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Criminal Procedure - Bail

Both accused were charged with murder. A joint application was made for bail. The First Accused relied on the grounds that they had been on remand for over a year; the prosecution had not adduced reasons as to why they should be further remanded; the prohibition of the granting of bail in cases of treason or murder is limited to the jurisdiction of the Magistrates' Court. The Second Accused relied on these same grounds but also the fact that the wife of the second accused had given birth to a child and had then fled from home leaving the baby and a young child behind.

HELD:

(i) Once charged, delay alone is not a factor relevant to the grant of bail;

(ii) The Court should not hear arguments as to fact or law which have previously been heard unless there has been a change of circumstances that may affect the original decision;

(iii) The seriousness of the offence does not diminish over time;

(iv) Section 101(5)(a) of the Criminal Procedure Code merely limits the jurisdiction of the Magistrates' Court to consider applications for bail in cases of murder or treason. Therefore, the Supreme Court has jurisdiction to grant bail to an accused charged with murder;

(v) When an offence is punishable with a mandatory sentence of life imprisonment or death the Court is cautious to grant bail. However, section 101(5) of the Criminal Procedure Code requires that there must be substantial grounds for believing that a suspect will fail to appear for his trial before a bail application is denied. The fact that the offence of murder carries the heaviest penalty is itself a ground for believing the suspect will fail to appear; and

(vi) The Department of Social Services and similar institutions are able to assist the family of the second Defendant. Personal factors have no bearing in considering bail for the Second Defendant.

Judgment: Applications for bail dismissed.

Legislation cited
Constitution of Seychelles, Art 18
Criminal Procedure Code, s 101

Foreign cases noted
Ngui v Republic of Kenya (1986) LRC (Const) 308
R v Slough Justices, ex parte Duncan (1982) Cr App R 384

Ronny GOVINDEN for the Republic
Danny LUCAS for the First Accused
Frank ELIZABETH for the Second Accused

Ruling delivered on 12 November 2004 by:

PERERA J: A joint application for bail has been made by both Accused in this case. Mr. D. Lucas, Learned Counsel for the First Accused relied on the following grounds –

(1) That the Accused had been on remand for over one year.

(2) That the Prosecution has not adduced reasons why the Accused should be further remanded

(3) That the prohibition placed in Article 18(7) (a) of the Constitution to the granting of bail in cases of treason or murder is limited to the jurisdiction of the Magistrates' Court. This sub Article of the Constitution appears as Section 101(5) (a) of the Criminal Procedure Code, as amended by Act no. 15 of 1995.

Mr. F. Elizabeth, Learned Counsel for the Second Accused adopted the grounds urged by Mr. Lucas, but in addition relied on a subjective circumstance, namely that the wife of the Second Accused had given birth to a child and that being a Psychiatric patient, she had left the home leaving the baby and a 19 month old child, and that her whereabouts are unknown.

Considering the three grounds cumulatively, the accused are on remand since September 2003. Their trial commenced before a Judge and jury on 8 March 2004. But the trial was aborted as Counsel appearing for them withdrew from the case on account of some disagreement relating to instructions. Thereafter their applications for legal aid were unduly delayed by the Registry until on 3 September 2004 when the two Counsels appearing now were assigned by me. Be that as it may, the trial in the case has been fixed for 21 March 2005 as no other earlier dates are available in the Court calendar.

Once charged, mere delay would not be a relevant factor to grant bail. The original application for remand was made, inter alia on ground (b) of Section 101(5), namely the seriousness of the offence for which the Accused have been arrested or detained. In the present case, both Accused stand charged with the offence of murder, which is the most serious offence in the Penal Code. Once the Court has remanded an Accused on this ground, the Prosecution need not canass the same ground each time as further remand is considering by the Court. As was held in the case of *R. v Slough Justices, ex parte Duncan* (1982) Cr. App. R. 384, the Court should not hear arguments as to fact or law which it has previously heard unless there has been such a change of circumstances as might have affected the earlier decision. To do otherwise would be to Act in an appellate capacity. The seriousness of the offence of murder does not diminish with the effluxion of time. Section 101(5) (a) of the Criminal Procedure Code merely limits the jurisdiction of the Magistrates' Court to consider applications for bail in cases of treason or murder. Consequently, this Court has jurisdiction to grant bail to Accused charged with murder.

However, where an offence is punishable with a mandatory sentence of life imprisonment or a sentence of death, a Court would be cautious due to the great possibility that the Accused would abscond or "jump bail". In the case of *Ngui v Republic of Kenya* (1986) L.R.C. (Const) 308, the Accused was charged with Robbery with violence, an offence carrying the mandatory death penalty in Kenya. He sought bail. The High Court held that although they had the jurisdiction to consider the application for bail on merits, yet as a general rule bail should not be granted where the offence charged carries a mandatory death penalty as the temptation to abscond or "jump bail" is great, and that this was the practice also in England in cases of murder although the death penalty has been abolished.

Section 101(5) of the Criminal Procedure Code, however requires *"*substantial grounds for believing that the suspect will fail to appear for his trial……". A charge for the offence of murder, which carries a mandatory sentence of life imprisonment, is in itself a substantial ground for believing that the Accused would abscond.

As regards the personal grounds urged by the Second Accused, the Court has great sympathy if the assertions be true. However there are institutions like the department of Social Services that can assist the family if he makes representations directly or through his lawyer. These personal factors have no bearing when considering bail in this case.

Accordingly the joint applications for bail are devoid of merit, and hence are hereby dismissed.

Record: Criminal Side No 85 of 2003

The Captain, Officers and Crew of the Fishing Vessel v The Owners of the Fishing Vessel “Aristotel" & Or

AND

The Captain, Officers and Crew of the Fishing Vessel "Rodios" v The Owners of the Fishing Vessel “Rodios” & Or

AND

The Captain, Officers and Crew of The Fishing Vessel "Demosfen" v The Owners of the Fishing Vessel "Demosfen" & Or

Admiralty – in rem action – foreign currency

The officers and crew of 3 fishing vessels brought action against their ships for unpaid wages, repatriation costs and catch bonuses.

HELD:

(i) The jurisdiction of the Supreme Court may in all cases be invoked by an action in personam;

(ii) The jurisdiction may be invoked by an action in rem against the ship or property in question;

(iii) Claims for wages under section 1(1)(n) of Part 1 of the Admiralty Jurisdiction Rules should generally be brought as actions in personam;

(iv) "Wages" includes emoluments, and bonuses are emoluments; and

(v) Repatriation costs fall within section 1(1)(o) of the Admiralty Jurisdiction Rules.

Judgment for the Plaintiffs in US dollars.

Legislation cited
Admiralty Jurisdiction Rules 1976, ss 1, 3; Ord 75 rr 13, 17

Foreign legislation noted
Merchant Shipping Act 1905 (UK)

Foreign cases noted
The Elmville (No 2) [1904] P 422
Shelford v Mosey [1917] 1 KB 523
The Westport [1966] 1 Lloyd's Rep 342

Kieran SHAH for the Plaintiffs
Defendant absent/unrepresented
Karen DOMINGUE representing the Interveners

Judgment delivered on 29 November 2004 by:

PERERA J: Three actions in rem were instituted by the captains, officers and crew of fishing vessels "*Aristotel" "Radios*" and "*Demosfen*", against the owners of these vessels, claiming wages, repatriation costs and "*catching bonuses*". The total claims as per the statements of claims filed are as follows-

Vessel	Wages (in US Dollars)	Catching bonus (in US Dollars)	Repatriation costs (in US Dollars)
"Aristotel"	99,447	199,403	28,992
"Rodios"	102,930	184,788	30,804
"Demosfen"	107.893	188,532	25.368

These claims are pursued by F.C.F. Fishery Company Ltd of Taiwan, the charterers, upon a power of Attorney dated First July 1996 (P3) granted by fifty officers and crew of the three vessels. The three cases were consolidated for Convenience. The matter presently before Court is the entering of default judgment consequent to the Defendants defaulting filing an acknowledgement of service. Apart from that default, Moscow Narodny Bank sought intervention as mortgagees of the said vessels.

Leave to intervene was granted on 23 October 1996 with a condition that the intervenor bank files a defence pursuant to Or. 75 Rule 17(4) on the Plaintiffs within two weeks. The intervenor failed to do so, but on 4 November 1996 filed an application under Or 75 Rule 13(4) for release from arrest of the three vessels, which was done on 8 November 1996, upon a bank guarantee being furnished. Thereupon on 10 December 1996, the intervenor applied for a stay of proceedings in the three cases on the ground of *forum non conveniens*. This Court dismissed that application on 3July 1997. The appeal to the Seychelles Court of Appeal was also dismissed on 9 April 1998. That Court held in obiter that as neither the owners of the vessels nor the intervenor had filed defences, the Plaintiffs were entitled to apply for default judgment.

Subsequently, an application by the Intervenor to file a defence out of time was dismissed by this Court on 19

November 1998. An appeal against that order to the Seychelles Court of Appeal was not prosecuted by the Intervenor bank failing to furnish security for costs within the stipulated period. Consequently the Plaintiffs filed motions dated 9 December 1998 for judgment by default. In respect of the vessel "*Aristotle*" a sum of US dollars 384, 346 was claimed being outstanding wages and repatriation costs and interest thereon. Subsequently on 1 December 2000, the capital sum was amended to US dollars 393, 096.00. In respect of the vessel "*Demosfen”* a sum of US dollars 322,393 was claimed, and in respect of the vessel "*Radios”* a sum of US dollars 382,985 was claimed.

These claims were purportedly, made under Section 1 (l) (n) of Part 1 of the Admiralty Jurisdiction Rules (S.I 60 of 1976) (Cap 52), which is as follows-

> (n) Any claim by a master or member of the crew of a ship for wages and any claim by or in respect of a master, or member of the crew of a ship for any money or property which, under any of the provisions of the Merchant Shipping Acts 1894 to 1954, is recoverable as wages or in the Court and in the manner in which wages may be recovered.

By virtue of Section 3, the Jurisdiction of the Supreme Court may in all cases be invoked by an action in personam. However Subsection (2) provides that in cases mentioned in paragraphs (a) to (c) and (2) to Subsection 1 of Section 1, Jurisdiction may be invoked by an action jn rem against the ship or property in question. Hence claims for wages, under paragraph (n) should generally be brought as actions in personam. However, Subsection (6) is as follows-

> (6) Notwithstanding anything in the preceding provisions of this Section, the Admiralty Jurisdiction of the Supreme Court of Seychelles shall not be invoked by an action in rem in the case of any such claim as is mentioned in paragraph (n) of Sub Section 1 of Section one of this Act, unless the claim relates wholly or partly to wages (including any sum allotted out of wages or adjudged by a Superintendent to be due by way of wages).

The Merchant Shipping Act, 1905 (UK) defines "wages" as including "emoluments'. It was held in the case of *The Elmville (No. 2)* [1904] PD 422 and in *Shelford v Mosey* [1917] 1 KB 523 that a “bonus” was part of emoluments and was therefore included in "wages". Accordingly, in the present cases, the Plaintiffs could claim the ages and "catching bonuses' under paragraph (n) aforesaid. As regards "repatriation costs', paragraph (0) of Section 1 (1) provides for –

> (0) Any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship.

It was held in the case of *The Westport* [1966] 1 Lloyd's Reports 342 that "fees charged by Agents for their services may be considered as disbursements". As "repatriation costs” cannot fall under paragraph (n) as money "recoverable as wages”, they may fall under paragraph (0) as disbursements made on account of the ship. However such disbursements can ordinarily be claimed by the master, shipper, charterer or Agent who expended them. In the present case, admittedly a company known as Amanda International Ltd, the operators of the said three vessels entered into an "enlistment contract with the master and crew of those vessels on 28 April 1995.

In these contracts, "Chops" were placed by 14 persons for enlistment in the vessel "Demosfen" 19 persons for enlistment in the vessel "Aristotel" and 17 persons for enlistment in the vessel "Rodios". Standard clauses of those contracts were –

1. Contract limited for 12 consecutive months with the right of the company to extend or reduce the period according to the requirements of the vessels.

2. The basic wage payable in US dollars in three month increments', first day after the third month.
3. Two months bonus payment at the end of the period of enlistment, and a further two month pay if the company extends the period.

4. "Catch bonus" according to individual co-efficient of each employee based on 40 of direct gross operating income payable after termination of enlistment period.

Amanda International Ltd has certified that the three vessels were operating from 28 April 1995 to 28 May 1996 (exhibit P5, P6 & P7). Hsia Ajenc (Pw1), the navigation officer of the vessel "Demosfen" testified that his monthly salary was US dollar 3533 and that he received payment only up to 28 April 1996. Although the vessels were under arrest from 27 May 1996, the witness and the crew of all the vessels were repatriated from Seychelles on 3 July 1996. Hence he is entitled to wages only for 2 months. As the enlistment period ended on 12 April 1996 he would be entitled to two months bonus payment. Further as there was a de facto extension of the enlistment period thereafter, he would be entitled to a further bonus of two months payment. This would be the basis of payment for the rest of the crew in all three vessels, depending on their respective wages and the co-efficient they are entitled to from the catching bonus.

Evidence was also given by Miao Yen Tai (Pw2) the Fishing Master of the vessel “Aristotel”, Fuliang Sang (Pw3) the Manager of FCF Fishery Corporation in Bangkok and Wu Teh-Teh (Pw1), the former General Manager of Amada International in Taiwan.

These witnesses corroborated the evidence of Hsia A Jen regarding the arrears of wages, the bonuses, the "catching bonus', and the repatriation costs incurred. As regards the "catching bonus”, Armanda International Ltd" has certified that the 40 of US dollars 472,830 shared by the crew amounted to US dollars 189,132. According to the evidence in the case, the co-efficient for the Fishing Master is 12 while for a Navigation Officer it is 5. The Chief Mate gets 4, the Deck Officer 3, the Translator 2 and the rest of the Sailors only 1.

In the statement of claim, the amount claimed as repatriation costs per person is US dollars 1812. According to the evidence in the case, these costs were paid by the families of the crew through the F.C.F. Fishery Company in Taiwan, and Aquarius Shipping Agency Ltd in Seychelles.

The crew of the three vessels were on identical terms of contract. There is proof that 17 members of the vessel "Aristotel", 17 members of "Rodios' and 14 members of “Demosfen” left by the Air Seychelles Flight to Singapore on 3rd July 1996. (exhibit P8). The total cost of the air fares was SR. 175,000. The period of enlistment therefore ended on 3 July 1996.

On the basis of the oral and documentary evidence, the claims are settled as follows-

THE VESSEL "ARISTOTEL"

Post	Monthly Salary (in US dollar)	Salary due (in US dollar) (2 months 2 months bonus at end of enlistment period 2 months bonus for extension of contract)	Catching bonus (in US dollars)	Repatriation Costs (in US dollar)
1. Fishing Master	4511	27,066	5,217	1812
2. Navigation Officer	3533	21,198	27,174	1812
3. Chief Mate	3044	18,264	21,139	1812
4. Deck Officer	1631	9,786	16,304	1812
5. Translator	675	4,050	9,783	1812
6. 11 Sailors	438x11	28,908	59,785	19932
		109,272	**199,702**	**28992**

Total= US$ 337,966

THE VESSEL "ARISTOTEL"

	Monthly Salary (in US dollar)	Salary due (including bonuses)	Catching bonus	Repatriation Costs
1. Fishing Master	4511	28,116	65,217	1812
2. Chief Mate	3044	18,974	21,139	1812
3. Desk Officer	2283	14,430	16,304	1812
4. 2nd Mate	1631	10,166	10,870	1812
5. 12 Sailors	438x12	31,716	65,220	21744
6. Cook	438	2,730	5,435	1812
		106,132	**184,185**	**30,804**

Total= US$ 321,121

THE VESSEL "DEMOSFEN"

	Monthly Salary (in US dollar)	Salary due (including bonuses)	Catching bonus	Repatriation Costs
1. Fishing Master	4511	27,066	65,217	1812
2. Navigation Captain	3533	21,198	27,174	1812
3.				
4. Chief Mate	3044	18,264	21,139	1812
5. Deck Officer	2283	13,698	16,304	1812
6. Translator	675	4,050	9,783	1812
7. 9 Sailor	438	23,652	48,915	16,308
		107,928	**188,532**	**25,368**

Total= US$ 321,828

Judgment is accordingly entered in favour of the Plaintiffs as against the owners, charters and operators, as follows-

1. The captain and crew of fishing vessel “Aristotel” (case no. 263/96), a total sum of US dollars 337,966 together with interest and costs.

2. The captain and crew of fishing vessel (Rodios” (case no. 262/96) a total sum of US dollars 321,121 together with interest and costs.

3. The captain and crew of fishing vessel “Demosfen” (case no. 264/96), a total sum of US dollars 321,828 together with interest and costs.

Record: Civil Side No 263 of 1996
Record: Civil Side No 262 of 1996
Record: Civil Side No 264 of 1996

Auguste & Or v Forest Builders (Pty) Ltd

Civil Code - contract – motion to restrain movement of director of company – order to pay money as security – Constitution

The Plaintiffs filed a claim against the Defendants for breach of contract. Following the filing of the claim the Plaintiffs sought an order that the director of the Defendant remain within the jurisdiction, or the Defendant deposit a sum with the Court as security for damages pleaded in the main action and as security for costs.

HELD:

(i) A company cannot leave the jurisdiction;

(ii) A director cannot be separately liable for the faults of the company as the company has its own legal personality and can itself be at fault;

(iii) In view of Article 25(1) of the Constitution, restraining the movement of a citizen can only be ordered for specific reasons;

(iv) A person's movement can be restricted if that movement (in this case, departure from Seychelles) will affect the rights of another person. The mere fact that averments are made against a person in a claim is not a sufficient reason to establish that their movement will affect another; and

(v) The law makes provision for the security of costs in Article 16 of the Civil Code and section 219 of the Code of Civil Procedure.

Neither piece of legislation can be applied to this case.

Judgment for the Defendant.

Legislation cited

Constitution of Seychelles, Art 25
Civil Code of Seychelles, art 16
Seychelles Code of Civil Procedure, s 219

Antony DERJACQUES for the Petitioners

Ruling delivered on 7 July, 2004 by:

RENAUD J: The Plaintiffs have filed a claim against the Defendant in the sum of R378,791.00 being for breach of contract. The Defendant is a proprietary company registered in Seychelles and is represented by its director Mr. Marc Agrippine.

Following the filing of the Plaint, the Plaintiffs have filed a Notice of Motion supported by affidavit, moving the Court to:

(a) Order the Director of the Defendant company namely Mr. Marc Agrippine of Le Niole, to remain within the jurisdiction until the final disposal of the main action;
OR

(b) Order the Defendant company to deposit with the Registry of the Supreme Court the sum of R378,791.00 as security for the damages pleaded in the main action,

AND

(c) Order the Defendant company to deposit with the Registry of the Supreme Court sum of RI0,000.00 as security for costs of the main action.

The Defendant is a proprietary company registered in Seychelles hence operating within the jurisdiction of this Court. It is unconceivable that a proprietary company can leave the jurisdiction. The Director is distinct from the Company. The Company is a distinct legal person on its own, and the Director is only liable to the extent of his shareholding in the Company and thus cannot be held liable in his personal capacity for the alleged fault of the Company. Furthermore, in view of Article 25(1) of our Constitution, restraining the movement of a citizen can only be ordered for specific reasons as laid down in Article 25(3) (a) to (e) of the Constitution. Article 25(3) (b) makes provision for the movement of a citizen to be restricted in the following terms*:* "for protecting the rights and freedoms of other persons". It is my view that the Court can restrict the movement of a citizen if the departure from Seychelles of that citizen will affect the rights of another person, but in my view, that right must have been established in no uncertain term. The mere fact that averments are made in a Plaint is not sufficient to establish that fact.

Restraining the movement of the Director of the Defendant in the circumstances is not appropriate. I therefore decline to grant order prayed for.

The law makes provision that security for costs or for that matter, security for damages may be granted by the Court in certain circumstances. Article 16 of the Civil Code of Seychelles states as follows:

> When one of the parties to a civil action is a non-resident, the Court may, at the request of the other party, and for good reason, make an order

> requiring such a non-resident to give security for costs and for any damages which may be awarded against him.

Section 219 of the Seychelles Code of Civil Procedure states as follows:

> The Court may, on the application of the Defendant, require the Plaintiff to give security for costs in all cases in which under the Civil Code such security may be required and also when the Plaintiff is known to be insolvent.

In the present circumstances the application cannot be sustained under the provision of Article 16 of the Civil Code because there is no allegation that the Director of the Defendant is a non-resident.

The provision of Section 219 of the Civil Procedure Code is not applicable in support of the present application. This provision of the law applies when the Applicant is the Defendant. The present Applicants are the Plaintiffs.

I therefore also decline to grant the Plaintiffs prayers (b) and (c) of their Motion.

Record: Civil Side No 99 of 2004

Ernesta & Ors v Appasamy & Or

Mental shock – damages

The first Plaintiff was handed a package of hashish to take to La Digue. The Defendant, then a police officer, told the Plaintiff that it was nappies. The package was opened by the three Plaintiffs. When they saw what it really contained, they suffered nervous shock.

HELD:

(i) There is a limit on the extent of admissible claims as "shock" which by nature are capable of affecting a wide range of people. The inherent elements of such a claim are-

(a) the class of persons whose claims should be recognised

(b) the proximity of such person to the accidence

(c) the means by which the shock was cause.

(ii) Cousins are not a close enough family tie for the purpose of suffering "nervous shock"; and

(iii) The test of liability for shock is the forseeability of injury by shock.

Judgment for the First Plaintiff against the First Defendant. Damages awarded R1,000 plus costs. Costs awarded for Second Defendant R1,000.

Legislation cited
Civil Code, arts 1382, 1384

Foreign cases noted
King v Philips [1953] 1 All ER 617
McLoughlin v O'Brian [1982] 2 All ER 298

Frank ELIZABETH for the Plaintiffs
Anthony JULIETTE for the Defendants

Judgment delivered on 16 June 2004 by:

PERERA J: This is a delictual case in which the Plaintiffs claim damages for shock distress, anxiety, trauma and headache allegedly caused by an Act of the First Defendant. It is averred that on 7th January 1999, the First Defendant, who was a Police Officer at that time, gave the first package said to contain babies' nappies to be given to one Yacinthe Bouchereau of La Digue.

It is further averred that later in the day, at the residence of the Third Plaintiff, the First Plaintiff opened the package on the advice of the Second Plaintiff. The Third Plaintiff an Ex-Police Officer, suspecting the material in the package to be hashish telephoned SP Ronnie Mousbe. It is also averred that the First and Second Plaintiffs suffered shock and distress and was treated at the Victoria Hospital. Although it is not averred that the Third Plaintiff was medically treated, he too claims damages for shock, and has produced a medical certificate.

The Plaintiff avers that at the time he received the package, he was unaware of its contents, whereas the First Defendant knew or ought to have known that the package contained an illegal substance and that if he was arrested and convicted, he would be liable to a minimum term of 8 years imprisonment.

The Plaintiffs further aver that the Police investigated the complaint, and consequently the First Defendant was dismissed from the Police Force.

The First Defendant had raised a plea in limine litis that the plaint does not disclose any cause of action for the Second and Third Plaintiffs as against him. He further denied that he gave any illegal substance to the First Plaintiff, nor had any dealings with him or the Second Plaintiff.

The Second Defendant, who is sued in a vicarious capacity admits that as at 7 January 1998, the First Defendant was a Police Officer attached to the drug squad. He admits the averments in paragraph 2, 3, 4, 5 and 7 of the plaint. The admission of these averments involve the admission that the First Defendant handed over a package of hashish to the First Plaintiff, that it was opened in the house of the Second Plaintiff as averred, that S.P Mousbe was informed about the discovery, and that the First Defendant was dismissed from the Police Force consequent to an inquiry into the complaint. The Second Defendant however avers that at the material time, the First Defendant was not acting within the scope of his employment, and that the alleged Act was a "deliberate Act on his part contrary to the express instructions given by him, and that that Act was not incidental to the First Defendant's service or employment as a Police Officer." In these circumstances the Second Defendant denies vicarious liability under Article 1384(3) of the Civil Code.

By a ruling dated 29 September 2000, the plea in limine litis was dismissed.

At the hearing, the First Plaintiff testified that the First Defendant requested him to carry a package to one Yacinthe Bouchereau, whom he himself knew in La Digue. He told him that the package contained babies’ nappies. He took the package to the house of the Third Plaintiff. The Second

Plaintiff was also present there. Later he and the Second Plaintiff had to go to the Airport to get a flight to Praslin, and as his bag was full, he gave the package to the Second Plaintiff. He asked him what it contained, and the First Plaintiff told him that he did not know. Then the Second Plaintiff opened it and found something wrapped in foil and newspaper. The Third Plaintiff also saw the package still wrapped in a red wrapping, and stated it was “chalas”. He then informed SP Mousbe, who took possession of the package and recorded their statements. Thereafter he went to the Mont Fleuri hospital as he was in a state of shock.

Andrew Ernesta, the Second Plaintiff stated that he saw the First Defendant handing over a package to the First Plaintiff that day. Before both of them went to the Airport, the First Plaintiff gave him that package to carry. When he asked him what it contained, he said babies’ nappies. Then he said Yacinthe does not have babies, and so decided to open the package. Then he saw "chalas" wrapped in newspaper and brown paper. The Third Plaintiff identified the substance as hashish. The Second Plaintiff also stated that he went to the hospital for treatment as he was in a state of shock. He contradicted the First Plaintiff and stated that he went to the Police Station after attending the hospital in the morning. He explained that the shock was due to the realization that if he was arrested for being in possession of drugs, his life would have been ruined.

The Third Plaintiff corroborated the evidence of the First and Second Plaintiffs. He stated that with his experience as a Police Officer for 7 years and a half years, he suspected that material in the package to be hashish. He went to the Drug Squad Office at the New Port to complain to S.P Mousbe, but instead he overheard the First Defendant speaking to someone on the telephone saying "I have already given it to them. They are coming at such a time on the boat”. He then went to the house of S.P Mousbe and reported the matter.

The package was taken away by him.

The Third Plaintiff’ s case is also that the First Defendant by handing over an unlawful substance to the First Plaintiff, and by the subsequent handing by himself and the Second Plaintiff, exposed all of them to be arrested and prosecuted, and if convicted, could have been liable to be sentenced to imprisonment.

Dr. Philip Gobine, the principal Bio-chemist called by the Plaintiffs testified that he had analysed several exhibits of hashish referred to him by the Police, but could not state whether the package involved in the present case was analysed, unless the C.B. number was given. He explained that the term hashish was used to describe the substance extracted from fruiting and flowering tops of the cannabis plant.

Superintendent Antoine Belmont testified that the First Defendant was dismissed from the Police service as he had stolen a piece of cannabis resin from the Drug Squad Office. He further stated that the enquiry commenced consequent to the Plaintiffs making a complaint regarding the handing over of a package of cannabis resin by the First Defendant. He however stated that the contents of that package were not analysed, but the Police Commissioner decided to dismiss him without prosecuting. He stated that from his experience the substance was cannabis resin.

Superintendent Ronnie Mousbe, corroborated the evidence of the Third Plaintiff that he brought a package to his residence early in the morning of 7 January 1998, and informed him that the First Defendant had given it to somebody and wanted him to examine the contents. He saw a dark substance, which he suspected to be cannabis resin. He took it to the Drug Squad Office and made a report to the Commissioner of Police. He stated that the size of the substance in the package was

about 8 centimeters long and 4 centimeters broad, and that there were other smaller pieces of the same exhibit in the exhibits cupboard from where it had been stolen.

Dr. Hassian Alt, produced a medical report stated 29th October 2001 (PI) issued to the Third Plaintiff. He stated that the patient "complained of a headache after noticing that a parcel handed over to his cousin to be delivered at La Digue contained drugs which he thought was hashish". On clinical examination, the patient had no abnormalities. He was given paracetamol and advised to report back to the clinic if his headache persisted. On being cross-examined, the doctor stated that a complaint of headache could not be medically diagnosed.

Neither the First Defendant nor the Second Defendant called any evidence.

On a consideration of the evidence in the case it has been established that the First Defendant had removed a piece of cannabis resin from the exhibit store of the Drug Squad Office, and that consequently he was dismissed from the Police Force. Accordingly, the Second Defendant cannot be held vicariously liable for any Act done by the Police Officer outside the scope of his duties. There is no evidence to show that the First Plaintiff to whom the package was handed over by the First Defendant, was an accomplice.

There is also no evidence that the First Defendant was aware that the package would be handled and opened by the Second and Third Plaintiffs. Article 1382(4) of the Civil Code provides that-

> A person shall only be responsible for fault to the extent that he is capable of discernment; provided that he did not knowingly deprive himself of his power of discernment.

According to the evidence, the First Plaintiff undertook to handle the package on the basis of the First Defendant's statement that it contained babies' nappies. It was opened only at the instance of the Second Plaintiff. The Third Plaintiff who is an Ex-Police Officer confirmed their suspicions that the substance in the package was hashish.

In psychiatric injury cases, English Law recognizes two categories; the primary victim, who is directly involved in the accident and is well within the range of foreseeable physical injury and the secondary victim who is not directly involved but who suffers from what he sees or hears.

French Law of delict is based on fault, and requires that there should be a causal connection between the act for which the Defendant was responsible and the damage. Further, it is inadequate to prove that the Defendant committed the fault; it must appear in addition that the accident was caused by that fault. The concept of moral damages in French Law includes mental suffering occasioned by death or injury to a member of the immediate family, or pain and suffering inflicted to oneself by another. In this respect the English Law concept is not very much different.

In the case of *McLoughlin v. O'Brian* (1982) 2. A.E.R. 298 the House of Lords held that there should be a limitation on the extent of admissible claims as "shock" in its nature was capable of affecting a wide range of people. The House held that there were three elements inherent in such a claim-

(1) The class of persons whose claims should be recognised.
(2) The proximity of such persons to the accident.
(3) The means by which the shock was caused.

As regards the class of persons, it was held that the possible range was between the closest of family ties, like of parent and child or husband and wife, and the ordinary by-stander. The board recognized claims from the first category, but as regards by-standers stated that claims should be denied either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure calamities of modern life or that the Defendants cannot be expected to compensate the world at large.

In the present case, the three Plaintiffs claim to be cousins. That is not a close family tie for purposes of suffering a nervous shock.

As regards the package, there is the admission of the Second Defendant that it contained hashish and the evidence of S.P Mousbe and S.P Belmont that the First Defendant was dismissed from the Police Force consequent to the incident. A person entrusted with a parcel which is said to contain babies' nappies, but turns out to be prohibited drugs could be said to have been in possession of drugs, but such inference could be rebutted by evidence that although he was in possession, he was completely mistaken as to its contents and could not have accepted possession had he known what the package in fact contained. In the present case, on a balance of probabilities, the First Plaintiff was not aware that the parcel contained cannabis resin. Hence the First Defendant had put him in a state potential danger of being involved in a serious criminal offence. As Lord Denning stated in the case of *King v. Philips* [1953] 1.A.E.R. 617 at 623 "the test of liability for shock is foreseeability of injury by shock". Hence the claim of the First Plaintiff for shock and distress is justified. As regards the Second and the Third Plaintiffs however, the First Defendant cannot be held liable as he could not have foreseen that that parcel would have been handled by several persons. As was held in the case of

McLoughlin (supra), the Defendant cannot be expected to compensate the world at large. Hence the claims of the Second and Third Plaintiffs cannot succeed, and are hereby dismissed.

Damages

There is no evidence that the First Plaintiff suffered any psychiatric injury. It is averred that he suffered shock and distress and was treated at the Victoria hospital. There is no medical evidence of any treatment given nor indeed of his attending the hospital. However he stated in evidence that he went to the hospital after the package was handed over to S.P. Mousbe and making a Police statement. The First Plaintiff was acting innocently, and took immediate steps to hand over the illegal substance to the proper authorities. In the interim period he would have suffered shock and distress, although there is no medical evidence to support that. However due to the trivial nature of the harm suffered, only nominal damages are payable.

Accordingly, judgment is entered in favour of the First Plaintiff against only the first Defendant in a sum of R1,000, and costs fixed at R500. As the claim was highly exaggerated, only a sum of R250 will become payable in respect of disbursements.

The case against the Second Defendant is dismissed with costs payable by the First, Second and Third Plaintiffs jointly and severally in a sum of R1,000.

Record: Civil Side No 125 of 1998

Barbe v Belize

Civil Procedure - writ habere facias possessionem – de facto partner

The Applicant sought to evict his former de facto partner from a house owned by him where the couple had lived together. The Applicant averred that since the relationship break-down, she had become a statutory tenant.

HELD:

(i) The general principles governing a writ of habere facias possessionem are –

(a) the Court in granting relief acts as a Court of Equity and exercises its equitable powers under section 6 of the Courts Act;

(b) those who come to Equity should come with clean hands. There should not be any other legal remedy available to the Applicant;

(c) this remedy is available to the Applicant whose need is of an urgent nature and any delay in the remedy would cause irreparable loss and hardship to the Applicant;

(d) the Court should be satisfied that the Respondent on the other hand has no serious defence to make;

(e) if the remedy sought is to eject a Respondent occupying a property merely on the benevolence of the Applicant then that Respondent should not have any right or title over the property; and

(ii) The Respondent had been permitted by the Applicant to live in the house during the de facto relationship. That permission amounted to a licence. Once the Applicant expressly revoked that licence, the Respondent's occupation became unlawful.

Judgment for the Applicant.

Legislation cited
Control of Rent and Tenancy Agreement Act
Courts Act, s 6

Cases referred to
Mary Dubignon v Antonio Morin CS 9/1999 (Unreported)

France BONTE for the Applicant
Dora ZATTE for the Respondent

Ruling on the application for a writ habere facias possessionem delivered on 29 March 2004 by:

KARUNAKARAN J: This is an application for a writ habere facias possessionem. The Applicant in this matter claims to be the owner of a dwelling house situated on parcel of land S979 at Anse Aux Pins, Mahe. He alleges that the Respondent is now occupying that property illegally without any colour of right. The Applicant therefore, seeks this Court for a writ

ordering the Respondents to quit, leave and vacate the said property.

The Applicant and the Respondent were living together as man and wife in the said house for the past 12 years. According to the Applicant, he is the sole owner of the property in question for having purchased the same out of a housing loan in the sum of R150,000 he took from the Seychelles Housing Development Corporation. He also took a further loan of R50,000 for the repairs of the house. He is still repaying the said loans. The relationship between the Applicant and the Respondent came to an end in June 2002. Following an argument between the Applicant and the Respondent, the Applicant was admitted to the Victoria Hospital for a couple of weeks. According to the Applicant, when he came back all the door locks had been replaced and he now find it difficult to continue living in the house with the Respondent. Further, the Applicant has averred in his affidavit that he has expressly withdrawn the licence given to the Respondent. He asked her to vacate the property but she refused in spite of all licenses having been withdrawn. According to the Applicant, the Respondent is therefore, presently occupying his property illegally without his consent and permission. For these reasons, the Applicant prays this Court to issue the writ ordering the Respondent to leave and quit his house first above mentioned.

On the other hand, the Respondent contends that she was a tenant of the said house by virtue of the fact that she paid the electricity, water and telephone bills. She bought food and other household items. She made an extension to the veranda in exchange for the right to occupy the house. Following the termination of tenancy by the Applicant, the Respondent contends that she has now become a statutory tenant and is entitled to all the protection under the Control of Rent and Tenancy Agreement Act. Therefore, the learned counsel for the Respondent submitted that this Court has no jurisdiction to

make an eviction order against the Respondent in this matter. For these reasons, the Respondents seek dismissal of this application.

The general principles governing the writs of habere facias possessionem are well settled by case laws. As I have observed in *Mary Dubignon v Antonio Morin* Civil Side No 9 of 1999, following are the cardinal principles normally considered and applied by the Court in cases of this nature: -

1. The Court in granting the relief herein acts as a Court of Equity and exercises its equitable powers in terms of section 6 of the Courts Act- Cap 52.

2. Those who come for equity should come with clean hands. There should not be any other legal remedy available to the Applicant who seeks this equitable remedy.

3. This remedy is available to the Applicant whose need is of an urgent nature and any delay in the remedy would cause irreparable loss and hardship to him.

4. The Court should be satisfied that Respondent on the other hand has no serious defence to make.

5. If the remedy sought is to eject a Respondent occupying the property merely on the benevolence of the Applicant then that Respondent should not have any right or title over the property.

Applying these principles, I carefully analyse the evidence adduced by the parties in this matter.

As regards the issue of tenancy raised by the Respondent, it is evident on the face of the affidavits filed by the parties that the Respondent had been permitted by the Applicant to

cohabit with him in his house as his common law wife. Undoubtedly, such permission in law only amounts to a licence. Now, the licensor namely, the Applicant has expressly revoked the licence. Therefore, the Respondent's continued occupation of the house is illegal and so I find. The payments made by the Respondent for the consumption of water, electricity etc. can no way convert a licence into a tenancy. Moreover, I find there is no evidence on record to show that the Respondent entered the property as a tenant at any point of time after the petitioner had allowed her to stay in his house as his concubine. Furthermore, I find no accuracy or correctness in the averments made by the Respondent in her affidavit in respect of her claim as to lease and statutory tenancy. In the circumstances, I find that the Respondent is presently in illegal occupation of the property without any colour of right.

As regards the Applicant's claim of ownership, I find there is sufficient evidence on record to my satisfaction in support of his claim in this respect. Consequently, I hold the Respondent does not have a serious defence to make in this matter. In my judgment, the claim made by the Respondent in her counter-affidavit is not tenable in law and on facts. On the face of the averments contained in the affidavits, simple justice demands that this petition should be granted. Indeed, no one should be deprived of his right to have exclusive possession and enjoyment of his property.

In my final analysis therefore, I find the Respondent does not have a serious defence to make to this petition. In the circumstances, I allow the petition, grant the writ and order the Respondent to leave, quit and vacate the house in question on or before 30 June 2004. Having regard to all the circumstances of this case, I make no orders for costs.

Record: Civil Side No 61 of 2003

Belmont v Quatre

Defamation of police officer

The Plaintiff, a police officer, claimed damages for defamation by the Defendant who publicly stated that she was a person of low morals.

HELD:

(i) An oral defamatory statement is actionable without proof of special damage when the implication of the statement is that the female target is unchaste or an adulterer; and

(ii) "Without proof of special damage" means, that the Plaintiff need not prove that she has suffered any resulting damages, as any damage is presumed because of the nature of the defamation.

Judgment for the Plaintiff. Damages awarded R25,000 with costs.

Frank ALLY for the Plaintiff
John RENAUD for the Defendant

Judgment delivered on 6 February, 2004 by:

PERERA J: This is an action for defamation. The Plaintiff is a Police Officer occupying Police Force Quarters at Mont Fleuri, while the Defendant is a Nursing Assistant residing at Barbarons.

The Plaintiff's case is that on 1November 2001 at 6 a.m. in the morning, the Defendant came to her Quarters with another person, and told her "in Creole":

> Mon ganny lenformasyon ki ou avek mon mari Pierre MARCEL. E Pierre in al travay depi yer bomaten 7er e i pa ankcor retournen. Wa pe kasyet li anndan kot ou, mon pe al rod lasistans en gard pou vin tir mon mari anndan kot ou.

Which, when translated into English, is -

> I have received information that you are having an affair with my husband Pierre Marcel. Since 7 a.m. yesterday morning Pierre has gone to work and he has not yet returned. You are hiding him inside your house. I am going to seek assistance from the Police to remove my husband from inside your house.

It is averred that those statements in their natural and ordinary meaning or by innuendo, mean and are understood to mean, that the Plaintiff is a person of low morals and was sleeping with her colleagues, and keeping her husband overnight. The Plaintiff therefore avers that the publication of these statements has injured her reputation both in her personal capacity and as a Police woman in the force. She claims R50,000 as damages.

The Defendant denies uttering these statements, and avers that on that day whilst she was inquiring about the whereabouts of Pierre Marcel, her concubine, she sought the assistance of the Plaintiff who was working on the same shift as Pierre Marcel at the Mont Fleuri Police Station. She admits speaking to her but denies that the words used were defamatory.

The Plaintiff testified that she occupied a flat in a block which had six flats. Her brother and his concubine also lived in that flat. When the Defendant uttered those allegations everyone

in those flats and others passing by were listening and watching. She called Police Inspector Neige Raoul who was also there at that time. The Defendant repeated the allegations in her presence.

The Defendant in justification of her suspicions stated that one day she caught her husband in the company of one Lucy Jean at the Port Launay beach. The Plaintiff stated that Pierre Marcel worked as a driver and he drove her and several others at the station on official duties.

The Plaintiff further stated that she telephoned the Police on behalf of the Defendant, as another lady who came with the Defendant was guarding the back door and she was in front, and that if she went to the Police Station, she could have stated that Pierre was in the house and had left in the meantime. When Sgt. Belle arrived she told him that the Defendant wanted his assistance. Then the Defendant repeated the allegation to him.

Detective Inspector Neige Raoul testified that she occupied a flat dose to that of the Plaintiff. On that day around 6 a.m. she was going to the dustbin to throw rubbish, and she saw the Plaintiff standing in front of her house, while the Defendant and another lady were standing outside the gate. Then the Plaintiff signaled her to come. The Defendant repeated the allegation. Then she saw Sgt Belle come. She informed the Defendant that she could be sued for making such an allegation, and advised her to make further Investigations as regards of her whereabouts of her husband. At that time three neighbours were watching the incident. The Defendant did not tell her that she had come merely to obtain information about Pierre and not to make any allegation. She appeared to be aggressive. When Sgt. Belle arrived the Plaintiff told him that the Defendant was accusing her of harbouring her husband, and the Defendant did not deny that.

Idens Belmont, the brother of the Plaintiff stated that on that day, the Plaintiff went downstairs to meet the Defendant, he heard them talking and the Defendant stating that she had information that the Plaintiff was having an affair with her husband. The neighbours were also watching, and Inspector Raoul also came there. This witness corroborated the evidence of the Plaintiff and Inspector Raoul on material particulars.

Sgt. David Belle testified that he was invited by the Plaintiff to enter her house and search tor Pierre Marcel as an allegation had been made by the Defendant that she was harbouring him. He searched the entire house, but he was not there.

The Defendant testified that her husband Pierre Marcel left for work on 31st October 2001 but never returned. The following morning he went to meet Daniel Dugasse, another Police Officer who lived in the Police Quarters to obtain information regarding the absence of Pierre. He told her that he saw him on Friday around 8 a.m. but he did not come back to his house for lunch. He advised her to go to the Plaintiff's house, as she worked with him, and would be in a better position to tell her about his whereabouts. When he went there, a boy peeped through the window and she asked to see the Plaintiff. When the Plaintiff came down, she greeted her, but she did not reply. Asked about Pierre, she said that although she worked with him he was not in charge of him. The Defendant further testified that from the tone of the Plaintiff, she suspected that she had something between her and Pierre and she told her so. Then the Plaintiff invited her into the house to search. When she stated that she did not want to do that without the assistance of Police Officer, she volunteered and phoned the Police Station. Sgt. Belle entered the house at the request of the Plaintiff, but he could not find Pierre there. She denied uttering the words complained of in the plaint. She maintained that she came with another lady that day to get information from Dugasse and it was on his

suggestion that she went to the Plaintiff's house. On being cross-examined as to why she could not have telephoned Dugasse without coming all the way from Barbarons to Mont Fleuri early in the morning, she stated that she did not have a telephone, and that a call box was far away.

Lance Corp Daniel Dugasse testified that the Defendant came to his house that morning in search of Pierre. He advised her to ask the Plaintiff who works with him. Pierre had never stayed overnight at his house, but he came there often for lunch. After the incident, Pierre told him that when his wife was looking for him he was spending the night with a friend who was a taxi driver. Although the Defendant denied making the statements set out in paragraph 2 of the plaint, the accuracy of the English translation was not challenged. Accordingly the Court accepts that as a correct translation of the statements averred to have been uttered in Creole. The statements in their natural and ordinary meaning impute immoral conduct on the part of the Plaintiff, and hence they are per se defamatory.

The only consideration therefore would be whether the Defendant in fact made those statements as averred. If as the Defendant stated she was only worried about her husband's absence that night, she could well have telephoned the Police Station where he was attached, and not come with another lady so early in the morning, unless she intended to surprise him and accost him in the company of the Plaintiff. I find that her visit to Daniel Dugasse was to ascertain the flat of the Plaintiff. The evidence of Inspector Raoul regarding the allegation, puts it beyond doubt that the Defendant formed the suspicion long before speaking to the Plaintiff. It was therefore a planned visit based on a suspicion that the Plaintiff was having an affair with Pierre. The Plaintiff acted diligently and called the Police Officer herself to prevent the Defendant from claiming that Pierre was with her and had left while she went to the Police Station. On a consideration of the

evidence, the Court accepts that the Defendant uttered the statements set out in paragraph 2 of the plaint and that thereby defamed the Plaintiff in the presence of her neighbours and passersby. There was therefore publication. Accordingly, the Defendant is liable in damages.

An oral defamatory statement is actionable per se. that is without proof of special damage, when such statement inter alia imputes unchastity or adultery to a woman. "Without proof of special damage" means, that the Plaintiff need not prove that she has suffered any resulting damage, as such damage is presumed.

The Plaintiff is a Police Officer by profession. She is therefore entitled to a degree of respectability in society. She has claimed R50,000 as damages. Damages awarded being compensatory and not punitive, I award the Plaintiff sum of R25,000.

Judgment is accordingly entered in favour of the Plaintiff in a sum of R25,000 together with interest and costs.

Record: Civil Side No 336 of 2001

International Investments Trading v Piazzolla & Ors

Civil procedure – Failure to appear on personal answer

The intervenor failed to appear to be examined on her personal answers. The Plaintiff sought to have its own evidence held to have been admitted and judgment entered in its favour given the First Defendant's admission in its defence.

HELD:

(i) There is no express provision in the Code of Civil Procedure on the consequence of the non-attendance of an individual on personal answers. However the issue is similarly regulated by existing case law on Section 161 which partly reproduces Article 324 of the French Code. Article 324 further adds that personal answers should not delay the judgment; and

(ii) Where an individual fails to appear or defaults appearance for examination on their personal answers, the trial Court has to examine the failure or default taking into account the facts of the case and the evidence adduced. The Court, if it is so satisfied, may treat the failure of default as complete proof of the claim held against the absentee or defaulter.

Ruling: Matter to proceed to hearing.

Legislation cited
Seychelles Code of Civil Procedure, ss 126, 131, 161, 162

Foreign legislation noted

Code of Civil Procedure (Fr), art 324
Cases referred to
Chez Deenu (Pty) Ltd v Philibert Loizeau Civil App 17/1987
Ex parte Kassamally Esmael (1941) MR 17

France BONTE for the Plaintiff
Pesi PARDIWALLA for the First Defendant
Philippe BOULLE for the Intervener

The Appeal was dismissed on 25 November 2005 in CA 8 of 2004.

Ruling delivered on 16 January 2003 by

JUDDOO J: The intervenor has failed to put up an appearance before this Court to be examined on her personal answers. Learned Counsel, on behalf of the Plaintiff, has moved that the "facts, materials and things alleged" by the Plaintiff be held to have been admitted. Accordingly, it is moved that Judgment be entered in favour of the Plaintiff on the basis of the pleadings given the admission by the First Defendant of the Plaintiffs claim in its defence filed on record.

Under Section 162(1) of the Seychelles Code of Civil Procedure (Cap 213) - "Any party to a cause or matter may examine the adverse party on his personal answers as to anything relevant to the matter at issue between the parties." Two issues which arise in the instant determination are, firstly, whether Article 162(1) of the Code of Civil Procedure applies to an intervenor-party and, secondly, the consequences of non-appearance of the intervenor to be examined on her personal answers. In *Chez Deenu (Pty) Ltd v Philibert Loizeau* Civil Appeal No. 17 of 1987 (Jt 22/07/88), the Seychelles Court of Appeal observed:

> The right of a party to examine his opponent on personal answers should not be taken away from

> the party except on strong grounds ... The purpose of calling a Defendant on his personal answers is to obtain admissions from him or evidence which would destroy his case or strengthen that of the party calling him."

In *Ex Parte Kassamally Esmael* (1941) MR 17, it is further observed:

> The party examined is not required to testify on oath or affirmation; he is treated as an adverse witness for the purpose of obtaining from him admissions or statements derogatory to his own cause or to substantiate his opponent's cause; he is a party in the cause who has already submitted to the jurisdiction of the Court either as Plaintiff or Defendant, otherwise he could not be required to submit himself for examination on personal answers.

It has been rightly stated that Section 162(1) is silent as far as the consequences following the failure or refusal of a party to put up an appearance for being examined on personal answers. By contrast, under Section 161(2), applicable to a public establishment, corporation or legal entity, it is expressly provided that failure by the appointed representative to appear and submit to examination on personal answers without "satisfactory reasons given, the facts, matters and things alleged by the adverse party may be held to be admitted". Hence in the latter category, a discretion is granted to the Court to assess the impact and consequence of non-attendance.

Although there is no express proviso pertaining to the impact and consequence of non-attendance of an individual on personal answers, I find that the issue is similarly regulated by the existing jurisprudence. In the examination of Section

162(1) of the Code of Civil Procedure, in the case of *Chez Deenu (Pty) Ltd v Philibert Loizeau,* supra, it was observed that "Section 161 of the Seychelles Code of Civil Procedure reproduces Article 324 of the French Code of Civil Procedure except that the French Code adds that the personal answers should not delay the "instruction" or the judgment." Resultingly, the following jurisprudence from Dalioz Repertoire Pratique, Verbo Interrogative sur faits et Articles is both relevant and appropriate:

1. L'interrogatoire sur faits et articles est une mesure d'instruction employee, a l'aide des reponses de son adversaire, a la decouverte de la verite des faits qu'elle a articules...

3. L'art. 324. C. proc. donne a "toute partie" le droit de demander 1'interrogatoire sur faits et articles, sans avoir egard a la qualite en laquelle elle figure au proces. Ce droit appartient done au defendeur comme au demandeur, qu'il soit partie prindpale ou intervenante. ou meme simplement interesse, sans y etre directement partie ...

137.La partie dont 1'interrogatoire a ete ordonne peut refuser de comparait, refuser de repondre. Il lui est d'ailleurs permis, lorsqu'elle comparait et refuse de repondre, de faire connaitre les motifs de son refus. Le juge doit, en pareil cas, dresser un proces-verbal sommaire des faits et dires de la partie, pour permettre au tribunal de tirer telles consequences que de droit lorsque 1'affaire viendra a l'audience.

138. <u>Si les motifs du refus de repondre ne paraissent pas fondes, le tribunal peut tenir les faits pour averes (C. proc</u>. art. 330, Paris, 28

> nov. 1822, R.115) - Il jouit. d'ailleurs. a cet egard, d'un pouvoir discretionnaire : la lot ne lui impose pas l'obligation de tenir les faits comme averes, elle lui laisse le soin d'apprecier les consequences du defaut de comparution et du refus de repondre ... Pouvant servir de prevue complete, le refus vnlnntaire de comparaitre peut, a plus forte raison. servir de commencement de preuve par ecrit ... (the underlining is mine).

In the light of the jurisprudence, as quoted above, it can be safely stated that where an individual fails or default to put up an appearance for examination on his personal answers, the trial Court has to examine the failure or default taking into account all the facts and circumstances of the case and the evidence adduced. Where it is so satisfied, the Court may treat the failure or default as complete proof of the claim held against the absentee or defaulter. However, this exercise can only be embarked upon once all the evidence, in the case, has been received and not at any intermediate stage.

In moving for judgment to be entered, learned Counsel relied on Section 126 of the Seychelles Code of Civil Procedure which provides that "if on the day fixed in the summons for the Defendant to appear, the Defendant appears and admits the Plaintiffs claim, judgment shall be given for the Plaintiff." Section 126 is applicable to instances where the Defendant first appears at the date fixed in the summons served upon him, elects not to file a defence and admits the Plaintiffs claim in totality. Where a defence has been filed, the matter is governed by Section 131 of the Code of Civil Procedure which provides for the parties:

> at any stage of the suit before judgement, (the parties may) appear in Court and file a judgement by consent signed by both parties

> stating the terms and conditions agreed upon between them in settlement of the suit and the amount ...

Accordingly, Section 126, supra, is not applicable.

As examined earlier, the failure or refusal by the intervenor to be present for examination on her personal answers will be assessed and accounted for at the end stage of the proceedings. At the present stage, the matter is to proceed with the hearing whilst taking into account the fact of non-appearance of the intervenor on her personal answers.

Record: Civil Side No 178 of 1998

Labiche v Francoise & Or

Civil procedure – counterclaim

The Plaintiff sued for the costs of building a house on the Defendant's land. The Plaintiff claimed that he was given permission to build the house which he could occupy until his death. The Defendants averred that they had mostly paid the construction costs and counterclaimed for damages for delictual acts committed by the Plaintiff while he lived in the house.

HELD:

(i) The cause of action in the main case is a claim for reimbursement for materials and labour supplied in constructing a house. Hence any claim or remedy arising out of that claim should be a cross-claim against the amount claimed by the Plaintiff. In the present case, a delictual claim cannot be raised as anything arising from the subject matter of the action.

(ii) There was no contract between the parties prohibiting the Plaintiff from bringing other people to live in the house. The Plaintiff did not purposely cause any harm to the Defendants or the land.

Judgment for the Plaintiff. Damages awarded R29,812.80. Counterclaim dismissed.

Legislation cited
Civil Code of Seychelles, art 555
Seychelles Code of Civil Procedure, s 80

Foreign legislation noted
Supreme Court Rules Order 15 (UK), r 2

Cases referred to
Francis Labonte v Paradise Resort Hotels Ltd CS 72/1992 (Unreported)

Bernard GEORGES for the Plaintiff
Charles LUCAS for the Defendant

Judgment delivered 21 June 2004 by:

PERERA J: This is an action based on Article 555 (3) of the Civil Code. The Plaintiff avers that during the years 1994 and 1995, he, with the consent of the Defendants, the owners of Parcel C. 2145 at Anse Boileau erected a dwelling house thereon. He further avers that he occupied that house until 17th October 1998 when the First Defendant forcibly evicted him He therefore claims R100,000 as the estimated value of the materials and labour invested in the building.

The First and Second Defendants deny that the said house was constructed by the Plaintiff with their consent. They aver that the Plaintiff, who is the uncle of the First Defendant, had no place to reside after he divorced his wife and that he assisted to erect the house by providing about R10,000 worth of building materials and his labour in exchange for free occupation of the house by him. The Defendants claim that balance materials and labour were provided by them. The Defendants further aver that the Plaintiff brought in another lodger, and that both of them burnt noxious materials in the house and the yard and constantly harassed them and their children. They further aver that the Plaintiff vacated the house on his own accord.

In a counterclaim, the Defendants aver that the acts allegedly

committed by the Plaintiff during the occupancy of the house, namely the burning of noxious materials and harassing their family amounted to a faute and consequently claims R25,000 as damages. They also claim a further sum of R10,000 for littering the interior of the house and causing damage thereto.

According to the evidence of the Plaintiff, he was living at Foret Noire with his wife, but after the divorce, he was offered the land which forms the subject matter of this action, by the First Defendant his nephew, to build a house. He stated that there was an oral agreement that after his death, the house would pass on to the First Defendant. He completed the house, except for the plastering of the kitchen and the fixing of windows and ceiling thereof. The First Defendant had a permit to remove gravel. Hence the Plaintiff supplied only the cement. Together they made 500 bricks, out of which 250 bricks were taken away by the First Defendant. The Plaintiff claimed that he used the balance 250 bricks in constructing the house and also purchased more bricks at the rate of R5 each. He worked as the mason and carpenter and also hired two other men. The Plaintiff further claimed that he purchased the sliding doors and the other building materials. He further stated that apart from helping in digging the foundation, the First Defendant did not contribute anything either by way of materials or labour towards the construction. The Plaintiff produced a bundle of receipts (PI) in proof of purchase of building materials during the period 1994 - 1995. Totalling a sum of R19, 945.05. This amount included payments for the electric and water connection to the house. He stated that he had lost receipts for items such as for corrugated iron sheets which he had left behind at his former wife's house at Foret Noire.

The Plaintiff denied that there ever was a condition that he could not bring anyone else to live with him in the house. He also denied littering the yard or the house. He stated that he left the house he constructed because he was beaten up by

the First Defendant. He brought Ms. Cecile Bastille, a valuer to value the house but the First Defendant prevented her from entering the house. However, on his own assessment, the value of the materials and labour he expended was R100,000. On being cross-examined, he stated that he brought some timber and used corrugated iron sheets from a chicken coop he demolished from the house at Foret Noire. He stated that those materials were used to construct a shed for the First Defendant. When the house was being constructed, he stayed in the house of the First Defendant, but paid for his meals.

Wilfred Accouche, a pickup driver testified that he transported wood, cement, bricks and masonite to Anse Boileau, where the Plaintiff was building a house, and was paid by him. He denied that he transported any building materials from Foret Noire. He further stated that it was the Plaintiff who was building the house.

Michel Jules, a mason testified that he was employed by the Plaintiff to build the house at Anse Boileau. He however laid the foundation and four rows of bricks, and was paid by the Plaintiff. During that time, he did not see the First Defendant.

Alexis Bibi, another mason also testified that he was employed by the First Defendant to construct the house. He took over from the stage after four rows of bricks had been laid, up to the stage when the roof was built. He was paid Rs7000 by the Plaintiff.

Didier Leon, testifying for the defence stated that he had worked with the First Defendant on several occasions and made bricks at his premises. He stated that he had seen the Plaintiff once or twice at the residence of the First Defendant. At that time the First Defendant was building a house close to his house, and he used some of the bricks he made. He however stated that those bricks were used on both these houses. He was paid by the First Defendant for making bricks.

Doris Appasamy, the Second Defendant testified that the Plaintiff came to reside with them after he had divorced his wife. He was given a room. The new house was being built by the First Defendant, and at the same time the house which they occupied was also being repaired and extended. She admitted that the Plaintiff brought two men to work on the new house, and that he brought corrugated iron sheets and timber joints, at his expense.

The Second Defendant further testified that the Plaintiff burnt noxious substances and littered the yard. She also stated that the Plaintiff left the premises as a result of an argument with the First Defendant regarding these matters.

The First Defendant corroborated the evidence of the Second Defendant, his concubine and stated that the Plaintiffs contribution was only the corrugated iron sheets and some timber. He had a block maker's licence, so the bricks were made by him. He claimed that the receipts the Plaintiff had produced for purchasing bricks and cement were for work done by him for others, as he was a self-employed mason. The First Defendant conceded that the Plaintiff's contribution towards the construction of the house was around R10,000.

As regards the alleged littering and burning of rubbish, he corroborated the Second Defendant and stated that the fumes emanating from the burning affected his son who was asthmatic.

In his cross-examination he stated that the house was built jointly with the Plaintiff with the assistance of workers. He however maintained that he supplied the bricks and cement. He also stated that the Plaintiff supplied some of the timber and also that the corrugated iron sheets were purchased by joint contributions.

On the basis of the evidence, it has been established on a balance of probabilities that the First Defendant permitted the Plaintiff to build a house on his property close to his own house. I accept the Plaintiff's evidence that there was an oral agreement, pending a formal written one, that he could live there until his death. According to the evidence, the First Defendant was simultaneously repairing and extending his own house. Hence there was no necessity to build another house at that time, unless for the purpose claimed by the Plaintiff. Admittedly the First Defendant was a cement block maker by profession. He stated that around 600 bricks were needed to construct the house. In this regard I prefer to accept the evidence of the Plaintiff that the First Defendant contributed 250 bricks, which he himself assisted to make. The receipts produced by the Plaintiff in his own name during the relevant period of the construction show that he had purchased cement, bricks, electrical wiring, water pipes and also that he obtained the electric and water connections to the house. On the other hand the First Defendant was unable to produce any receipts.

As regards the dispute between the parties, which culminated with the Plaintiff leaving the house, I find that the reasons adduced by the Defendants were not of any serious significance. I also do not find that there is any merit in the Defendant's claim that the. Plaintiff burnt noxious material to cause harm to the Defendants. In this respect, I believe the evidence of the Plaintiff that he was beaten up thrice, and that he left the house due to fear of being killed. I also find that there was no condition that the Plaintiff could not bring in any lodger.

In terms of Article 555(3) of the Civil Code, if the owner elects to preserve the structures, he must reimburse the third party:

> in a sum equal to the increase in the value of the property or equal to the cost of materials and labour estimated at the date of such reimbursement, after taking into account the present condition of such structures...

The Plaintiff has opted to claim the latter.

In making the award, I accept the sum of R19, 945.05 as the amount spent by the Plaintiff in respect of materials. However as the value has to be estimated at the time of reimbursement, I would allow a 5-fold increase in prices between 1995 and 2004. For the purpose of this calculation I would deduct R2,590 paid for the water deposit, electric meter and electricity connection. Hence R19, 945.05 less R2,590 = R17,355.05 x 5 = R18,222.80. With the sum of R2,590 aforesaid, the total amount under the head of materials would be R20,812.80. As regards labour, I accept the evidence of Alexis Bibi that he was paid R7,000 by the Plaintiff for his work. Michel Jules worked for only 21 days and laid the foundation and built four rows of bricks. On a comparison of the work claimed to have been done by Alexis, I would accept that his work was worth R1500. In addition I award a further sum of R500 as the hire charges of Wilfred Accouche, the pickup driver who transported building materials.

Accordingly, the total amount payable to the Plaintiff apart from his own labour would be R29,812.80. As regards the counter claim. Section 80(1) of the Code of Civil Procedure provides that –

> Subject to Sub-Section (2), where a Defendant in any action wishes to make any claim or seek any remedy or relief against a Plaintiff in respect of anything arising out of the subject matter of the action, he may, instead of raising

> a separate action make the claim or seek the remedy or relief by way of a counter claim in the action.......

Although the counter claim is based on faute, Mr. Lucas, Learned Counsel for the Defendants submitted that the acts complained of were done by the Plaintiff during the period of his occupation of the house, and that hence the delictual claim arose from the subject matter of the action in the case. On an interpretation of Section 80(1), the cause of action in the main case is a claim for reimbursement for materials and labour supplied in constructing the house. Hence any claim or remedy arising there from could be the Defendant's cross claim against the amount claimed by the Plaintiff. I have already held that there was no contract between the parties that the Plaintiff was not entitled to bring anyone else to reside with him, nor that he purposely caused any harm to the Defendants to merit a claim for delictual damages. In any event, in the case of *Francis Labonte v. Paradise Resort Hotels Ltd* (C.S. 72 of 1992) I observed that Section 80(1) of the Code of Civil Procedure was more restrictive than Order 15 Rule 2 of the R.S.C. Rules of the United Kingdom, which permits counterclaims "in respect of any matter whenever and however arising". In the present case a delictual claim cannot therefore be raised as "anything arising from the subject matter of the action". Accordingly the counterclaim is dismissed.

Judgment is therefore entered in favour of the Plaintiff in a sum of R29,812.80 together with interests and costs.

Record: Civil Side No 102 of 1999

Laurette & Or v Sullivan

Property – access to land – right of way – agreement between parties – compensation

The Plaintiffs sought an order declaring entitlement to road access over the Defendant's land and an order for compensation to the Defendant if that were claimed by the latter. The Defendant's property was the only possible starting-point for an access road to the Plaintiffs' property.

HELD:

(i) The property of the Plaintiffs is enclaved and the only practical possibility of having access to the main public road is across the property of the Defendant. The Plaintiffs are entitled to a right of way over the Defendant's land;

(ii) No monetary compensation should be requested by the Defendants; and

(iii) In the event that the Plaintiffs do not comply with the road extension as agreed to, the Defendant will reserve his right to deny vehicle access through the right of way pending completion of the road.

Judgment for the Plaintiffs. No orders as to costs.

Legislation cited
Civil Code of Seychelles, arts 682, 683

Wilby LUCAS for the Plaintiffs

Judgment delivered on 1 October 2004 by:

RENAUD J: The Plaintiffs are seeking an Order of this Court and to declare their entitlement to have an access road over the land of the Defendant and an Order for compensation to the Defendant if that is claimed by the latter.

It is not in dispute that the Plaintiffs are the registered owners of Title T2128 situated at upper Bougainville, Mahe having purchased it from S.D. Company (Proprietary) Ltd, represented by one of its Director Mr. Radley Sinon. (Exhibit P.1). Ms Lindy Monthy is the registered owner of an adjoining Title T2130 and has signified her consent for the Plaintiffs to build an access road by way of an easement dated 6 January 2003 and duly registered on 3 April 2003. (Exhibit P.4) The Defendant is the registered owner of Title T747 that is bounded with the main Bougainville road, and through which is the only possibility of starting an access road to the Plaintiff's land. The Plaintiffs aver that the construction of their dwelling house has been delayed for four years pending negotiation with the Defendant for an access road over the latter's property but this has not materialised. The Plaintiffs further aver that their land is completely enclaved as shown on (Exhibit P.5).

The Defendant did not file a Statement of Defence and on the date of the hearing Learned Counsel for the Defendant informed Court that the Defendant is not objecting and that the matter may proceed ex parte. The Court accordingly granted leave for the matter to proceed ex parte.

The First Plaintiff testified that at the time of purchasing the said property the Plaintiffs and Mr. Radley Sinon discussed with Defendant and his lawyer regarding the access road. The matter has not been concluded so far. However the Defendant by letter dated 22 August 2001 addressed to his lawyer and copied to Mr. Radley Sinon (Exhibit P.2), inter alia stated as follows:

In our discussion with Mr. Sinon we agreed to an access road as follows:

(1) The road through our property will be the normal 3 metres with up to 2 metres for adequate drainage.

(2) The road is to be located more to the South West of the proposed layout submitted by Mr. Sinon so that is passes on the lower side of the slope so as not to take the views available from the high ground on T.767. This proposed route has been marked with Mr. Rene Mondon and Mr. Michael Georges and they should be consulted prior to the marking and earthworks commencing, (refer attached rough diagram)

(3) No monetary compensation is requested from Mr. Sinon, however in exchange for the easement of the right of way through parcel T747 Mr. Sinon is required to extend the road through his parcel T1093 to the boundary of T747 (as per attached diagram as marked in red pen). This extension will possibly assist landholders to T1221; T1095 and T743.

(4) In the event that Mr. Sinon does not comply with the road extension requirement as detailed in 3 above we will reserve our right to deny vehicle access through the right of way pending completion of the road.

The diagram referred to in paragraphs 2 and 3 above is (Exhibit P. 5) and the common demarcation for the proposed access is marked in red ink. The First Plaintiff in evidence stated that both the Plaintiffs and Ms. Lindy Monthy agreed to jointly give a 3 metre right of way over their respective

property as borne out by Exhibits P4 and P5 - that is each of the two parties will grant a parallel 1.5 metres.

The relevant law applicable in the circumstances is Articles 682 and 683 of the Civil Code of Seychelles which state:

> Article 682 (1) - The owner whose property is closed on all sides, and has no access or inadequate access on to the public highway, either for the private or for the business use of his property, shall be entitled to claim from his neighbours a sufficient right of way to ensure the full use of such property, subject to his paying adequate compensation for any damage that he may cause.
>
> (2) - However, where the owner has been deprived of access to a public road, street or path in pursuance of an order converting a public road into private property, the person who has been granted such property shall be required to provide a right of way to the owner without demanding any compensation.
>
> Article 683 - A passage shall generally be obtained from the side of the property from which the access to the public highway is nearest. However, account shall also be taken of the need to reduce any damage to the neighbouring property as far as possible.

On the basis of evidence before the Court I am satisfied that the property of the Plaintiffs is enclaved and the only practical possibility of having access to the main public road is across the property of the Defendant, namely Title T747. In the circumstances I declare that the Plaintiffs are entitled to a right of way over Title T747 and I order accordingly.
The Defendant had agreed, albeit with conditions, to allow the

Plaintiffs and one Ms. Lindy Monthy to have a motorable access over his property, the right of way referred to above shall be one and the same as the motorable access agreed to by the Defendant on the following conditions:

(1) The motorable access road through the property of the Defendant, namely T747 will be the normal 3 metres with up to 2 metres for adequate drainage.

(2) The said road is to be located more to the South West of the proposed layout so that it passes on the lower side of the slope so as not to take the views available from the high ground on T.767. This route is marked on the layout. Mr. Rene Mondon and/or Mr. Michael Georges should be consulted prior to the marking and earthworks commencing.

(3) No monetary compensation is requested from the Plaintiffs, however in exchange for the easement of the right of way through parcel T747 the Plaintiffs are required to extend the road through their parcel T1093 to the boundary of T747 (as per attached diagram as marked in red pen).

(4) In the event that the Plaintiffs do not comply with the road extension requirement as detailed in 3 above, the Defendant will reserve his right to deny vehicle access through the right of way pending completion of the road.

I make no order as to cost.

Record: Civil Side No 284 of 2003

Isaac v Seychelles Marketing Board

Employment – termination for breach of trust – damages

The Plaintiff's employment was terminated after an accusation of breach of trust. The competent officer of the Ministry of Employment adjudicated the Plaintiff's grievance and found that the accusation had not been proved and the termination was not justified and ordered that the Plaintiff's legal benefits be paid to her. The Plaintiff claimed moral damages for loss that was not compensated under the Employment Act. The Defendant pleaded that the Plaintiff was compensated under the Employment Act and had no further claim for damages.

HELD:

(i) Where the reason for termination is a breach of trust based upon an allegation of theft, it is the employer who decides whether on the basis of the alleged act and taking into account all the circumstances of the case and its effect on the employee generally, the misconduct would result in dismissal. It is up to the employee to initiate action if they are aggrieved; and

(ii) The allegation of theft was the basis of the termination for which remedy had already been sought and obtained under the Employment Act. It is not conduct that falls outside the ambit of the Act and therefore cannot be a separate cause of action.

Judgment for the Defendant.

Legislation cited
Employment Act 1995

Cases referred to
Elizabeth v SPTC CS 157/1997 (Unreported)
Philo v Pension Bel Air CS 157/1997 (Unreported)
Rosalie v Bodco Ltd CS 193/1997 (Unreported)
Antoine Rosette v ULC SCA 16/1994

Foreign cases noted
British House Stores v Burshell (1978) IRLR 379

Wilby LUCAS for the Plaintiff
France BONTE for the Defendant

Ruling on the plea in limine litis delivered on 23 January 2003 by:

JUDDOO J: The Plaintiff seeks to recover from the Defendant moral damages for prejudice and loss suffered "which had not been remedied under (the) grievance procedure under the Employment Act". In essence, the plea in limine litis raised on behalf of the Defendant is that the Plaintiff having been compensated under the Employment Act has no further claim for moral damages.

It is not disputed that the Plaintiff's employment was terminated in February 2000 pertaining to an accusation of breach of trust. On 31 July 2000, the competent officer adjudicated the Plaintiff's grievance and determined that the accusation of breach of trust against the Plaintiff had not been proved; that the termination of the Plaintiff's employment was not justified and ordered that all her legal benefits be paid to her. The said determination was upheld on appeal. The Plaintiff avers that the basis of the alleged breach of trust was false and injurious to her character, credit and reputation and claims for moral damages from the Defendant.

On behalf of the Plaintiff, it is submitted that the remedy of the

Plaintiff lies with the Supreme Court, not with the Ministry of Employment as they have no jurisdiction to entertain a claim for moral damages. Therefore, that is the reason why the Plaintiff decided to lodge a case before the Supreme Court. It is also submitted that the alleged breach of trust was a "false and malicious accusation (of theft) made against her" for which she is seeking remedy.

In general, misconduct leading to dismissal covers a wide range of behaviour including, inter alia, fighting, swearing, lateness, betting, incompetence, theft, neglect, dangerous or obstructive conduct, breach of safety rules, refusal to obey orders, breach of hygiene rules, insubordination, unauthorised absenteeism and lateness. In each case the employer is to consider the gravity of the offence, its effect on the employment generally and the previous history of the employee. With regard to a charge of theft, in *Selwyn's Law of Employment*, 3rd Edn, para 8-102, 8-103, the author states:

> If an employee has committed an act of theft, it is for the management to decide what should be done in the circumstances of the case and provided a fair procedure is adopted, the eventual decision is for the management...
>
> It would place an unreasonable burden on employers if they could not dismiss employees who have stolen property which had been entrusted to their care...
>
> Nor need the employers prove that an offence has been committed beyond reasonable doubt, for this would impose on them a higher commitment that would even be possible to fulfil *(British House Stores v Burshell)...*
>
> The fact that an employer faces criminal charges,

> and is acquitted on those charges, is also irrelevant to the issue of fairness of the dismissal.

Similarly, in *Employment Law,* BA Hepple, 3rd Edn, P259, the author states:

> When considering the reasonableness of a dismissal for felonies such as dishonesty and theft... the following guidelines seem to emerge:
>
> (1) The employer must show the genuineness of his belief that the offence was committed.
>
> (2) The employer must show that at the time of his dismissal, he had in mind reasonable grounds upon which to sustain that belief. It matters not that in a criminal Court, the suspected offence was in fact not committed...
>
> (3) The employer must show that, having formed a preliminary view, he carried out as much investigation as was reasonable in the circumstances.

In the light of the above, where the reason for termination is breach of trust based upon an allegation of theft or dishonesty, it falls upon the employer within the contractual relationship that govern the parties to decide whether on the basis of the alleged dishonesty or theft, taking into account all the circumstances of the case and its effect on the employees generally, the alleged misconduct would result in dismissal.
Where the employer proceeds with dismissal, it falls upon the employee who is aggrieved to initiate the grievance procedure and seek remedy under the Employment Act 1995.

In *Antoine Rosette v ULC* (SCA 16 of 1994) Ayoola J.A. held:

> The whole tenor of the Employment Act is to fully define the rights and liabilities of parties to a contract of employment upon termination of such contract in the provision of the Act without recourse to the provision of the Civil Code of Seychelles, Common Law, or any other law...It seems both reasonable and just that the Act having made adequate provisions for compensation and dealing with cases of unjustified termination of contracts of employment, would take away the jurisdiction of the Court to determine those same questions arising from an unjustified termination or indeed touching on whether or not there has been an unjustified termination...

With regard to claims falling outside the ambit of the Employment Act, the learned Justice of Appeal added:

> However, if in the course of terminating a contract the employer committed a delict, such for instance, as libel or assault, that act which amounted to a delict would be a separate cause of action apart from the unjustified termination…

It is settled from the above, that for a delict to be actionable as a separate cause of action it must not be one which raises "he same questions arising from an unjustified termination or indeed touching on whether or not there has been an unjustified termination". Delictual actions constituting a separate course of action apart from or not touching upon the unjustifiable termination arose in several decisions of this Court including:

(i) *Rosalie v Bodco Ltd* CS193 of 1997 where the Court held that the failure of an

employer to comply with an order made by the competent officer and the Minister to reinstate him constituted a faute under Article 1382 of the Civil Code.

(ii) *Elizabeth v SPTC* CS157 of 1997 where the Court found that failure to amend a certificate of conduct by the employer was an error of conduct which constituted a faute under Article 1382. The decision was affirmed on appeal CA.

(iii) *Philo v Pension Bel Air* CS70 of 1998 where the Court found that the failure by the employer to pay statutory benefits to the Plaintiff under the Employment Act could amount to a faute under the Civil Code.

In the above instances the Court stressed the fact that the cause of action was "considered as being separate from matters relating to the contract or arising 'outside the provisions of the Employment Act".

In the present case, the allegation of theft or dishonesty forms the basis of the unjustified termination for which remedy has been sought and obtained under the Employment Act. It does not constitute a delict which could support a "separate cause of action apart from the unjustifiable termination".

In these circumstances, the plea in limine is upheld.

Record: Civil Side No 78 of 2002

Georges v Georges

Civil procedure – duties of counsel – defendant not represented

The Plaintiff filed suit against the Defendant for a sum that she claims she contributed to a car that was then registered in the Defendant's name and over which he has full control. A Court date was set. However, before the date, the Plaintiff filed a motion seeking an urgent hearing and an interim injunction directing the Defendant to hand over the car to the Plaintiff pending the final determination of the suit. At the urgent hearing, the Defendant's attorney sought an adjournment of the case, stating that the dispute was likely to be settled out of Court. The case was set aside. The Defendant's attorney then left the Seychelles and transferred the file to another lawyer. The Defendant was not advised of this change in representation.

The Defendant's new lawyer, having not met the Defendant or had any discussion with him, then appeared before the Court with counsel for the Plaintiff, to report on progress of the out-of-Court negotiations. A date was set a date for a hearing. At this time the pleadings were not complete. When the case came to Court, the Defendant's lawyer informed the Court that he was not competent to proceed with the hearing as had received no instructions and asked leave to withdraw from the case. Counsel for the Plaintiff applied for leave to proceed ex parte against the Defendant. The Court said that the case should only be heard after the Defendant had been notified, and set a later date for the hearing. On the date set, the Defendant was not present and the Court proceeded to give ex parte judgment for the Plaintiff. No notice was given to the Defendant on the ex parte hearing due to an inadvertence on the part of the Registry. The Defendant now applies for a new trial.

HELD:

(i) The principles of natural justice require that a Defendant should have reasonable opportunity to be heard, unless they have abused Court process;

(ii) The principles of natural justice dictate that the Defendant should be given a reasonable opportunity to be heard. The Defendant's behaviour has not been abusive of the Court process; it was the unethical conduct of his former counsel that he was not given fair representation;

(iii) The circumstances which led to the ex parte hearing were not within the knowledge and control of the Defendant, nor was he responsible for the change of counsel;

(iv) The actions of the Defendant's first attorney were unethical as they did not protect the interests of the client;

(v) Every counsel has a duty to their client to fearlessly raise every issue, advance every argument, and ask every question, however distasteful, which they think will help their client’s case. As an officer of the Court concerned in the administration of justice, counsel has an overriding duty to the Court, to the standards of the legal profession, and to the public, which may and often does lead to a conflict with their

client's wishes or with what the client thinks are their personal interests; and

(vi) On setting a date for a hearing, counsel has a duty to their client to have the hearing at the earliest day possible in order to avoid undue delay, but also a duty to the Court to ensure that pleadings are complete before applying for a date, so as to save time and unnecessary adjournments.

Judgment for the Defendant. The ex parte judgment is set aside. Application for new trial is granted. Costs to the Plaintiff.

Legislation cited
Seychelles Code of Civil Procedure, ss 194, 196

Cases referred to
Naiken v Pillay (1968) SLR 101

Foreign cases noted
Rondel v Worsley [1967] 3 All ER 993

Frank ELIZABETH for the Plaintiff
Wilby LUCAS for the Defendant

Ruling delivered on 14 October 2004 by:

KARUNAKARAN J: This is an application for a new trial brought by the Defendant under section 194(c) of the Seychelles Code of Civil Procedure, which reads thus:

> A new trial may be granted on the application of either party to the suit, when it appears to the Court to be necessary for the ends of justice.

The background facts of the case are the following.

At all material times, the Plaintiff and the Defendant were husband and wife but were living apart. By a plaint dated 7 May 2002, the Plaintiff (the wife) instituted the instant suit claiming a sum of R45,000 from the Defendant (the husband) on the ground of unjust enrichment, alleging that she had contributed this sum towards the purchase of a motor vehicle, a car, which now remains in Defendant's control and possession having been registered in his name. The suit was filed on 8 May 2002. The original suit-summons was duly served on the Defendant to appear at a sitting of the Court appointed to be held on 24 September 2002. Before the appointed date the Plaintiff filed a motion dated 6 June 2002 seeking an order for an urgent hearing of the suit and for an interim injunction directing the Defendant to hand over the said car to the Plaintiff pending the final determination of the suit. Notice of that motion was duly served on the Defendant informing him of the hearing to be held on 29 August 2002. The Defendant retained Ms. Nicole Esparon, an attorney-at-law to appear before the Court as his counsel in the suit. Ms. Esparon accordingly, put up appearance on 29 August 2002 and sought an adjournment of the case, stating that the dispute between the parties was likely to be settled amicably, out of Court. The Court therefore, granted an adjournment and set the case to be mentioned on the 24 September 2002 for report as to settlement, if any by then. In the meantime, the Defendant's counsel Ms. Esparon left the Republic having handed over the brief to another legal practitioner Mr. W. Lucas. According to the Defendant, his counsel Ms. Esparon did not inform him of her departure or of her decision to transfer the brief to Mr. Lucas. Obviously, without any instruction from the Defendant, Mr. Lucas put up appearance in Court on the 24 September 2002 on behalf of the Defendant and proceeded to have the hearing of the suit fixed for 5 March 2003. At this juncture, I should mention that the

pleadings were not even complete by then. In fact, the Defendant had not filed his statement of defence, when both counsel jointly applied to the Court for a hearing date. I should pause here to observe that counsel owes a duty not only to his client to have the hearing of the case fixed at the earliest date possible to avoid undue delay, but also owes a duty to the Court in that, the counsel ought to ensure that the pleadings are complete before he or she applies to the Court for a hearing date, so as to save its precious time against unnecessary adjournments being sought at the last minute on technical grounds. Be that as it may. On the 5 March 2003, at the eleventh hour as and when the case came up before the Court for hearing, Mr. Lucas appeared and informed the Court thus (in verbatim):

> My Lord, in September last year I was still standing in for Ms. Esparon. I have never met the client until today. I am not competent to proceed with the hearing today because I have no instructions whatsoever. I need to ask leave to withdraw from this case.

Therefore, the Court granted leave for Mr. Lucas to withdraw his appearance from the case. Mr. Elizabeth, learned counsel for the Plaintiff swiftly applied for leave to proceed ex parte against the Defendant and hear the case the same day. However, the Court declined to hear the case the same day and made the following order:

> We should be fair and give notice to the Defendant. Ex parte hearing will only be allowed after due notice has been served on the Defendant. Since the Defendant is absent, I grant leave for the Plaintiff to proceed ex parte on 30 March 2003 at 1.45 p.m. However, the Defendant should be notified of the date as well as of the order for an ex parte hearing.

On the day appointed for hearing, the Defendant was not

present and the Plaintiff was allowed to adduce evidence. On the strength of the untested evidence the Court proceeded to give ex parte judgment for the Plaintiff in the absence of the Defendant. I should also note here that despites Court's order, no notice has been sent to the Defendant informing him of the ex parte hearing presumably, due to inadvertence on the part of the Registry.

In the circumstances, the Defendant has now come before this Court for a new trial within the statutory period of three months from the date of the judgment in terms of section 196 (b) of the Seychelles Code of Civil Procedure.

I diligently perused the entire record of proceedings and the affidavits filed by the parties in support of and opposing the motion. I gave due consideration to the submissions made by the counsel on both sides. Firstly, I note that the circumstances, which led to an ex parte hearing in this matter, were not within the knowledge and control of the Defendant nor was he responsible for the change of counsel that took place behind his back. It is unfortunate to note that the counsel, whom the Defendant had originally retained for services, failed in her ethical duty as she has left the Republic without handing over the case file to her client and more so she did not even inform him or even the Court for that matter, of her departure from the jurisdiction. This has obviously resulted in an ex parte judgment being entered against the Defendant, for no fault of his own. In considering the ethical duty of a legal practitioner nothing is more important than protecting the interest of his or her client. However, in passing, I would like to remind the members of the Bar that the threefold duties of a practitioner in a civil case is set out with admirable clarity in the speech of Lord Reid in the renowned case of *Rondel v Worsley* [1967] 3 All ER (HL) at 998 and 999 thus:

> Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. As an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests (emphasis added).

Coming back to the present case, as rightly held in *Naiken v Pillay* (1968) the principles of natural justice require that a Defendant should have reasonable opportunity to be heard, and in the case of non-compliance by him with a rule of procedure, he should not be deprived of that opportunity, unless his behaviour, or the nature of the defence he is endeavouring to put forward, indicates that he is making an abusive use of Court procedure, or that he has no material ground of defence.

Applying the same yardstick to the facts of the instant case, I find that the principles of natural justice – audi alteram partem – dictate that the Defendant should be given a reasonable opportunity to be heard on his defence in this matter. Obviously, the Defendant's behaviour does not indicate that he is making an abusive use of the Court procedure in this matter.

In view of all the above, I hereby set aside the ex parte judgment dated 31 March 2003 entered in favour of the Plaintiff in this case and order a new trial as it appears to be necessary for the ends of justice. Hence, I allow the Defendant to file his statement of defence so that the case may proceed on the merits. However, I order the Defendant to pay to the Plaintiff the costs, which the latter has so far incurred in this matter.

The application for new trial is accordingly, granted.

Record: Civil Side No 101 of 2002

Alexis v Sinon & Or

Personal injury – damages

The 17 year old Plaintiff was a passenger in a vehicle being driven by the First Defendant. As a result of driver neglect, she suffered pain and a permanent scar. The liability of the Defendant was not challenged. The Court discussed the appropriate quantum of damages.

Judgment for the Plaintiff. Damages awarded R42,000.

Cases referred to
Petrina Ezparon (a minor) v Paul Amesbury CS 157/1994 (Unreported)
Simon Maillet v Louis CS 117/1990 (Unreported)
David Rose & Ors v Vivian Vidot & Ors CS 287/1997 (Unreported)
Sinon v Kilindo CS 225/1992 (Unreported)

Frank ELIZABETH for the Plaintiff
Ramniklal VALABHJI for the Defendant

Judgment delivered on 17 May 2004 by:

JUDDOO J: This is a tortious claim brought by the Plaintiff against the First Defendant, owner and driver of vehicle bearing registration S 709, and the Second Defendant, the company with which the First Defendant had an insurance policy.

On 31 May 1997 the Plaintiff, whilst travelling as a passenger in vehicle S 709 driven by the First Defendant, suffered injuries when the said vehicle was involved in a road accident. In her testimony, the Plaintiff explained that with some other friends in the car, they were all returning from Katiolo nightclub at about 4.00 a.m. The First Defendant was driving

at a fast speed despite several calls from all the passengers that he slows down. At a certain moment, the First Defendant had an argument with another driver and, thereafter, "was driving very fast and we told him to slow down because he was going too fast". The Plaintiff added that the First Defendant kept on driving very fast.

The vehicle, a mini-moke, hit against a rock on the left side of the road. All the passengers were thrown outside the vehicle except for the Plaintiff who was injured in the car, was in pain and vomiting blood. Soon after, the Plaintiff was brought to hospital.

Shirley Cecile gave evidence that she was a passenger in vehicle S 709 at the material time. She added:

> we were going so fast, the rain was pouring down Moira and the other guys were screaming at the back and telling Norbert (the Plaintiff) to slow down but he thought that he was driving normal. It was raining, we were going in a comer and when he turned round and looked in front of him it was already too late and (we) hit with a rock and fly out…

No evidence was adduced on behalf of the Defendants. On the basis of the unchallenged testimony of the Plaintiff and her witness, I find liability to be established in favour of the Plaintiff.

According to the unchallenged medical report, exhibit P2 A, the Plaintiff was admitted into Victoria hospital on 31 May 1997. She was injured in the abdomen and the right shoulder and was vomiting blood. An examination of her abdomen revealed “extremely tender epigastrium. Guarded and rigid - upper and right half of abdomen..... Haemoperitoneum was

clinically diagnosed…" The examination of her right shoulder revealed "fracture of the right clavicle, right scapula and dislocation of the right shoulder..." The Plaintiff received surgical treatment on 1 June 1997 to repair a tear "in the lesser omentum closer to the right gastric border...". The Plaintiff's shoulder was immobilized in Plaster of Paris for five weeks although she was discharged on 9 June 1997. She continued physiotherapy treatment thereafter.

The Plaintiff was a girl of 17 years old at the material time and the surgical intervention has left a scar as revealed by exhibits P1, P2 and P3.

In *Simon Maillet v Louis* Cs 117 of 1990, the Plaintiff sustained a fracture of the left tibia and fibula. A sum of R30000 was awarded for pain and suffering, and a further sum of R10,000 for loss of amenities and enjoyment of life. In *Sinon v Kilindo* Cs 225 of 1992 the Plaintiff had a fracture of the right tibia and fibula. A global sum of R69,197.20 was awarded for pain and suffering and loss of amenities of life.

In *Petrina Esparon (a minor) v Paul Amesbury* Cs 157 of 1994, the Plaintiff suffered a fracture of the left femur and several lacerations to the check as a result of a road accident. The Court awarded R10,000 for the several scars to her face, R10,000 for the embarrassment and trauma suffered and R25,000 for the fracture of the leg.

Taking the above into account. I find it just and reasonable to award the Plaintiff a global sum of R35,000 as moral damages for pain and suffering and amenities of life and a sum of R7,000 for the unsightly scar resulting from the road accident. In the end result, I enter judgment in favour of the Plaintiff in the sum of R42,000 with interest and costs against the First Defendant.

The liability of the Second Defendant to satisfy the judgment only arises once judgment is entered against the First Defendant. The Second Defendant shall bear its own costs vide: *David Rose & Ors v Vivian Vidot & Ors* Cs 287 of 1997.

Record: Civil Side No 87 of 2002

Albert v Carolla

Civil procedure – ex parte hearing - motion to set aside before judgment

The Plaintiff filed suit against the Defendant for damages. After several delays for various reasons the case was heard ex parte. Judgment was set to be delivered when the Defendant applied to set aside the order to hear the case ex parte so that he could defend the action. The Defendant averred he was wrongly informed of the hearing date.

HELD:

> There is no provision in Seychelles law which permits, after an ex parte hearing but before judgment is delivered, a motion that the judgment should not be delivered so that the Defendant may defend the action despite having previously failed to do so. A Defendant in that situation must wait for the delivery of the judgment before seeking an order to set it aside.

Ruling – motion dismissed.

Legislation cited
Seychelles Code of Civil Procedure, ss 65, 66, 69

Charles LUCAS for the Plaintiff
John RENAUD for the Defendant

Ruling delivered on 9 February 2004 by:

ALLEEAR CJ: Reyma Albert, of Montagne Posee Mahe, sued Terry Carolla, of Mont Buxton, Mahe, claiming a total sum of R125,000 with interests at the commercial rate and costs.

The suit was filed on 22 May 2000. The defence was filed on 12 March 2001. The case was then set for hearing. On several occasions the hearing was postponed for one reason or another. Eventually, a hearing date was set for 13 January 2003. On that day, Mr. Bonte representing the Defendant sought and obtained leave from the Court to withdraw from the case.

On 13 January 2003, on motion of Mr. Lucas for an ex parte hearing, the Court was satisfied that the Defendant on at least two occasions failed to appear in Court and leave was given to Mr. Lucas to proceed ex parte. Judgment was to be delivered on 7 February 2003.

On 10 February 2003, Mr. J. Renaud on behalf of the Defendant moved the Court for an order that "the order/or hearing the case be vacated and the Applicant be given leave to defend the action on the young that he did not know of the actual date fixed for the hearing having been wrongly informed".

At the hearing of the motion of the Defendant, Mr. C. Lucas for the Plaintiff intervened to query under which section of the Civil Procedure Code the Defendant's motion was grounded. In reply, Mr. J. Renaud stated that what the Defendant was in fact asking the Court was to allow him to defend the action after it had been tried ex parte.

Mr. J. Renaud submitted that all that he was seeking from the Court was that the judgment in the action be not delivered and the hearing ex parte be set aside so as to enable the Defendant to defend the action.

Mr. C. Lucas resisted the motion on the ground that it had no basis in law. Section 65 of the Seychelles Code of Civil Procedure, Cap 213 provides:

> If on the day so fixed in the summons when the case is called on the Plaintiff appears but the Defendant does not appear or sufficiently excuse his absence, the Court, after due proof of the service of the summons, may proceed to the hearing of the suit and may give judgment in the absence of the Defendant, or may adjourn the hearing of the suit ex parte.

Section 66 is expressed in the following terms:

> If the Court has adjourned the hearing of the suit ex parte, and the Defendant, at or before such hearing, appears and assigns good cause for his previous non appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

Section 69 of the Seychelles Code of Civil Procedure provides for the setting aside of judgment given ex parte:

> if in any case where one party does not appear on the day fixed in the summons, judgment has been given by the Court, the party against whom judgment has been given may apply to the Court to set it aside by motion made within one month after the date of the judgment if the case has been dismissed, or within one month after execution has been effected if judgment has been given against the Defendant, and if he satisfies the Court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit

> was called on for hearing, the Court shall set aside the judgment upon such terms as to costs, payment into Court or otherwise as it thinks fit and shall order the suit to be restored to the list of cases for hearing. Notice of such motion shall be given to the other side.

As Mr. C. Lucas rightly points out, there is no provision in our law which permits a motion to be made after an ex parte hearing but before judgment is delivered for the said judgment not to be delivered and to allow the Defendant the opportunity to defend the action which he failed to do.

I am accordingly of the opinion that this motion is premature. The Defendant has to wait for the delivery of judgment after which he can come to Court and seek to set it aside.

Record: Civil Side No 147 of 2000

The Republic v De Commarmond & Or

Sentencing

The convict was an 18 year old first-time offender. He claimed there were aggravating circumstances and that he was remorseful and had entered an early guilty plea.

HELD:

In sentencing a young offender, factors to be taken into consideration are –

(i) The age of the accused and previous convictions for similar offences;

(ii) Circumstances preceding the commission of the offence, the role played by the convict or the victim, and whether there was an element of provocation or emotional stress;

(iii) The magnitude of the crime and the injuries or loss suffered by the victim; and

(iv) Conduct of the convict after the commission of the crime.

Judgment: Convict sentenced accordingly.

Legislation cited
Penal Code, ss 224, 260

Cases referred to
Marcel Dick v R (1982) SLR 67

Helen CAROLUS for the Republic

Samy FREMINOT for the Accused

Sentence delivered on 13 September 2004 by:

PERERA J: The First Accused Anthony De Commarmond will be 19 years old on the 23rd of this month. He was charged with two counts of wounding, an offence contrary to Section 224(a) of the Penal Code, one count of sexual assault contrary to Section 130(1) of the Penal Code, and one count of stealing, contrary to Section 260 of the Penal Code. The First Accused pleaded guilty to counts 1 and 2, and not guilty to count 3. The Second Accused Harry Harrison was charged with one count of sexual assault, and jointly charged with the First Accused on count 5 for stealing. The Prosecution withdrew count 3 against the First Accused, and accordingly he was convicted of the charges under counts 1, 2 and 5. The Prosecution also withdrew the charges under counts 4 and 5 against the Second Accused, and consequently he was discharged from the proceedings.

In count 1, the First Accused is charged with wounding one Lisette Tamboo on 29 June 2004 at La Poudriere, Mahe, and on count 2 for wounding one Michel Julienne in the same transaction. Under count 5, the First Accused is charged with stealing R1,500 in cash and a mobile telephone belonging to Lisette Tamboo.

According to the facts disclosed by the Prosecution, and corroborated by the Probation Report filed in the case, the First Accused was living with his mother Mariana, her concubine, Michel Julienne, his brothers Shane, 29 years old (who is physically handicapped) Dave (25 years old) and his sister Marie Michelle (15 years old). The mother of the First Accused left for Bahrain on employment and one evening when he returned home, he found Michel Julienne having sexual intercourse with Lisette Tamboo on his mother's bed. In a state of anger he hit both of them with a piece of wood

causing injuries.

Consequent to the assault, Michel Julienne sustained three lacerated wounds, one on his skull, one on his forehead, and one on the upper lip. These wounds were sutured. Lisette Tamboo sustained a laceration on the head, which had to be sutured, and bruises behind the right ear, the left temple, and scratches on her chin, left knee, and right thumb.

A person convicted of an offence under Section 224 of the Penal Code is liable to be imprisoned for a period of seven years, and so is a convict under Section 260. I have considered the submission of Learned Counsel for the Accused in mitigation, and also considered the probation report setting out the circumstances in which the assault took place. The Accused is a first offender, and he was 18 years old at the time of committing the offences. With the vacation of the house by Michel Julienne, the Accused is the sole income earner to support his crippled brother and the school going sister.

The offences under Section 224 and 260 of the Penal Code are felonies. However, in the case of *Marcel Dick v R* (1982) SLR 67, a person was convicted by the Magistrates' Court on a charge under Section 219(a) for causing grievous harm with intent to disfigure. In that case, the Accused had attacked the Complainant with a knife on the forehead and on the back. He was sentenced to 18 months imprisonment. In appeal Seaton CJ on a consideration of the circumstances of the assault reduced the charge to the lesser offence of unlawful wounding under Section 224(a) of the Penal Code, and imposed a fine of R2,000, with a compensation order in favour of the Complainant.

In sentencing a youthful offender, some of the factors that ought to be taken into consideration are –

(1) The age of the Accused and previous convictions/or similar offences.

(2) Circumstances preceding the commission of the offence, the role played by the convict or the victim, and whether there was an element of provocation or emotional stress.

(3) The magnitude of the crime and the injuries or loss suffered by the victim.

(4) Conduct of the convict after the commission of the crime.

In the present case, admittedly, the Accused reacted angrily on seeing his mother's bed being used by the Complainant Michel to have sex with another woman. Although he ought not to have assaulted them the way he did the circumstances preceding the commission of the offence, and the role played by the victims entitle the Accused who is still a youth, and a first offender, to be given a lenient sentence. He has been on remand since 12 July 2004.

According to the probation report he is now remorseful. I have also taken into consideration the fact that the Accused pleaded guilty without washing the time of the Court. The Accused is a young man who should be given a chance to rehabilitate himself without being exposed to more serious criminal elements in Prison. Accordingly I sentence the First Accused as follows:

Count 1 – 2 years imprisonment

Count 2 – 2 years imprisonment

Count 5 – 6 months imprisonment.

Sentences to run concurrently, but suspended for a period of 2 years.

Conditions of the suspended sentence are explained to the Accused.

Accused is also informed of the right of appeal on sentence.

Record: Criminal Side No S7 of 2004

The Republic v Belmont

Sentencing

An escaped convict participated in a robbery while on the run. He sought to serve the sentence for that offence concurrently with his present sentence.

HELD:

(i) In general, sentences are served consecutively in order to maintain the legislative intent to punish the offender for the offence charged; and

(ii) The execution of sentences concurrently is the exception not the rule. Whether or not the Court will exercise its discretion to direct that the sentence run concurrently will depend on the facts and circumstances of each case.

Judgment: Sentences to be consecutive.

Legislation cited
Criminal Procedure Code, s 7
Penal Code, s 36

David ESPARON for the Republic
Samy FREMINOT for the Accused

Sentence delivered on 13 December 2004 by:

PERERA ACJ: The Third Accused Eddy Georges Belmont, pleaded guilty before the Magistrates' Court, to the offence of robbery, pursuant to Section 281 of the Penal Code. The Learned Magistrate has remitted the case to this Court for

sentencing pursuant to Section 7(1) of the Criminal Procedure Code, as his sentencing powers are limited to imposing any sentence up to 5 years.

An offence under Section 281 is punishable with 18 years imprisonment.

According to the facts disclosed, the Accused was a party of three masked men who attacked a shop Assistant at the Baie Lazare Petrol Station on 12 July 2001, and stole cash, telephone prepaid cards, and cartons of cigarettes, all valued at R15,700. Admittedly, the Accused was serving a prison sentence when he escaped and committed the present offence he is charged with. The Learned Magistrate has noted that this Accused had been convicted of offences of house breaking, stealing, and burglary on 15 occasions from 1999 to 2001 and has served prison sentences. The sentence he is presently serving is due to expire in February 2006.

The Third Accused has therefore a dismal record. The numerous prison sentences he has served, and is still serving, have had no reformative effect on him. It was also disclosed that the present offence was committed as a gang robbery and disguised as masked men in army uniforms. He has therefore graduated to committing sophisticated crimes, and hence the danger he poses to the society has increased.

Mr. Freminot, Learned Counsel for the Accused however urged the Court to pass a concurrent sentence.

Section 36 of the Penal Code is as follows-

> Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that

> sentence, any sentence, other than a sentence of death or of Corporal punishment, which is passed upon him under the subsequent conviction, shall be executed after the expiration of the former sentence, unless the Court directs that it shall be executed concurrently with the former or of any part thereof.

Hence, the general rule that the legislative intent to punish the offender for the offence charged, has to be maintained. Accordingly, while the execution of a sentence immediately after the expiration of any former sentence is the Rule, its execution concurrently is an exception. In this regard the Court has a discretion. Whether or not a sentencing Court will exercise this power and direct that a sentence shall run concurrently with a former sentence would depend on the facts and circumstances of each particular case. In the present case no special reasons have been adduced for this Court to consider a concurrent sentence.

Accordingly, considering all the circumstances of the case including the mitigatory factors adduced, and the fact that the legislature, in a bid to deal with the high incidence- of robberies, has increased the penalty from 14 years to 18 years imprisonment. I impose a sentence of 8 years imprisonment which will be executed immediately after the expiration of the present sentence he is serving.

Record: Criminal Side No 105 of 2004

The Republic v Kate

Criminal procedure – remand in custody – constitutional rights

The Accused was charged with sexual assault which carried a maximum sentence of 20 years. The Accused was remanded in custody before entering any plea. The prosecution applied for an order to continue remand in custody.

HELD:

(i) The court may remand an accused in custody if the accused is charged with a serious offence. However the court must be satisfied that –

(a) the accused before the court is the right person who is alleged to have committed the offence;

(b) the offence with which the accused is charged is not frivolous or fictitious;

(c) the charge has been laid in good faith based on reasonable facts available and that such facts would eventually be presented before the court.

(ii) Remand is not a form of punishment or admonition of the accused for the offence that they allegedly committed; and

(iii) When considering whether or not to remand an accused, the court must always have regard to the constitutional rights of liberty of the accused and the fundamental

rights of other members of society to live securely and peacefully.

Ruling: Order for further remand in custody granted.

Legislation cited
Constitution of Seychelles, Arts 18, 19
Criminal Procedure Code, ss 101, 179

Ronny GOVINDEN for the Republic
Anthony JULIETTE for the Accused

Ruling delivered on 19 May 2004 by:

RENAUD J: The accused person stands charged with the offence of sexual assault contrary to and punishable under Section 130(2)(d) and punishable under section 130(1) of the Penal Code. The particulars of the offence are that "Gerard Kate of Ma Joie, Mahe, on the 24 April 2004 at Port Launay, Mahe, sexually assaulted A by penetrating the vaginal and anal orifices of A for a sexual purpose". The accused has not pleaded to the charge yet. When the accused appeared before Court on 29 April 2004 he was remanded in custody until today 12 May 2004.

Learned Senior State Counsel, Mr. R. Govinden appearing for the prosecution has filed an application before Court applying for an order for the further holding of the accused in remand custody under Section 179 of the Criminal Procedure Code. The reasons for the application are:

(a) The accused is charged with a very serious offence which is punishable with a maximum custodial sentence of 20 years, this seriousness was further aggravated by the following factors:

(i) The accused was armed with the knife which he used to threatened the virtual complainant with during the commission of the sexual assault.

(ii) The accused committed the assault per annum and vaginum.

(iii) The accused committed the assault despite the presence and hearing of other persons.

(b) The main eye witnesses of the Prosecution and virtual complainant is known to the alleged accused and Counsel is instructed that she is in fear that in the event that the accused is enlarged on bail he would harm, threatened or otherwise intimidate her. An affidavit from the virtual complainant was attached to the application.

Mr. A. Juliette, Learned Counsel for the accused submitted to the Court that his client ought to be released on bail pending trial. He submitted that the accused is deemed to be innocent until proved guilty as Article 19(2)(a) of the Constitution provides. Further, he emphasised that it is incumbent on the Court to release the accused as called for in Article 18(7) of the Constitution, albeit, on stringent conditions.

Mr. Juliette in opposing the application invited the Court to release the accused on bail albeit with the imposition of very stringent conditions that the Court could possibly made. He further invited the Court not to rely on the affidavit of the virtual complainant as this could be self-serving and amounts to the Court believing the complainant before she testified and is cross-examined in Court. Further, Mr. Juliette contended that the contents of the complainant's affidavit are mere

speculations and are not based on any ascertained facts in support of such mere speculations. It may be true that the complainant may be traumatized, but this is the case of any virtual complainant, he said. Secondly, Mr. Juliette vehemently argued that there is no evidence before the Court on which the Court could base itself to determine that the accused had indeed committed such offence. There is only the affidavit of the Learned prosecuting Counsel. Mr. Juliette further argued that the mere fact there is a piece of paper whereon it is written a serious charge against the accused person is again not a proper basis on which the Court should act. The charge could very well be unfounded and fictitious and at the end of the day the accused would be found to have been remanded for no valid cause.

Mr. Govinden, Learned Counsel of the Republic, opposed the submissions of Mr. Juliette on the ground that the application for remanding the accused is in accordance with the provision of the constitution and it is not a breach of his rights. He submitted that the Court may not grant bail and remand a person if the Court is satisfied that to do so would be proper in view of the circumstances which Article 18(7) (a) to (f) of the Constitution spells out. Mr. Govinden emphasized that the offence with which the accused is charged is indeed a very serious charge and as such it warrants the necessity for remand. Mr. Govinden assured the Court that the charge against the accused is not fictitious and is based on available evidence that would be laid before the Court at the trial. He agreed, however, that these are his averments and he has deponed thereto in his affidavit in support of the application.

From a reading of Articles 18(2) and 18(7)(b) of the Constitution, and Sec.101(5)(b) of the Criminal Procedure Code Cap.54, I have no doubt that this Court has the power to restrict a person's constitutional right to liberty without violating such right, after having regards to any one of the circumstances set out Sec. 101 (5) (b) of the Criminal

Procedure Code Cap.54 which is a reproduction of Article 18(7) (a) to (f) of the Constitution. The Court can remand any person accused of the offence of murder, treason or any other serious offence notwithstanding Article 19(2)(a) of the Constitution deeming the person to be innocent until proven guilty.

Indeed, the Court has the power to remand an accused person in custody if the accused is charged with a serious offence. However, the Court has to be satisfied that the accused before the Court is the right person who is alleged to have committed the offence and secondly that the alleged offence with which the accused is so charged is not frivolous or fictitious but is made in good faith based on reasonable facts available and that such available facts would eventually be laid before the Court.

The person having personal knowledge of the available facts on which the charge against the accused is based is Mr. Octobre who was the Police Officer in charge of the investigation of the case and who testified in person before the Court and subjected to cross-examination, asserted that he has sufficient reasonable evidences in his possession that would eventually be laid before the Court in support of the serious charge against the accused and further the charge is not frivolous and fictitious.

The seriousness of an offence does not mean only offences that carry hefty fines and/or a long term of imprisonment; or minimum mandatory sentence or fines; but must also be considered in a broader perspective, including the prevalence of the offence; the prevailing tendency of such crime; the necessity to root out or curb the vice; the negative impact of the offence on the virtual complainant and the view taken by society of such offence; whether the offence is the act of a sole individual or a possible conspiracy involving other parties who may be directly or indirectly, openly or secretly involved;

the circumstances and manner the alleged offence took place; among other considerations.

Remand is not a form of punishment or admonishment of the accused for the offence he/she is alleged to have committed. It is simply a transitory stage prior to the time when trial proper is to take place. During the intervening period an accused may be remanded, based on the face of the charge laid against him/her before the Court. If the Court is of the view that the alleged offence is so serious that the accused ought to be removed from society and be made to live apart because of the untoward manner in which the accused has conducted himself in society, that is when the Court will remand the accused. When considering whether to remand an accused or not, the Court must always have regard not only to the constitutional rights of liberty of the accused, but also to the fundamental rights of other members of society to live securely and peacefully.

The accused is charged with the offence of sexual assault and using or threatening violence in the process. It is alleged that he committed the sexual assault by penetrating both the vaginal and anal orifices of the victim whilst brandishing a threatening weapon during the process, and, without being deterred by the presence and hearing of other persons. When viewed in the light of the factors enumerated above, this Court is led to no other conclusion but that the offence with which the accused is charged cannot be considered less than a very serious offence indeed. This Court will therefore order that the accused be remanded in custody until the completion of the trial.

I accordingly order that the accused be remanded for a further 14 days, that is up to 2 June 2004 at 9 a.m. when he will have to appear again before this Court.

Record: Criminal Side No 50 of 2004

The Republic v Marday & Or

Criminal Procedure - bail – conditions – constitutional rights

The two accused were charged with abduction. They sought bail pending trial.

HELD:

(i) The court must act judiciously when exercising its discretion to remand an accused in custody;

(ii) An accused charged with a serious offence should not be automatically remanded on custody;

(iii) It is insufficient to remand an accused in custody simply to allow the Police to perform their duties more easily;

(iv) An accused may be remanded in custody if the offence charged, except for a capital offence, is of such a nature that it is abhorred by society;

(v) A person who has allegedly behaved in such a manner that it would be in the best interest of society to have them removed to live separately from others because of their apparent lack of respect of the rights of other members should not be granted bail;

(vi) An accused on remand pending trial is not to be treated as a convict; and

(vii) The court is always mindful of the prevalence and circumstances of crime in society that is detrimental to peaceful and orderly living. Every person is entitled to enjoy fundamental rights but such enjoyment ought not to impact negatively on society. The prevalence of certain serious crime is now of major concern. It is evident that citizens of Seychelles do not feel comfortable living alongside persons who have allegedly gone to the extent of having abused their rights in those areas.

Ruling: Bail allowed on strict conditions (residency, bonds by accused and homeowner, reporting, curfew, non-contact, surrender of travel documents).

Legislation cited
Criminal Procedure Code, s 179

Cases referred to
Republic v Gerard Kate (2004) SLR 99

Ronny GOVINDEN for the Republic
France BONTE for the First Accused
John RENAUD for the Second Accused

Ruling on Application for Bail delivered on 23 June 2004 by:

RENAUD J: The Counsel for the two accused have filed applications to this Court praying that the two accused be released on bail.

The particulars of the offence are as follows.

The two accused have been jointly charged with the offence of abduction contrary to and punishable under Section 244 as

read with Section 23 of the Penal Code and were brought before the Court for the first time on 11 May 2004. Learned Counsel for the Prosecution had by then filed an application moving the Court to remand both accused in custody until the conclusion of the trial by extending such orders every 14 days in accordance with Section 179 of the Criminal Procedure Code. The reasons for making the application were stated thus:

> (a) The accused are charged with a very serious offence punishable with a maximum custodial sentence of 7 years imprisonment.
>
> (b) That the main eye-witnesses of the prosecution and virtual complainant are known to the accused and in the event that the accused are released on bail they would harm, threaten or intimidate them.

In support of the Application, the Prosecution had in addition to the reasons stated above, attached an affidavit sworn to by Police Sub Inspector Sonny Legate stating substantially the same facts as above.

The Application was duly served on both accused on the same day prior to their coming to Court. When the matter came up before His Lordship the Chief Justice, Ms. K. Domingue appearing for the accused, opposed the application and instead sought that the accused be enlarged on bail with conditions. After hearing the Investigating Officer, S.I Legate on oath, His Lordship the Chief Justice ruled that the two accused be remanded in custody for 14 days and that they had to appear before the Court on 25 May, when an early date for trial will be fixed. In the intervening period the Prosecution was to serve all the documents pertaining to the

case, on Counsel for the accused. The two accused accordingly appeared on 25 May, but did not take the plea and were remanded for a further period of 14 days up to 7 June 2004. The Prosecution having not been able to serve the documents, was again asked to do so in the meantime.

On 7 June, 2004 Mr. F. Bonte appearing for the First accused and Mr. J. Renaud appearing for the Second accused, objected to the application of the Prosecution for the further remanding of the two accused in custody. They were advised to file proper application before the Court and the two accused were remanded for a further 7 days up to 14th June, 2004.

Learned Counsel for the accused filed applications for bail supported by affidavits with copy of statements on which the Prosecution grounded the charge. The principal grounds are that:

(i) The reasons for the remand of the Accused as given to the Supreme Court are no longer tenable, given the length of time that has elapsed since they were first remanded in custody;

(ii) The evidence against the Accused, is extremely weak and there is no likelihood of a conviction;

(iii) Given the state of the evidence, no further charges are anticipated; and

(iv) The Accused have no previous convictions.

They argued that the evidence available to the Prosecution in support of the charge is so weak that no Tribunal properly informed will record a conviction against the accused. The

Accused are being remanded in custody at the Long Island Prison and the conditions of the Prison do not provide for the separation of the Accused from the convicts, contrary to Article 18(11) of the Constitution.

It was further contended on behalf of the two accused that the objections to bail would be met by the following conditions:

(i) The First Accused lives with his parents at Quincy Village, not far from Victoria and will stay with his parents, and the Second Accused lives at La Retraite, not far from Victoria;

(ii) The accused are in a position to provide a surety of R3,000 each;

(iii) A curfew may be imposed that the Accused remain at home until the determination of the trial; and

(iv) The Accused may be prevented from obtaining travelling documents.

Mr. Camille Learned State Counsel appearing for the Prosecution maintained that there has been no change of circumstances since the two accused persons were first remanded. The Police are still pursuing its investigations and two more suspect are still at large and yet to be apprehended. The release of the two present accused will further compound the impediments that the Police are facing in their efforts to arrest the two fugitives.

To establish its contentions, the Prosecution presented ASP Cecile to testify on oath. He reiterated that the Police are still pursuing two more suspects who are evading arrests and if the two present accused are released on bail, there is the

likelihood that they may meet and discuss the case. However, the Police have sufficient information and was hopeful that the arrests of the two who are now known to the Police would be made quite soon. The main witness is still apprehensive and fears for his safety and security should the Accused be enlarged on bail, in view of the prior threats they made upon him at the time of committing the offence.

When considering application for remanding an accused in custody, what is foremost in my mind is that such measure is not a punishment for having allegedly committed a serious offence, nor is it imprisonment in the interim pending final determination of the trial. This cannot be so, as our Constitution has accredited all accused as being innocent until proven guilty. Remand in custody is a deprivation of the liberty of a citizen whom the Court may order as a matter of exception in certain circumstances, of particular relevance is Article 18 (2)(b) of the Constitution.

The Court must act judiciously when exercising its discretion to remand an accused in custody. In the case of *Republic v Gerard Kate* CR50/2004, I set out certain observations as to my reasoning for remanding the accused after having been charged with a serious offence. It is not automatic that once an accused is charged with any serious offence that it should follow that that accused must be remanded in custody. It may not be sufficient reason to remand an accused simply to allow the Police to perform its duties more easily. In my view an accused may be remanded in custody if the offence with which he/she is charged, (save for a capital offence) is of such a nature that society abhorred because it puts people in fear and impedes their safe and peaceful life pattern. A person who has allegedly conducted himself/herself in such manner that it would be in the best interest of society to have him or her removed and be made to live separately and apart from others, because of his or her apparent lack of respect for the rights of other members of society. As such those in remands

pending trial are not to be treated as convicts. The Court is always mindful of the prevalence and circumstances of crime in society that is detrimental to peaceful and orderly living. Everyone is entitled to enjoy fundamental rights but such enjoyment ought not to impact negatively on society, such as creating fear and panic which at times tends to become the order of the day. The prevalence of certain serious crime is now of major concern, particularly - homicides; drug related offences; sexual assaults on small children; sexual assault using threat or violence; burglary, housebreaking, whether with violence or not; robbery with violence; offences which have a negative impact on the tourism industry committed particularly on the person of a tourist; are offences which society at present strongly abhorred. It is evident that citizens of this country do not feel at all comfortable to have alongside them, persons who had allegedly gone to the extent of having abuse their rights in those areas. The Court is cognisant of the prevailing concern and will not hesitate to exercise its discretion by placing elsewhere such persons in order to allow other reasonable members of society to enjoy their fundamental rights too.

Abducting others for the purpose of extracting material gains is not dissimilar to robbery with violence, except that such offence is not so prevalent in our society at present.

In the present case, I have given very careful consideration of the facts presented to this Court by both Counsel for the Prosecution and Defence, as well as affidavits in support and evidence of the Police witnesses. It would appear that there is more than what meet the eyes in this particular case.

In the final analysis, I am of the view that the two accused may be allowed on bail subject to stringent conditions that this Court will impose. These conditions are:

(i) The First Accused shall live at his home at La Retraite, Mahe, subject to the owner or lessee of the house consenting and permitting him to do so and signified in writing to this Court, that person shall also act as his surety by signing a bond in the sum of R5,000;

(ii) The Second Accused shall live with his parents at Quincy Village, subject to his parents consenting and permitting him to do so and signified in writing to this Court, and a parent shall also act as his surety by signing a bond in the sum of R5,000;

(iii) The First and Second Accused shall each deposit at the Supreme Court's Registry a sum of R10,000 in cash as surety, which sum shall automatically be forfeited to the Republic in the case of any breach of any of the conditions set out in this order, by any of the two accused;

(iv) The First Accused shall report at the Anse Etoile Police Station and the Second Accused shall report at the Victoria Police Station following the most direct route from their respective homes to the said Police Station and back in the company of the surety every Wednesday between 1400 and 1500 hours;

(v) A curfew is henceforth imposed on both the First and Second Accused whereby the First Accused shall remain at his home at La Retraite, Mahe and the Second Accused shall remain at his

home at Quincy Village, Mahe at all times of the day or night until the determination of the trial except when travelling to report to Victoria or Anse Etoile Police Station or to this Court as the case may be;

(vi) Both the First and Second Accused shall not in any way interfere with, threaten, molest or communicate with the complainants and their immediate families; with other witnesses; with co-accused and with other suspects, either in person, by mail or telecommunication;

(vii) Both the First and Second Accused shall surrender to the Registrar of the Supreme Court any travel document they may hold and they are not allowed to leave the jurisdiction of this Court;

(viii) The Immigration Authority is directed not to issue to either of the two accused any travel document and not allow them exit at any Immigration point hence preventing them from leaving the jurisdiction of this Court.

(ix) A breach by either of the two accused of any of the conditions set out above shall, in addition, result in the accused who committed the breach to be remanded in custody until conclusion of the trial.

Upon the accused meeting the conditions stated above to the satisfaction of this Court, I shall accordingly grant their applications for bail. In the meantime, the two accused shall be remanded in custody for a further period of 14 days or until

compliance with the bail conditions when the accused will be released.

Record: Criminal Side No 59 of 2004

The Republic v Marengo & Ors

Criminal Law – no case to answer – evidence – co-accused – confession – retracted confession – possession – environment protection

The eight Accused were charged with unlawful possession of turtle meat and with killing a protected bird. At the end of the prosecution case, the counsel of each Accused made separate submissions of no case to answer. The defence challenged the reliability of the State's evidence. Some statements made by some of the accused to the Police had later been retracted.

HELD:

(i) Except in the situations where there is no case to answer, the court should not make a decision as to conviction or acquittal of an accused until the evidence of both parties has been heard;

(ii) There is no case to answer if –

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

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

(iii) If a submission is made that there is no case to answer, the court should make a

decision based on whether the evidence is such that a reasonable court might convict the accused and not whether the court, if compelled to do so, would at that stage convict or acquit the accused;

(iv) Where a court comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is the duty of the court, upon a submission being made, to stop the case;

(v) Where the prosecution evidence is such that its strength or weakness depends on the view to be taken on the reliability of a witness or other matters within the province of the jury, and where on one possible view of the facts there is evidence upon which could properly come to the conclusion that the defendant is guilty, then the Judge should allow the matter to be tried by the jury;

(vi) Subject to two exceptions, an out of court admission by one accused made when in the absence of another accused is not evidence against that other accused;

(vii) The confession of an accused may be used against a co-accused if –

(a) the co-accused by words or conduct accepts the truth of the statement., so as to make all or part of it a confession statement of their own, or

(b) in respect of a conspiracy, statements or acts of one conspirator in the execution or furtherance of the common design are admissible in evidence against any other party to the conspiracy provided that there is some other evidence of the common design.

(viii) In general, the need to look for corroboration will arise in retracted confessions; in the case of a repudiated confession, it will depend entirely on the circumstances whether corroboration should be regarded as the essential element;

(ix) The established rules for a retracted confession are –

(a) confession is not to be regarded as involuntary merely because it is retracted;

(b) as against the maker of the confession, the retracted confession may form the basis of a conviction if it is believed to be true and voluntarily made;

(c) as against the co-accused, both prudence and caution require the court not to rely on a retracted confession without independent corroborative evidence. The corroboration should not only confirm the general story of the alleged crime, but must also connect the accused with it.

(x) In the ordinary use of the word ‘possession’ one has in possession whatever is to their own knowledge, physically in their custody, or under their physical control. This is what was intended to be prohibited in the case of dangerous drugs. The technical doctrines of the civil law about possession are irrelevant to this field of criminal law. An attempt must be made, from the apparent intention of statute, to reach a construction of the word ‘possession’ which is not so narrow as to stultify the practical efficacy of the statute or so broad that it creates absurdity or injustice; and

(xi) The precautionary principle an essential feature of sustainable development. This principle means that the State and other statutory authorities must anticipate, prevent, and address the causes of environment degradation.

Ruling: The prosecution has established a prima case against all the accused.

Legislation cited
Criminal Procedure Code, s 184
Wild Animals and Bird Protection Act

Foreign subsidiary legislation noted
Practice Note [1962] 1 All ER 448

Cases referred to
Pool v R 1974 SCAR 88
R v Jose Pillay Crim s 8/1986 (Unreported)
R v Stiven (1971) SLR 137
Treffle Finesse v R Crim App 1/1995 (Unreported)

Foreign cases noted
DPP v Brooks [1974] AC 862
R v Galbraith [1981] 2 All ER 1060
R v Waller [1991] Crim LR 381
Robinson v Everett & WFC Bonham & Sons [1988] Crim LR 699
Warner v Metropolitan Police Commissioner [1969] 2 AC 256

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Danny LUCAS Counsel for the First Accused
Alexia ANTAO Counsel for the Second, Third and Eighth Accused
Pesi PARDIWALLA Counsel for the Fourth Accused
Frank ALLY Counsel for the Fifth and Sixth Accused
Somasundaram RAJASUNDARAM Counsel for the seventh Accused

Ruling on submission of no case to answer delivered on 6 April 2004 by:

PERERA J: In this case, the First to Seventh Accused were originally charged with 5 counts, but subsequent to the Prosecution withdrawing counts 2, 3 and 5, they presently stand charged with Counts 1 and 4. Count 1 relates to unlawful possession of turtle meat and Count 4 with the killing of a protected bird. The 8th Accused stands charged with Count 6, namely for possession of turtle meat.

At the end of the Prosecution case, Learned Counsel appearing for all the eight Accused made separate submissions of no case to answer in respect of their respective Accused.

The Practice Note, reported in (1962) 1 AER 448, as followed

in *R v Stiven* (1971) SLR 137 provides that a submission of no case to answer may properly be made and upheld in two situations.

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

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

The note further goes on to direct that that –

> Apart from these two situations, a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If however a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit, but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on evidence so far laid before it, there is a case to answer.

Hence the primary consideration at this stage of the case is to consider whether the Prosecution, has established a prima facie case against the accused persons, sufficiently to require them to make a defence. It is therefore purely an objective consideration, and a step in the procedure. In the case of *Treffle Finesse v R* the Seychelles Court of Appeal followed

the 2nd guideline provided in the case of *R v Galbraith* that-

> 2(a) Where the Judge comes to the conclusion that the Prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.
>
> (c) Where, however, the Prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability or other matters which are generally speaking within the province of the jury, and where on one possible view of the facts there is evidence upon which could properly come to the conclusion that the Defendant is guilty, then the Judge should allow the matter to be tried by the jury.

The Prosecution evidence against the Accused consists of: (1) a statement made by them to the Police under caution, which this Court after holding voire dire admitted them in evidence on the basis that they were made voluntarily; (2) evidence of Mr. Selby Remy, the Expert who testified regarding exhibits of turtle meat and bird meat produced in the case; (3) two witnesses, who testified regarding the presence of some of the Accused in the case at Providence, where the boat carrying the alleged turtle meat and bird meat, was moored on 30 of January 2003; (4) Evidence of Police Officers engaged in the investigation.

<u>The Evidence of the Expert</u>

Learned Counsel for the First Accused, with the other Counsel agreeing submitted that the evidence of Mr. Selby Remy, the

Expert witness for the Prosecution was imprecise and should not be acted upon in deciding whether there is a case to answer as, he was unable to satisfactorily establish that the exhibits produced in the case were turtle meat, and that the birds alleged to have been killed were of a protected species. Mr Remy testified that there were three types of “Boobies” in Seychelles, the masked booby, the red-footed booby, and the brown booby, but he stated that although he was certain that the meat seen by him in the gunny bags belonged to the "Booby" family, he could not state as to which of the three species they belonged, as they were cleaned, cut and salted. The Second and the Seventh Accused referred to the meat as that of birds called "Fou". Mr Remy stated that a "Booby" is also a "Fou". Adrian Skerett in his book *Birds of Seychelles* gives the creole name of the masked Booby as "Fou Zenero", that of the red footed Booby as "Fou Bef or Fou Rozali" and the brown Booby as "Fou Crispen". As regards turtle meat as well Mr Remy stated that the meat was undoubtedly that of a green turtle which had only one claw on its flipper. This was observed on inspection of the exhibits at Providence and in Court. This view is confirmed in the IUCN/SSC Marie Turtle Specialist Group Publication under the Title "Research And Management Techniques For The Conservation Of Sea Turtles" at page 26. As was held in the case of Treffle Finesse (supra):

> Whether his evidence (that of an Expert) was reliable or not was not a matter for the trial Court to determine on a submission of "no case". It sufficed that there was evidence which if accepted could support a conviction. At that stage of the proceedings, it was not for the trial Judge to accept: or reject evidence.

I am satisfied that the evidence of Mr. Remy without furthermore, could support a conviction in the case.

Before I examine the other relevant evidence, I propose to consider the law relating to confessions of a co-Accused, upon which a substantial part of the Prosecution case is based. It is a fundamental evidential Rule that an out of Court admission or one Accused in the absence of another Accused *was not evidence* against that other Accused. This does not mean that the same Act committed by one person should be considered as not having been committed by the other. It only means that such admission can be *proved only against the maker and not against the other*.

However, two recognised exceptions to this Rule are –

(1) Where the co-Accused by his words or conduct accepts the truth of the statement, so as to make all or part of it a confession statement of his own.

(2) In the case of conspiracy or any crime which, according to the case for the Prosecution, was committed in pursuance of a conspiracy; statements or acts of one conspirator in the execution or furtherance of the common design are admissible in evidence against any other party to the conspiracy provided that there is some other evidence of the common design.

Before the Accused were called upon to plead, the defence raised a preliminary objection to Counts 2 and 5 of the original charge which contained charges of conspiracy to commit the substantive offences contained in counts 1 and 4, on the ground that those counts were improper, unfair and undesirable as they added nothing to the substantive counts. Alleear CJ in a Ruling dated 12 March 2003 upheld that objection partly, and held that although counts 2 and 5 could

not be laid as substantive counts, they could be laid as alternative counts and ordered accordingly. However before the pleas were taken, the Prosecution withdrew counts 2 and 5. Hence the 2nd exception cannot be applied in the present case. But could the 1st exception apply? The statements of the seven Accused, which have been held to be voluntary statements have therefore to be considered individually, as evidence, to the extent of their own incrimination, but not as evidence against the other co-accused, except so far as they have themselves, by words or conduct accepted the truth of those statements.

At this stage of the case, the Court is concerned only with the quality of the Prosecution Evidence adduced to maintain the charges. Hence an in depth consideration of the individual statements for the purpose of the first exception set out above need not be made. However the statements made by the First, Second, Fourth to Seventh Accused, taken as against themselves, contain admissions that each one of them went to sea on a fishing expedition on 11th January 2003, and returned on 30th January 2003. There is evidence that the Police Officers found the First and Second Accused on board the Vessel wherein they were in the hold where gunny bags identified as containing turtle meat and bird meat, were stored. The statements also contain admissions that they had knowledge that the gunny bags contained salted turtle and bird meat. It was contended by the defence that the retracted statements would need corroboration. The retracted statements, which on a voire dire were found to be voluntarily made, were those of the First, Second, Fourth, Fifth and Seventh Accused. The Third Accused's statement was admitted without objections and the statement of the 8th Accused was challenged only on the ground that there was non-compliance with the Judges' Rules. As regards corroboration required in a retracted confession, the Seychelles Court of Appeal, in the case of *Pool v R* 1974 SCAR 88 held that each case must depend on its own

circumstances, but that in general the need to took for corroboration, in Seychelles, will arise in *retracted* confessions, while in the case of a *repudiated* confession, it will depend entirely on the circumstances whether corroboration should be regarded as the essential element.

In the case of *R v Jose Pillav* (Criminal Side 8 of 1986) (unreported) Seaton CJ found no corroboration in a retracted confession. However considering the case of *Pool* (supra) as a Rule of prudence stated –

> But, while bearing all this in mind, the Court is of the view in all the circumstances of the case, that the statement is true and may safely be acted upon. I have come to that conclusion after carefully considering the evidence and of seeing the demeanour of the witnesses, including the Accused as they gave evidence.

In this respect, Seaton CJ approved the dicta in the East African Court of Appeal case of *Tuwamoi v. Uganda* (1967) E.A. 84, wherein that Court stated inter alia that-

> .... corroboration is not necessary in law, and the Court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot, but be true.

The established Rules regarding a retracted confession are –

(1) A confession is not to be regarded as involuntary merely because it is retracted.

(2) As against the maker of the confession, the retracted confession may form the

basis of a conviction if it is believed to be true and voluntarily made.

(3) As against the Co-Accused, both prudence and caution require the Court not to rely on a retracted confession without independent corroborative evidence. The corroboration should not only confirm the general story of the alleged crime, but must also connect the Accused with it. (*Law of Evidence* - Ratnalal and Thakore 4th Edition, 88).

It was submitted by the Prosecution that, as for corroboration, the statements of the First, Second, Fourth, to Seventh Accused contain admissible evidence as regards the presence of turtle and bird mat on the boat in which they admittedly went to sea on 1101 January and returned on 30 January 2003, the presence of Clubs and Harpoon-like implements that could have been used to capture and kill the turtles and birds, and independent oral evidence regarding their presence at Providence where the boat was moored. Such evidence prima facie implicates these Accused with the offence of possession contained in count 1.

In this respect, the statement of the Third Accused contains a complete denial of the trip made by the other Accused. Although the First, Second, Fourth, Fifth, Sixth and Seventh Accused implicated him as one of those on that particular trip, and in fact as the captain of the boat, that would not be evidence against him. Even the 1st exception does not apply against him. In his statement he stated that on 31st January 2003, around 9 a.m. he went to Robert Souris' place at Providence to get fibre glass. The 8th Accused also stated that he saw him by the roadside near Souris' place. Robert Souris, the boat builder saw him with the 4ih Accused on 30 January 2003 around 6.30 p.m. While the Fourth Accused came from the boat, the Third Accused was not with him.

Joliff Juliette who was also working with Souris, saw both the Third & Fourth Accused at about the same time. Only the Fourth Accused spoke with Souris. Both the Third and Fourth Accused then left towards the road, with the Fourth Defendant carrying a gunny bag on his shoulder. There is therefore only circumstantial evidence regarding his presence in the area where the boat was moored. In the absence of a charge of conspiracy or of common intention, such evidence alone would be insufficient to call upon the Third Accused to present a defence to a charge of unlawful possession of turtle meat under count 1. Accordingly I find that he has no case to answer under count 1.

As regards the 8th Accused, he stated in his statement under caution that he undertook to transport "salted fish" for the Fourth Accused. He went on board the vessel, and returned to the shore. He told the Police Officers that there were people in the boat. He claimed that it was then that he noticed a gunny bag in his pick-up. A Police Officer told him that the bag contained turtle meat.

Mrs Antao, Learned Counsel for the 8th Accused contended that possession involved both the mens rea and actus reus, and that the 8th Accused had neither. However, testifying on oath at the voire dire, the 8th Accused stated that he told the Police Officers that the "gunny bag belonged to the fishermen". In his statement he had admitted agreeing with one of the Accused to transport "salted fish". Hence he had knowledge about the gunny bag in his pick up. But was he in possession, in the sense of knowing the contents which was in his custody and control? In the case of *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256, it was held inter alia that-

> A person who accepted possession of a Parcel, normally accepted possession of the contents, but that inference could be disproved or shaken

> by evidence that although a person was in possession of a Parcel, he was completely mistaken as to its contents and would not have accepted possession had he known what kind of thing the contents were. A mistake as to the quality of the contents, however, did not negative possession. If the Accused knew that the contents were drugs or tablets, he was in possession of them, though he was mistaken as to their qualities. Again if, though unaware of the contents, he did not open them at the first opportunity to ascertain what they were, the proper inference was that he was accepting possession of them. (It would be otherwise if a person had no right to open the Parcel). Again if a person suspected that there was anything wrong about the contents when he received the Parcel, the proper inference was that he was accepting possession of the contents by not immediately verifying them.

The Privy Council in the Jamaican case of *DPP v Brooks* [1974] AC 862, stated:

> In the ordinary use of the word "possession" one has in one's possession whatever is to one's own knowledge, physically in one's custody or under one's physical control. This is what was intended to be prohibited in the case of dangerous drugs……… These technical doctrines of the civil law about possession are irrelevant to this field of Criminal Law.

Lord Pearce in *Warner* (supra) stated that -

> One must therefore, attempt from the apparent intention of the Act itself to reach a construction

> of the word "possession" which is not so narrow as to stultify the practical efficacy of the Act or so broad that it creates absurdity or injustice.

In the present case, the Accused stand charged with offences under the Wild Animals and Bird Protection Act which has been enacted in the pursuit of legitimate social policy and Environment objectives to maintain the rhythm and harmony in the natural world. In this respect, the legislation has a similar public policy objective as legislation enacted to control the misuse of dangerous drugs.

Environment Protection Legislation is largely marine ecosystem oriented. In this respect the "precautionary principle" is one of the essential features of sustainable development. This principle means that the State and other statutory authorities must anticipate, prevent and attack the causes of environment degradation. The protection of wild animals and birds is one field in this system. Environment and wildlife protection offences are based on strict liability. The principle is to punish the event and not the intent.

In *R v Waller* (1991) Cr. L. Review 381, the Accused was given a box by a friend for safekeeping. He removed a plastic bag from that box without examining it. The next day, the Police seized the bag and found a sawn - off shotgun with cartridges. The Accused stated that he did not know what the bag contained but thought there might be a crowbar inside. He was charged with possessing a firearm. The Court took into consideration the public policy involved in the Act and construed the offence as an absolute one, where the state of mind was irrelevant. Accordingly it was held that the Prosecution need not prove that the Accused knew what was in the bag.

In the present case, the statement of the 8th Accused contains an admission that he went on board the boat and saw people

there. Although he stated that one of the Accused told him to transport salted fish, when the Police Officers questioned him, he told them that he did not know anything about the gunny bag in his pick up. There is evidence on record that the bag had a peculiar odour and that a greenish oily substance was oozing therefrom. Hence there was sufficient reason for the 8th Accused to suspect that what was in the bag was not salted fish. In these circumstances the evidence available against the 8th Accused is sufficient to call upon him to present a defence under count 6.

Accordingly I rule that the First, Second, Fourth, Fifth, Sixth and Seventh Defendants have a case to answer in respect of the offence charged under count 1, and the Eighth Accused under count 6.

Count 4 relates to the offence of killing a protected bird contrary to Regulation 4(1) of the Wild Birds Protection Regulations of 18th April 1966. In the particulars, it is alleged that the First to Seventh Accused unlawfully killed approximately 40 "Boobies", a protected bird.

In the case of *Robinson v. Everett & W F.C. Bonham & Sons* (1988) Cr. L. Rev. 699, the Court decided on the basis that where the Accused failed to establish on a balance of probabilities that a stuffed and mounted bird found in his possession was not killed by him, there was an inference of killing. In the present case however there is a specific charge of killing the birds.

The Prosecution, withdrew the charge under count 4 as against the Third, Fourth and Fifth Accused for lack of evidence of killing of the birds. As regards the other Accused, although the First Accused did not expressly admit to any killing of birds, he stated that he salted the birds brought by the Second Accused. There is therefore sufficient evidence to call upon him to present a defence in respect of count 4.

The Second Accused stated "we killed about 50 birds (Fou)". Admittedly a "Booby" is a "Fou". The word "we" in the plural includes the singular. Hence there is an admission of killing by the Second Accused, and accordingly he has a case to answer on count 4.

The Sixth Accused in his statement stated that two others killed about 10 "*Fou*" birds, and salted them. He admitted to packing the salted turtle and bird meat in gunny bags. There is sufficient evidence adduced by the Prosecution to call upon him to present a defence under count 4.

The Seventh Accused in his statement, admitted going in search of birds. While two others killed the birds, he cleaned them and put them in a gunny bags. Then he stated "*we* killed about forty birds which we later salted on board the boat. There is therefore sufficient evidence to call upon him to present his defence to the charge in Count 4.

In summary therefore, I rule that the Prosecution has established a prima facie case against the following Accused persons in respect of the counts indicated below-

1st Accused counts 1 and 4
2nd Accused counts 1 and 4
4th Accused count 1 (count 4 withdrawn by the Prosecution).
5th Accused count 1 (count 4 withdrawn by the Prosecution)
6th Accused counts 1 and 4
7th Accused counts 1 and 4
8th Accused count 6.

Accordingly I call upon them to present their defences.

Pursuant to Section 184 of the Criminal Procedure Code, the

Third Accused is acquitted on counts 1 and 4.

Record: Criminal Side No 11 of 2003

Lesperance v The Republic

And

Azemia & Or v The Republic

Civil procedure - bail pending appeal – right to fair hearing – Constitution

The Court considered two applications for bail pending appeal.

HELD:

(i) Chances of success on appeal should not be considered as a ground for granting bail. If prima facie there exists some obvious error of law, the court should arrange an expedited hearing of the appeal in the Supreme Court. In the case of the Court of Appeal, an appeal from the Supreme Court is usually heard within four months, which is a reasonable delay in the case of a convicted person;

(ii) Bail will only be granted in exceptional and unusual circumstances that may arise in a particular case, or where the hearing of the appeal is likely to be unduly delayed;

(iii) In dealing with the latter class of case, the court will have regard not only to the length of time which must elapse before the appeal can be heard, but also to the length of sentence being appealed from, and further, these two matters should be considered in relation to one another;

(iv) Where there is a delay for which the Appellant is not responsible, and which cannot be remedied by the trial court, from where bail is sought, it is within the right contained in Article 19(1) of the Constitution to consider the granting of bail. This is more so, as if bail is refused, an appeal to the full Court of Appeal will also be subject to a delay, leaving the applicant without a remedy. However, the reasonable delay envisaged in Article 19(1) of the constitution is relative to the facts and circumstances of each case; and

(v) In cases where there is no prima facie error of law in sentencing, it is premature to consider granting bail for reasons unconnected with the merits at least until half the period had been spent.

Ruling: Application for bail refused.

Legislation cited
Constitution of Seychelles, Art 19
Criminal Procedure Code, s 342
Court of Appeal Rules 1978, rule 20

Cases referred to
Joubert v R (1976) SLR 17
Rolly Lesperance v R SCA 2/2004
Salim Mhommed Akbar v R Crim s 5/1998 (Unreported)

Pesi PARDIWALLA for Mr. Rolly Lesperance
Alexia ANTAO for Mr. Robert Azemia & Mr. Beddy Payet
Ronny GOVINDEN for the Republic

Order delivered on 12 July 2004 by:

PERERA J: There are two applications for bail pending Appeal. One filed by Rolly Lesperance in the Supreme Court under the provisions of Section 342(4) of the Criminal Procedure Code, and the other filed by Robert Azemia and Beddy Payet in the Court of Appeal. Rule 20 of the Seychelles Court of Appeal Rules 1978, provides that –

> Whenever application may be made to the Court or to the Supreme Court, it should normally be made in the first instance to the Supreme Court.

Hence although both applications are entertainable by this Court, yet, different considerations would apply. In respect of the former application, Section 342 (4) provides that:

> the Judge may in is discretion, in any case in which an appeal to the Court of Appeal is filed .... grant bail pending the hearing of such Appeal.

In a ruling in the case of *Salim Mohammed Akbar v. R* (Criminal Side 5 of 1998), which involved a bail application pending Appeal filed in the Court of Appeal, the use of the words "the Judge" and not "a Judge" in the context of that Section was held to necessarily mean, the Judge who convicted and sentenced the accused. Such Judge being seized of the merits of the case and other circumstances is empowered to use his discretion in granting bail pending Appeal.

In the latter application filed in the Court of Appeal, I am being called upon to consider the application as an ex-officio single Judge of the Court of Appeal. In view of the distinct nature of the applications, I shall consider them separately.

Rolly Lesperance v. R (S.C.A. no 2 of 2004) the Applicant has relied on two grounds:

(1) That there exists cogent grounds of Appeal and the circumstances are such that prima facie, the chances of success of the Appeal are very high.

(2) There are special and usual (sic) reasons for the granting of bail.

Obviously, the second ground was based on "unusual" reasons, and not "usual" reasons as erroneously stated therein.

As regards the first ground, I stated the following in the *Akbar* case (supra):

1. Chances of success in Appeal should not be considered as a ground for granting bail. If however prima facie there exists some obvious error of law, the Court should arrange an expedited hearing of the Appeal in the Supreme Court. In the case of the Court of Appeal, an Appeal from the Supreme Court is usually heard within four months, which is a reasonable delay in the case of a convicted person.

2. Bail will only be granted in exceptional and unusual circumstances that may arise in a particular case, or where the hearing of the Appeal is likely to be unduly delayed.

3. In dealing with the latter class of case, the Court will have regard not only to the length of time which must elapse before the

> Appeal can be heard, but also to the length of sentence being appealed from, and further, these two matters should be considered in relation to one another.

An application under Section 342(4) of the Criminal Procedure Code is of wider application. In the case of *Joubert v. R* (1976) SLR 17, it was held that "the Court would grant bail where the chances of success of the appeal are so great that the probability that the appeal will be allowed is overwhelming". In *Akbar* I observed that this was an overstatement of the English rule in dealing with applications of this nature. The Applicant, in the present matter, has quite correctly, modified the rule contained in *Joubert* (supra) and formulated ground 1 on the basis that on a prima facie basis, the chances of success of the appeal are very high.

I have perused the grounds of appeal against both the conviction and sentence. Without dwelling on the merits of such grounds, I fail to be convinced that there are any grounds which, on a prima facie basis provide even the remotest chance of success in appeal.

As regards ground 2, based on the averment that there exists special any unusual reasons for granting bail, Mr Pardiwalla Learned Counsel for the Applicant invited the Court to consider the present situation created by the non-functioning of the Court of Appeal due to the appointments of the President of the Court and that of one Justice of Appeal being challenged by the Bar Association of Seychelles, and a practising lawyer. This indeed is an unprecedented situation not only for Seychelles but perhaps in the whole world. The functioning of the highest appellate court has been paralysed for about six months. However it will become functionable shortly. In this respect, Mr. Pardiwalla relied on the statement made by me in *Akbar* that:

> bail could however be granted for reasons unconnected with the merits of the case, such as the possible delay in the hearing of the Appeal. The prisoner who has a right of appeal under Article 19(11) of the Constitution, has also the right to a hearing of that Appeal within a reasonable time. The delay is considered in relation to the sentence of imprisonment imposed on him.

Mr. Govinden, Learned Principal State Counsel however submitted that the delay caused by the non-functioning of the Court of Appeal alone was not a special reason unless there was prima facie, a fundamental error of law in the sentencing. He submitted that there was no such error and that hence the Court should not consider that delay.

Article 19(11) of the Constitution provides that-

> Every person convicted of an offence shall be entitled to appeal in accordance with the law against the conviction, sentence and any order made on the conviction.

The right of a fair hearing contained in Article 19(1) extends to an appellate hearing as well. Hence when I stated in *Akbar* that bail could be granted for reasons unconnected with the merits of the case, I had not anticipated a situation as now prevailing. However where there is a delay for which the appellant is not responsible, and which cannot be remedied by the trial Court, from where bail is sought, it is within the right contained in Article 19(1) to consider the granting of bail. This is more so, as, if bail is refused, an appeal to the full Court of Appeal will also be subject to a delay, leaving the applicant without a remedy. However, the reasonable delay envisaged in Article 19(1) is relative to the facts and circumstances of each case.

In *Akbar* I stated that the delay is considered in relation to the sentence. In that case the sentence was 8 years imprisonment, and hence I ruled that a normal delay of 3 months was reasonable. In *Joubert* (supra) a delay of two months in a 12 month term of imprisonment was considered reasonable. In the present case, the applicant was convicted on 18 May 2004. He has not even served two months out of the possible 18 months he should serve with the 1/3 remission. Hence in cases where there are no prima facie errors of law in sentencing, it is too premature to consider granting bail for reasons unconnected with the merits at least until half the period had been spent. That would be a reasonable delay in the circumstances of the present case. Hence bail is presently refused.

Robert Azemia and Beddy Pavet v R (S.C.A. no 1 of 2004)

This joint application for bail which has been filed in the Court of Appeal comes up for consideration before me in my capacity as ex officio single Judge of the Court of Appeal. The grounds urged are the same as those in the application of Roily Lesperance. Mrs. Antao, Learned Counsel for the Applicants conceded that in view of the dicta in *Akbar*, chances of success in appeal may not be considered by an ex officio single Judge. She however urged the Court to consider ground 2 based on the delay in disposing the Appeal by the Court of Appeal, due to the unprecedented situation where there is no functional Court. She also referred the Court to Article 19(1) and 19(11) of the Constitution. However for the same reasons stated in respect of the application of Roily Lesperance, the present application is refused, as there are no prima facie errors in sentencing, a consideration of granting bail for reasons unconnected with the merits would be premature unless at least half the period of the sentence had been spent. That delay is reasonable in the circumstances of the case.

Orders made accordingly;

Record: Criminal Side No 11 of 2003