as a "complete and total settlement" of any obligation the deceased person may have had. The appellant does not claim that the late Mrs Nazari intended to transfer a parcel of land in addition to the alleged promise to permit him to occupy the premises until death. On the same basis, in the absence of evidence it is unreasonable to believe that the executrix transferred that parcel of land in addition to whatever occupational rights that her deceased mother may have

granted or promised to the appellant. The ppellant testified that he had lost a written document creating a life tenancy in his favour by the late Mrs Nazari. The Board was justified, in the circumstances of the case, to reject that evidence.

The respondent testified that the appellant was given time to build a house on parcel T 1636 and vacate the present premises. Subsequently the respondent by letter dated 24July 1997 (exhibit P3) sent through her lawyer, gave the appellant notice to quit the premises within two months. The appellant by letter dated 17 September 1997 (exhibit P4) refused to vacate the premises claiming that he has a right of occupation until death. He offered to buy the entire property for R800,000. The respondent replied by letter dated 26 September 1997 (exhibit P6) indicating that she had no intention to sell the property. The appellant however persisted and by letter dated 31 October 1997 (exhibit P5) offered a sum of R1,000,000 (one million) to purchase parcels T 1637 and T 1166. The Cadastral Survey (exhibit P7) shows that these two parcels adjoin P 1636 which is now owned by the appellant. According to the evidence the entire land is about 60 acres in extent, and the market value is about R2 million. It has thereon a main dwelling house, and two other units of dwelling accommodation. The appellant is in occupation of both those units, paying no rent. He has also extended the dwelling house by encroaching on a portion of the eastern boundary of parcel T 1636 now owned by him, without permission or authority of the respondent (exhibit D1).

On an evaluation of the oral and documentary evidence, the Rent Board decided that the appellant had no life tenancy in the premises in suit, and that whatever right he had to occupy the premises had now ceased. They therefore ordered eviction on or before 31 December 1998.

As ground 1 of this appeal, it was contended that the Rent Board did not have jurisdiction to determine this case. It was

contended by counsel for the appellant that by extending the dwelling house, the appellant had acquired an interest in the premises and hence an application for eviction could not have been determined until that interest had been adjudicated upon. The Rent Board came to the following finding on this issue.

> On the basis of the evidence, we are satisfied that the respondent has slightly extended the structure of the cottage onto the adjacent land of his own, crossing the boundary line as show in exhibit DI. He has done so unlawfully, without permission from the applicant. This deliberate act of encroachment by the respondent cannot provide him any protection in law against eviction. We find this act of extension is illegal and ill motivated to create a pseudo right for the respondent in order to perpetuate his stay in the cottage. In any event an illegal act can in no way metamorphise into a legal right for the benefit of the perpetrator.

It is settled law that a certain set of facts must exist before the Rent Board has jurisdiction. Hence it can inquire into the facts in order to decide whether or not it has jurisdiction. Where the issue of ownership of the premises arises, the board has jurisdiction to determine that only as a collateral issue. In the case of *Sidna Monnaie v Manoharan Pillay* (unreported) Civil Appeal 6/1994 the Rent Board had, in considering whether a lessor and lessee relationship existed, proceeded to the realms of contractual law and determined that there was a promise to sell between the parties. That finding was held by this Court to be ultra vires the powers and jurisdiction of the Rent Board. Similarly in the case of *May Emilie Richard v Joseph Pillay* (unreported) Civil Appeal 4/1996 the Rent Board, in inquiring into the facts to decide whether it had jurisdiction, made a finding under article 555 of the Civil Code

and ordered the occupier of the premises to "emove and take away the structure. This Court held that the board had acted ultra vires its powers.

The facts of the instant case are somewhat different. The appellant does not deny that the dwelling house he occupies free of rent, and parcel T 1637 on which it is situated, are owned by the respondent. In ground 2 of the memorandum of appeal, the appellant submits that he has an interest beyond that of a lessee in the said house and hence should not be considered merely as a lessee. It was therefore contended that the Rent Board ought not to have proceeded with the application for eviction and referred the parties to seek their remedy before the Supreme Court which alone had the jurisdiction to determine a matter falling under article 555 of the Civil Code. This contention is misconceived. The Rent Board did not make any order under article 555 of the Civil Code as it did in the case of *Richard v Pillay* (supra). It merely made a finding of fact on a collateral issue only for the purpose of ascertaining whether it has jurisdiction to entertain the application for eviction. Both parties admit that an extension has been made to the dwelling house owned by the respondent. The board correctly held that the appellant could not alter his position as a "lessee" (in the extended sense of a person enjoying the use and occupation of a dwelling house for which an indemnity is payable or not), by creating a right of his own to evade the jurisdiction of the Rent Board and the applicability of the Rent Act. Hence grounds 1 and 2 fail.
In ground 3, it is contended that the Board failed to consider the reasonableness of the respondent's application for eviction. Though not stated, the application was based on section 10(2)(f) of the said Act, which reads as follows-

> The dwelling house is reasonably required by the lessor for occupation as a residence for some person engaged in his employment or with whom conditional on housing accommodation being

> provided, a contract for such employment has been entered into and the lessee was in employment of the lessor or a former lessor and the dwelling house was let to him in consequence of that employment and he has ceased to be in that employment.

The appellant in his defence denied that he was engaged as a general supervisor to look after the respondent's property. He claimed that by a verbal agreement, he and his wife were given right of occupation of the dwelling house for life in lieu of remuneration for services rendered by looking after and caring for the aged parents of the respondent, who are now both dead. As already held, the appellant failed to establish a life tenancy. Hence, it was, at best, a service tenancy, and the subsequent transfer of parcel T 1636 to the appellant "in complete and total settlement" of the appellant and his wife's "care and kindness to" the deceased parents of the respondent, establishes that the service tenancy has ceased and that the appellant has no "contract" with the respondent to continue to occupy the premises.

The respondent testified that he has engaged one Robert Bason as a caretaker on condition that he could occupy the cottage presently occupied by the sppellant, free of rent and for a monthly salary of R400. Robert Bason (Pw2) corroborated the evidence of the respondent and stated that he has been engaged as the caretaker. The board on a consideration of the evidence stated thus –

> We are satisfied on a preponderance of probabilities that the applicant reasonably and bona fide requires the cottage to house her employee in her estate with whom the applicant has entered into a contract of employment with condition of housing accommodation being provided in pursuance of such employment.

In the case of *Dubel v Bossy* (1973) SLR 385, Sauzier J gave a strict interpretation to paragraph (f) of section 10(2) and held that "there must be a subsisting contract of employment between the lessor and some person before the provisions of paragraph (f) of section 10(2) of the ordinance may be invoked as a ground of eviction". In that case, the succeeding employee had not yet been appointed, and the lessor in his testimony stated "I have to employ somebody to work the property. I can't until the appellant moves out of the house". The essence of the ground contained in paragraph (f) is to grant relief to a lessor, who is also an employer, to obtain possession of a house let to an employee whose employment has been terminated. For that purpose there should necessarily be a nexus between employment and housing as part of the contract. In such circumstances the contract of tenancy ends with the termination of employment, and hence the employer should be able to obtain vacant possession of the premises to accommodate the succeeding employee with a similar condition regarding accommodation.

In the *Dubel* case (supra), the Court allowed the appeal thereby permitting the lessee whose employment had been admittedly terminated to continue in occupation of the premises merely because the lessor employer had not yet employed a successor. With respect, that was an interpretation which was grossly inconsistent with the rationale of the provisions of section 10(2), especially as the lessor may not have had any other ground under section 10(2) to evict a person who had been a lessee only because he was his employee, and the lessor - lessee relationship had ceased, and a succeeding employee may not accept employment until he is assured of housing accommodation.

In the instant case, the nexus between the appellant and the tenancy was the care and support he and his wife gave the aged parents of the respondent. That nexus ended with their

deaths. The respondent as an act of gratitude transferred a parcel of land adjacent to the cottage they are occupying and gave them sufficient time to build a house of their own. They do not seem to be in such indigent circumstances, as they offered to purchase the entire property for 1 million rupees. There is no legal justification for the appellant to continue in occupation of the dwelling house of parcel T 1637. The Board was satisfied that the respondent had employed one Robert Bason as a caretaker of the property on payment of a monthly salary and on condition that accommodation would be provided, as the appellant's services were in any case unsatisfactory. This case should therefore be distinguished from the *Dubel* case (supra). The Court accepts the findings of facts made by the board on that issue.

The Board further noted that the question of a balance of hardship need not be considered under the proviso to section 10(2) of the Act in the case of an eviction under section 10(2) as in the instant case, but proceeded to give two months time to vacate, in the interest of justice. This Court finds no justification to interfere with that finding of fact nor with the order made for eviction. Grounds 3 and 4 therefore fail.

The appeal is accordingly dismissed with costs.

**Record: Court of Appeal (Civil No 11 of 1998)**

**Michel v Republic**

*Penal Code - indecent assault – sentence*

The appeal is against a seven year imprisonment sentence for conviction on an indecent assault charge. The appellant claimed that the sentence was harsh and excessive on the circumstances. The State contended that the imprisonment term was seven years out of a maximum of fourteen years. The offence was committed by a 65 year old impotent man on a 3 year old girl.

**HELD:**

(i) An appellate court may interfere with sentence passed by the lower court in the following circumstances –

(a) If the sentence is not justified by law, in which case it will be interfered with not as a matter of discretion but of law;

(b) Where the sentence has been passed on a wrong factual basis;

(c) Where some matter had been improperly taken into account;

(d) Where the sentence was wrong in principle or manifestly harsh and excessive or inadequate; and

(ii) Arguments on behalf of the appellant did not meet any of the circumstances that qualify interference on a lower court's sentence; and

(iii) The sentence was consistent with previous cases.

**Judgment:** Appeal dismissed.

**Legislation cited**
Penal Code, s135

**Cases referred to**
*Agnes v Republic* (1990) SLR 92
*Confiance v Republic* (1992) SLR 75
*Cupidon v Republic* (1990) SLR 67
*R v Agrippa* (unreported) Cr 35/1998
*R v Allain Leon* (unreported) Cr 17/1998
*R v Willy Brioche* (1997) SLR 71
*R v Parameswaran* (unreported) Cr 27/1998
*R v Cliff Rachel* (unreported) Cr 23/1998

John RENAUD for the appellant
Lucy POOL for the respondent

**Judgment delivered on 14 May 1999 by:**

**ALLEEAR CJ:** The appellant was charged with the offence of indecent assault on a female contrary to section 135(1) of the Penal Code. The particulars of offence were that Irene Michel of Anse Louis, Mahe on 2 November 1995, at Anse Aux Pins, unlawfully and indecently assaulted A, a girl of three years of age.

The appellant had pleaded not guilty to the count. The evidence disclosed that the appellant aged 65 years had inserted his penis into the mouth of a young girl and had sucked her vagina. The senior magistrate convicted the appellant and sentenced him to undergo a prison term of 7 years.

This is an appeal against sentence on the ground that the appellant was "remorseful in that he had not cross-examined the complainant aged three years. He had saved her further embarrassment and trauma."

Mr Renaud also highlighted the fact that the appellant was impotent and he respectfully urged the Court to reduce the sentence passed.

Counsel representing the State, Ms Pool, argued that the appellant had pleaded not guilty. He was sentenced to only 7 years out of the maximum of 14 years' imprisonment which the senior magistrate could have imposed. The victim, she said, was only three years old. She said the fact that the appellant was impotent had nothing to do with the sexual assault, as the evidence showed that the appellant was seen sucking the vagina of the young victim and putting his penis in her mouth.

Ms Pool disagreed with the appellant's counsel that the sentence passed was harsh and excessive in all the circumstances of the case. She cited the case of *Republic v Moncherry* in which Perera J referred to the following cases:-

1. *R. v Agrippine* (unreported) Cr 35/1998 - sexual assault on a 15 year old girl (8 years imprisonment)

2. *R v Parameswaran* (unreported) Cr 27/1998 - sexual assault on a boy (8 years imprisonment)

3. *R v Willy Brioche* (unreported) Cr 12/1997 - acts of indecency on a child (5 years imprisonment)

4. *R v Allain Leon* – (unreported) Cr 17/1998 - sexual assault on a 14 year old boy (8 years imprisonment)

5. *R v Cliff Rachel* (unreported) Cr 23/1998 - non-accidental touching the sexual organ of a girl under 15 years of age. In this case the Probation Officer remarked that it was "a blatant abuse of a young helpless girl by an irresponsible male adult." The accused was sentenced to 5 years imprisonment.

Ms Pool stated that the young victim in the present case had been traumatised by the incident. She was still suffering from nightmares and was being counselled. Ms Pool therefore urged the Court to dismiss the appeal.

An appellate ourt will normally interfere with the sentence passed by the lower Court in the following circumstances:

(i) if the sentence is not justified by law, in which case it will be interfered with not as a matter of discretion but of law;

(ii) where the sentence has been passed on a wrong factual basis;

(iii) where some matter had been improperly taken into account;

(iv) where the sentence was wrong in principle or manifestly harsh and excessive or inadequate.

Vide the case of *Cupidon v Republic* (1990) SLR 67, *Confiance v Republic* (1992) SLR 75, *Agnes v Republic* 1990 (SLR) 92.

At the time the offence was committed the maximum sentence in respect thereof was 14 years' imprisonment. It has now been enhanced to 20 years.

It is borne in mind that any court while passing sentence must look at all the circumstances of the case and also the maximum sentence provided for by law at the time of the commission of the offence and not at the time of sentencing. Therefore the enhancement of the sentence of imprisonment to 20 years in respect of the present offence at the time of sentencing has been correctly ignored by the sentencing court.

In the present case I do not find any justification for interfering with the sentence passed on the appellant. None of the circumstances referred to above is applicable. Hence the appeal is dismissed.

**Record: Court of Appeal (Criminal No 7 of 1997)**

## Pointe v Republic

*Penal Code - deceit – cheating – false documents – sentencing*

The appellant was a first time offender convicted of 14 counts of cheating and 14 counts of uttering false documents. He was sentenced to 18 months imprisonment in respect of the cheating offences and 2 years imprisonment for the remaining offences. The appellant appealed against conviction on the grounds that the Magistrate erred in principle in failing to apply a shorter term of imprisonment and for the 2 prison sentences to run concurrently was harsh and excessive in all the circumstances.

**HELD:**

> It is not always the case that a first-time offence should not be given a custodial sentence or should be given a short prison term. The Court must take into account the nature of the offence, the conduct of the person convicted, the position of trust which he enjoyed and the amount of money stolen, the means the deception used, and the number of occasions on which the deception was practised.

**Judgment:** Appeal against conviction and sentenced dismissed.

**Legislation cited**
Penal Code, ss 299, 301, 339

**Cases referred to**
*Dingwall v R*
*R v King & Others*

Antony DERJACQUES for the appellant
Romesh KANAKARATNE for the respondent

**Judgment delivered on 30 July 1999 by:**

**ALLEEAR CJ:** The appellant, Rodney Pointe, was charged with 21 counts of cheating contrary to and punishable under section 299 of the Penal Code, 21 counts of uttering a false document contrary to and punishable under section 339 of the Penal Code and 14 counts of conspiracy to defraud contrary to and punishable under section 301 of the Penal Code.

The appellant pleaded not guilty to all the charges. He was convicted after a trial on 14 counts of cheating and 14 counts of uttering a false document contrary to section 339 of the Penal Code. He was acquitted of the all the conspiracy counts levelled against him. He was sentenced to undergo a prison term of 18 months in respect of the 14 counts of cheating and *2* years imprisonment in respect of the 14 counts of uttering a false document contrary to section 339 of the Penal Code.

The appellant now appeals against his conviction and sentence. There are 8 grounds of appeal, namely:

1. The learned Magistrate erred in law in failing to appreciate that the Appellant was operating under procedures introduced and accepted by the management of the complainant vis a vis the first 14 counts.

2. The learned Magistrate erred in law in failing to appreciate that no person ‘cheated’ or suffered pecuniary loss vis a vis the first 14 counts.

3. The learned Magistrate erred on the facts in finding that the Appellant carried or practised deceit for pecuniary gain.

4. The learned Magistrate erred in law in failing to appreciate the evidence required for "uttering a false document" as per section 339 of the Penal Code.

5. The learned Magistrate erred in finding that the Appellant had the required intention as per section 339 of the Penal Code.

6. The learned Magistrate erred on the facts in finding the Appellant guilty beyond a reasonable doubt in that there is insufficient evidence.

7. The learned Magistrate erred in principle in failing to appreciate the inconsistencies and discrepancies in the prosecution's case.

8. In all the circumstances of the case, the conviction is unsafe and unsatisfactory.

Two grounds have been raised against sentence. They are as follows:-

***1.*** The Magistrate erred in principle in failing to apply a short, sharp term of imprisonment.

***2.*** The sentences of 18 months imprisonment for the first 14 counts, to run concurrently, and the sentences of 2 years' imprisonment to run concurrently, are harsh and excessive in all the circumstances of the case.

With regards to ground one of his written submission, counsel for the appellant stated that the management of SMB, the complainant, was primarily concerned that the work to be done was done properly. Administrative guidelines on mode and method of payments were flexible in the extreme. The cheques were ordinarily made in the name of the appellant who went to cash them and then proceed to make payments to the workers. In other words, the kernel of Mr Derjacques' submission is that strict accountancy procedures were not followed.

It was also argued by Mr Derjacques that the complainant had failed to prove that they had lost property through theft or they had been falsely induced, deceived or cheated by the acts or omissions of the appellant. It is alleged that the senior magistrate erred in imputing mens rea to the appellant. It is claimed that the appellant was not fraudulent or committed the acts "knowingly".

With regards to ground 2, it was urged that the appellant had no mens rea and SMB was not deceived. As stated, the submissions advanced in favour of the appellant against his conviction were that the appellant had not uttered a false document knowingly or fraudulently. He had not deceived by means of fraudulent tricks or obtained from SMB a sum greater than would otherwise be payable to him. Hence, it was argued that the convictions were unsafe and unsatisfactory.

Against sentence, it was argued that for a first offender a non-custodial sentence ought to have been imposed. However, if the senior magistrate was minded to impose a prison sentence, then a maximum of 3 to 6 months ought to have been imposed.

Counsel representing the respondent, ie the Republic,

supported the senior magistrate's finding of conviction and sentence imposed. At page 8 of the judgment counsel stated that the senior magistrate made the following observations:

> …the defendant used or applied a fraudulent trick or device and thereby the deceived acted upon it and delivered anything capable of being stolen or money.

Counsel stated that the appellant knew of the falsehood when he prepared the invoices requesting the cheques from the complainant company. In his extra-judicial statement, admitted without objections, the appellant had stated that Edwin Port-Louis did not perform any work for SMB, yet he prepared invoices in favour of Edwin Port-Louis and received cheques which he cashed and kept the cash for himself. Hence the fraudulent tricks or device were the making of the invoices for payment to Edwin Port-Louis for work the latter did not perform.

The appellant had also stated that Edwin Port-Louis had never transported or spread manure in the plantation. This was confirmed by Louis Medine, PW8, who had never seen Edwin Port-Louis in his plantation.

Counsel referred to the case of *R v King & Ors* and stated that the trick or device must have operated on the mind of the complainant. He said SMB would not have issued the cheques for payment had they known that Edwin Port-Louis had not carried out any work for them.

Edwin Port-Louis was employed by the Division of Environment and hence was not entitled to any payment from SMB. The fact that SMB prepared cheques for payment to Edwin Port-Louis clearly showed that they were deceived and tricked by the appellant, counsel added.

With regards to grounds 4 and 5, the appellant admitted that

he was well aware that the invoices contained falsehood, so it cannot be said that the element of knowingly and fraudulently had not been proved beyond reasonable doubt by the prosecution.

Counsel representing the State supported the sentence passed by the senior magistrate and stated that the appellant was occupying a position of trust and was engaged in repeated fraudulent acts.

According to counsel the senior magistrate must have also taken into consideration the amount of money stolen which was considerable when he passed the sentence.

The evidence against the appellant was overwhelming. All the elements of the offences for which the appellant was convicted had been established beyond doubt. See page 8 of the judgment. The defendant used or applied a fraudulent trick or device and the deceived acted upon it and delivered anything capable of being stolen or money.

The senior magistrate emphasised that the deception created by that trick or device must have had a bearing on the mind of the deceived. He therefore came to the irresistible conclusion that the appellant must have known the falsehood when he prepared and uttered the invoices requesting the cheques.

The evidence clearly shows that the appellant knew that Edwin Port-Louis did not perform any work for SMB. Yet he prepared invoices in favour of Edwin Port-Louis for payment, received the cheques from SMB and cashed them and pocketed the money. The fraudulent trick or device is the making of invoices for payment to Edwin Port-Louis for work that the latter never performed. In his own voluntary statement admitted without objections, the appellant states:

> I gave him (Edwin Port-Louis) R500. Edwin never questions me on the cheque and he had never bring manure (sic).

The said statement is corroborated by the evidence of Louis Medine, PW8 who stated at page 16 of the record:

> I have never seen Edwin Port-Louis in my plantation. I have never seen Edwin Port-Louis delivering any manure.

The appellant had falsely stated that Edwin Port-Louis had spread manure on the plantation of Louis Medine. This was a fraudulent declaration which induced SMB to prepare cheques for payment. SMB would have never prepared a cheque but for the trick and fraudulent declaration of the appellant.

Section 339 of the Penal Code is couched as follows:

> Any person who knowingly and fraudulently utters a false document is guilty of the offence.

In his statement admitted in evidence, the appellant conceded that he was aware that the invoices he had prepared contained falsehood. The intention in preparing these invoices was to obtain money from SMB for work not performed by Edwin Port-Louis. The intention to defraud SMB is patent. The senior magistrate rightly considered it, see page 10 of the judgment. That there was a fraudulent deception by the appellant and that SMB acted upon is clearly manifest.

The evidence of one Cyril Julie was rightly ignored by the learned senior magistrate. That witness had been turned hostile. The magistrate was right in convicting the appellant as he did on all the charges referred to above.

The appeal against conviction on all counts is accordingly dismissed.

An appeal court will only alter a sentence imposed by the trial court if it is evident that it has acted on a wrong principle or overlooked some material fact or if the sentence imposed is manifestly excessive or harsh in all the circumstances of the case. The appeal Court is not empowered to alter a sentence on the mere ground that if it had been trying the case it might have passed a somewhat different sentence. See the case of *Dingwall v R***.**

The appellant in this case was a first offender. It does not always mean that a first offender should never be given a custodial sentence or that he should necessarily be given a short prison term. The nature of the offence, the conduct of the person convicted, the position of trust which he enjoyed and the amount of money stolen, the means of deception used, the number of occasions on which the deception were practised must necessarily be taken into account.

The senior magistrate must have taken all these into account and therefore I do not think that he erred in any way. I believe that the appellant got his just desert. A court in imposing sentence must sometimes bear in mind the deterrent effect that that sentence will have on potential offenders.

This was not an isolated or single act of cheating and uttering false document by the appellant. As can be seen from the charges levelled against him, the appellant committed several offences. The maximum term of imprisonment for an offence of cheating contrary to and punishable under section 299 is three years imprisonment.

The senior magistrate imposed a term of 18 months. It cannot be said that the said sentence is manifestly harsh or

excessive or wrong in principle. It will be recalled that the appellant occupied a position of trust with SMB and for that kind of offence, a prison term is warranted. I do not think that the senior magistrate erred in any way. Hence the appeal against conviction and sentence is dismissed.

**Record: Court of Appeal (Criminal No 16 of 1998)**

## Ramkalawan v Republic

*Administrative law - judicial review – Constitution – Commission of Inquiry*

An incident occurred in the precincts of the National Assembly. A Committee of the Assembly was set up to investigate the incident and it submitted a report to the National Assembly. The appellant appeared and testified before the committee before the presentation of its report. The appellant was then prosecuted in the Magistrates' Court. The appellant sought judicial review of a decision in the Magistrates' Court in order to rely on a certificate signed by the Chairperson of the Committee to the effect that he had given testimony to the Committee. The prosecution claimed that the Chairperson had ceased to act in his capacity as Chairperson given that the Committee had already submitted its report to the National Assembly, and that the National Assembly had been dissolved prior to the hearing in the Magistrates' Court. The appellant contended that the certificate issued by the Chairperson of the Committee was a valid certificate under section 15 of the Peoples' Assembly (Parliament Immunities and Powers) Act.

**HELD:**

> The committee ceased to exist after it delivered its report to the National Assembly and the chairperson ceased to be a member of the National Assembly, became functus officio and could not thereafter act in any manner or under any authority obtained from the National Assembly by virtue of his membership or appointment as chairman of a committee.

Case remitted to the Magistrates' Court.

**Legislation cited**
Constitution of Seychelles, arts 81, 101, 110
Penal Code, ss 102, 122, 236
Peoples' Assembly (Parliament Immunities and Powers) Act, ss 8, 14, 15
National Assembly Standing Orders 1994, ords 9, 45, 80

**Foreign legislation noted**
Election Commissioners Act 1852 (UK), s 8

**Foreign cases noted**
*Baldry v DPP of Mauritius* [1982] 3 All ER 973
*Q v Holl and Ors* (1881) 7 QBD 575
*R v Letham* (1861) 30 LJ QB 205
*Thomas v Newton* (1827) 2 C&P 606

Anette GEORGES for the appellant
Anthony FERNANDO for the respondent

**Judgment delivered on 15 December 1999 by:**

**JUDDOO J:** The instant judgment arises out of a motion to review the finding of the Senior Magistrate that a certificate, issued under the signature of Mr Georges Bibi, was not a valid certificate under section 15(2) of the Peoples' Assembly (Parliamentary Immunities and Powers) Act (Cap 163) - herein after referred as "the Act".

It is not disputed that on 11 November 1997 an incident occurred in the precincts of the National Assembly involving some of its members. A Committee of the Assembly was set up to investigate the incident. The committee, chaired by Mr Georges Bibi, completed its inquiry into the incident and submitted its report before the National Assembly on 18 November 1997. The appellant had appeared and testified before the Committee prior to its report.

On 12 September 1998, a criminal charge of assault was laid before the Magistrates' Court against the appellant contrary to section 236 of the Penal Code (Cap 158). The charge reads as follows:

> Wavel Ramkalawan of St Louis, Mahe on the 11th day of November, 1997, within the premises of the National Assembly at Victoria, Mahe, unlawfully assaulted Barry Faure thereby occasioning actual bodily harm to him.

Both the appellant and the said Barry Faure were members of the National Assembly at the material time.

By motion, dated 8 January 1999, an application was made by counsel for the accused to stay the proceedings before the Magistrates' Court. The ground as per the motion was as follows:

> The defendant, having appeared as a witness before a Committee of the National Assembly in the determination of matters the subject of the proceedings herein, will produce a certificate under the hand of the Chairman of the Committee that the defendant was required to answer questions put to him by the Committee and answered them.

At the hearing of the motion, a certificate under the signature of Mr Georges Bibi, dated 18 November 1998, was produced (Exhibit PI) and was relied upon. The prosecution objected to the stay of proceedings on the ground that the certificate issued was invalid and therefore could not be relied upon to stay the proceedings before the Magistrates' Court. The Senior Magistrate, after having heard the submission of both counsel, ruled that:-

> …the certificate was not a valid certificate under section 15 of the Act . Hence, this document cannot be relied upon and acted upon to grant a stay of proceedings in this matter.

The instant application made is for this Court to review the above finding of the lower Court.

In essence, the prosecution's stand is that the certificate, under the signature of Mr Georges Bibi, is invalid because at the material time when it was issued, on 18 November 1998, the said person had ceased to act in his capacity as Chairman of the Committee given that the Committee had already submitted its report to the National Assembly on 18 November 1997 and additionally the National Assembly had been dissolved on 19 February 1998.

On the other hand, the argument by the defence may be summarised as follows. The certificate, issued by Mr Georges Bibi, is a valid certificate under section 15 of the Act. It is contended that section 15 does not require that the certificate must be issued at the time when the committee sits. The section only states that a witness before the committee is entitled' to receive a certificate in the hand of the Chairman and only becomes relevant:

> if and when charges are instituted before a court of law against a person called as a witness before a Committee and following his testimony before such a Committee. The Chairman of the Committee can certify what took place before the Committee even after it had reported to the House. Further, the fact that the National Assembly was dissolved on 18 February 1998 does not nullify the fact that the Committee heard witnesses, filed its report, three months before the dissolution of the Assembly and the Chairman can issue the certificate.

Accordingly, it is submitted that:

> Mr Georges Bibi was entitled to issue the certificate on 18 November 1998 and to interpret section 15 in any other way limits the said section so as to make it otiose.

The certificate produced before the Magistrates' Court is under the hand and signature of Mr Georges Bibi and is dated 18 November 1998. It is not disputed that by that date the Committee Report had been tabled before the National Assembly and the session of the National Assembly had been dissolved since 18 February 1998. The determination before this Court is whether Mr Georges Bibi had authority to sign and issue the certificate, when he did so, on 18 November 1998. Such authority, if any, would be by virtue of the powers of the Committee or an enabling Act or a statutory instrument.

Under section 101 of the Constitution, the National Assembly may make standing orders for the regulation and orderly conduct of its proceedings. By virtue of the National Assembly Standing Orders 1994 (S.I 45 of 1994) orders were made to regulate the conduct of proceedings in the National Assembly and of members sitting in Committee. The Committee set up by the National Assembly to investigate into the incident was instituted under Order 80(1) and is referred to as a "Committee other than a Sessional Standing Committee". It is appointed by resolution on a motion made and consisted of members of the National Assembly. Under Order 81, the scope of the enquiry by a Committee is defined by the terms of the Order under which it is established. The object of the Committee is to "consider or take evidence" upon any matter in line with its terms of reference and its duty is to "report its Opinion for the information and assistance of the Assembly." (Vide: Order 80(2)). This is akin to what is commonly termed a 'select committee' under the UK legislation.

After the report by the Committee to the National Assembly, the latter shall debate the matter further and reach a decision on the issues (vide: 5.104(4) of the Constitution). The National Assembly is not bound by the Committee's recommendations (vide: Strauss Case, UK Parliament, Cmnd 605 (1958)). In his examination of the functioning of a select committee, Erskine May in *Parliamentary Practice* (19th edition) at p 630, states that:

> Each session other committees (select committees) may be set up upon motion in which are laid down their orders of reference, the number proposed as the quorum and the powers with which it is proposed that the committee should be invested... Such committee ceases to exist at prorogation or (if they have not been given power to report from time to time) after they have made their report to the House.

Accordingly, the submission of the report by the Committee to the National Assembly brings an end to the Committee. It also brings a discharge to the responsibilities and obligations of each member of the Committee as per the terms of reference except where the National Assembly resolves that "the report should be recommitted and revived" (vide: Erskine May, supra, p 662). After the submission of the report to the National Assembly, the Committee and every member of the Committee, including the Chairman of the Committee, becomes functus officio with regard to the powers granted to the Committee upon institution.

Similarly the disciplinary powers of a Commission of Inquiry (instituted under an Act) cannot be exercised by the Chairman after the Commission had completed its report and submitted such report to the President in accordance with its terms of reference unless there is specific legislation to that effect. In *Baldry v DPP of Mauritius* [1982] 3 All ER 973, a Commission of Inquiry was instituted on 28 December 1978 to enquire into

allegations of fraud and corruption made against the appellant in his former capacity as Minister of Social Security. The Commission produced its report on 2 May 1979. Thereafter, on 18 May 1980 at a political rally, the appellant uttered contemptuous words to the address of the Commissioner. In delivering its judgment, the Privy Council observed that:

> Since the appellant's speech was delivered long after the Commissioner was functus officio, it need not be said that the disciplinary power (of the Commissioner) was not, and could not, have been used in the present case.

In addition, a Committee set up under Order 80 of the National Assembly Standing Orders 1994 (S.1 45 of 1994) possesses no authority or power except that which it derives from the National Assembly upon being instituted. The session of the National Assembly which instituted the Committee under which the certificate, issued by Mr Georges Bibi, is purported to emanate was dissolved by virtue of the Dissolution of the National Assembly 1998 (S.16 of 1998) on 19 February 1998 in accordance with section 110 of the Constitution. This dissolution brought an end to any proceedings pending in the Assembly as provided by Order 9(3) of the National Assembly Standing Orders 1994 whereby it is enacted that:

> At the dissolution of the Assembly all proceedings then pending shall terminate and lapse

The other relevant and important effect of the dissolution of the National Assembly is that under section 81(1)(a) of the Constitution –

> A person ceases to be a member of the Assembly ... on the dissolution of the Assembly.

Accordingly the Committee, having ceased to exist after it delivered its report to the National Assembly, and Mr Georges Bibi, having ceased to be a member of the National Assembly, he became functus officio and could not thereafter act in any manner or under any authority which he had obtained from the National Assembly by virtue of his membership or appointment as Chairman of a Committee unless he was authorised to do so by legislation.

The argument of counsel for the appellant is that such authorisation is provided for by the legislator under section 15 of the Act and authorises Mr Georges Bibi to issue and sign the certificate when the need for a certificate arises at any later stage. Any other interpretation, it has been submitted, would make the operation of section 15 otiose because the need for a certificate under section 15(2) only becomes relevant once proceedings are started against the appellant.

The relevant part of section 15 of the Peoples' Assembly (Parliamentary Immunities and Powers) Act read as follows:

> 15(1)
> Every witness before ...an authorised committee who shall fully and faithfully answer any question put to him by ...such committee to its satisfaction shall be entitled to receive a certificate stating that such witness was upon his examination so required to answer and did answer any such questions.
>
> 15(2)
> Every certificate under subsection (1) shall, ... in the case of a witness before the committee, be under the hand of the chairman thereof.
>
> 15(3)
> On production of such certificate to any court of

> law, such court shall stay any proceedings, civil or criminal,... against such witness for any act or thing done by him before the time and revealed by the evidence of such witness...

A Committee of the National Assembly may request, summon a person to attend before such Committee and to be examined upon oath to any facts, matters or things related to the subject of the inquiry. Such a person may refuse to answer any question put to him on the grounds that the same is of a private nature and does not affect the subject of the inquiry. In such cases the Chairman of the Committee has to report the refusal with reasons thereof to the Chairman of the Assembly who may thereupon either excuse or order the person to answer such question (vide: Section 13(2)). In addition, under section 14(1) every person summoned to give evidence before the Committee shall be entitled to the same right and privilege as before a court of law. However, the refusal to give evidence before a Committee of the National Assembly may constitute a contempt of the House.

It is certainly due to the fact that a witness before a Committee may be required to answer a question and may thereby lose his "right and privilege" that the power given under section 15 of the Act becomes most relevant. The power is for the Committee to grant to a witness, who upon his examination was required to answer fully and faithfully any question put to him and did answer such question to the satisfaction of the Committee, a certificate. The said certificate shall be under the hand of the Chairman of the Committee (under section 15(2)) and may be produced to stay any proceedings, civil or criminal (except for a charge under section 102 or 122 of the Penal Code) against such witness for any act or thing done by him before his answer and revealed by his evidence before the Committee (vide: section 15(3)).

Inherent in the grant of a certificate to a witness under section 15(1) of the Act is the exercise of the judgement of the members of the Committee to the following issues:-

(i) whether the witness was required by the Committee to answer fully and faithfully,

(ii) whether the witness did answer the required questions fully and faithfully;

(iii) whether the Committee was satisfied with the answers;

(iv) whether the witness is entitled to receive a certificate from the Committee.

The prerogative of examining the above issues and reaching a decision is that of the Committee and is not that of its Chairman. It is only after the members of the Committee have determined the above-mentioned issues arising under section 15(1) and resolved that the witness is entitled to a certificate to protect him against any act or thing done by him before the time and revealed by his evidence that such a certificate may be issued under the hand of the Chairman of the Committee under section 15(2) and produced in a Court of law under section 15(3) of the Act.

In *R v Holl & others* (1881) 7 QBD 575, the Court of Appeal examined a similar provision under section 7 of the Corrupt Practices Prevention Act (now repealed) which provided that where a witness had appeared before an Election Committee and was required to answer questions which incriminate or tend to incriminate him, he shall be entitled to a certificate, issued under the hands of the Commissioners, stating that he had so answered the questions and may use the certificate to stay proceedings against him pertaining to the answers revealed (except for perjury). In his examination of the power

given to the Election Committee to grant and issue the certificate Bramwell LJ, at p 580, observed:

> The certificate is to be a certificate stating that such a witness was required to answer questions relating to the matters aforesaid, the answers to which incriminated or tended to incriminate him, and had answered all such questions. That means, 'had truly', that is to say, 'honestly' answered all such questions. But for them (the Commissioners) to certify that the man had truly answered all such questions is to certify that in their opinion and iudgment, he had done so. It is not certifying to a mere matter of fact which requires no opinion or judgement upon it, as that the man was sworn, or that he gave his evidence in a black coat, or anything of that sort but it is the expression of a judgement or opinion that he had bona fide answered all those questions, the answers to which incriminated or tended to incriminate him. It cannot be otherwise.(the underlining is mine)

In the same manner the determination by the Committee that the appellant had answered "fully and faithfully to its satisfaction is not certifying to a mere matter of fact which requires no judgement or opinion upon it but has to represent the decision of the Committee after taking into account the judgement or opinion of the members. Accordingly, it cannot be denied that the determination by the Committee as to whether a witness is to receive a certificate can only be made by the Committee, and necessarily, before it ceases to exist.

Further, the enactment under section 15(3) entitles a witness to a measure of protection for any act or thing done by him before the time and revealed by the evidence of such witness. In a court of law, a witness (other than the defendant) is

privileged to answer any question which may tend to incriminate him, ie to expose him to any punishment, penalty or forfeiture. (Vide: *Archbold* (1992 Edition) para 12-2*).* The responsibility for invoking a right or privilege rests upon the shoulders of the person entitled to that right or privilege. By way of example, the entitlement of the privilege against self-incrimination resides in the witness, as observed in *Archbold*, supra, para 12-2*.*

> The proper person to take the objection is the witness and he is presumed to know the law sufficiently to enable him to take it (*R v Coote* (1873) LR 4 PC 599). However he will, in practice, usually be warned by the Ccurt that he need not answer if an answer may clearly tend to incriminate him. Otherwise, he must claim the privilege himself (*Thomas v Newton* (1827) 2 C&P 606)...

A Committee established under Order 80(1) of the National Assembly Standing Orders (1994) may of its own raise the issue and determine whether a witness is entitled to a certificate under section 15 of the Act. Where such is, however, not the case, it falls upon the witness to request the Committee to reach a determination as to whether he is entitled to a certificate. The relevant time for a witness to do so is when he gives evidence before the Commission or at latest before the Commission has tabled its report to the National Assembly and had, thereafter, ceased to exist". By making his request at the relevant time, the witness calls upon the Committee to ascertain from the "judgement and opinion" of its members whether he had "fully and faithfully" answered the required questions to its satisfaction and to resolve whether, pertaining to this witness, a certificate is to be issued. It is only after the Committee has so resolved that the witness is entitled to a certificate under section 15(1) which is issued under section 15(2) and may be relied upon to stay

proceedings under section 15(3) of the Act.

The likelihood and time at which proceedings, if any, civil or criminal, is or may be lodged against the witness for "any act or thing done by him before the time and revealed by the evidence of such witness" is not a relevant consideration to the determination by the Committee as to whether the said witness shall receive the certificate under section 15 of the Act and for such a certificate to be issued under the hand of the Chairman. Neither has provision been made for another person to sign the certificate at that later date in the absence of the Chairman, taking the unlikely example that he has been struck by lightning or has absconded. The important distinction is that proceedings, if any, shall only be stayed upon production of the certificate under the Act in cases where such proceedings are against the witness for any act or thing done by him before the time and revealed by his evidence before the Committee. Where the proceedings are for any act or thing done by the witness which is not revealed by his evidence before the Committee, a certificate issued under section 15 will not operate to stay proceedings, civil or criminal, under section 15(3) of the Act.

Under the Election Commissioners Act 1852 (UK) (now repealed) section 8 required all persons summoned to give evidence before the Commissioners appointed to inquire into such practices to attend before the Commissioners and answer all questions put to them and produce all books and documents bearing on the enquiry "provided always, that no statement made by any person in answer to any question put by such Commissioner shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceedings civil or criminal."It was held in *R v Letham* [1861] 30 LJ QB 205 (see English & Empire, Digest Vol 20, para 1571) that "a document already in existence before the time at which a witness was examined before the Commissioners and referred to by him in the course of that

examination, was admissible in evidence against him in subsequent proceedings, other than the specified indictment for perjury, if it was otherwise admissible and was proved by an independent witness aliunde".

The motion made for the stay of proceedings before the lower Court, quoted earlier, states that the appellant, having appeared as a witness before the Committee in the determination of matters the subject matter of the proceedings before that Court, shall produce a certificate under the hand of the Chairman that he was required to answer questions put to him by the Committee and answered them. The certificate produced was issued and signed by Mr Georges Bibi on 18 November 1998. It is not denied that the said Mr Bibi was the Chairman of the Committee that was duly instituted and empowered by the National Assembly to enquire and report back to the House. Generally, where acts which require the concurrence of official persons are relied upon, a presumption arises that the person acted, prima facie, within the limits of his authority until the contrary is shown: Omnia proesumtur rite et solenniter esse acta donee probetur in contrarium- uide: *Broom's Legal Maxim* (1011 edition) p 642. The mere fact that the certificate was issued and signed at a time when Mr Georges Bibi was no longer Chairman of the Committee, the said Committee having ceased to exist, prevents the operation of the presumption and reliance upon its content. In that respect the averment under paragraph 3 of the purported certificate which reads: "The Hon Wavel Ramkalawan fully and faithfully answered all questions put to him to the satisfaction of the Committee" is open to doubt in the absence of other evidence to support this determination. Such a determination, as it has been established earlier, can only be made by the Committee itself and, in all circumstances, before such Committee ceases to exist, unless the Committee is "revived" to so determine.

The relevant time for the Commission to determine the grant of a certificate under section 15 of the Act and, correspondingly, for the issue a certificate to the witness, under the hand of the Chairman, is before both the Committee and the Chairman of the Committee become " functus officio" unless there is specific provision in the legislation to enable the determination and issue of the certificate at a date later than when the Committee had ceased to exist.

There is no other evidence before the Court that the Committee instituted to enquire into the incident, which occurred on 11 November 1997, had resolved that the appellant was entitled to a certificate under section 15 of the Act. Had such been the case and in the absence of a valid certificate issued to him, the appellant would still be able to rely on the exercise of the discretion of the Honourable Speaker of the National Assembly to refuse leave under section 8(1) of the Act for the proceedings of the Committee to be produced in a court of law on the grounds of privilege of the House. Incidentally the record does not disclose that exhibit P1 had been produced in the lower Court with special leave of the National Assembly as required under section 8(1) of the Act. Additionally, the issue of privilege, if any, pertaining to an act done within the precincts of the National Assembly and the claim of 'autrefois convict' are matters which have to be addressed and determined before the trial Court. They do not form part of the present review.

For reasons given above, I find that the Senior Magistrate came to the right conclusion when he found that the certificate was not a valid certificate issued under section 15 of the Act.

Accordingly, I remit the case back before the Magistrates' Court.

**Record: Criminal Revision No 7 of 1998**