THE SEYCHELLES LAW REPORTS

SUPREME COURT DECISIONS

VOLUME
2006

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Published by Authority of the Chief Justice

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CITATION

These reports are cited thus:
(2006) SLR

Printed by
Imprimerie St Fidèle

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Criminal procedure - rights of accused in absentia

The Court order authorised the accused to go to Mauritius to undergo investigations for a medical report. He was on bail and needed to return to the Seychelles for trial. The prosecution had closed its case.

HELD:

(i) The Court must be satisfied that the constitutional right of the accused to be defended is not contravened;

(ii) The accused should not be tried in absentia except with their permission;

(iii) Counsel can inform the Court of the choice of the accused if the accused is not able to be present; and

(iv) Counsel cannot agree to the trial proceeding in the absence of the accused.

Judgment in favour of the accused.

Legislation cited
Constitution of the Seychelles, Art 19(2)
Criminal Procedure Code, ss 184(1), 133(1)

Cases cited
Mathiot v R (1978) SLR 91

David ESPARON for the Republic
Frank ELIZABETH for the Accused

Ruling delivered on 26 October 2006 by:

PERERA J: This Court, by order dated 22 June 2006, authorised the accused, who was already on bail, to proceed to Mauritius to undergo investigative procedures on the basis of a medical report furnished. His passport which was impounded by the Court was not returned, but he was required to obtain a travel document from the Director of Immigration. On 22 June 2006, when the order was made, the case was listed for continuation of hearing on 12 and 13 October 2006. Consequently, he left for Mauritius on 8 July 2006. The travel document is valid only till 6 January 2007.

When the case was taken up for trial on 12 October 2006 at 9.00am, Mr Elizabeth, Counsel for the Accused informed the Court that the Accused was still awaiting the necessary tests being done. He produced reports and receipts from the "Medpoint" Hospital in Mauritius in proof of the tests done so far and the payments made for them. He produced another report from "Medisave Medical Centre" dated 21 July 2006, stating that for further tests, the cost would be around Mauritius R60,000. Mr Elizabeth submitted that the family of the Accused is making arrangements for the necessary funds to be remitted to the Accused, and that he will return to stand trial as soon as all the tests have been completed.

The Prosecution has closed its case, but the Accused had not been put to his election under Section 184(1) of the Criminal Procedure Code. Mr Elizabeth is prepared to make the election on his behalf. Section 184(1) requires that when at the end of the Prosecution case, "it appears to the Court that a case is made out against the Accused person ...... the Court shall again explain the substance of the charge to the Accused, and shall inform him" of the choices. The election is therefore a personal choice of the Accused. Where he is legally represented, he could make his choice on the advice of his Counsel. In the alternative, Counsel could, with the

concurrence of the Accused inform the Court of the choice. In *Mathiot v R* (1978) SLR 91 where the Accused was unrepresented, it was held that:

> The absence of the mention in the record that the Magistrate had asked and recorded the question whether the Accused had any witnesses to examine or other evidence to adduce in his defence, was fatal to the conviction.

In any event the Court must be satisfied that the Constitutional Right of the Accused to be defended, either in person or with legal representation, is not contravened. Hence I rule that in the absence of the Accused, and without the agreement of the Accused, Counsel appearing for him has no right to make an election under Section 184(1).

Mr Esparon, Learned State Counsel moved for a hearing in absentia under Section 133(1) of the Criminal Procedure Code and Article 19(2) of the Constitution. With respect, Section 133(1) applied when "if it is proved that the Accused person has absconded and there is no immediate prospect of arresting him". Article 19(2) guarantees that an Accused shall not be tried in absentia "except with the person's own consent". Hence even his Counsel cannot agree to the trial proceeding in his absence. The derogation to that right is "unless the person's conduct renders the continuance of the proceedings in the person's presence impracticable". There is no such situation in the present case. All safeguards have been taken by this Court, in its order dated 22 June 2006 for the Accused to proceed abroad for medical treatment and return for trial. Hence this application is premature. If the Accused fails to return after his travel document has lapsed, the Court would be in a better position to consider an application for the trial proceeding in absentia. Ruling made accordingly.

Record: Criminal Side No 38 of 2005

Republic v Cole & Or

Remand – seriousness of offence – prevalence of offence

An order was made under Section 179 of the Criminal Procedure Code that the accused should be remanded in custody pending the determination of the case. Counsel for the accused objected to this order as it contradicted Article 18(7) of the Constitution.

HELD:

(i) Remand is not a form of punishment. It is a transitory stage prior to the proper trial;

(ii) When deciding whether to remand, the Court must pay regard to the constitutional rights of liberty of the accused and the fundamental rights of other members of society to live peacefully. If an offence is deemed to be serious, then the accused may be remanded. When assessing the seriousness of an offence, the prevalence of such an offence in the community must be considered; and

(iii) The accused are charged with three offences which remain prevalent in the society: sexual assault; robbery; and bodily harm.

Judgment for the prosecution. The accused should be kept on remand.

Legislation cited
Constitution of the Seychelles, Art 18(7)
Criminal Procedure Code, s 179

Criminal Code, ss 130(2)(d), 280, 281, 23

Cases cited
Republic v Gerard Kate (2004) SLR 86

Elvis CHETTY for the Republic
Frank ELIZABETH for the Second Accused

Ruling delivered on 23 May 2006 by:

GASWAGA J: When the accused persons appeared before this Court on 18 May 2006, I made an order under section 179 that they should be remanded in custody pending the determination of their case and as such to be produced in Court after every 14 days until otherwise ordered. I hereby give my reasons for the order that I had earlier made.

The prosecution filed a notice of motion with the prayer for remand in custody of the accused in accordance with section 179 of the Criminal Procedure Code read with Article 18(7) of the Constitution. It was accompanied by an affidavit from sub-inspector Marie.

Mr Elizabeth, who appeared for the Second accused, vehemently objected to the application and averred that under the Constitution, Article 18(7) thereof, the accused person was entitled to be released on bail since there was no fear expressed that they may not come back to Court for their trial. He also submitted that the accused were charged with one offence of mere sexual assault, which according to him was not very serious. In the case *Republic v Gerard Kate*, supra, the Court stated as follows:

> The seriousness of an offence does not mean only offences that carry hefty fines and/or long term 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 that the alleged offence took place; among other considerations.

The learned Judge went on to state with regards to pre-trial incarceration:

> 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 the proper trial is to take place. 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 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 regards not only to the Constitutional rights of liberty of the accused, but also the fundamental rights of other members of society to live securely and peacefully.

A quick perusal of the application filed by the prosecution and the charge sheet revealed that both accused persons are charged with three offences allegedly committed at the same transaction of events against and the same victim namely; sexual assault contrary to section 130(2)(d); robbery contrary

to section 280 read with section 281 and section 23 of the Penal Code and assault occasioning bodily harm contrary to section 236 read with section 23 of the Penal Code. The Court takes judicial notice that all these three types of offences remain prevalent in this society.

The rights of the members of the public and those of both accused have been carefully considered, especially as put across by Mr Elizabeth but the interest of justice in this case overwhelmingly dictate that the accused be kept on remand at Long Island Prison.

I so order.

Record: Criminal Side No 25 of 2006

Republic v Eulentin & Or

Robbery with violence – in absentia hearing

Offence of robbery with violence. When the case came up for hearing, only one accused appeared. Prosecution counsel applied for a hearing in the absence of the Second Accused.

HELD:

(i) A trial in absentia is permissible only if the accused has consented to it, or the Court finds that the accused conduct themselves in such a way that the continuing with the proceedings with them present would be impractical and they would be ordered to be removed;

(ii) Evidence can be taken if the accused is absent if it is proved that they have absconded and there is no immediate prospect of arresting them;

(iii) An application for a hearing in absentia can be granted only if the above procedures are complied with; and

(iv) The Court does not have clear evidence as to where the accused is and whether they have absconded.

Judgment: Application for a hearing in absentia rejected.

Legislation cited
Constitution of Seychelles, Arts 18(12), 19(2)(i)
Criminal Procedure Code, ss 133(1), 179
Penal Code, ss 23, 281

Cases cited
R v Cliff Emmanuel and Richard Freminot Cr S 83/2003

David ESPARON for the Republic
Basil HOAREAU for the First Accused
Alexia ANTAO for the Second Accused

Ruling delivered on 23 November 2006 by:

GASWAGA J: The two accused herein have been jointly charged with the offence of Robbery with violence contrary to and punishable under Section 281 of the Penal Code read together with Section 23 of the Penal Code and are currently on remand under Section 179 of the Criminal Procedure Code Cap 54. When the case came up for hearing on 22/11/2006 only the first accused was produced and the State Counsel Mr Esparon applied to Court under Article 19(2)(i) and Article 18(12) of the Constitution to have the matter heard in the absence of the second accused. He also cited the authority of *R v Cliff Emmanuel and Richard Freminot* Crim. Side No 83 of 2003. Mrs Antao appearing for the second accused objected to the application and submitted that Article 19(12) was not applicable since the accused was not at large and further that the police officers must depone an affidavit with regard to the whereabouts of the accused and not the State counsel to give evidence from the Bar.

Under Article 19(2)(i) a trial in absentia is permissible only if the person has consented or if the Court finds that the person's conduct renders the continuance of the proceedings in the person's presence impracticable and it orders for his removal. With due respect to Mrs Antao, in my view, Article 19(12) cannot be restricted to only those persons that are still at large. It reads:

> a person who has, in accordance with law, been

> served with a summons or other process requiring the person to appear at the time and place appointed for the trial and who does not so appear shall be deemed to have consented.

In the circumstances of the case of *Richard Freminot* (supra) I found the accused, who had been remanded under Section 179 (supra) with clear orders for his future appearance or production in Court and he escaped from such lawful custody while being conveyed to Court for the hearing of his case which he very well knew, to have consented to the trial taking place in his absence. This situation is dissimilar to the one at hand.

Evidence can also be taken in the absence of the accused pursuant to Section 133(1) of the Criminal Procedure Code "if it is proved that an accused person has, absconded and that there is no immediate prospect of arresting him..." While attempting to satisfy these requirements Mr Esparon led evidence of one of the police officers Police Constable Daniel Sinon that was at the time seated in Court. The following part of the record is pertinent:

Q And where is Mr Zeiia?

A He has absconded

Q Since when?

A Two or three weeks

Q And on the day in question, you were instructed to go to Montagne Posee to pick the one that is absent?

A No.

Q So, you were not asked, you were not the one that went and so you have no personal knowledge of the circumstances of this escape? Therefore, what you are saying to

this Court, you have no knowledge of because you were not there?

A No.

With due respect to the learned State counsel the preconditions have not been fulfilled. It is for the police or prison authorities to officially notify the Court on the escape of the Second accused and the circumstances under which he escaped have filed no formal report or affidavit. The police officer's testimony clearly shows that he is not conversant with what happened to the second accused and generally the circumstances of his escape. He was not present during the escape, does not know the date of the incident and admittedly he was only told by another police officer. This leaves the Court guessing as to whether the accused has indeed absconded and if so whether there is any immediate prospect of his being arrested. It should be observed that any application filed on such unproved and shaky grounds is inevitably bound to fail.

In fact Mrs Antao's complaint on the matter carried merit. Judges are not angels to know what exactly happened outside Court or at the scene of crime; they entirely rely on the evidence and only that evidence presented before the Court through the well-known and established formal channels. It is hoped that this humble opinion will in future offer some guidance to the manner in which criminal prosecutions are to be conducted.

In these circumstances, which are different from those in the *Richard Freminot* case where a police officer deposed to the unlawful escape of the accused and therefore proved his having absconded, I am unable to grant the application for a hearing in absentia in respect of the second accused unless proper procedures are adopted. The application is rejected.

Record: Criminal Side No 31 of 2005

Republic v Francourt

Criminal procedure - bail application – medical grounds

The Applicant was accused of trafficking heroin and cannabis resin and is making a second bail application on medical grounds. The doctor stated that the accused should not be kept in confinement.

HELD:

(i) The Court must look at the cases cited and draw analogies or distinguish the facts of the case to decide whether the accused is of sufficient health to remain in custody;

(ii) In this case, the accused was diagnosed with anaemia and was experiencing frequent blackouts; and

(iii) The Defendant could be treated in Seychelles, even in prison.

Judgment No sufficient grounds to grant bail.

Legislation cited
Criminal Procedure Code 1995, s 101(4)
Constitution of Seychelles 1993, art 18(7)

Cases cited
R v Cecil Morel & Ors Cr S 25/2005
R v Jonathan Volcere Cr S 34/2005
R v Jude Lespoir Cr S 33/2005
Republic v Bernard Loizeau Cr S 83/2005
Republic v Noddy Agathine (2005) SLR 1

Foreign cases noted
Ngui v Republic of Kenya [1986] LRC (Const) 308

Ronny GOVINDEN for the Republic
Frank ELIZABETH for the Accused

Ruling delivered on 2 November 2006 by:

GASWAGA J: The accused, now Applicant herein stands charged with two counts, count 1 with trafficking in a controlled drug namely heroin, and count 2 trafficking in a controlled drug namely cannabis resin and she is making a second bail application relying on medical grounds.

It was submitted on her behalf that she suffers from anaemia and frequent bouts of blackouts and that her state was serious and could pose a greater danger to her life if she was to continue living in the prison conditions. That the Applicant's counsel Mr Frank Elizabeth once visited her at Anse Etoile police station when she had collapsed. Dr Marc Felix working with the Ministry of Health certified the said ailments and his report, addressed to Mr Frank Elizabeth, reads as follows:

> 10th October 2006.
>
> RE: Agnielles Francourt, 26 years, Anse Boileau.
>
> Reference is made to the above named patient who was seen by me on Sunday 1st October 2006 at English River health centre with symptoms of anaemia. Blood investigations were carried out and she was advised to continue on Ferrous Sulphate tablets prescribed a week previously.
>
> The diagnosis of anaemia is mainly clinical, from the symptoms elicited physical signs are few notably pallor. As your client is experiencing frequent episodes of

> blackouts it is of my opinion that she should not be kept in confinement.
>
> Signed
> Marc Felix MBChb.

Principal State Counsel Mr Govinden lambasted this report with regard to both its form and content leading to the author thereof being summoned. On the day of his appearance another report dated 11 October 2006, with the same contents but on a Ministry of Health letter head and official seal, was presented. When asked by Mr Govinden, Dr Marc offered the following answers:

> She complained of dizziness and blackouts and she presented a history of anaemia so we did a blood count.... I came to a diagnosis upon the history as told to me and the physical examination.

The Doctor agreed with Mr Govinden that to come to a meaningful conclusion there was a need to consider everything together thus the history of the patient, the physical examination and the blood test results but that the blood test results were not yet out by the time he wrote the report and were therefore not considered. Had the Doctor considered the said results he would have come to a different conclusion. That however the blood test results revealed that her haemoglobin was 11.4 grams per decimal, a level slightly different from the normal level in a female which ranges between 11.5 and 15.5 grams per decimal.

Mr Elizabeth and Mr Juliette urged the Court to release the Applicant on very stringent conditions and if need be to impose a twenty four hour curfew in addition. They cited the cases of *Republic v Noddy Agathine* Criminal Side No. 38 of 2005 and that of *Republic v Bernard Loizeau* Criminal Side

No. 83 of 2005, wherein the Supreme Court released the accused persons basing on their respective illnesses despite the fact that they, like the present Applicant, were both charged with very serious offences of trafficking in a controlled drug. Indeed the provisions of Section 101 (4) of the Criminal Procedure Code (as amended by Act No. 15 of 1995) and the Constitution Article 18 (7) thereof are couched in mandatory terms, authorising the Court to release on bail an accused person placed before it unless the said accused falls within the category of the exceptions outlined therein. The Applicant remains in custody at the moment as she was denied bail on grounds of seriousness of the offences with which she is charged.

It is imperative for the Court to look at the cited cases in detail and the one at hand and if possible draw a distinction. In *Loizeau* (supra) the accused was warded in Victoria Hospital with a back pain, frequency of micturition, shortness of breath and insomnia and was being given absolute bed rest with two hourly side to side turn. Various medications were recommended and pethedin injections administered in addition to short wave diathermy being done. Dr Gupta testified before Court that the patient was still under observation, but if released he would need a ‘comfortable bed’ (which was not available in the detention facility) as there was the possibility of a relapse. It was averred in *Noddy Agathine* (supra) that he was suffering from headaches, dizziness, vomiting, blackouts and high blood pressure. The report by Dr Kumaran Chetty recommended that an MRI scan of the brain be done overseas. A letter from the Director General Hospital Services stated that "the patient needs a consultation with a neurologist or physician to enable us evaluate his medical needs and to be able to confirm his future diagnostic proceedings". Since the MRI scanning facilities are not available in this country the accused was enlarged on bail and allowed to proceed to Mauritius to carry out the said tests well in time to ascertain the cause of his illness before the

condition of his health deteriorates. It should be noted that the conditions in the above two cases cannot be compared to the present one as the ailments in the former cases were complex and serious in nature and could not be handled while the accused were in detention.

Again, this Court in *R v Jude Lespoir* Criminal Side No. 33 of 2005, and *R v Jonathan Volcere*, Criminal Side No. 34 of 2005) released the accused persons respectively on bail when the surgeon, following an operation for haemorrhoids on each one of them, made a recommendation that they needed to have a bath in a hygienic area yet the police had confirmed that such a facility was not available at the central police station and the Long Island prison.

On the other hand the Court did not deem the medical condition of a 54 year old woman with ulcers and high blood pressure as being a sufficient consideration for release on bail as those ailments could be treated while she was on remand See *Ngui v Republic of Kenya* (1986) LRC (Constitution) 308. Further, the ruling by Perera J in *R v Cecil Morel & Ors* (Criminal Side No 25 of 2005) was to the effect that bail should not be granted where any health condition complained of can be treated in prison or if necessary upon the accused being transferred to hospital under the usual safeguards.

In the present case Dr Felix said that it was his own opinion (though another Doctor could give a divergent opinion) that the accused should not be kept in confinement and further that the said opinion was subjective. In answer to the questions asked by the Court and later on by Mr Juliette the Doctor clearly stated that despite his opinion the accused's ailments or medical condition could well be treated in this country and even while she is confined in the prison. In conclusion therefore, and while being mindful of the constitutional rights of an accused person in detention, I rule that there are no sufficient grounds on which the Court can

enlarge the accused on bail. The application is rejected and accused further remanded in custody to 16 November 2006.

Record: Criminal Side No 48 of 2006

Republic v Julie

Criminal procedure - remand – seriousness of offence – drugs

The Defendant was charged with cultivation and trafficking a controlled drug. He was remanded, and objected to further remand.

HELD:

(i) Bail is a constitutional right which should be granted to every person accused of an offence who appears before a Court;

(ii) It should be noted that pre-trial incarceration is not a punishment; and

(iii) The seriousness of an offence should be calculated through the balancing of a number of factors, including the prevalence of the offence in the community. This offence is prevalent and therefore is seen to be serious.

Judgment for the Republic. Applicant is to be remanded.

Legislation cited
Misuse of Drugs Act, ss 26(1)(a), 29(1)
Constitution of Seychelles 1993, Arts 18(7)(a)–(f), 19(2)(a)
Criminal Procedure Code 1995, s 100(5)

Cases cited
Mervin Benoit v The Republic Cr App 18/2004 (Unreported)

David ESPARON for the Republic
Anthony JULIETTE for the Accused

Ruling delivered on 15 November 2006 by:

GASWAGA J: The Applicant, through her lawyer Mr Juliette, is objecting to her further remand in custody as prayed by Mr Esparon, State Counsel, who submitted that the offence with which the Applicant is charged is serious in nature. Two different counts of offence have been preferred against the Applicant, to wit:

Count 1
Statement of offence
Cultivation of a Controlled drug contrary to Section 8 of the Misuse of Drugs Act read with Section 26(1) (a) of the same and punishable under Section 29(1) of the said Misuse of Drugs Act read with Second Schedule of the same.

Particulars of offence
Marie-Nanette Julie on or about 29 September 2006, at Les Canelles, Mahe was found cultivating a Controlled Drug, namely 18 plants of Cannabis.

Count 2
Statement of offence
Trafficking in a Controlled Drug contrary to Section 5 of the Misuse of Drugs Act read with Section 26(1) (a) of the same and punishable under Section 29(1) of the said Misuse of Drugs Act read with the Second Schedule of the same.

Particulars of offence
Marie-Nanette Julie on the 29 September 2006, at Les Canelles, Mahe was trafficking in a Controlled Drug by virtue of having found in the possession of 81.8 grams of Cannabis which gives rise to the rebuttable presumption of having possessed the said Controlled Drug for the purpose of trafficking.

Bail is a constitutional right which should be granted to every person accused of an offence and presented before a Court of law unless the accused's case and or the circumstances fall within any of the six categories of exceptions outlined in Article 18(7)(a)-(f) of the Constitution. The Applicant continues to be detained in prison on grounds of seriousness of the above offences and Mr Juliette challenges the said ground and submits that most of the offences filed before this Court are serious in nature and this would mean incarcerating all the people appearing before the Court. I think he had in mind the definition of a serious offence as being one that carries a sentence of a fine of R10,000 or imprisonment for a term of not less than three years or both fine and term of imprisonment: see Section 100(5) of the Criminal Procedure Code (as amended by Act No. 15 of 1995) and *Mervin Benoit v The Republic* Criminal Appeal No. 18 of 2004.

He also had a quarrel with the practice of the Court imprisoning people like the Applicant who have not yet been proven guilty especially that she has arguably a good case; that she was not present when her premises (house), which stands on the land that belongs to a third party was being searched; that she lives with and looks after a 12-year old boy and a 67 year old mother and she is the sole breadwinner.

The Court is alive to the provisions of Article 19(2) (a) of the Constitution and indeed considers and treats this Applicant as being innocent till proven otherwise or pleads guilty. But it should be noted that pre-trial incarceration is not a punishment. The Court must be careful while walking this fragile balance before denying the accused of her liberty at this stage and examine not only the charges before it but also the surrounding circumstances. It is premature for this Court to evaluate the evidence to be relied on in the main trial as at this time, in most cases, prosecution is still gathering it or compiling the police file. However, by the time one comes within police notice and charges are preferred there must be

some evidence on record linking them to the offence in one way or another and should therefore expect some inconvenience.

The framers of the Constitution must have considered a number of aspects before listing ‘seriousness of offence’ as one the grounds on which to base a decision to remand an accused in custody at this stage of the trial. It could be stated that on the face of the charge sheet the offences are serious, or attract big sums of fines or long imprisonment terms upon conviction, or that they are rampant in society and that if the accused is released on bail may abscond or commit further offences. The captioned offences could be the type that may have very grave effects not only on the accused but also on other members of the society hence warranting the isolation of the accused from the rest so that the public is saved of such effects. In my view, it is not just the writings on paper and therefore the allegation of seriousness of the offence as submitted by Mr Juliette that the Court looks at but it is a combination of factors that reflect the seriousness of a given offence.

A perusal of the offences herein reveals that the accused is charged with cultivation of and trafficking in a controlled drug which offences attract a minimum sentence of 10 and 8 years imprisonment respectively. Needless to emphasize the enormous and long term effects of consumption of controlled drugs on men, women and children of this country and the world. I take judicial notice of the number of such new cases that are filed in this Court every week. It is indeed alarming for such a small country with a small population, which situation calls for the responsible organs to put an end if possible or prevent this flourishing trade. The Court is sympathetic to the Applicant's social situation and responsibilities but one ought to have had this in mind before setting out to venture, if she at all did, into such activities. Moreover, members of the public are at the moment well

aware that the police is out to search for whoever is still daring to get involved in the possession, consumption and or trafficking of controlled drugs.

From the above discourse, I reject the submission by defence counsel and remand the Applicant in prison under Section 179 of the Criminal Procedure Code Cap 54 for another fourteen days.

I so order.

Record: Criminal Side No 49 of 2006

Republic v Matombe

Criminal procedure - no case to answer - sexual assault

The Defendant was charged with sexual assault of person under 15 years of age. In the alternative, charged with committing an act of indecency on a person under 15 years of age. He submitted no case to answer.

HELD:

(i) A submission of no case to answer may properly be upheld if there is no evidence to prove an essential element of the offence or if that evidence is unreliable or not credible or if a reasonable jury would not convict based on the evidence; and

(ii) Before making a decision on a submission of no case to answer, the judge must wait till the conclusion of the prosecution's submissions.

Judgment: Trial to proceed.

Legislation cited
Criminal Procedure Code, s 183

Cases cited
R v Olsen (1973) SLR 188
R v Stiven (1971) SLR 137

Foreign cases noted
Yeo Tee Soon & Anor v Public Transport (1994) 2 CLR 611

Basil HOAREAU for the Republic
France BONTE for the Accused

Ruling delivered on 24 May 2006 by:

GASWAGA J: The accused is charged with Sexual Assault contrary to section 130(1) of the Penal Code read with section 130(2) of the same code and punishable under the said section 130(1) on Count one. It is alleged that Jacques Matombe, on the 8 August, assaulted A, a girl under the age of 15 years. In the alternative to Count 1 he is charged with committing an act of indecency towards A, a person under the age of 15 years contrary to section 135(1) of the Penal Code and punishable under the said section 135(1).

At the close of the prosecution case, Mr Bonte for the accused submitted that the prosecution had not made out a prima facie case that required his client to be put on defence. Section 183 of the Criminal Procedure Code requires a Court to stop the hearing of a case, and therefore acquit the accused, if there was no evidence to sustain the charges preferred.

Earlier on Mr Hoareau for the prosecution had led evidence to the effect that the victim's father found the accused committing an act of indecency towards her, that the accused had pinned the victim against the wall near the toilets of a hotel at Anse Forban and thereby, not only impeded her movement but also physically prevented her from leaving the place. Further, that the accused tried kissing the victim several times but was not successful as she kept dodging him. Although defence counsel severely cross-examined the prosecution witnesses, the prosecution asked the Court to put the accused on his defence submitting that the evidence on record warranted so.

The submission of no case to answer may properly be upheld:

> (a) Where there has been no evidence to prove an essential element of the offence charged or;

(b) Where the evidence for the prosecution has been so discredited or is so manifestly unreliable that no reasonable tribunal would safely convict on it (*R v Stiven* (1971) SLR 137.

The proper basis to decide whether there is a case to answer is not whether the trial Court does not think that in presence of the evidence adduced any Court would convict the accused, but whether the evidence was such that a reasonable tribunal might convict (*R v Olsen* 1973 No 5).

In the case of *Yeo Tee Soon and Another v Public Transport* (1994) 2 CLR 611, it was held as follows:

> It was fundamental to adversarial procedure that issues of fact are not to be decided, even provisionally, until the whole evidence had been heard. The trial Judge is only entitled to accede to an application of no case to answer at the conclusion of the prosecution's case and stop the case if he is satisfied that some essential elements in the charge had not been covered by evidence or if the prosecution evidence was so inherently incredible that no reasonable person could accept it as true. Once the prosecution had adduced evidence which revealed all the elements of the offence, and which was not so completely discredited that no reasonable tribunal of fact could believe it, a prima facie case has been made out, which if unrebutted, would warrant a conviction.

In the instant case it cannot be said that an essential element of offence of committing an act of indecency towards another person under the age of 15 contrary to section 135(1) of the

Penal Code and punishable under the said section has not been proved or is the evidence of the witnesses so inherently incredible so that no reasonable person or tribunal could accept it as true. In short, the evidence on record requires that the accused person offers an explanation in rebuttal, failing whereof, a conviction may be entered.

Accordingly, there being no merits in the submission of no case to be answered, I order the accused person to be put on his defence in respect of the alternative count (Count 2) under section 184 of the Criminal Procedure Code.

Record: Criminal Side No 7 of 2005

Republic v Matombe

Sexual assault - evidential requirement

The accused was charged with sexual assault of person under 15 years of age. In the alternative, he was charged with committing an act of indecency on a person under 15 years of age.

HELD:

The prosecution must prove the case beyond reasonable doubt in order secure a conviction.

Judgment charges dismissed.

Legislation cited
Penal Code, ss 130(1) and (2), 135(1)

Cases cited
Ibrahim Gilbert Suleman v R Cr Ap 3/1995
Raymond Mellie v Republic SCA 1/2005

Basil HOAREAU for the Republic
France BONTE for the Accused

Judgment delivered on 27 November 2006 by:

GASWAGA J: The accused was originally charged with two different but related offences as follows:

Count 1: Sexual Assault contrary to Section 130(1) of the Penal Code read with Section 130(2) of the same code and punishable under the said Section 130(1). It was alleged that Jacques Matombe, on 8 August, assaulted A, a girl, under the

age of 15 years. In the alternative to Count 1 he is charged with committing an act of indecency towards A, a person under the age of 15 years contrary to Section 135(1) of the Penal Code and punishable under the said Section 135(1). He pleaded not guilty and the prosecution called three witnesses to prove its case, as required by law, beyond reasonable doubt. However, at the closure of the prosecution case and following a submission of no case to answer by the defence the accused was acquitted on count 1 and instead put on his defence in respect of the alternative count under Section 184 of the Criminal Procedure Code Cap 54.

According to the prosecution's evidence giving rise to the said charge, it was deponed that B came to the Seychelles together with his daughters A (PW1), the complainant herein and C. On the evening of 8 August, 2004 the family were joined by some relatives for a dinner dance at the Alamanda Hotel, Anse Forban, Mahe. The hotel guests danced to the music that was being played by the band. On several occasions the accused was seen dancing with the complainant. They also talked while seated in the sofa and the accused offered her a glass of wine. Prior to this she had taken some martini bought by her father. Later on, as the complainant and her sister were walking out of the toilet someone, who was at the time standing by the entrance of the men’s toilet grabbed her arm. It was the complainant's evidence that the man told her that he wanted to show her something before he put his hand on the wall and left her in the middle and then tried to kiss her on the lips. She however kept turning away but the man was still at it. That it was at this point that B arrived, shouted and swore at the accused. The following questions and answers offered thereto by B as extracted from the record are pertinent:

> A I saw a gentleman who had his arms against the wall. My daughter was in front of him, it looked to me and I was pretty certain that he

was trying to kiss her on the mouth. She was turning her head but he had his arms against the wall.

Q You said that it looked to you that he was trying to kiss her. Why do you say it looked to you? Why do you say it looked to you, what was he doing?

A He was trying to kiss her because I have done these sorts of things myself. So I know and I understand when a man is trying to kiss.

Q What was he doing, tell the Court what was he doing?

A He was pinning her against the wall in my view as a father and as a man. In my view, he was trying to molest the child.

Q Tell us exactly what he was doing, apart from having his hands against the wall. What was he doing for you to say that he was trying to kiss her?

A He was pointing his mouth.

(Witness shows this demonstration.)

Q What was A doing at that time?

A She was trying to get away.

Q You said that A was trying to avoid the kiss and the accused was trying to kiss her. Was there any contact?

A Yes.

Q What kind of contact?

A His arms were preventing her, he was holding her arms.

Q There was no face contact?

A Yes, he was kissing her on the mouth and it was not a friendly kiss. I live in France."

On the same aspect, the complainant had this to say when being cross-examined:

Q He did not touch you because both hands were on the wall?

A Yes.

Q He was only trying?

Mr Bonte demonstrates to Court in a manner he described how the witness said it happened.

A Yes.

Q I put it to you that Jacques was standing like that. You were standing in front of him and he had a glass in one hand and another against the wall? I am telling you that he was not standing like you said, you were standing freely?

Mr Bonte shows another demonstration to the Court.

A I do not know.

And in re-examination:-

Q Yes, one hand against the wall and another was holding a glass, which version is correct. Tell the Court?

A I think my one is, I remember a glass smashing. I do not remember if it was my dad's or his. I was panicking.

From this evidence it is clear that the father's testimony sharply contradicts that of the daughter (complainant) in some material particular instead of lending credibility and corroboration. For instance, although the complainant says that she was worried and scared of Jacques nowhere in her testimony did she state that there was a body to body contact between her and the accused. She even categorically said that the accused did not kiss her though he was trying to do so. But her father, who started his testimony with the same position kept changing course, tending to incriminate the accused, as he went further into the examination in chief by saying that he saw the accused kissing the complainant and pinning her on the wall, holding her arms and therefore preventing her from leaving. D (DW2) who had been in the toilet and at the scene together with the complainant at the material time said that after A and her sister had finished smoking and fixing their hair they went out of the toilet leaving her behind. On her way back to the bar she passed by the accused, whom she knew very well talking, to the complainant while holding a glass in one of his hands. That "there were people around and she was free, she could go but they were talking naturally, normal, everything was normal." The accused said he was looking for the complainant to ask her to go and dance with him. Indeed the contradictions were grave

in nature as they significantly affected the material issues. See *Ibrahim Gilbert Suleman v R* Criminal Appeal No. 3 of 1995.

It was the testimony of the accused that he had only one of his arms placed against the wall and not both of them as deponed by the complainant's father and further that the glass that smashed was the one he was carrying in his hand. B claimed that it was his glass. As for the complainant she said she did not know whether the glass was for her father or the accused. The Court is left in a situation whereby it is convinced that the accused had a glass in one of his hands but not sure whether the complainant's father also had one and, if they each had a glass, which one of the two was smashed. It is a settled principle of law that whenever doubt is cast on any issue before the Court the same must be resolved in favour of the accused.

It therefore follows that if the accused was holding a glass in one of his hands he could not have been able to pin the complainant against the wall with both of his hands and prevent her from leaving let alone hold her arms. Had this been the case then A who was walking two steps ahead and talking to the complainant would have at least noticed a change; that her sister had been seized. It should be noted that the aspect of consent is out of question in such cases. Although no birth certificate was exhibited, the person who was present during the birth of the complainant, her father (B), corroborated the complainant that she was born on 3 February, 1991 and at the time of the incident she was only 13 years old. But generally speaking her demeanour especially during cross-examination was wanting while the evidence by B was tainted with some falsehoods and therefore unsafe to wholly rely on. Admittedly, he was over-protective of the daughters as a responsible father. In a situation of this nature lie would do his best to bring to book whoever interacts with the daughters in such unclear

circumstances to him as those that prevailed at the time.

As a cardinal requirement of the law for the prosecution to secure a conviction in a criminal trial it must prove its case beyond a reasonable doubt. That is why the Court of Appeal in *Raymond Mellie v Republic* SCA 1 of 2005, held that an accused person is not to prove his innocence but the prosecution is to prove his guilt beyond reasonable doubt. The evidence adduced herein is so weak to sustain the alleged offences and accordingly the charges must fail. The same is hereby dismissed and the accused acquitted.

Record: Criminal Side No 7 of 2005

Republic v Labodo

Criminal procedure - application to dismiss case – bail restrictions

The Defendant was accused of defrauding his employer. The accused was held in custody and an application was made to further detain him on the grounds that the offence was serious and that the accused should be prevented from interfering with potential witnesses and that the investigation into the crime was incomplete. The application was granted for the accused to remain in custody until the completion of the investigation. The investigation was not completed within the specified time. The accused was released on bail.

HELD:

(i) The Court may release a suspect and impose reasonable conditions considered necessary to ensure that the suspect is available for the purpose of police inquiries or other issues surrounding the case in which the suspect is accused If the accused is able to leave the jurisdiction before the completion of the investigation, it will obstruct the course of justice;

(ii) Section 101 of the Criminal Procedure Code empowers the Court to impose restriction on freedom of movement of a suspect by impounding their passport;

(iii) The right to freedom of movement is subject to such restrictions as are prescribed by law necessary in a democratic society for protecting the rights and freedoms of other persons and for the

prevention of a crime or compliance with an order of a Court;

(iv) Restrictions cannot be placed on a suspect arbitrarily for an unspecified length of time for any reason; and

(v) The period of time that a restriction can be imposed should be decided by the Court based on all circumstances of each particular case.

Judgment for the Republic. It is just and necessary that the police should be given a further two months to complete their inquiry. Motion for dismissal refused.

Legislation cited
Penal Code, s 266
Criminal Procedure Code, s 101
Constitution of Seychelles, Art 25(3)(b) and (c)

Ronny GOVINDEN for the Republic
Antony DERJACQUES for the Defendant

Ruling delivered on 30 January 2006 by:

KARUNAKARAN J: At all material times, the Defendant was an employee of the Public Utilities Corporation. On 19 July 2005, the police arrested him as a suspect in a case involving an alleged offence of "Stealing by servant" contrary to Section 266 of the Penal Code. According to the police, the Defendant - hereinafter called the "suspect" - during the course of his employment with PUC, made and authorised local purchase orders dishonestly, representing his employer and used them to purchase construction materials and other items fraudulently to the tune of R1,055,772 and thereby defrauded his employer.

On 20 July 2005, the police having started investigation in this matter, arrested the suspect and detained him in their custody for 24 hours. And, thereafter, they applied to the Court in terms of Section 101 of the Criminal Procedure Code, for a further holding of the suspect, pending investigation on the grounds that:

(i) The offence alleged was a serious one;

(ii) The suspect should be prevented from interfering with potential witnesses and obstructing the course of justice; and

(iii) Investigation is incomplete.

The Court having heard the parties granted the application for the further holding and remanded the suspect in custody until 25 July 2005 so that the police could complete the investigation. However, the police could not complete the investigation within the said remand period. According to the police, the investigation is complex and time consuming since it involves verification of a number documents, financial transactions, and investigation into transfers of huge sums of money to and from different bank accounts. Moreover, a number of witnesses involved in those transactions have also to be interviewed. In the circumstances, the Court on 25 July 2005, that is, after the expiry of the said remand period, released the suspect on bail pending investigation on condition inter alia, that he should surrender his passport to the Registrar of the Supreme Court. Although this condition impliedly restricted the suspect's “freedom of movement” it was obviously intended to compel the suspect to be present in Seychelles and make him available to the police so as to assist them to complete their investigation. The police are still investigating the matter and according to them, they still need two more months to complete the investigation.

In the meantime, Mr Derjacques, learned counsel for the suspect moved the Court for an order to dismiss the case and discharge the suspect unconditionally and release his impounded passport so that he could travel freely in and out of the country. According to counsel, section 101 of the Criminal Procedure Code cannot take away the suspect's fundamental right to "Freedom of Movement" that is guaranteed under the Constitution.

On the other side, Mr Govinden, learned State Counsel argued that Section 101 of the Criminal Procedure Code empowers the Court to release the suspect unconditionally or impose any reasonable condition which the Court may deem necessary having regard to the circumstances of the case. Therefore, he submitted that the Court might in its discretion, releases a suspect on condition that the suspect should surrender his passport and thus, may restrict his freedom of movement until the completion of investigation. This, the counsel contended, is a reasonable condition in the given circumstances of the instant case. However, such a restriction according to Mr Govinden, cannot be made for an unduly indefinite period. In this particular case, the police reasonably require a period of only two months to complete the investigation. Hence, he requested the Court to adjourn the proceedings for two months hence and secure that the suspect is available to the police for the completion of the investigation.

On a diligent examination of the arguments advanced by the counsel on both sides, it seems to me the following are the questions before the Court for determination:

(i) Does Section 101 of the Criminal Procedure Code empower the Court to impose restriction on the suspect's freedom of movement by impounding his passport for the purpose of

assisting the police to complete the investigation?

(ii) Can this restriction be extended for an indefinite period on a suspect for any reason whatsoever?

(iii) Should the police in the instant case on hand, be given more time namely, two more months for the purpose of completing the investigation?

To my mind, the answers to all three questions lie squarely, within Section 101 of the Criminal Procedure Code, hereinafter called the “Code”, reads thus:

> 101(1) Subject to section 100, a police officer or other person who is holding a person without a warrant (in this section referred to as the "suspect" may, where the police officer or other person has reasonable ground for believing that the holding of the suspect beyond the period specified in section 100 is necessary-
>
> (a) produce the suspect before a Court; and
>
> (b) apply in writing to the Court for the further holding of the suspect.
>
> (2) An application under subsection (1) shall state-
>
> (a) The nature of the offence for which the suspect has been arrested or detained;
>
> (b) The general nature of the evidence on which the suspect was arrested or detained;
>
> (c) What inquiries relating to the offence the police and what further inquiries the police have made proposes;

(d) The reasons for believing...

And shall be supported by an affidavit.

(3) A Court shall not hear an application under this section unless the suspect has been served with copy of the application

(4) Where an application is made under subsection (1), the Court shall release the suspect unconditionally or, where the Court has reasonable ground for doing so, upon reasonable condition unless the Court, having regard to the circumstances specified in subsection (5), determines that it is necessary to remand the suspect in custody.

(5) The circumstances referred to in subsection (4) and (7) are-

(a) Where the magistrate's Court...

(b) The seriousness of the offence for which the suspect was arrested or detained;

(c) there are substantial grounds for believing that the suspect will fail to appear for trial or will interfere with witnesses or will otherwise obstruct the course of justice or will commit an offence while on release;

(d) There is necessity to keep the suspect in custody for the suspect's own protection...

(e) Suspect is serving a custodial sentence;

(f) The suspect has been arrested pursuant to a

previous breach of condition...

(6) Subject to this section, where a Court makes an order under subsection (l) for the remand in custody of a suspect, the period of remand shall not exceed 4 days.

(7) The police officer ... the period of extension granted... shall not,… together exceed in aggregate 7 days.

(8) The reasonable conditions referred to in subsection (4) are reasonable conditions necessary to secure that the suspect-

(a) does not, whilst on release, commit an offence or interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person

(b) is available for the purposes of enabling inquiries or a report to be made to assist the Court in dealing with the offence of which the suspect is accused.

(c) appears at a later date at the time and place required in connection with proceedings preliminary to a trial or with the trial of the offence or for the purpose of assisting the police with their enquiries.

(9) A Court may...... require the suspect

(a) To execute a bond...

(b) To provide ... Sureties for the bond.

It is necessary now to find the answers to the questions above

in the light of the above provisions of law.

As regards question No. (i), it is evident from section 101 (4) and (8) (b) supra that where the Court has reasonable grounds for doing so, may release a suspect upon reasonable condition necessary to secure that the suspect is available for the purpose of enabling police inquiries or reporting to be made to assist the Court in dealing with the offence of which the suspect is accused. In fact, if the suspect is allowed to leave the territorial jurisdiction before the completion of the police inquiries, it will obviously, hamper the investigation of the alleged crime and would obstruct the course of justice. In the circumstances, it is just and necessary for the Court to take all reasonable measures to ensure that the suspect is available in the jurisdiction for the purpose of enabling police inquiries. In my considered view, one among such reasonable measures is to put restriction on the suspect's right to leave Seychelles before the completion of police enquiries. Hence, as I see it Section 101 of the Criminal Procedure Code, does empower the Court to impose restriction on freedom of movement of a suspect by impounding his passport in the remand proceedings pending police investigation or inquiries.

As regards questions 2 and 3, it is truism that the Court in impounding the passport of a suspect, it does impose restriction on the suspect's right to leave Seychelles in effect, curtailing his, freedom of movement guaranteed under the Constitution. However, the Court does so through its lawful orders, in the larger interest of the society in order to protect the rights and freedoms of other persons. And the Court in this process has to strike a delicate balance between the interest of an individual namely, the suspect on the one hand and that of the society on the other hand. Indeed, in terms of article 25(3) (b) and (c) the right to freedom of movement is subject to such restrictions as are prescribed by a law necessary in a democrat society for protecting the rights and

freedoms of other persons and for the prevention of a crime or compliance with an order of a Court. Therefore, to my mind, this reasonable restriction imposed by the Court on the suspect's freedom of movement is legal and falls within the parametres of the Constitution as such measure is prescribed by a law in this particular case the Criminal Procedure Code. However, as rightly submitted by Mr Govinden such a restriction cannot be imposed arbitrarily on a suspect for an indefinite period in the guise of assisting police inquiries or for any other reason whatsoever. Having said that, I hold that the period of such restriction in each case, has to be determined by the Court on the basis the facts and circumstances peculiar to that case, giving due consideration to all the factors such as the complex nature of investigation, the seriousness of the offence alleged, and the necessity to secure the suspect's presence in the jurisdiction to gather or preserve evidence relating to the offence alleged etc. Coming back to the case on hand, after giving due consideration to all the circumstances surrounding the enquiry, it seems to me reasonable, just and necessary that police should be given a further period of two months to complete the enquiry.

Therefore, I refuse the motion of the defence counsel for dismissal but adjourn the proceedings to a later date granting a further period of two months for the police to complete the enquiry in this matter. The case will be reviewed on 31 March 2006. The suspect is accordingly, directed to appear in Court on the said date at 9 am.

Record: Criminal Side No 52 of 2005

Republic v Emmanuel & Or

Criminal law and procedure - manslaughter – robbery – amendment to indictment – miscarriage of justice – accomplice

The two Defendants were charged with robbery. Before the trial, the indictment was amended to include manslaughter.

HELD:

(i) An amendment to an indictment may be made before trial or at any stage of a trial. No amendment may be made after the close of the case for the prosecution;

(ii) Charges may be quashed if there is a miscarriage of justice. An amendment might lead to a miscarriage of justice only if, by mistake, omission or irregularity of trial, the appellant has lost a chance of acquittal that was fairly open to him;

(iii) A Defendant should move to quash a charge before the accused is arraigned, not after. Objections after arraignment are allowed, but are disapproved of if the delay is for tactical reasons;

(iv) Two people will have both committed an offence if, on the facts:

a. They form a common intention to commit an offence together. The agreement may be tacit.

b. They act to carry it out the offence.

c. An offence is committed as a probable consequence of the initial act.

(v) The Court should rely on a retracted voluntary statement only if it is corroborated by independent evidence;

(vi) Uncorroborated evidence of an accomplice is admissible, as long as the Court warns itself of the danger of convicting based on the evidence; and

(vii) Where a case depends exclusively on circumstantial evidence, the prosecution has to exclude any alternative possibility that might point to the innocence of the accused.

Judgment: Both accused guilty on both accounts.

Legislation cited
Constitution of Seychelles 1993, Art 19(2)(h)
Criminal Procedure Code, s 187(2)(a)
Penal Code, ss 23, 158, 192, 280, 281

Foreign legislation noted
Penal Code (India), s 34

Cases cited
Pool v R (1982) SLR 4
Onezime v Republic (1978) SLR 140
R v Gaetan Sonny Rene and Ors (1998) SLR 1
R v M (1966) SLR 237
R v Marie (1973) SLR 218
Raymond Mellie v R SCA 1/2005
Republic v Ernesta (1985) SLR 58
Republic v Hoareau (1984) SLR 18

Sauzier v Republic (1961) SLR 264

Foreign cases noted
Asif v R (1982) Cr Appl R 123
Barendra Kumar Ghosh v The Emperor [1925] All ER (PC) 1
Davies v Director of Public Prosecutions [1954] AC 375
DPP v Marymend [1973] AC 584
DPP v Newbury and Jones [1977] AC 500
Duffy's Case (1830) 1 Lewin 194
R v Church (1966) 1 QB 59
R v Lamb (1967) Cr App R 51, 417
R v Mansfield [1977] 1 WLR 1102
R v Baskerville [1916] 2 KB 658
R v Tate [1908] 2 KB 68
Uganda v Dickens Elatu (1972) Crim Rev 17

Ronny GOVINDEN for the Republic
Frank ALLY for the First Accused
Frank ELIZABETH for the Second Accused

Judgment delivered on 18 October 2006 by,

GASWAGA J: Mr Cliff Emmanuel (Al) and Mr Richard Freminot (A2) have been jointly charged with two counts; (1) Manslaughter contrary to Section 192 read together with Section 23 of the Penal Code CAP 158 and, count (2) Robbery contrary to Section 281 and punishable under the provisions of section 281 read with section 23 of the Penal Code CAP 158. The particulars allege that Cliff Emmanuel, Richard Freminot and Patrick Lime who earlier on pleaded guilty to the offence of manslaughter and was accordingly convicted and sentenced, on the 19th day of August 2003 at Point Lame, Mahe committed the offence of manslaughter of Norah Antat and thereafter at the same place all the three accused robbed Fanchette Antat of other property, to wit several pieces of jewellery consisting of gold earrings with precious stones, gold rings, gold bracelets, gold necklaces,

silver necklaces and a flat computer screen all worth the approximate amount of Seychelles Rupees one hundred thousand (R100,000). Save for Patrick Lime, the other two accused persons Al and A2 pleaded not guilty to both offences whereupon the prosecution had to call witnesses to execute the burden placed on its shoulders to prove the case beyond reasonable doubt.

I find it imperative to briefly narrate the facts of this case, which culminated with the arrest, and subsequent arraignment of the accused persons herein. On the morning of 19 August 2003, Fanchette Antat PW 6 and daughter of the deceased left the house as usual in proper order for work at the Ministry of Tourism. When she returned home in the afternoon at 2.00 pm she together with her driver David Richard PW 8 and, Mr Hans Marguerite PW 4 who was doing some construction work on the house, she discovered the deceased Norah Antat lying on the floor of the living room. Both of her hands were tied at the back. The legs too were tied together while her upper part of the body was covered with a plastic tablecloth. Her mouth had been gagged with pieces of cloth. She was motionless and later on at 4.45 pm DR Murahidhar Vuppunuthula PW 11 of Victoria Hospital certified her dead. See (Medical certificate P4.)

On 21 August 2003 Dr Maria Zlatkovich PW 13, a pathologist at the same Hospital examined Norah Antat's body and found the following external injuries; cyanosis (congestion of the blood) of the face and hands caused by obstruction of the nose and mouth. She concluded in her report P4 that the cause of death was asphyxia (a lack of oxygen) resulting from suffocation due to blockage of the nose and the mouth. That these mechanical causes obstructed the upper air ways and she further suggested that obstruction could be done with different objects like a pillow and, once deprived of air, depending on the violence, it could take a person two to three minutes to die.

Fanchette Antat PW6 testified in Court that she left home at 07.30 am on that day after having breakfast with the deceased. She then telephoned her mother a number of times from 10.00 am till 02.00 pm when she decided to check on her but there was no response. Molly Antat PW 9 had started calling her mother on the house telephone at 09.00 am with no answer. Upon arrival Fanchette Antat looked through the window and noticed that all the rooms and wardrobes other house had been ransacked. All the items listed in count two of the charge sheet and belonging to her were missing. Assistant Superintendent of Police (ASP) Reginald Elizabeth (PW2) attached to Scientific Support and Crime Record Bureau attended the scene and took the photographs exhibited as PI and P2 and, developed and printed by Mr Henry Jean-Louis (PW1).

Perhaps at this point I should first deal with the motion raised by Mr Elizabeth to have the case dismissed on technicality that the charge and indictment as drafted by prosecution is bad for duplicity. His quarrel was in respect of count two most especially the phrase containing the last ten words added during the recent amendment. Count two reads as follows;

Statement of offence
Robbery with violence contrary to section 281, read with section 23 of the Penal Code and punishable under the proviso to section 281 of the Penal Code.

Particulars of offence
Cliff Emmanuel also known as "Katilo", Richard Freminot and Patrick Lime on the 19 August 2003, in the district of Pointe Larue unlawfully robbed one Fanchette Antat of Pointe Larue of jewellery consisting of gold earrings with previous stones, gold rings, gold bracelets, gold necklaces, silver necklaces and a flat computer screen all worth the approximate amount of R100,000 and during the said robbery unlawfully killed

Norah Antat.

Mr Elizabeth contended that count one alleged that Cliff Emanuel had committed manslaughter and that the same allegation against the same victim, Norah Antat was repeated in count two in addition to the particulars of the offence of robbery with violence which mistake or act of bad drafting calls for the Court to quash the indictment and inevitably order an acquittal. He relied on numerous authorities including *DPP v Marymend* [1973] AC 584 and *R v Mansfield* [1977] 1 WLR 1102, wherein the golden rule was stated that "an indictment may contain several counts but each count must allege only one offence." Mr Govinden protested against the manner in which the motion was brought especially that it was being presented at a very late hour of the proceedings to catch the prosecution off guard and deny them a chance to cure the defect if there was need. The prosecution also submitted that the statement of offence clearly defined the different offences in that charge to the accused who even took his plea without any complaint. But a plain reading of the indictment in question, in my view and as rightly pointed out by Mr Elizabeth, could easily cause confusion to an accused as the particulars in count two tend to send a message of two distinct offences to wit; “robbery” and “unlawful killing”, which makes it bad in law for duplicity.

The Court then asked Mr Elizabeth the following questions, which have been extracted from the record:

Q. Why did you not raise this issue as a preliminary point of law?

A. The reason was that we did not want to give the prosecution the opportunity to amend the charge and then to proceed. It was an approach which we have taken now, the timing is now because basically ... . they

have now closed their case My Lord

Q. As an Officer of this Court you are supposed to assist the Court in the interest of justice.. ?

A. Certainly My Lord. I am here not to assist the prosecution but to defend my client .... and if there is a loop hole in the law, there is something which the prosecution should have done but they have not done I would use it to my client's advantage to get an acquittal My Lord.

Q. So it is bad for duplicity ... ... Is it curable?

A. It would have been curable if the prosecution had not closed their case .... they do not have the power to amend the charge. That is why the motion was not made at the outset My Lord.

Q. ...... the charge is bad for duplicity, has it in any way affected the accused? If at all it has in what way? ......

A. My Lord it has not affected the accused in any way because the accused is charged with an offence of robbery and the prosecution brings evidence that the accused committed robbery. So the accused comes prepared to defend himself against a charge which is levelled against him which is robbery. The defective charge is only a technicality. It is something which the prosecution did not foresee or mistook on behalf of the prosecution which the defence then takes advantage of.

Q. At what point in time did you note that?

A. My Lord I noticed that from the outset of the proceedings but as I submitted to the Court the reason why the motion was not made from the outset was if it had been made from the outset the prosecution could have amended the charge and say okay we agree that the charge is bad for duplicity and we will amend. When the prosecution closes its case and the motion is then made where a count is bad for duplicity then the prosecution does not have the opportunity.

Q. But if they accepted ... ... section 187 of CPC does not allow anything like amendment?

A. No it does not. So the Court would have only one option to quash the indictment on that basis.

Q. How would that prejudice your client?

A. It does not prejudice my client ......

Section 187 (2) (a) of the Criminal Procedure Code Cap 54 is relevant and reads:

> (2) An amendment may be made-
>
> (a) before trial or at any stage of a trial, except that in a trial held by a Magistrates Court no amendment may be made after the close of the case for the prosecution.

It should be stressed that not every defect and irregularity in a

charge makes a charge bad in law to the extent of rendering the ensuing proceedings a nullity. Duplicity per se may, but not necessarily, lead to a charge or conviction being quashed. A wealth of authorities have unanimously suggested that the test should be whether the defect has occasioned a "miscarriage of justice" See *Uganda v Dickens Elatu* Crim Rev No 71 of 1972. *Archbold* (38 ed) at para 925 offers the meaning of that expression:

> A miscarriage of justice within the meaning of the proviso has occurred where by reason of a mistake, omission or irregularity in the trial the appellant has lost a chance of acquittal which was fairly open to him.

Clearly, a charge should not be quashed upon a mere technicality that has caused no embarrassment or prejudice to the accused. From the answers provided by Mr Elizabeth it cannot be said that his client suffered any embarrassment or prejudice nor can it be said that the defects complained of occasioned him any miscarriage of justice during the trial. Had that been the case the motion would have been raised well in time to stop the injustice from continuing as the accused and his counsel watched. The defence chose to sit on their rights. Moreover, equity helps the vigilant.

According to *Blackstone's Criminal Practice* (1992) at 1140, where a count is bad on its face for duplicity, the Defendant should move to quash it before the accused is arraigned. Although the objection can be taken at a later stage, as was the position in the case of *Johnson* (1945) KB 419, the Court of appeal has disapproved of the defence postponing the application to quash for purely tactical reasons. See *Asif* (1982) Cr App R 123. It is also open to the prosecution to defeat a motion to quash by asking the judge to allow a suitable amendment of the indictment. This the prosecution did not do and the defence, as indicated above, intended and

was all out to trap them. A Court administering substantive justice however should never allow a party to thrive on technicalities.

Mr Elizabeth has pointed out what he called another defect in count two that the property robbed belonged to Fanchette Antat but the violence was allegedly visited on a different separate and independent person, Norah Antat, at a different time and that as such the offence should have been one of theft and not robbery.

He also invited me to dismiss the charges arguing that the words "any person" in section 280 of the Penal Code cap 158 meant and could only refer to "the person on whom the act of robbery is being caused". Regarding this submission as frivolous Mr Govinden averred that sections 280 and 181 of the Penal Code required the prosecution to prove that violence was meted out on "any person", whether that person is the owner of the property stolen or not, before, during, and or after the act of stealing if the robbery charge was to stand. I do not think the words "any person" lend themselves to such restrictive interpretation as Mr Elizabeth had sought to place on them. The intendment of the Penal Code and therefore the legislature, apparently, is to give a wide meaning to the words "any person" so as to include such cases, which the legislature must have envisaged, where goods are or property is stolen from custodians or from the hands of third parties, as is always the case. The present case is no exception. By adding the element of violence the trainers of the code must have intended to lay a clear distinction between the ordinary offence of 'stealing' and that of 'robbery'. Where the provisions of a statute are capable of a wider and narrow meaning, a liberal interpretation, which does not deprive a citizen of justice, is to be preferred. Further, where also, a narrow meaning will lead to absurdity and callousness whereas the word used is capable of a wider meaning, the wider meaning is to be preferred. A construction, which will

deprive a citizen of a right e.g. the right to own and enjoy property exclusively and to protection of same by the state, the right to redress for injustices occasioned by others etc regardless of the illegality, cannot be correct construction. Mr Elizabeth's construction of these words falls in this category. It cannot be said for example that A who robs a bank and uses personal violence on B the security guard should be indicted for stealing and not robbing money belonging to the bank because (i) the money does not belong to B and, (ii) the bank as an institution (legal entity) cannot suffer violence. In conclusion therefore, with the greatest respect to the learned counsel, and I hope I will be acquitted of discourtesy, I decline the invitation to dismiss the charge and or acquit the accused on the grounds indicated above.

The Courts have settled the law on involuntary or unlawful act of manslaughter through the famous cases of *DPP v Newberry* and *DPP v Jones* [1977] AC 50. The Court of appeal stated inters alia before dismissing these appeals:

(a) An accused was guilty of manslaughter if it was proved that he intentionally did an act which was unlawful and dangerous and that act inadvertently caused death, and

(b) that it was unnecessary to prove that the accused knew that the act was unlawful or dangerous; that the test was the objective test namely whether all sober and reasonable people would recognise that the act was dangerous and not whether the accused recognised its danger.

For the prosecution to succeed on a charge of manslaughter the following ingredients must be proved: (a) that act of the accused was intentional; (b) that act was unlawful and dangerous and (c) that act of the accused inadvertently

caused death.

Therefore in manslaughter the guilt of an accused is associated with his culpability in committing an unlawful act, which is unconnected with his intention or foresight to the causing of death. The mens rea should be appropriate to the unlawful act see. *R v Lamb* (1967) 51 Cr. App. R417. However:

> an unlawful act causing death of another could not simply because it was an unlawful act render a verdict of manslaughter inevitable, for such a verdict inexorably to follow the unlawful act must be such that all sober and reasonable people would inevitably recognise it as an act which must subject the other person to at least the risk of some harm resulting there from, albeit not serious harm". See *Regina v Church* (1966) 1QB 59.

As already narrated herein above there is no doubt that there was a killing in this case which was the result of an unlawful act as confirmed by Dr Murahidhar Vappunuthula PW 11 and the government Pathologist Dr Maria Zladkotvich PW 13 who testified that Norah Antat died as a result of suffocation caused by a mechanical obstruction of the upper air ways. The legs and hands were tied while the nose and mouth were gagged with a plastic tablecloth, which also covered most of the upper part other body as she lay down in the sitting room. There is no doubt again that whoever tied her and also gagged her was carrying out an unlawful act, which all sober and reasonable persons will realise must have subjected the victim to some harm (physical harm as described in the case of *R v Ernesta*, supra) which ought not to be serious harm. It is immaterial whether it was known to whoever did it that the act was unlawful. The prosecution led evidence establishing the circumstances under which Norah Antat died. That on the morning of 19 August 2003, the deceased who was

apparently in good health and proper shape had breakfast with her daughter Fanchette Antat before the latter left for work at 7.30 a.m. At 9.00 a.m. Molly Antat telephoned her mother on the house line, as did Fanchette Antat at 10.00 a.m. but both received no response and at 2.00 p.m. the body of Norah Antat was discovered in the house.

Any sober person ought to have known that the assault or treatment of such an elderly lady by way of tying her legs and her hands as well as gagging her mouth and nose should have occasioned her some risk of harm. She was confined, could not walk nor use her hands to free herself or scream for help. Eventually she could not breath as she lacked supply of oxygen, all these intentional, unlawful and dangerous acts by her assailants resulted into her death. The persons who allegedly committed the crime paid no regard to what would be the outcome of their acts thus that they would lead to suffocation (a physical harm) although objectively a reasonable person would have at least seen that this would have led to certain harm on the person of the victim.

I find the prosecution to have proved all the elements to manslaughter but what remains to be answered is whether it is the accused herein that committed the crimes alleged.

Section 23 of our Penal Code has been added on to both counts to have the accused charged jointly. It provides:

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

This section 23 in itself does not create an offence but provides for the establishment of common intention and lays down a principle of joint criminal liability, which therefore is only a rule of evidence. *Law of Crimes* (23 ed) by Ratanlal and Dhirajlal offers a commentary on Section 34 of the Penal Code of India (common intention) and states thus:

> This section is framed to meet a case in which it may be difficult to distinguish between the Acts of individual members of a party or to prove exactly what part was taken by each of them. The reason why all of them are deemed guilty in such cases is that the presence of accomplice gives encouragement, support and protection to the person actually committing the act.

Further, at page 89:

> It is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case. The inference could be gathered by the manner in which the accused arrived on the scene and mounted the attack, the determination and concert with which the beating was given or the injuries were caused by one or some of them, the acts done by others to assist those causing the injuries, the concerted conduct subsequent to the commission of the offence, as for instance, that all of them had left the scene of incident together and other acts which all or some might have done as would help in determining the common intention to all. In other words; the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common

> intention to commit an offence with which they could be convicted. The actual assault and involvement therein would undoubtedly be of central importance. But culpable liability might arise and be indicated with certain assurance because of preceding; intervening as well as succeeding conduct of the person accused of an offence and claimed to be involved therein. Section 34 (our Section 23) has enacted a Rule of co-extensive culpability when offence is committed with common intention by more than one accused. Such co-extensive culpability would be indicated by reason of actual participation, some overt act, active presence, pre-plan, and preparation, and eventual participation therein as well as immediate conduct after the commission of the offence It would be immaterial by whose hand the eventual blow was dealt..............

The evidence of the prosecution witnesses clearly shows that before 19 August 2003 there was a preparatory meeting at Mr Freminot's House on 18 August where a plan was hatched to go and rob the house in question. Rene Port Louis had two weeks earlier informed Freminot that there was a safe with money in that house and that an old Italian man lived there but a week later, according to Mr Freminot's statement, and after further observation and surveillance Port Louis confirmed that an old lady who is fond of planting flowers at the house every morning stays at the premises alone after 8.00a.m. It should be noted that in his further testimony, which was given on oath. Port Louis informed the Court that at one point in time before the incident he was employed to do some odd jobs in the same home by Mrs Fanchette Antat. He was familiar with the premises. Hubert Bristol, a friend of Freminot deposed that on 18 August 2003 at around 7.00pm to 7.30p.m. he met Freminot at the Point Larue road which goes

up to Nageon Estate. Freminot asked him to lend him a film but Hubert Bristol told him that he had none. Between 8.30p.m. and 9.00p.m. Hubert Bristol, while returning to his girlfriend's flat which is located about 25 metres away from that of Mr Freminot, decided to call on Mr Freminot who was at that moment together with his relatives sitting under the veranda and eating away from a plate. Patrick Lime, one of the accused persons was also present and seated on a gunny bag that had been placed in a corner of the same veranda. That at about 9.30p.m. or 10.00p.m. Freminot borrowed and talked on Hubert Bristol's mobile telephone and in his presence and hearing said “Tilo tomorrow at 7.00" and that again after 15 seconds he asked the recipient of the call to come up. This reference to "Tilo" in the context of later participation was undoubtedly Cliff Emmanuel also known as “Katilo” as indicated in the charge sheet. Indeed shortly there after “Katilo” or Cliff Emmanuel joined the group at the veranda but Hubert Bristol left for his home 15 minutes later where he alleged he arrived at a time between 10.30p.m. and 11.00p.m. Save for Cliff Emmanuel the other two; Freminot and Patrick Lime were well known to Hubert Bristol. That evening Hubert Bristol was interacting with Cliff Emmanuel for the first time although he had seen him before. Rene Port Louis too had interacted with Richard Freminot before but not with Cliff Emmanuel whose face he said was familiar.

As for Mr Andrew Sophola he testified that on the night of 18 August 2003 he went to the house of Mr Richard Freminot and among the people present were Mr Richard Freminot, Patrick Lime and Cliff Emmanuel “Katilo”. That Richard Freminot informed them that they were going to break into a high-class house at Anse Francois, Point Larue, to get money and gold but warned that an old lady lives there and that it was difficult to break in because the burglar bars were inside. Then Cliff Emmanuel “Katilo” said that “fodre nou al laba” (we have to go there) referring to the house. That this discussion between Richard Freminot, Cliff Emmanuel “Katilo”, Patrick

Lime and Andrew Sophola went on as they were eating food. They all agreed to go there in the early hours of the next morning i.e 19 August 2003 and hide in the nearby bushes until 8.00a.m. when the other lady staying with the old woman leaves the house to go to work.

When cross-examined Andrew Sophola admitted that he had earlier on been arrested by the police as a suspect in this case and told not to mention the arrest before the Court. He claimed to have attended the meeting at Mr Freminot's place on the night of 18 August 2003 for 2 to 3 hours i.e. from 5.00p.m. to 8.00p.m. before departing for his home and that Mr Hubert Bristol was among the people he left there. In further cross-examination by Mr Frank Ally, Mr Andrew Sophola, contrary to what was stated by Mr Hubert Bristol and in Mr Freminot's statement said that Cliff Emmanuel "Katilo" was at Freminot's house from 5.00p.m. to 8.00p.m while Hubert Bristol arrived later on at 6.00p.m and found all the others there. He also stated that during his stay there he did not see Richard Freminot borrow or talk on a mobile phone. Of all the prosecution witnesses Mr Andrew Sophola was severely attacked and lambasted by both defence counsel and his testimony left wanting. A proper evaluation of the evidence by Mr Andrew Sophola reveals some material contradictions in most of his testimony as pointed out above which makes it difficult and unsafe for the Court to believe him and therefore rely on the said testimony. Accordingly this Court rejects Mr Sophola's evidence.

Mr Patrick Barra PW 14 deposed that he was a dog handler with the Dog Unit of the police force for five years. That in the afternoon of the 19th (and not 18 August as he corrected himself during cross-examination and re-examination) of August 2003 he was ordered by his superior SP Mousbe to proceed to Point Larue at the locus of crime thus the house which he identified in photographs number 37 and 38. He took along with him a German Shepherd Police dog called

"Lady". Corroborating ASP Reginald, Lance Corporal Maxime Payet and Molly Antat he stated that police officers were at the scene of crime, which had been cordoned off. In further corroboration of ASP Reginald's testimony he said that nobody had touched anything at the scene before he took the dog to sniff and track the path taken by the intruder. He jumped over a wall and then saw a path that went down and which he later discovered was leading to a river. At this point he noticed that some grasses had been crashed and there were footprints which the dog sniffed and started the tracking. It led him down that narrow path across the river where people wash from for about thirty minutes to a veranda of a flat in Nageon estate, which he later came to learn that it housed Mr Freminot and his family. Mr Barra had never been there before nor did he know that Mr Freminot and Miss Rose whom he pointed out in Court lived in that flat. He then telephoned the police officers he had left at the scene of crime to join him and they indeed came and assisted him to conduct a search at the said premises where upon Mr Freminot was arrested. Mr Barra corroborated ASP Reginald and Lance Corporal Maxime Payet's testimonies when he said that these two were among the officers that responded to his telephone call and assisted in the search, which yielded nothing incriminating.

Mr Barra also informed the Court that this dog was used to him and he personally trained it for four years which training started when the dog was six months old. He related that if he set this dog to pick a scent he could tell, by observing his actions, whether or not he is doing it the right way. That if he does not get a scent he will not go further but just move around and, that if he follows a particular direction Mr Barra would be able to know that he is following the scent picked at that point as instructed. While at Cap Ternay with the advisor who came from overseas to teach him how to train dogs, Mr Barra trained the dog among other things how to save a drowning person and how to locate a person who has

escaped and gone into hiding in the bush or building. That dog had on many occasions successfully tracked down people and recovered stolen items. In further cross-examination Mr Barra said the dog was also trained to detect drugs and sniff scents and track people who steal things at the beach and from houses. That according to the training he received from his overseas advisor and given his own experience with that dog, after nine hours the dog could still track the scent of a person when it smells his sweat from the path he followed, footmarks, shoes or clothes that person was wearing.

Although Mr Barra could not answer some of the questions put to him complaining that he did the tracking a long time ago while still in the police force and had therefore forgotten some minor details, he did emphasize however during cross-examination that “I still remember what happened on that day. I can take you to that place where I was and I can show you the path I had taken.” The Court is convinced that this dog's “propensities and skills” and “breeding and training” made it able to track the path and location of a human being by his particular scent. That person had been to the house in question on the 19th of August 2003 and through the path tracked ended up in Mr Freminot's flat. I am also satisfied that the handler Mr Barra is sufficiently knowledgeable and well experienced in regard to the characteristics of this dog which he personally trained as intimated. Further the Court is alive to the need of acting on track dog evidence with caution. See G McCormack “The Admissibility of Tracker Dog Evidence” and *Dulip v R* (1990) MR 149.

Jimmy Andre Antoine PW 5 of Point Laure, Camp Pigeon testified that he is a friend of Richard Freminot whom he has known for a long time. That on the morning of 19 August 2003 at about 9.00am or 9.30 am, while he was going to play football he met Richard Freminot who was at the time emerging from the narrow footpath that leads to the river and

beyond to Anse Francois they walked up together until the point when Freminot branched off into another path that goes to his home while Jimmy Andre continued to the playing field. Later, he stated, Mr Freminot joined them to play football. It was the evidence of Mr Hans Marguerite PW 4 that when he arrived at the house between 11.30 am and 12.00 pm to continue with his construction work he knocked on the door several times and called out "Manman, Manman, Manman", as usual to ask for a cold glass of water and his lunch but there was no answer. That since the door of the store where his tools were kept was open he thought the deceased had gone to town and he commenced his work. However he noted that the house phone kept ringing all the time.

Lance Corporal (LC) Maxime Payet PW 15 was one of the first officers to come to the scene of crime and was involved almost at each and every stage of the case since he was assisting the chief enquiring officer Sub-Inspector (SI) Sonny Leggaie who is reported to have left for Australia in July 2005 and not returning to Seychelles. That Constable Davis Simeon currently living in England with no hope to return also assisted in the investigations. There were police officers attached to the fingerprint section, the criminal investigations department (CID), ADAMS section, and one constable Barra was one of the two officers from the dog unit. These were immediately dispatched in different directions each with a dog. It was LC Payet's evidence that after SI Leggaie had received a telephone call he ordered them to proceed to Nageon Estate where they found Mr Barra with his dog at Mr Freminot's house. Mr Freminot and Miss Rose together with her children were also present. While at the CID Mr Freminot was brought from the cells on 24 August 2003 to record a statement from him under the supervision of LC Payet, Constable Davis Simeon and SI Leggaie who first explained to him his constitutional rights. This statement was retracted. When cross examined LC Payet stated that while writing the statement Mr Freminot's lawyer. Miss Karen Domingue was

allowed to confer with him and when she left Mr Freminot said he had been advised not to answer any more questions nor sign the statement and requested to be taken back to the cell.

After conducting a voir dire and establishing the voluntariness of the statement under caution, the same was admitted in evidence as P7 (Reasons for so doing are outlined in my ruling of 28/03/2006) and I find it imperative to reproduce part of it:

> ... I do not recall the date when Rene Port Louis approach me at Tower Point Larue Nageon Estate and told me that there is an old Italian man who is living in a house at Anse Francois close to where Perley lives and overthere, there is a safe and a lot of money. Rene told me that we would continue to do an observation to see how many people there. Two weeks later Rene Port Louis gave me the details and during that time Barry Panagari was there ... ... The plan to go and burgle the house was not done because I decided not to do it. Then Rene told that in the house its only an old lady who lives there. 1 week before the 18th August 2003 around 1600 hours, I met Cliff Emmanuel also known as “Katilo” at the upper part of Point Larue opposite Azemia 's house called “Kan Pizon”. At that time Rene Port Louis was sitting by the road side ... . he gave all the details of the house of the foreigner to “Katilo” ... . “Katilo” told him to go back and check the house again ...... Rene told “Katilo that after 08.00 hours there is only an old lady left at the house alone ... ... On 18th August 2003 around 1700 hours Hubert Bristol who is one of my friend came to my house with his mobile which he uses at work and I telephoned Barone around 1900

hours on the number 581126 ... ... Barone told me that "Katilo" was with him right now and they he would pass the phone to "Katilo". I spoke to "Katilo" for about 1 minute and told him to come to my house the next day ... ... 19th August 2003. "Katilo" said he was coming this evening ... ... Patrick Lime was there, Hubert ate he stayed here until when "Katilo" came ...... about 20 minutes later ... ... Before 2000 hours Hubert ..... went to his house, behind there were "Katilo" Patrick Lime and myself. "Katilo" said to Patrick Lime and I let's go and buy bread, that means lets go and steal... .... The next day 19th August 2003 around 0700 hours ..... "Katilo" came and call me ... ... said it is time to go and get bread that means to steal. ... ... I wore a white sleeveless shirt and greenish jeans and sleepers. We went towards the river ..... 15 minutes later Patrick Lime came he had brought 7lb hammer which had a long handle, as Rene Port Louis said there was a safe in the house. ... ... we took some small foot path which separate Anse Francois and Pointe Larue and we were about 30 to 35 metres from the old lady's house at Anse Francois, above the foot path "Katilo" told Patrick Lime to go and observe if there was anyone at the house, Patrick Lime went through a foot path and go to the road at Anse Francois about 4 minutes Patrick came back and said that he had seen the old lady, Rene had told us that the lady liked to plant flowers in the morning. ...... that everyone had left and that the old lady was outside. Patrick told me let's go but I said I was not going. I would wait for the here where we where. They left me and I went high up and waited for them. They move closer up to the house and they began to change that is "katilo"

> put on a white pair of socks on his hands and a black t-shirt around his head and face ... ... Patrick put on a blue pair of socks on his hands and a black t-shirt around his head ... ... and he took the hammer and a pair of mason scissor, ... I saw Patrick Lime and "Katilo" climbed a wall of the house ... ... They went on the grass in the house's compound and ... ... walked on all fours this is to say hands and knees towards the house. .... A little while later Patrick Lime returned to me alone ... ... he said to me, "Katilo" asked you to hurry and come and not be long ... . I told Patrick I was not going to this place.

In *R v M* (1966) SLR 237 it was held (1) that a Court can only act upon statement made freely and voluntarily although subsequently retracted if there is independent evidence corroborating the statement in material particulars, (2) to corroborate a retracted confession all that is required is some evidence *aliunde* which implicates the accused in some material particular and which tends to show that what is said in the confession is probably true.

Freminot's statement is both exculpatory and inculpatory. In the case of *Pool v R*, supra, the Court took the view that there is no reason why a Court should not accept and act upon admission made by an accused as against himself, though rejecting as untrue the part of the statement sought to implicate other persons. Hence the Court used Mr Freminot's statement as against himself and not against any other accused. Further, as a general rule such evidence must be corroborated by evidence which itself does not require corroboration see *R v Marie* (1973) SLR 218. It is worth noting that Hubert Bristol's evidence and that of Port Louis corroborated Richard Freminot's statement in some material particular, with regard to the manner and the sequence in which the events of this case unfolded before 19 August 2003.

However there was a slight difference in the timing of the said events which the Court noted as gathered from the evidence that must have been due to the fact that these witnesses and Mr Richard Freminot were not accurate because they were just estimating the time taken for each event without looking at a watch. A few contradictions pointed out in the prosecution evidence were minor indeed and of no significance as they did not affect the material issues. See R*aymond Mellie v R* (2005) SCA 1. The prosecution witnesses were subjected to long sessions of thorough grilling by both defence counsel and, save for Andrew Sophola, I found the rest to be coherent, truthful and reliable.

It was submitted by both Mr Ally and Mr Elizabeth that Andrew Sophola, Hubert Bristol and Rene Port Louis are accomplices and therefore could not provide any corroboration to the confession by Freminot. Lord Simonds described the term "accomplice" to include participants in the offence charged, whether as principals or aiders and abettors *(participes criminis)*. See *Davies v Director of Public Prosecutions* [1954] AC 357. Obviously the defence was fearing the danger arising from the motive of avoiding or minimizing such witness's own involvement in the offence charged, and of emphasizing, or it may be, fabricating, that of the accused. However, the case of *R v Baskerville* [1916] KB 658 held that "there is no doubt that the uncorroborated evidence of an accomplice is admissible in law as long as the Court warns itself of the danger of convicting basing on that evidence." It was also stated that there is no statement of the exact warning to be given by the judge. This rule of practice has become virtually equivalent to a rule of law and in the absence of such a warning by the judge, the conviction must be quashed: *R v Tate* [1908] 2 KB 68 Further, the corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime: See *Baskerville* (supra).

Like I stated herein before there was no eyewitness or direct evidence to the commission of this offence. When questioned by the defence counsel ASP Reginald confirmed that he did not obtain any physical or forensic evidence from the scene of crime. None of the accused persons testified during the trial. Indeed they were not obliged to and no adverse inference has been drawn from their election to remain silent, which is perfectly in line with the constitutional rights enjoyed by an accused person. See Article 19 (2) (h) of the Constitution 1993. This left the prosecution to entirely rely on circumstantial evidence. It was held in *Sauzier v R* (supra) that:

> where a case depends exclusively on circumstantial evidence, it is necessary for a trial judge to direct himself, expressly, that he must find, before convicting, that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

The prosecution has to exclude any alternative possibility that might point to the innocence of the accused (see *R v Hoareau*, supra) and, before drawing the inference of guilt from circumstantial evidence, the trial Court should also be sure that there were no other circumstances weakening or destroying the inference of guilt (see *Onezime v R*, supra).

Evidence has been adduced to the satisfaction of the Court that Cliff Emmanuel Richard Freminot and Patrick Lime had a meeting on 18 August 2003 at Mr Freminot's home where they all agreed to execute the plan to rob the house in question the following day. Richard Freminot confessed to this fact and to the effect that he went to the house but did not enter inside as he remained at the wall. Obviously he was trying to diminish his involvement in the crime or to completely erase his guilt. Cliff Emanuel was properly placed in this

meeting by Hubert Bristol's evidence. Moreover, earlier on Port-Louis had been detailed to furnish Freminot and Cliff Emanuel with information and activities touching the occupants of that house which he did on several occasions. The robbery took place at the very house, date and time as per the plan and, the old woman alone, now deceased, was found at the premises where a number of valuable items listed in the charge sheet went missing. One now wonders what Freminot was doing at, around or near this house at this time without the knowledge and or invitation of the occupants.

When the accused set out to execute their plan they very well knew that the old lady at the house was one of the impediments standing in their way, which they had to clear. The above discourse holds them equally and jointly liable. It is immaterial who dealt the fatal blow. Everyone must be taken to have intended the probable and natural results of the combination of Acts in which he joined. But a different view was held by the Court in *Duffey's case* (1930) 1 Lewin 194:

> If three persons go out to commit a felony, and one of them, unknown to the other, puts a pistol in his pocket and commits a felony of another kind, such as murder, the two who did not concur in this second felony will not be guilty thereof, notwithstanding it happened while they were engaged with him in the felonious Act for which they went out.

This is not the situation in the present case as there is no evidence pointing to the guilt of a single accused neither was the act, in *Duffey's case*, in some manner in furtherance of a common intention. J.P Bishop on *Criminal Law* Vol 1 (3rd Edition) at 439 supports the former position when he writes:

> When two or more persons unite to accomplish a criminal object, whether through the physical

> volition of one, or of all, proceeding severally or collectively, each individual whose will contributed to the wrong doing is in law responsible for the whole, in the same way as though performed by himself alone.

Common Intention therefore implies a pre-arranged plan, prior meeting of minds, prior consultation in between all the persons constituting the group. It also means the mens rea necessary to constitute the offence that has been committed. In other circumstances it means evil intent to commit some criminal act, but not necessarily the same offence, which is committed. Be that as it may, common intention does not necessarily, and in all cases; imply an express agreement and pre-arranged plan before the act. The arrangement may be tacit and common design conceived immediately before it is executed on the spur of the moment. For example the accused could be found guilty for offences flowing from their actions if in the process of prosecuting a pre-conceived unlawful plan to rob they confine a person found at the premises and also block her mouth in order for her not to make noise or move or in any way disrupt their said business. There need not be proof of direct meeting or combination nor need the parties be brought into each others' presence; the agreement may be inferred from circumstances raising a presumption of a common plan to carry out the unlawful design. Common intention therefore is a question of fact. It is subjective but can be inferred from facts and circumstances, see SN Misra on the *Indian Penal Code* at 96.

In his written statement to police Mr Freminot also stated that when they reached the house he said "...but I said I was not going I would wait for them here where we were." A similar matter was dealt with by the Privy Council in the case of *Barendra Kumar Ghose v The Emperor* 1925 AIR (PC). The facts are that a sub-postmaster was counting money in the back room when several persons entered the room,

demanded him to give up the money and immediately afterwards fired pistols at him. He died. The assailants fled in different directions but Barendra, the appellant now, was chased and caught and charged with murder under section 302 read with section 34 (to establish common intention) of the Indian Penal Code. The appellant contended that he was standing outside and had not fired at the post-master. While dismissing the appeal Lord Sumner held that "Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things 'they also serve who only stand and wait'."

Perera J discussed extensively the application of section 23 of the Penal Code and also cited some of these passages in the case of *R v Gaetan Sonny Rene and Others* Crim. Side No.28 of 1998, which was upheld by the Seychelles Court of Appeal. In this case the complainant could not tell exactly who of the three persons that had attacked and assaulted him did actually cut off the foreskin of his penis. It was argued by Mr Frank Ally for the Republic, and rightly so, that there was a common intention to commit the offence systematically since two of the accused firmly held the complainant as one of them cut the organ circumferentially. All three accused were found liable and convicted for the offence.

Fanchette Antat whose evidence was not challenged confirmed to Court that the items listed in the charge sheet were stolen from her house, which had been ransacked on the 19 August 2003. These items have economic value that was estimated at R100,000 and are things capable of being stolen. There is abundant circumstantial evidence to show that they were stolen at the time the accused herein were in Fanchette Antat's house and during, before or after the stealing force was used on the deceased, Norah Antat under whose custody and care the said items had been left. The items have not been recovered but on the very day they got lost Mr Freminot, as stated by Hubert Bristol, wanted and

asked to sell him a flat computer screen computer which he had kept under a stone. The latter could not buy it because he had no money. Although one is free to keep their property wherever they want the Court wonders why this particular screen was being kept under a stone and not in the seller's house if the same was not obtained feloniously. Moreover it was being marketed on the very day a flat computer screen belonging to Fanchette Antat was stolen; yet there is ample evidence that Mr Freminot and Cliff Emmanuel had planned to break into and steal from her house the same day, which incident did happen and a police dog tracked the scent and path of the intruders from the house straight to the flat where Mr Freminot was found. Earlier on in the morning Jimmy Andre had seen Freminot coming from the same path. It should not be forgotten that this is the same venue (the flat) that hosted their meeting of 18 August 2003. Was this a coincidence?

All this cogent and incriminating circumstantial evidence irresistibly points to the accused's common intention to prosecute an 'unlawful purpose' or 'unlawful object'. The only logical and reasonable inference to make here is that Mr Freminot was one of the robbers in this case. He actively participated in the whole exercise, which was in furtherance of their plan with Mr Cliff Emannuel to break into and rob that house. Mr Cliff Emmanuel was party to the joint accomplishment of this criminal object and his will contributed to the wrong doing which in law makes him responsible for the whole crime as though performed by himself alone.

I think I would be right to deduce from these facts that before the robbery could be properly carried out there was need to confine the deceased, (and given the way she was tied, it must have been a concerted effort of a number of people) and also blind fold her not to see her assailants. The disorganized living room with scattered things, contrary to what Fanchette Antat left that morning, and the bruises on the deceased's

body clearly indicate signs of a struggle and therefore use of force against the deceased. As already stated by the Pathologist, Norah Antat died of asphyxia occasioned by mechanical causes. The circumstances of this case, which are incapable of any explanation, again point to the guilt of the accused persons herein as the ones who are liable for the manslaughter of Norah Antat, which is a probable consequence of the prosecution of their unlawful purpose. The Court is convinced that no other person, save for the accused persons, could have visited that house on that morning before the arrival of Hans Marguerite PW 4 and his colleague Joe Zarine. He on that particular day, unlike other days when he reported for work at 9.00 am, arrived at the house at a time between 11.30 am and 12.00 pm because he had been buying construction materials in town and when questioned by the police he even presented to them his bus ticket which was still with him in the pocket. Therefore, in the absence of evidence that any person capable of committing the offences, other than the accused persons, was in the house at the material time on the day the offences were committed, the only inexorable logical inference is that the accused persons were, beyond reasonable doubt, the only persons present and that they committed these offences.

In conclusion therefore and after the Court warning itself of the danger of relying and convicting on uncorroborated accomplice evidence, I find that these inculpatory facts are incompatible with the innocence of Mr Richard Freminot and Mr Cliff Emmanuel and are incapable of explanation upon any other reasonable hypothesis than that of guilt. The Court is satisfied that this inference of guilt has not been in any way or by any other circumstances weakened or destroyed and, it is further held that any other alternative possibility, if any, that might point to the innocence of the accused persons has been folly excluded by the prosecution. The prosecution has proved its case against both accused persons beyond a reasonable doubt. I find them guilty and accordingly convict

each one of them as charged on each of the two counts.

Before I take leave of this matter I find it important, though onerous a duty, to say something regarding the conduct of these proceedings which have taken a whole three years with the accused persons remaining on remand since their arrest in August 2003. All the five judges of the supreme Court have each, at one point in time had a go at this case and the reasons for their withdrawal from the same are clearly indicated on the record. In some instance, it reads, the accused took a very bad as well as hostile attitude towards the presiding judge. On numerous occasions they shouted and asked endless questions, walked out of the dock and became unruly making it difficult for the Court to continue functioning in that fashion. Despite repeated pleas to them by their counsel and the judge the accused never heeded. About ten lawyers have appeared, on legal aid certificate, for the accused in quick succession as most of them got fired by the accused while others withdrew citing a conflict of interest-that it was just impossible for them to execute the accused's instructions. Sometimes only one accused attended Court while on other occasions one of them intimated that he was sick and unfit to proceed with the case on that day. In the meantime the witnesses, one of them reporting from abroad, kept coming to the Court in response to the summons with the hope to testify but only got turned away until early this year. Sadly one of the witnesses listed was reported dead while two others, former police officers were unable to return to the country to testify.

My turn came in February this year and I had to start the case afresh to listen to evidence from about twenty five witnesses in the main trial and the several trials within a trial. The cross-examination was very thorough and long, at times taking two days for a single witness. As we made progress into the hearing one of the accused, Mr Freminot escaped from lawful custody and has never been apprehended. Given the

prevailing circumstances, and for reasons in the ruling of 2 March 2006, I ordered that the trial continue in his absence. It should also be noted that this trial was fraught with objections and applications from the defence that at times required the Court to adjourn and write a ruling. For a few times the case could not take off because of the non-representation by counsel of one of the accused. Reconciling the diary of the Court with those of the prosecution as well as defence counsel to secure a convenient date for their attendance and continuation of the case proved to be one of the hardest tasks in this trial.

These are just a few of the factors that led to the numerous adjournments and consequent delay of the conclusion of this case. Here I shall be quick to state therefore that any person venturing to comment about this case before any forums and limiting themselves to only the aspect of the time it has taken before the Courts without putting into consideration or explaining the above factors and others as against the constitutional provisions regarding speedy and fair trials and, bail would not be objectively and impartially assessing the situation and, inevitably is bound to reach (as it has already happened) a misleading and self-serving conclusion devoid of logic and merit. Such approach, in my view, would offer better guidance for future commentary and respect of the sub judice rule.

Yes, justice delayed is justice denied. But in this context, each case should be judged on its merits and basing on the surrounding circumstances.

Record: Criminal side No 85 of 2003

Chez Deenu Pty Limited v
State Assurance Corporation of Seychelles

Insurance – transit

The Plaintiff had insurance with the Defendant for cash and cheques while in transit. Two employees of the Plaintiff were attacked and robbed outside a company warehouse, while awaiting transportation to take cash to the company headquarters. The Defendant claimed the cash was not in transit.

HELD:

(i) Goods are temporarily housed during the course of transit if they are housed as an incident of the transit, such as when they are temporarily housed for a few hours awaiting loading; and

(ii) Insurance policies should be interpreted in light of the purpose of the insurance.

Judgment for the Plaintiff.

Foreign cases noted
Crows Transport v Phoenix Assurance Co Ltd (1965) 1 WLR 383
Eurodale Manufacturing Ltd (2003) EWCA Civ 203
John Martin of London Ltd v Russell (1960) 1 Lloyds LR 554

Somasundaram RAJASUNDARAM for the Plaintiff
Danny LUCAS for the Defendant

Judgment delivered on 20 January 2006 by:

ALLEEAR CJ: On 2 April 2004, Chez Deenu, Pty Ltd of Victoria, Mahe, hereinafter referred to as the Plaintiff, sued the State Assurance Corporation of Seychelles, represented by its Chairman, Mr Antonio Lucas, hereinafter referred to as the Defendant, for alleged breach of an insurance contract and prayed for judgment in its favour the sum of R245,712.92 with interest at 8% per annum and costs.

It is common ground that the Plaintiff, which has its headquarters at Quincy Street, Victoria, and its warehouse at Providence is engaged inter alia in the purchase, sale and distribution of Seybrew products.

The Defendant is an Insurance Company. The Plaintiff who has been insuring its business with the Defendant for the past 20 years had at all material times a cash insurance policy with the Defendant referred to as risk No. 016, loss of cash and cheques while in transit from Providence warehouse to the head office at Quincy Street. A limit of R400,000 was set to the Plaintiffs loss under the said policy.

It is averred in paragraph 4 of the plaint that for the last ten years it has been the practice for the Plaintiff to collect cash as payment made for sales of Seybrew products to its various customers on Mahe and bring same to a transit centre at Providence warehouse for checking against receipts. The same afternoon the said cash is transferred to the Plaintiffs headquarters in Victoria for safe keeping.

It is not in dispute that on 1 July 2003 at around 5.15 pm two employees of the Plaintiff's staff were attacked and robbed while they were awaiting transport at the Providence warehouse to take them to Victoria.

In its statement of defence the Defendant, whilst admitting that there was a report of a robbery having taken place at the Plaintiffs warehouse, challenges the Plaintiffs averments that

it had lost the sum stated in the plaint. Additionally, the Defendant's contention is that the Plaintiffs alleged loss is not covered by its insurance policy with the Defendant, in that the monies allegedly stolen were not in transit within the terms of the policy.

In this case, as I see it, there are basically two issues which call for adjudication:

(i) whether there had been a robbery at the Plaintiffs warehouse at Providence resulting in the loss of the sum of money claimed in the plaint; and

(ii) whether the Plaintiffs alleged loss falls within the definition of transit under the terms of the said Insurance Policy.

The first witness to depone in support of the Plaintiffs action was Pinaya Gamurthy Moarchthy, the Manager at Chez Deenu Pty Ltd who has been employed in that capacity for the past 8 years. Moarchty explained that the Plaintiff is, inter alia, engaged in the import, retail and wholesale of goods and products of various kinds and the distribution of Seybrew products.

This witness went on to elaborate that cash collected from Plaintiffs customers around the island and cash paid by customers at Providence warehouse are kept during the day at the Providence warehouse. In the evening the cash and cheques collected from the sales are counted and checked against receipts at Providence before they are taken to the headquarters in Victoria. The witness stated that the above transaction takes place on a daily basis. The Manager at Providence warehouse, Venkatesan Pillay is based there whilst another employee of the Plaintiff, Andre Marengo goes round to distribute products of Seybrew to customers. Both Venkatesan Pillay and Marengo are authorised to issue

receipts to customers upon receiving payment for sales of Seybrew products.

It is not in dispute that on the day of the alleged robbery it was Andre Marengo who had gone around the island collecting cash from customers. This witness explained in even greater detail the transactions taking place at Providence warehouse. He said after receiving orders from clients for Seybrew products, they distribute same to them from the warehouse where stock of Seybrew products are stored.

According to Venkatesan Pillay his duties involve the taking of stocks, buying of bottles and collecting money at the warehouse. Andre Marengo distributes goods to customers and collects money from sales. Upon receiving cash or cheques from customers, Venkatesan Pillay stated that he issued them with a receipt. Andre Marengo too has a receipt book when he goes around distributing Seybrew products to customers.

The evidence shows that the warehouse at Providence normally opens at 8 am and closes at 4.45 pm. On 1 July 2003, after he had collected all the cash and cheques, Venkatesan Pillay placed them in a plastic bag and was awaiting transport to take him to the Victoria headquarters. At the same time Andre Marengo went inside a parked vehicle to answer a telephone call. While Venkatesan Pillay was standing in an open veranda with the said plastic bag in his hand and Marengo was in the car talking on the mobile phone, Venkatesan Pillay saw somebody climb down a wall and enter the premises. At the same moment the phone rang inside the warehouse, and Venkatesan Pillay went inside the warehouse to take the call. From inside the warehouse, he heard a noise outside. He took the plastic bag containing the cash and cheques which he held in his hand and placed it in a drawer and went outside to see what the commotion was all about. Venkatesan Pillay saw two men assaulting

Ramabarathy a fellow employee. The two men then came towards him and one of them hit him with the flat side of the blade of a long knife. The same man who had assaulted him then went inside the warehouse and seized the said plastic bag and ran away with it. According to Venkatesan Pillay that man was Richard Rosette, a former employee of the Plaintiff. Venkatesan Pillay said that the day's collection which included cash and cheques amounted to R748,849.72.

Soon after the said incident Venkatesan Pillay made a complaint to the police about the robbery. Following the making of the complaint he proceeded to Victoria Hospital where he was medically examined and treated. He said Marengo had given him all the money that he had collected on that day and he had placed all the cash and cheques in the said plastic bag. He said he counted only the money that he had collected at the Providence warehouse and there was roughly R60,000. He did not count the cash given to him by Marengo.

Venkatesan Pillay explained that the receipt book which he used on the day of the incident was with him in the morning and in the afternoon when Andre Marengo went out to distribute the Seybrew products to customers he used the same receipt book.

Venkatesan Pillay testified that at the Providence warehouse there is an Indian manager, by the name of Ramabarathy Pakshinamoorthy, a fellow employee of the Plaintiff. Mr Ramabarathy is in charge of cash sales at the warehouse and keeps all cash collected sepatately. Venkatesan Pillay collects money from customers who had obtained credit from the Plaintiff. In the morning Andre Marengo stays at the Providence warehouse. He receives purchase orders on the telephone and in the afternoon he goes out to deliver the Seybrew products around the island. Venkatesan Pillay stated that the day after the incident, he, Andre Marengo and

Ramabarathy all gave statements to the police who recorded same at the Chez Deenu headquarters. Venkatesan Pillay maintained that while he and Ramabarathy were waiting outside under the veranda for transport to take them to the head office the phone rang inside the office. He went inside with the plastic bag containing money to answer the phone. Moments later he placed the plastic bag containing cash and cheques under the counter and ran outside to see what was going on. He saw Ramabarathy was being attacked by two persons. Upon seeing him one of the assailants left Ramabarathy and came to him and struck him with a machete. He was hit with the flat part of the blade. After he had received the blow, the witness said he stepped backwards. Both assailants went inside the warehouse. They each had a machete with them. When they came out, he saw Richard Rosette leaving with the plastic bag which he had left under the counter.

Ramabarathy had left the day's takings in a drawer. The witness admitted that none of the money which was in Ramabarathy's bag was taken.

After the alleged robbery Mrs Aldindor of State Assurance Corporation of Seychelles interviewed Venkatesan Pillay. The latter denied that he had told Mrs Alcindor, during the interview that followed, that Richard Rosette had emptied the contents of the plastic bag on the floor and had grabbed a few hundred rupee notes and ran away with his accomplice. He further denied that he had said that the balance of the money left in the plastic bag was handed over to the police.

Venkatesan Pillay maintained that he was telling the truth in Court. He said that when he spoke to the, police he was still in a state of shock. In his statement to the police, which was read out to him, Venkatesan Pillay had not said that he came outside with the plastic bag containing money. Venkatesan Pillay maintained that when he was attacked by Richard

Rosette under the warehouse veranda the plastic bag containing money was under the counter inside the warehouse.

Venkatesan Pillay further denied that he had told Mrs Alcindor that after the robbers had left the premises cash was scattered all over the floor, He also denied that he had mentioned to Mrs Alcindor that the remaining cash that was not stolen was handed over to the police.

He explained for the benefit of the Court that in the morning he used one receipt book at the warehouse. In the afternoon the same book was used by Andre Marengo when he went out on his round to distribute Seybrew products. However, if a customer happened to come at the warehouse at Providence in the afternoon, when Andre Marengo was out, Venkatesan Pillay would use a fresh receipt book to record the sale. The witness denied that he had made out receipts for payments not received on the day of the robbery.

Venkatesan Pillay said that if his evidence in Court differs from the statement that he had given to the police that was because he was answering questions put to him by the police. The witness maintained everything he stated in chief.

According to Venkatesan Pillay the police arrived five or ten minutes after the robbers had left the warehouse and there was no money scattered on the floor. Venkatesan Pillay maintained in cross-examination everything that he said in chief.

Andre Marengo testified that he had worked for the Plaintiff for 20 years. He started working in the year 1982. On 1 July 2003, he worked from 8 am until about 5 pm. He did not witness the alleged robbery incident, but was only informed about it, he said. His job at the Providence warehouse was to deliver Seybrew products to shop keepers around the island

and to collect cash and cheques given its payments for the said products.

Andre Marengo clarified that he collected money from clients who were supplied goods on credit. After payment was received, he issued a cash or cheque receipt to the client. He explained that after he collected money from clients of the Plaintiff same was taken to the Providence headquarters. Payments, he stated were made either by cash or cheques.

On 1 July 2003, Andre Marengo started his round between 12.30 and 1pm. After collecting payments from customer of the Plaintiff, he handed the money to Mr Venkatesan Pillay. He said he handed the money in a black leather brief case. That day after dropping his wife in town he was informed about the alleged robbery incident. He went back to the headquarters and saw two police officers. The officers remained at the said warehouse for about 20 minutes. He recalled that on that day he had collected R340,000 in cash from one Lydia Sinon at Glacis.

Andre Marengo said it is Venkatesan Pillay who could tell how much money had been stolen. He stated that the money he had placed in the brief case was not counted at the warehouse at Providence but at the Plaintiffs headquarters at Quincy Street. On that day he recalled handing over the brief case to Venkatesan Pillay at the counter at which the latter sat. When he returned from his round on the day of the alleged incident only Venkatesan Pillay and Ramabarathy were in the warehouse. After the incident he said he never saw the leather bag again.

The financial controller of the Plaintiff, Chandran Kanand, testified that since 2002 he had occupied the said position. He is based at the Plaintiffs headquarters at Quincy Street. Every afternoon, after money is collected from customers over the island of Mahe, it is taken to Providence warehouse, and

finally to his office. His work is to reconcile the accounts with the invoices and receipts and prepare a statement. From the receipt books produced to him, the witness was able to ascertain the exact amount of cash lost. He prepared a cash missing statement. The statement that was prepared by the witness consists of five columns. The five columns indicate the receipt number, the name, cash or cheques and the amount.

According to this witness, the cash that went missing on that day amounted to R246,260. He identified four cheques that were lost on that day. They were for the sum of R14,540 — receipt No. 6777, receipt No. 6779 for R8,060, receipt No. 6788 for R37,675.90, receipt No. 6787 for R1,047.60, receipt No. 6798. According to the witness a payment of R340,000 by cheque was received on that day. According to the said statement the figure written as the amount lost was given as R278,260.50 and the claim by the Plaintiff is R245,712. The witness explained that the above discrepancy in the above figures was due to the amounts of the four cheques which were deducted. Subsequently the customers issued fresh cheques as payments after they had been informed about the lost cheques. The customers were also informed to advise their banks to stop payment on the cheques that had been lost.

The witness admitted that after the incident of 1 July 2003, Mrs Alcindor and one Ms. Juliette visited his headquarters. Present at that meeting were Venkatesan Pillay, Ramabarathy, and himself. He said he did not recall Venkatesan Pillay saying to Mrs Alcindor that Richard Rosette had grabbed a few hundred rupees notes from the plastic bag and ran away with it and that the remaining cash was scattered on the floor. He further stated that he did not recall hearing Venkatesan Pillay making the same statement to the police. He did not remember whether Venkatesan Pillay had

stated during the said meeting that the money in the briefcase had been handed over to the police.

According to Mr Kanand monies collected are brought in plastic bags but not in a brief case to the headquarters. On 1 July 2003 the witness did not see the brief case. According to the reconciliation done against receipt books, the total cash collected on that day was R246,260.92. On that day R81,538.80 was collected by Venkatesan Pillay and Andre Marengo had collected R165,207.12. The witness was asked to look at receipt No. 6779 issued by Venkatesan Pillay and he said that that was a cheque transaction. The witness was again asked to look at receipt No. 6782 and he said it is a cash receipt issued by Mr Venkatesan Pillay.

Learned Counsel for the Defendant pointed out to the witness that some of the receipts failed to mention whether it was a cash or cheque transaction. The witness was again asked to look at receipt No. 6852 and state whether it is cash transaction. Nothing was written on that receipt to indicate whether it was a cash or cheque transaction. Receipt No. 6789 was partly a cash of the amount of R3000 and the balance a cheque transaction of R9600. Receipt No. 6799 did not indicate whether it is cheque or cash transaction. So is receipt No. 6793. The sum of R340,000 collected by Andre Marengo was paid according to the witness by cheque whereas Andre Marengo said he was paid in cash. Receipt No. 6790 does not mention whether it is cash or cheque transaction. Receipts No. 6800, 6797, 6795, 6794 and 6785 do not indicate whether it is cash or cheque transaction. This witness said he prepared his statement based on the receipt books.

It was put to the witness that after he had reconciled all the payments made by cheque he assumed that the balance was received by way of cash. The witness said he prepared his

statement based on the receipt books. He said on that day all the information was given to him by Mr Venkatesan Pillay.

This witness explained that Venkatesan Pillay supplied him with information on receipts which did not indicate whether it was a cash or cheque transaction. It is noted that the Plaintiff company made a cash deposit with Barclays Bank on 7 July for the amount of R65,300. The witness denied that the brief case used by Andre Marengo was handed over to him. He strenuously and repeatedly denied that officers from SACOS were informed that only a few notes had been taken by the alleged robbers. The witness remained silent when asked whether the said brief case was handed over to the police. He finally denied that the evidence he gave in Court was based on incorrect datas.

Following the alleged incident at the Providence warehouse, investigating officer Godfrey Hermitte received a complaint at the station that two persons, one of whom had been identified as Richard Rosette had assaulted two Indians and taken money from them. The two alleged victims were one Mr Pillay and Ramabarathy. This witness said that Richard Rosette had been charged with the offence of robbery. He was unsure as to the amount having been robbed but he thought it was around R100,000. No money had been recovered from the accused, according to the officer. The officer deponed that no complaint was received that the money from the briefcase had been stolen; only monies from the plastic bag were reported to have been stolen. No money was found at the premises at Providence warehouse.

Christine Alcindor, the claim executive manager employed by the Defendant for the past 1.6 years referred to a claim made by the Plaintiff in respect of an alleged robbery at Providence warehouse on 1 July 2003. She and a colleague of hers investigated the said claim. This witness stated that from information gathered and from questioning the Plaintiff, it was

found that cash were still on the premises at the time the alleged incident occurred. This witness said that when she interviewed Mr Venkatesan Pillay the latter said at the time of the incident the money was in a drawer. Mrs Alcindor stated that no mention was made about the brief case containing money having been stolen.

Juliette Nibourette who assisted Mrs Alcindor went to the warehouse at Providence and the office of the Plaintiff. She saw Mr Kanand, the accountant, and Mr Venkatesan Pillay who told her that Richard Rosette had barged into the building on 1 July 2003 and taken a plastic bag containing money. She added that Richard Rosette had allegedly taken the bag, shaken it and grabbed some notes which fell on the floor and ran away. The remaining cash was collected and handed over to the police. The police denied that, any money was handed over to them. I found the testimony of this witness to be vague and unhelpful.

On the evidence, it is clear that on 1 July there had been a robbery at Providence warehouse. The robbers took off with a plastic bag containing cash. The one million rupees question is the amount taken by the robbers.

It has been proved to my satisfaction that only monies collected on the morning of 1 July by Venkatesan Pillay had been lost. This money was in a plastic bag which the robbers took away with them. I am unable to say on the evidence what happened to that brief case which contained money collected by Andre Marengo on the same day. From the receipt books produced by the Plaintiff a total amount of R81,053.80 is proved to have been lost. There are some invoices produced which fail to indicate whether the proceeds were received by way of cash or by cheques. The Court cannot engage in mental gymnastics to ascertain whether those receipts were in respect of cash of cheque transaction.

The next issue as stated earlier in the judgment is for the Court to interpret the contract of insurance and to determine the definition of "in transit". In the case of *Crows Transport Ltd v Phoenix Assurance* Co *Ltd* Lord Denning MR, Danckwerts and Salmon LJJ considered this phrase.

The Plaintiffs were a firm of hauliers carrying goods by lorry to and from London and the North. They had a London depot consisting of a yard and covered garage, and a basement office, access to which was from some steps and along a passage. The office was normally occupied by their London manager and a clerk, his wife.

Lorries came down from the north overnight and while their drivers rested during the day goods were brought by various means to the depot for consignments often being brought in the consignors' own vehicles. On the morning of 12 September 1962, a gramophone record company delivered to the depot in their own van 17 cartons of records. The cartons were unloaded in the yard and the Plaintiffs' manager signed the receipt. He then carried the cartons down the steps to the lobby outside the office for safe custody, for loading on to a northbound lorry the same evening. During his 20 minute absence for lunch and while his wife was in the office but with the door closed, seven of the cartons, valued at £222 16s 3d, were stolen.

The Plaintiffs claimed that sum from their insurers under a "good in transit" policy which covered goods against loss or damage (inter alia) "whilst temporarily housed during the course of transit whether on or off the [insured] vehicles." The insurers denied liability. The county Court judge found in favour of the insurers that though the goods were "temporarily housed," they were not covered by the policy since "the course of transit" did not begin while the hauliers had taken some steps towards loading the goods on to one of their vehicles; and he dismissed the claim. On appeal by the

Plaintiffs, it was held, allowing the appeal, (Salmon LJ dubitante), that the loss was within the cover provided by the policy, for where goods were housed as an incident of the transit, whether for minutes, hours, or a day, and awaiting loading on to the insured's vehicles, they were "temporarily housed during the course of transit."

Per Danckwerts, L.J. These goods were in transit from the moment they left the consignors' premises until they reached their destination in the north.

It is quite clear that these goods were "in the custody and control of the insured." They were not being "loaded upon carried by or unloaded from" any of the Plaintiffs vehicles. The question is whether they were "temporarily housed during the course of transit whether on or off the vehicles." It is clear that they were "temporarily housed ... on or off the vehicles." The sole question is whether it was during the course of transit."

The County Court judge held that these goods were not in the course of transit. He said:

> The course of transit does not begin until some step has been taken by the hauliers towards loading the goods on to one of their own, or a sub-contractors', or other hauliers' vehicle.

I think that this is too narrow a construction. It seems to me that goods are "temporarily housed during the course of transit" if they are housed as an incident of the transit, such as when they are temporarily housed for a few hours awaiting loading. Mr Dehn stressed that it has got to be transit "per the insureds vehicles." I agree. But they are in transit per the insured's vehicles when they are awaiting loading in those vehicles. Instances were put in the course of the argument. When you take a parcel to the post office or to a railway station and you hand it over and get a receipt, the goods are

in transit from the moment the post office or the railway take them. They are in transit by the post office or the railway's vehicles, as the case may be, because from that moment onwards everything that is done is incidental to that transit. So here it seems to me that from the moment that the Plaintiffs accepted these goods from Decca and took them down the steps, they were there temporarily housed awaiting loading on the Plaintiffs' own vehicles. It was an incident of the transit by those vehicles. That seems to me to be 'in transit per the Plaintiffs' vehicles.'

In my view, in a case such as the present, where the consignees, Decca sent the goods in their own lorries to the Plaintiffs' premises, those goods were in transit from the moment they left the premises from Decca. It is true that that part of the journey was not one for which the Plaintiffs were responsible, and of course it was not covered by the terms of this policy; but the goods when they left Decca then started on their journey to the north to Gates head and they remained, in my view, in transit from that point until they reached their destination. When they reached the Plaintiffs' premises they had to be unloaded and, as a practical matter, it is obvious that they might occasionally be carried from one vehicle to another, but such more probably, I should have thought, in most cases they would be put down temporarily on the ground or someplace where it was convenient and kept there, it might be for minutes or it might be for hours or it might be for a day. In all those cases it seems to me it was part of the transit and therefore plainly covered by the terms of the concluding part of the indorsement, "temporarily housed during the course of transit whether on or off the vehicles."

In the case of Eurodale Manufacturing Limited v Ecclesiastical Insurance Office Plc, per Lord Justice Longmore, it was held:

> When you take a parcel to the post office or to a railway station and you hand it over and get a

> receipt, the goods are in transit from the moment the post office or the railway takes them. They are in transit by the post office or the railway's vehicles, as the case may be, because from that moment onwards everything that is done is incidental to that transit. So here it seems to me that from the moment that the Plaintiffs accepted these goods from Decca and took them down the steps, they were there temporarily housed awaiting loading on the Plaintiffs' own vehicles. It was an incident of the transit by those vehicles. That seems to be to be 'in transit per the Plaintiffs' vehicles.

The judge proceeded to state:

> I accept that in the absence of express wording in the insurance contract the goods would not in these circumstances properly be regarded as being in transit. But the effect of the voyage provision, in my judgment, is that the parties agreed that the goods should fall within the transit cover. This agreement does not seem to me an improbable arrangement or one repugnant to the essential nature of the transit cover. On the contrary, it seems to me unsurprising that the parties agreed that these arrangements should be regarded (in the words of Lord Denning) as 'an incident of the transit.' There is no reason that effect should not be given to the natural meaning of the typed clause for which Eurodale contends.

In the case of *John Martin of London Ltd v Russell*, it was held:

> (1) that transit shed at Liverpool was the place at which goods were placed as soon as they Were discharged and they were then waiting patiently to go somewhere else; and that, therefore, the transit shed was not the final warehouse that insurer's contention that cover ceased if consignee did not intend to send goods to a final warehouse did not give reasonable businesslike meaning to the clause and that there was no condition that goods were only covered so long as they were intended to go to a final warehouse; and that, therefore, the insurer had failed to prove that goods were not covered when damaged.

In the present case, in my judgment, R81,053.80 had been robbed on the day of the incident. That cash was in transit awaiting to be transported to the Plaintiffs headquarters. Any other conclusion that would be drawn would be perverse in the light of the authorities cited above and under the insurance policy. In a manner of speaking, the cash had not reached its final resting place, i.e. the Plaintiffs headquarters in Victoria before it was eventually banked. Any other interpretation would defeat the very purpose for which the Plaintiff had insured the risk to the cash collected at the warehouse.

Judgment is accordingly given in the sum of R811053.80 in favour of the Plaintiff with interest at 8% per annum and costs.

Record: Civil Side No 92 of 2004

Lalanne v Regar Publications Pty Ltd & Ors

Defamation – defences of truth, qualified privilege, fair comment

The Minister for the Environment was fishing outside a prohibited area. The Defendant newspaper published a photo of the Minister for the Environment fishing. A caption stated that he was fishing in a prohibited area. The Minister claimed that the publication was a libel. The Defendants rely on the defence of truth and in the alternative, the defence that the publication was done in qualified privilege. They also relied on the defence of fair comment.

HELD:

(i) There is liability for publication of photographs for purposes other than those intended by the subject of the photograph;

(ii) No privilege will attach where the common interest is one that springs from idle gossip or curiosity;

(iii) No privilege can be claimed if the knowledge that is published is not positive knowledge but just an assumption of knowledge;

(iv) For information to be privileged, it must be in the public interest, rather than merely being "interesting to the public";

(v) The law of defamation in Seychelles is based on English Law, however not all English cases are applicable due to specific provisions in the Seychelles

Constitution regarding freedom of expression and right of access to official information;

(vi) The defence of fair comment cannot be made out if it is made without any factual basis. The defence is not available where the information was published with malice;

(vii) The publisher acted with malice, so the defence of fair comment fails;

(viii) In determining damages for cases of libel or slander the reputation of the defamed may be taken into account. If they had a position of status, this should be taken into account when calculating damages. Size of area of circulation of the information should also influence the amount of damages awarded; and

(ix) In this case compensation should be made for damage to the Plaintiff's reputation, as well as exemplary damages.

Judgment: Damages of R350,000 to the Plaintiff, payable jointly and severally by the Defendants, as well as interest and costs.

Legislation cited
Civil Code of Seychelles, art 1383(3)
National Parks and Conservancy Act
National Parks (Aldabra Special Reserve Regulations), reg 10

Cases cited
Patrick Pillay v "Regar" Publication & Ors (1997) SLR 14
Roger Mancienne v Claude Vidot SCA 36/1994

Seychelles Broadcasting Corporation & Or v Barnadette Barrado SCA 9/1994 and 10/1994

Foreign cases noted

Adam v Ward [1917] AC 309
Arnold v King Emperor [1914] All ER (PC) 116
Association v Greenlands Ltd [1916] 2 AC 35
Dingle v Associated Newspapers [1961] 2 QB 162
Gertz v Welch (1974) 418 US 323
Kemsley v Foot [1952] All ER 502
Lewis v Daily Telegraph Ltd [1964] AC 234
London Artists v Littler [1968] 1 WLR 607
Neethling v Weekly Mail (1994) 1 SA 708 (A)
New York v Sullivan (1964) 376 US 254
O'Keefe v Argus Printing and Publishing Co Ltd [1954] SA 244 (C)
Reynolds v Times Newspapers Ltd [2001] 2 AC 127
Turner v MGM [1950] 1 All ER 449
Uren v John Fairfax & Sons Pty Ltd (1967) 117 CLR 118
Wall Street Journal Europe (appellants) [2006] UKHL 44

France BONTE for the Plaintiff
Bernard GEORGES for the Defendants

Appeal by the Defendant was allowed on 24 August 2007 in CA 25 of 2006.

Judgment delivered on 23 October 2006 by:

PERERA J: The Plaintiff was, at the time of instituting this action for libel, the Principal Secretary of the Ministry of Environment and Chairman of the Seychelles Islands Foundation (SIF). It is averred that the Defendants, in the 14 June 2002 issue of the “Regar” Newspaper published the Plaintiff’s photograph with the following Caption in English language:

> Fishing in the Aldabra Lagoon is strictly prohibited. The above picture from the last Saturday's "Nation" may indicate that this regulation, like all regulations in Seychelles, does not apply to everyone.

The Plaintiff avers that —

> The said statements were intended to mean and in their natural and ordinary meaning and/or by way of innuendo the damages meant and were understood to mean that the Plaint & as the Principal Secretary for the Ministry of Environment and chairman of the SIF is fishing in the Aldabra Lagoon, an area which is by law, rules, and regulations prohibited for fishing and as Chairman of SIP the Organisation responsible for the enforcement of such law, rules and regulations the Plaint does such prohibited acts as though those laws, rules and regulations do not apply to him; he being above such rules and regulations.

It is further averred that the statements published were false and malicious and constitute a grave libel on the Plaintiff, affecting his character, credit, reputation and office as the Principal Secretary of the Minister of Environment and as the Chairman of the SIF. He also avers that he has consequently been lowered in the esteem of right thinking members of society, and generally been brought into hatred, ridicule and contempt. A sum of R600,000 is claimed as damages, including exemplary damages.

The Defendants deny that the statements complained of bore or were understood to bear or were capable of bearing or being understood to bear any of the meanings attributed by the Plaintiff, or any meaning defamatory of him. The Defendants rely on the defence of truth, further and in the

alternative; they aver that the words complained of were published on an occasion of qualified privilege.

The Defendants also aver further and in the alternative, that the words complained of were fair comment made in good faith and without malice upon a matter of public interest, namely the action of a High Government Officer entrusted with the protection of the environment, fishing in the vicinity of a strict nature reserve. The Plaintiff in his testimony denied that he was fishing in the lagoon as alleged. He stated that fishing in the lagoon was strictly prohibited. He was fishing "inside the reef of Aldabra" with three other people off Polymnie Island. He explained that Polymnie is the second Island after Picard Island on the West side. After Picard, is the entrance to the lagoon which is called the main channel. Next to that is Polymnie where they were fishing. The Plaintiff further testified that in terms of internal Regulations under the National Parks and Conservancy Act (Cap.141), more particularly under Regulation 10 of National Parks (Aldabra Special Reserve Regulations), members and staff of the SIP are permitted to fish for subsistence up to 1 kilometre from the high water mark of Aldabra. He said that he, as the Chairman of SIP was fishing for subsistence outside the lagoon on that day. As regards the procedure, he stated that in a venture of that nature, those fishing would start off on the reef edge, and allow the boat to drift, and it is in drifting away that fish to consume are caught Referring to the position he was in when the photograph was taken, he stated that the boat had drifted outside the 1 kilometre distance from Polymnie. He stated that in any event, the SIP Regulations permitted him to fish even within the 1 kilometre limit. He also stated that the photograph was taken by Mr Claude Pavard, another Director of SIP, who downloaded that photograph and some others to his laptop computer. The Ministry of Education wanted a few photographs to illustrate their Article in the "Nation" about school children visiting Aldabra that day with him, and he sent them the photograph in question. He did not find anything

wrong in that photograph being published as he was not doing anything illegal.

The Plaintiff further testified that the internal SIP Regulation regarding fishing for subsistence is contained in an Operations Manual and another Manual which is revised every year by the Board. He added that when Aldabra was managed by the British Royal Society, subsistence fishing in the lagoon was allowed, and that concession was perpetuated by the SIF. He however stated that that facility has now been withdrawn.

On that day there were 15 members of the staff on the Island on the Atoll. Four of them were on the boat. The fish caught were categorized, weighed in the presence of the Research Officer and put in a freezer to be consumed later, He agreed that the internal SIF Regulations obviously applied for the benefit of the staff of the Board, but stated that his objection was to the assertion that he was fishing inside the lagoon which was a prohibited area for everyone. He further stated that people questioned him about the imputation in the "Regar" Newspaper that he was an illegal fisherman as he was allegedly flouting Regulations. He maintained that he did not fish in the lagoon and that he did not breach any law or Regulation as implied in the Article. He further stated that the other person on the boat who was fishing, was doing so between 1 and 1.2 or 1.3 kilometres outside the lagoon, which was not a prohibited area for anyone.

Mr Jean-Francois Ferrari, the Publisher of "Regar" Newspaper testified that his Newspaper championed the worthy cause of environment and has been systematically publishing at least one Article every week in that field. As regards the publication of the photograph in issue with the comment, he stated that the "Regar" received a "couple of telephone calls" from people who expressed concern about the photograph which might involve a breach of the law, and "suggesting that they take up

the matter and seek to inform the public on the possibility of that breach of the law." However before republishing the photograph from the "Nation", he "sought advice from a friend, a colleague, who is a "Master Mariner, and a sea Captain, whether the photograph could have been taken as far as 1 kilometre from the shoreline of Aldabra." The opinion he received was that it had been taken well within the 1 kilometre radius of Aldabra. He also found out that of the three persons on the boat, only two were SIF personnel, and the other was a Teacher who was accompanying the students on the trip. He further stated that the "Regar" raised the issue, as at least one person on the boat was not authorised to fish in that particular area. Mr Ferrari further stated that examining the photograph with an "expert eye", the glare on the water, from a professional point of view, indicated that the boat was very close to the Island. They then decided to republish the photograph with an extended Caption "raising the question of possible disregard to Regulations." He said that it was common knowledge that there were restrictions on fishing around the Island. He further stated that it was the policy of "Regar" to avoid publishing names of people and hence left it to their readers to identify the people and make their own assessment of the situation. He emphasized on the word "may" in the Caption and stated that it was a deliberate choice of word as they were not hundred percent sure of the accusation as they had to rely on the advice and opinion of others on that matter. He however contradicted himself and stated that the Editorial Board was satisfied with the opinion of the "Master Mariner", that the boat was fishing not more than I kilometre from the shore. He further stated that the Caption referred to the "lagoon", as the "Master Mariner" who examined the photograph observed the backdrop of the Island and the trees and concluded that the boat was in a shadow area close to the Island. Mr Ferrari however did not name the "Master Mariner". In these circumstances the Editorial Board decided that in the interest of environment, the issue should

be raised publicly to prevent a repetition. He denied that the publication was done with malice towards the Plaintiff.

After the publication, Mr Claude Pavard sent him a letter dated 9 July 2002 (P3). It was published, with a note from the Editor in the "Regar" Newspaper of 12 July 2002. The English translation of the letter and the note are as follows:

Fishing outside the Aldabra lagoon

Dear Editor

I refer to the Regar newspaper No.20, Volume 11, where you have published on page 8 a photo of three persons fishing accompanied by a commentary supposedly that the fishing had taken place inside the Aldabra lagoon. I would like to give three remarks on that subject:

1. I am the author of that photo and certified that the photo was taken on 16th April at 18:00 hrs, one kilometre open sea at the reef of Picard Island. After the fishermen returned, the fish was weighed and placed in the deep freezer to supply the staff at the Research Station.

2. One of the gifts of Seychellois people is their interest in fishing. Even in fishing competitions rules are by-passed sometimes. What affects me the most as a board member of the SIF, is that this misunderstanding could be spread abroad in the world of conservationist or the WWF, or again the World Heritage, and this will tarnish the image of SIF in particular and Seychelles in General. This is why I am asking you to rectify

this issue in the next edition of the Regar newspaper.

3. A critical journal is indispensable in all democratic countries, but the critics must not miss the target. As the saying goes 'Canard Enchainé'!. A famous French criticism weekly newspaper: 'Pan sur le Bec!'

Yours faithfully
C. PAVARD

Editor's Note

The picture published was reproduced in the Nation' new paper and was used alongside other pictures in a long article about Aldabra.

Fishing round the Aldabra atoll is prohibited within a radius of one kilometre. We regret that some people or organizations felt affected by the publication of the photo and comments accompanied

The Defendants also called Captain Jeffery Benoiton, a Director at Maritime Safety Administration. He stated that he was familiar with the Aldabra Atoll. With the aid of a sea chart and instruments, he plotted Aldabra Atoll and Polymnie Island and stated that 1 kilometre from the high water mark off Polymnie was about 500 metres, and at 1.2 metres was about 600 metres or more. Similarly from Picard Island, 1 kilometre was about 400 metres in depth. He stated that it was not normal for anyone in a small fishing boat to fish with a hand line at those depths as it was not possible to anchor a small boat. He further stated that it will not be possible to fish in those depths even when drifting. He further stated that from a fisherman's point of view, 200 to 250 metres would be considered as deep water. Cross examined by Counsel for the Plaintiff, Captain Benoiton stated that the fish "Etelis" was

considered a deep water fish, but could be found in depths of 80 to about 140 or 150 metres. Shown the photograph, he was unable to say whether the boat was fishing in the lagoon of Aldabra. The Court drew his particular attention to the land mass with trees in the background and asked him whether he could identify. He stated that it "bears resemblance to Aldabra, but it could be also any other Island". Hence the positive location of the boat in the photograph remained inconclusive.

The Seychelles "Nation" Newspaper of 8 June 2002, in a Center-Spread Article entitled "Aldabra: A Haven of Life" carried eight photographs, one of which was the photograph in issue, which was republished in the "Regar" Newspaper of 14 June 2002. The "Nation" Article (Exh. D1) was written by a student of Plaisance Secondary School, which was one of the four Schools that went to Aldabra with three Teachers and the then Principal Secretary in the Ministry of Environment and Chairman of SIF Mr Maurice Lousteau Lalanne, the Plaintiff in this case. The Plaintiff testified that he gave permission to the "Nation" Newspaper to publish all the photographs as there was nothing wrong with any of the activities they portrayed. Their photographs were used to illustrate the activities that took place during that trip. The Defendants reproduced the photograph in issue, without his consent or approval, nor that of the "Nation" Newspaper.

Liability for publication of photographs for purposes other than those intended, was well illustrated in a South African case of *O'Keefe v Argus Printing and Publishing Co Ltd* (supra). In that case the Plaintiff was employed by the South African Broadcasting Corporation which did not allow publicity in advertisements by their employees. She agreed to the use of her photograph for the Article in the Defendant's Newspaper. However the Defendant published a picture of her shooting with a rifle and assisted by an Instructor, and the Advertisement in which the Second Defendant was described

as being the exclusive factory distributor for the union of South West Africa of certain Makes of rifles, pistols, revolvers and ammunition. There was a caption beneath the photograph describing what the Plaintiff was doing and inviting others to come and use her shooting range. The Plaintiff had not consented to the Advertisement. It was held by the Cape Provincial Division that, judged in the light of modern conditions and thought, the Plaintiff had been subjected to offensive, degrading and humiliating treatment, and hence the Defendants were found liable in damages. In that case, Watermeyor AJ added that:

> Much must depend on the circumstances of each particular case, the nature of the photograph, the personality of the Plaintiff his station in life, his reference to publicity, and the like.

Although that decision was based on the *actio injuriarum* in Roman Dutch Law, the basic principle of liability for defamation remains the same.

In the present case, questioned by Counsel for the Plaintiff as to why he did not ask the Plaintiff where he was fishing, Mr Ferrari replied as follows:

> A: Because this Captain had nothing to do with Mr Lalanne. It was not about the people who are seen in the photograph, it is about the incident of fishing. <u>So we did not, at any point, believe that we should be talking to anyone of these people, because we are not targeting anyone of them in particular.</u>
>
> ,Q: So, that is why you did not do anything about it?

A: Yes, there are other reasons, and, the other reason would be that, it is genera% difficult to get information from Government Officials, when this information concerns sensitive or controversial material.

Q: Yes but the picture was, one of the persons from the picture was Mr Lalanne, and you tell the Court that you did not attempt to contact him to get the location of the fishing?

A: No, I did not.

However, Mr Ferrari testified that the photograph was republished after an unnamed “Master Mariner” advised him that the boat was fishing within the 1 km radius of Aldabra which is the prohibited area. This “Master Mariner” was not called to testify, and Mr Georges, learned Counsel informed Court that he was not being called. Hence Mr Ferrari’s evidence on the issue remains unsubstantiated.

Mr Ferrari’s second ground was the identification of the persons in the photograph. He positively identified the Plaintiffs, while an unnamed “fisherman” identified one other, as an employee of SIF. Then “someone” informed him that the third person was a Teacher. He then stated:

> So, we checked out the photograph and the information, what we found was that, at least, at least one person on the boat fishing that day was probably not authorised to be fishing in that particular place. So that is why we raised the issue.

The Defendants rely mainly on the defence of truth. The evidence adduced by the Defendants was inconclusive as

regards the position of the fishing boat. The gist of the Caption was that the three persons were fishing in the Aldabra lagoon. The truth of that assertion was not established. In fact Mr Ferrari stated that they used the word "may" as they were not sure whether any Regulations were being breached. He said "we decided to leave it to the appreciation of our readers to identify the people and to make their own assessment of the situation." That was recklessness on the part of the Publisher,

As Lord Devlin stated in *Lewis v Daily Telegraph Ltd* [1952] 3 WLR 50):

> ... You cannot escape liability for defamation by putting the libel behind a prefix such as 'I have been told that" or it is rumoured that", and then asserting that it was true that you had been told or it was in fact being rumoured ... for the purpose of the law of libel, a hearsay statement is the same as a direct statement, and that is all there is to it.

Similarly the use of the word "may" has the same impact. The Defendants rely on "truth in substance."

Mr Georges, learned Counsel for the Defendants referred the Court to Geoffrey Robertson on *Media Law*, where at page 74, he states:

> The question of "substance" may be significant — it is not necessary to prove that every single fact stated in a criticism is accurate so long as it's "sting" (its defamatory impact) is substantially true.

The "sting" in the caption, sued upon in this case is that the Plaintiff, among others in the photograph was

engaged in illegal fishing by flouting Regulations. That was not, on the basis of the evidence, true.

The Defendants also rely on the Defence of qualified privilege. In the case of *Adam v Ward* (1917) AC 309 at 224, Lord Atkinson stated that:

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

No privilege will attach where the common interest is one which springs from idle gossip or curiosity only (*London Association v Greenlands Ltd* (1916) 2 AC 35) the use of the word “may” in the caption attracts the inference that the publication of the photograph, without positive knowledge of the position of the boat was based on curiosity and guess work and hence no privilege can be claimed. As Hoexter J.A stated in the case of *Neething v Weekly Mail* (1994) 1 SA 708, and cited with approval by Adam JA in the case of *Roger Mancienne v Claude Vidot* (SCA) 36 of 94:

> In deciding whether a defamatory publication affects qualified privilege, the status of the matter communicated (i. e, its source and intrinsic quality) is of crucial importance. In this connection obvious questions which suggest themselves ... are: Does the matter emanate from the official and identifiable source or does it spring from a source which is an informal finding based on reasoned conclusions, after weighing and sifting of evidence, or it is no more than … mere hearsay.

The pre-publication investigation, if any, in the present case was based on unidentified sources, undisclosed in evidence to Court.

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

> The freedom of the Journalist is an ordinary pan of the freedom of the subject and to whatever length the subject in general may go, so also may the Journalist; but, apart from statute law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious Journalist do make him more careful, but the range of his assertions, his criticisms, his comments, is as wide and no wider than that or any other subject.

The defence of qualified privilege is available to responsible Journalism reporting matters of public interest.

In paragraph 10 of the Defence, the Defendants aver that:

> ... The Plaintiff was at all material times the Chairman of the Seychelles Island Foundation and Principal Secretary of the Ministry of Environment. A picture reproduced from the Seychelles Nation clearly showing the Plaintiff fishing in the vicinity of Aldabra, a world heritage site and strict environment reserve under management of the Seychelles Islands

> Foundation, instead of protecting its environment, was a matter in which the Defendants and the Seychellois public had a common and corresponding interest in the publication of the photo graph and caption.

Although all privilege is based on the publication being in the public interest, there is a difference between that which is interesting to the public, and what is in the public interest: *Neethling v Weekly* (supra). It is therefore not necessary in the public interest to publish what interests the public (*London Artists Ltd v Littler* [1968] 1 WLR 607 at 615.

Although, by virtue of Article 1383 (3) of the Civil Code, the civil law of defamation in Seychelles is governed by English Law, not all decisions of the U.K. Courts are applicable here in view of the specific provisions in the Constitution relating to freedom of expression and right of access to official information. Both these rights are subject to derogations. The law of defamation in America gives great latitude to criticism of the conduct of public officials in view of the public interest in getting information regarding public affairs and public officials. In two landmark decisions, *New York v Sullivan* (1964) 376 US 254 and *Gertz v Welch* (1974) 418 US 323, it was held that even false statements made about the official conduct of a Public Officer may be published unless it is done with malice. This is permitted to generate public debate in the national interest. The Courts specifically held that even erroneous statements about Public Officials are entitled to constitutional protection. Such laxity is justified in the U.S.A due to the 1st amendment to the Constitution which provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof or abridging the freedom of speech, or the press, or the right to the people."

> There are no derogations to that fundamental right.

In the recent case of *Wall Street Journal Europe SPRL* (2006) UKHL 44 (11 October 2006), the House of Lords decided (Lord Hoffmann and Baroness Hale dissenting in part) that publishers of an article of "clear public interest" were not to be denied the protection of qualified privilege on the narrow ground that, despite having taken reasonable steps to verify its contents, they failed to delay publication to enable the Plaintiffs to respond. The matter arose in a case where the Defendant Publishers, in an Article in the "Europe" alleged the monitoring of certain bank accounts by the Saudi Arabian Central Bank, at the request of US Enforcement Agencies, to prevent the channeling of funds to terrorist organisations. The Plaintiffs, a Saudi Arabian businessman and his Trading Company incorporated there, were among those named as holding such accounts. That Company however owned no property and conducted no trade in the U.K, but had a commercial reputation in U.K. The appeal arose initially from the decision of Eady J in the Queen's Bench Division that qualified privilege was not available to the Publishers as they had failed to obtain the response from the Plaintiffs Company prior to publication, and that hence that Company was entitled to seek protection of its reputation, relying on the common law rule of presumption of damage: [2004] 2 All ER 92. That decision was upheld by the Court of Appeal: [2005]) QB 904.

In the House of Lords, Lord Bingham of Cornhill stated inter alia that on the issue of privilege, the decision in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 built on traditional foundations of qualified privilege but carried the law forward in a way which gave greater weight than formerly to the value of informed public debate on significant public issues. In that case, Lord Nicholas considered that matters relating to the nature and source of the information were to be taken into account in determining whether the duty of the Publisher to

publish, and the public interest test was satisfied. In brief, the test was whether the public was entitled to know the particular information. It was held that where the public interest requirement was satisfied, the Publishers had to satisfy the test of responsible Journalism, and that where an ingredient of the Article was complained of as being defamatory and untrue, its inclusion might be justifiable so long as the thrust of the Article was true,

These recent decisions in the UK seem to move somewhat closer to the public interest concept followed in the USA. But the UK has no written constitution and hence, to meet any changes in defence situations, public safety, public order, public morality or public health, the extension of the concept or public interest by developing the common law there is justified. However, in our written constitution, due to the permitted derogations on those aspects, the freedom of expression does not equate to the *Freedom of the Wild Ass*. The Defendants therefore cannot rely on the defence of qualified privilege as the publication of the photograph and the caption, on the basis of the evidence, had been done recklessly and, therefore, maliciously, without making an honest attempt to investigate whether the Plaintiff was fishing in a prohibited area, merely because the background island resembled Aldabra. Even Captain Benoiton who was called as a witness for the defence, was not prepared to tread that path and make any positive assessment on that issue. Schedule Part II of the Constitution, lists 46 small islands as forming the Aldabra atoll in the Aldabra group. Hence the publication was designed to mislead the public, and to bring the Plaintiff to hatred any ridicule.

The Defendants also rely on the defence of fair comment. This defence implies that every person has a right to express an opinion honestly and fairly on matters, which are of public interest. In *Kemsley v Foot* (1952) 1 AER 502 Birkett LJ stated:

> The defence of fair comment is an integral part of the greater right of free speech. It is the right of every man to comment freely, fair/y and honest/y in any matter of public interest and this is not a privilege which belongs to particular persons in particular circumstances.

This statement is qualified by the statement of Lord Porter in *Turner v MGM* [1950] 1 All ER 449 at 461, that**:**

> The question is not whether the comment is justified in the eyes of the judge or jury, but whether it is the honest expression of the commentator's real view and not merely abusive or invective under the guise of criticism.

The defence of fair comment cannot be maintained if the comment is made without any factual basis. In the present case, the evidence disclosed that the comment in the caption could not have been an honest expression as it was made without positively establishing the position of the boat in the area where there are several small islands.

The defence of fair comment is therefore not available where the publisher was actuated by malice, in the legal sense, which is, lack of honest belief, and publication with reckless disregard of the truth when circumstances existed for proper investigation. Geoffrey Robertson, in *Media Law* states at page 83:

> A failure to apologise or to publish a retraction will not normally be evidence of malice, but rather of consistency in holding sincere views. But editors who refuse to retract damaging comments after clear proof that they are wild/y exaggerated may lay themselves open to the

> inference from this conduct that they were similarly reckless at the time of the original publication.

Mr Claude Pavard identified himself as the person who took the photograph in question and sent the letter dated 9" July 2002 (P3) to the editor of "Regar" wherein he specifically stated that "it was taken on 16 April at 1800 hours, one kilometre open sea at the reef of Picard Island." He further stated that, as per the regulations, the fish were weighed and placed in a deep freezer to supply the staff of the research section. He further asked for a rectification in the next issue.

The "Regar" published that letter in full but with an editorial note, which read:

> ……fishing round the Aldabra atoll is prohibited within a radius of one kilometre. We regret that some people or organisations felt affected by the publication of the photo and the comment that accompanied.

That was not a retraction or an apology. The "sting" in the caption was perpetuated, and hence the inference of malice, on the part of the publisher has been established. Hence the defence of fair comment fails.

In conclusion therefore, the three defences relied on by the Defendants failed. The Defendants used an otherwise innocuous photograph appearing in the Seychelles Nation in connection with an environment article, to bring the Plaintiff who was the Chairman of the SIP and Principal Secretary to the Ministry of Environment; both organisations responsible for the Administration of Aldabra, to hatred, ridicule and contempt in the eyes of the public. Such publication with a caustic comment is a masterpiece of irresponsible journalism. Hence the Defendants are liable in damages.

Damages

The Plaintiff claims R600,000 as damages against the Defendants jointly and severally, and a further sum as exemplary or punitive damages deemed appropriate by Court. In the case of *Seychelles Broadcasting Corporation & Or v Barnadette Barrado* (SCA Nos. 9/94 and 10/94) Ayoola JA stated:

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

Where a Plaintiff sued more than one person in the same action in respect of the same publication, Gatley on *Libel and Slander* states at paragraph 1463 that:

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

As regards the nature of damages to be an awarded in defamation cases, Windeyer J summed up the position in the case of *Uren v John Fairfax & Sons Ptv Ltd* (1967) 117 CLR 118 and 180, thus:

> It seems to me that, properly speaking a man defamed does not get compensation for his damaged reputation. He gets damages because he was public/y defamed for this reason, compensation by damages operates in two ways

> — vindication of the plaintiff to the public, and as a consolation to him for wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.

In the *Barrado* case (supra), Ayoola JA stated that: "It was perfectly legitimate for the judge to have taken into consideration the status of the Plaintiff in the assessment of damages on the principle. "The higher the Plaintiff's position the higher the damages." (*Dingle v Associated Newspapers* [1961] 2 QB 162, and *Lewis v Daily Telegraph Ltd* (supra).

The position and status of the Plaintiff at the relevant time is not in dispute. In that capacity any allegation whether implied or expressed, that he was engaged in breaching regulations under the National Parks and conservancy Act, and condoning such acts by others in his company, was a gross attack on his reputation and credibility. The Plaintiff testified that several people questioned him about it, and he felt humiliated and distressed. In *Barrado* (supra) the Plaintiff was the personal assistant to the former President of Seychelles. This Court awarded damages in a sum of R550,000 as a solarium for the wrong done to her personal reputation. That award was reduced by the Court of Appeal to R100,000. In the case of *Patrick Pillay v "Regar" Publication & Ors* (Cs. 11 of 1996) the Minister of a senior Ministry was defamed with imputations of dishonestly and a global sum of R450,000 was awarded on the basis of a solarium and also as a demonstrative mark of vindication. The Court of Appeal in reducing the award to R175,000 stated:

> It is, however, pertinent to place all factors into perspective in considering the assessment of damages. In the *Barrado* case, for example, the defamatory statement was made in a political party television broadcast during prime viewing

> time; in the present case, the defamatory statement was made in a weekly newspaper with a total distribution of 2600 copies, 2300 of which accounted for local distribution, and 150 for overseas distribution. Great care should always be exercised in any effort to arrive at a fair assessment of damages.

Hence the quantum of damages was based on the size of the area of circulation. The *Pillay* case was decided by the Court of Appeal on 13 August 1998, It has been admitted by the Defendants that the total distribution of the "Regar" both locally and abroad has increased to over 2000 copies and that "Regar" is now available on the world wide website (www.regar.sc). Moreover, there are several websites on environmental matters and hence the Defendants created the possibility of the libel to be published to a larger readership than in the *Pillay* case.

In assessing the quantum, the amount payable to the Plaintiff should be more than in the *Barrado* case, as the Plaintiff was holding a much higher position, as Chairman of S.I.F, an institution which was known worldwide due to Aldabra being a world heritage site. Mr Pavard in his letter to the edition of "Regar" alluded to this fact when he stated:

> What affects me the most as a board member of the SIP, is that this misunderstanding could be spread abroad in the world of conservationists or T-WWF, or again the world heritage, and this will tarnish the image of SIP in particular and Seychelles in general This is why I am asking you to rectify this issue in the next edition of the Regar Newspaper.

The Defendants as I stated before did not retract the publication in substance but merely expressed regret to those

who felt affected. Hence as the publication was done with malice in the legal sense, and reckless disregard of the truth, the Defendants should be made liable to compensate the Plaintiff not only for the damage done the Plaintiff's reputation, but also as exemplary damages. Taking all those factors into consideration, I award a sum of R350,000 to the Plaintiff payable jointly and severally by the Defendants, together with interest and costs.

Record: Civil Side No 226 of 2002

Aithal v Seychelles Breweries Ltd

Civil Code - damages – nervous shock – lizard in bottle – establishing liability – evidential burden

The Plaintiff claims for nervous shock and stress suffered upon finding a decomposed lizard inside a bottle of ginger ale. The Defendant is the retailer. It is averred that the Plaintiff saw the object before opening the bottle. The Plaintiff claims that the Defendant Company is liable for failing to carry out duties in regards to the bottling of the soft drink. The Plaintiff, who did not drink any of the contents of the bottle, claims R25,000 as damages for shock, mental stress and nervousness and R25,000 as moral damages.

HELD:

(i) The legal burden of proof is on the Plaintiff to establish the Defendant's negligence;

(ii) The evidential burden to establish the efficiency of manufacturing processes with regards to the claim, falls on the Defendant;

(iii) No damage has been caused. Shock must cause damage to body or mind;

(iv) Being disappointed does not amount to shock; and

(v) The test for whether shock has been caused is that of the reasonable person. The Court does not take into account the idiosyncrasies of individuals.

Judgment: Plaintiff's action dismissed without costs.

Legislation cited
Civil Code of Seychelles, art 1383(1)

Cases cited
Felix Camille v Seychelles Breweries Ltd Cr Ap 6/1996 (Unreported)
Sarah GrandJean v The Seychelles Breweries Ltd CS 368/1996 (Unreported)

Foreign Cases Noted
Donoghue v Stevenson [1932] AC 562
Daniels and Daniels v R White & Son Ltd and Tarbard (1938) 4 All ER 258
Bhuddo v Hurry (1958) MR 113

France BONTE for the Plaintiff
Kieran SHAH for the Defendant

Judgment delivered on 29 September 2006 by:

PERERA J: This is a delictual action in which the Plaintiff claims damages for nervous shock and stress allegedly suffered upon discovering a foreign object, (a decomposed lizard*)* inside a bottle of "Ginger Ale" purchased from a retailer of the Defendant Company. It is averred that the said object was observed before opening the bottle to consume. Liability is sought to be established against the Defendant Company for:

(a) failing to take adequate care and attention in bottling the said soft drink.
(b) failing to check the bottled product.
(c) Failing to clean the bottle adequately before bottling the product.

The Plaintiff testified that apart from the bottle of "Ginger Ale", he purchased some other soft drinks, which were also

Seybrew products, from that shop. The glass of the "Ginger Ale" bottle (exhibit P1) is transparent, and the liquid contents are light brown in colour. Hence the decomposed lizard in it is visible without difficulty. Questioned by Court as to why he did not see the impurities when purchasing the Plaintiff stated that the Shopkeeper put everything in a plastic bag and gave him. In his cross-examination, he stated that the bottle was not opened, and that hence he did not obviously drink the contents. He went to the Defendant Company with the contaminated bottle, but was offered two bottles of lemonade in replacement, which he refused to accept. He claims R25,000 as damages for shock, mental stress and nervousness, and a further sum of R25,000 as moral damages.

A similar claim arose in the case of *Felix Camille v Seychelles Breweries Ltd* (Civil Appeal no 6 of 1996). In that case the Plaintiff averred that he purchased a bottle of beer manufactured by the Defendant Company, from a retail shop at Bel Air. Before opening the bottle to consume, he heard a tinkling noise inside, and found a piece of broken glass. He claimed that he suffered "shock, distress and anxiety". He took the bottle to the Seychelles Bureau of Standards (SBS) and obtained a report, which certified that:

> The bottle contains a piece of broken glass. On cross-examination it was obvious that the bottle had not been opened, which leads to the conclusion that the piece of glass could only have been introduced in the bottle accidentally in the filling process.

However, the Standards Officer of the S.B.S. who issued that certificate stated in evidence before the Magistrates' Court that he could not conclusively state that the bottle had not been opened before examination by him and that his conclusion was based on a subjective assessment. The

Bottling Manager of the Defendant Company also testified that it was possible for a bottle to be opened and re-corked without detection, by using a sharp object. He also stated that bottles go through 10 stages of cleaning in both upright and inverted positions and hence a foreign object like a splinter of glass could not stick to a bottle. The Learned Magistrate followed the principle laid down in the case of *Donoghue v Stevenson* [1932] AC 562, and awarded R2000 as moral damages for shock, distress and anxiety. In *Donoghue*, the Plaintiff had averred that he suffered injury as a result of consuming part of the contents of a bottle of Ginger beer which had been manufactured by the Defendant Company, containing the decomposed remains of a snail. That bottle was made of dark opaque glass; so that the Plaintiff had no reason or opportunity to suspect that it contained anything but ginger beer. It was therefore averred that it was the duty of the company to provide a safe system of working to prevent impurities to get into their products. The bottle was purchased by a friend of the Plaintiff who poured the contents into two tumblers. The pieces of the snail fell into the friend's tumbler. The Defendant company averred that even if the snail had got in due to negligent breach of duty on their part, it would have to be a duty established by contract which was owed only to those who were in contractual relations with them, and not to members of the Public who were strangers to the contract under which the Ginger beer was supplied to the Plaintiff. The House of Lords, by majority decision upheld the Plaintiff's claim.

The case laid the foundation of the Modern English Law of negligence.

However the decision in *Camille* (supra), was set aside by me in appeal on the basis that that case was based on faute under Article 1382 of the Civil Codes and hence the principles laid down in the case of *Donoghue* did not apply to an action in delict filed under the Civil Code. In that respect I cited the

following passage from Barry Nicholas on *The French Law of Contract* (2 ed) at 171, that:

> ……… the tort in Donoghue v Stevenson arose out of, but was nevertheless independent of, a breach of contract with the person who bought the Ginger beer, but we do not express it in those terms. This is mainly because the basis of the action in tort is negligence, and negligence is irrelevant to an action for breach of contract, whereas in French Law, fault is ordinarily the basis of both actions. Moreover the French Law of delict has no requirement of a duty of care owed to the Plaintiff. The Plaintiff has simply to show that the Defendant was at fault, and that the damage resulted from that fault.

In *Sarah GrandJean v The Seychelles Breweries Co. Ltd* (C.S. 368 of 1996), the foreign object found in the bottle of "Coca Cola" was also a lizard. The Plaintiff, a minor, drank a glass of the drink and suffered stomach ache. She was taken to hospital where she was given a "stomach wash". The medical history form recorded the complaint as *"……..* intestines contaminated. Coca Cola today around 5.30 p.m. contained a lizard". After the "stomach wash", the child was normal.

In that case, I stated that:

> although sufficiently cogent evidence has been adduced by the Plaintiff to establish the presence of a decomposed lizard, the burden is on the Plaintiff to establish that such foreign body had entered the bottle due to an act, negligence or imprudence on the part of the Defendant company in terms of Article 1383(1) of the Civil Code.

However noting that the burden on a Plaintiff to prove negligence or imprudence on the part of a manufacturer utilizing highly sophisticated machinery, was very heavy, I ruled that while the legal burden of proof continued to remain with the Plaintiff, the evidential burden to establish the efficiency of the manufacturing process, which is peculiarly within their knowledge, shifted to the Defendant. In that case, the "Bottling Manager" testified in detail the various procedures involved in cleaning the bottles, filling the liquid and bottling. The Court was satisfied that there was overwhelming evidence that no foreign object could have entered the bottle during the entire process. As regards the legal burden on the Plaintiff, I cited the case of *Daniels and Daniels v R White & Son Ltd and Tarbard* (1938) 4 AER 258, in which the Plaintiffs suffered a burning sensation in their stomachs after drinking bottled lemonade. The contents after analysis was found to contain 38 grains of carbolic acid. The Defendant company adduced evidence of a fool proof system. Lewis J, was satisfied with the level of supervision involved in the process, and stated:

> That method has been described as fool proof, and it seems to me a little difficult to say that if people supply a fool proof method of cleaning, washing and filling bottles, they have not taken all reasonable care to prevent defects in their commodity. The only way in which it might be said that the fool proof machine was not sufficient, was if it could be shown that the people who were working it were so incompetent that they did not give the fool proof machine a chance.

The onus of proof may shift from time to time as a matter of evidence only. But the legal burden on the Plaintiff, however onerous remains with him. The Plaintiff in the present case has only testified that he received a "*shock*" when he saw the

impurities inside the bottle. He was apparently relying on the maxim res ipsa loqitur. But that maxim does not apply in French Law of delict. In the case of *Bhuddo v Hurry* (1958) MR 113, a lorry carrying a load of sugar canes overturned as it went over a rut on the road, and a labourer seated on top of the canes was killed. The Court, dismissing the claim stated "we are asked to say that the mere fact of the lorry going into the rut and overtaking amounts to imprudent or negligent driving. We cannot do so". The Court further stated that in French Law "the precise nature of the "*faute"* must be proved and the burden of proving it lies on the Plaintiff. Mere conjectures and presumptions are not sufficient".

In the present case even if the Court, on a balance of probabilities would be disposed towards holding that the lizard had been introduced into the bottle during the bottling process, yet, no "*damage"* as envisaged in Article 1382 has not been established. In *Sarah GrandJean* (supra), the child suffered a stomach ache and was treated in hospital. In the English case of *Daniels and Daniels* (supra) the Plaintiffs suffered a burning sensation in their stomachs, after consuming lemonade contaminated with carbolic acid. Although both claims failed on the ground of liability, "damage" or "harm" was established. In *Felix Camille* (supra), I stated:

> for a delictual claim, "shock" must be of such a nature that it causes damage to body or mind. Usually, there should be partial or total damage to the nervous system. If the type of "shock" the Plaintiff is said to have got, is actionable in law, there would be endless litigation. He would have however been "disappointed" as he claimed, as he was unable to enjoy his drink. But such disappointment is <u>de minimis</u> and hence not actionable in tort.

The present case also falls into the same category. An ordinary, reasonable person, comes across several incidents and situations which may shock him in his daily life. Not everyone reacts in the same way. The Court does not take into consideration the idiosyncrasies of individuals. The test is the reasonable man. On that basis, the maxim, de minimis non curat lex (the law does not concern itself with trifles) applies. As is stated in Broom's *Legal Maxims* at 88, "where some injury is so little for consideration in law, no action will lie for them".

The Plaintiff's action is accordingly dismissed, but without costs.

Record: Civil Side No 52 of 2004

Giovanni Rose (ex parte)

Civil procedure - injunction – equitable jurisdiction - urgency

Ex parte application for an order to restrict a person from leaving Seychelles and for a returnable date to be set so the matter may be heard between the Applicant and the other person, and for a restraining order to remain in force until judgment is filed.

No wrongful act had actually occurred.

HELD:

(i) The equitable jurisdiction of the Court will be invoked only in cases where there is no sufficient legal remedy;

(ii) The Supreme Court Practice Rules of England, Order 29 Rule (3) can operate in matters of urgency;

(iii) Ex parte injunctions should be for cases of real urgency where it is truly impossible to give notice of motion;

(iv) If there is no certainty with regard to the Respondent's travel plans for leaving the jurisdiction, then there is no urgency;

(v) There is sufficient remedy available in law so the equitable jurisdiction does not need to be invoked; and

(vi) The Court is reluctant to interfere with the enjoyment of the fundamental right of freedom of movement.

Judgment: Application dismissed.

Legislation cited
Constitution of Seychelles, Art 25
Courts Act, s 6
Seychelles Code of Civil Procedure, s 304

Cases cited
Government of Seychelles v Shivkrishnasingh Ramrushaya (2003) SLR 94
France Bonte v Innovative Publications (Pty) Ltd (1993) SLR 120
*Attorney-General v Deltel (*1954) SLR 277

Foreign cases noted
American Cyanamid v Ethicon Ltd [1975] AC 396

Basil HOAREAU for the Applicant

Ruling delivered on 24 July 2006 by:

GASWAGA J: An application has been filed by Giovanni Rose moving the Court to make the following orders:

(a) an ex parte order, restraining one Rita Esparon of Cascade, Mahe, from leaving the jurisdiction of Seychelles until further order of the Court and for a copy of the said order to be sent to the Director of Immigration;

(b) for a returnable date to be set, so that the matter may be heard inter partes between the Applicant and the said Rita Esparon and thereafter for the restraining order to remain in force until the final

determination of the principal case to be filed by the Applicant.

Mr Basil Hoareau submitted that the application was being brought under S. 6 of the Courts Act Cap 52 which gives the Courts equitable powers and not under S. 304 of the Seychelles Code of Civil Procedure Cap 213 that deals with interlocutory injunctions to restrain a Defendant from the repetition or continuance of the wrongful act or breach of contract. That in this case the wrongful act has not yet occurred and further that the said S.6 confers similar powers to the Court like those under Order 29 of the Supreme Court Practice Rules of England. In particular, the exception under Order 29 Rule (3) was cited since there was no plaint filed because the Applicant considered this case to be a matter of urgency. He relied on the authority of *Government of Seychelles v Shivkrishnasingh Ramrushaya* (supra). Order 29 Rule 3 reads as follows:

> (3) The Plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit.

The affidavit filed establishes a serious question to be tried and therefore the Applicant has a good arguable claim to the right he seeks to protect. On 2 May 2006 the Respondent sold a rock drilling machine to the Applicant for a sum of R35,000 which sum was paid in full. But in breach of the said contract the Respondent has not delivered the rock drilling machine and is reported to be soon leaving the country for good. That if the order is granted the Applicant intends to file

a plaint against her within one week. However, the grant or refusal of an injunction is a matter for the exercise of the Courts discretion on the balance of convenience. See *American Cyanamid v Ethicon Ltd* [1975] AC 396. Moreover, it is contended that if the Respondent leaves the jurisdiction of the Court before settling the case the Applicant is likely to suffer the great hardship or irreparable damage, with no recourse, since she owns no property in Seychelles.

My reading and understanding of Order 29 Rule 3 is that the provision is only applicable where the case is one of urgency while the equitable jurisdiction provided for by S. 6 (supra) is only invoked in all those cases where no sufficient legal remedy is provided by the laws of Seychelles.

Section 6 provides:

> The Supreme Court shall continue to be a Court of Equity and is hereby invested with powers, authority, and jurisdiction to administer justice and to do all acts for the due execution of such equitable jurisdiction in all cases where no sufficient legal remedy is provided by the law of Seychelles.

For this application to succeed two questions must be resolved:

(a) whether this matter can rightly be considered as one of urgency,

(b) whether there is no sufficient legal remedy provided by the laws of Seychelles apart from equitable powers of the Court.

Decided cases will offer better guidance while determining the

first question. In the case of *France Bonte v Innovative Publications (Pty) Ltd* C.S. No. 200 of 1993, the "Seychelles Independent" newspaper published the text of a telephone conversation between the Plaintiff in his professional capacity as a lawyer, and a client. The newspaper, in the same issue informed its readers that other parts of that conversation would be published in the next issue, which was due to be circulated within three days when the application was filed.

In the case of *Attorney General v Deltel* (1954) SLR 277, (supra), the Attorney-General sought an injunction on the Defendant Mr Alexandre Deltel, who was elected as a member of the Legislative Council for the South Mahe District, from sitting and voting at the session of the legislative Council to be held the next day, on the ground that he was disqualified to hold such Office by virtue of Section 11(5) (a) of the Seychelles (Legislative Council) Order in Council, 1948. The application was filed on 16 December 1954, and the Legislative Council sitting was to be held on 17December 1954.

Further, in the case of *Government of Seychelles v Shivkrishnasing*h *Ramrushaya* (supra) (successfully argued by Mr B. Hoareau for the Applicant) the Respondent, a Mauritian national, was due to leave Seychelles on 16 August 2003 at 8.55 a.m. by flight no. HM. 055 for Mauritius and Australia on leave. It had been deponed that he neither had an air ticket from Mauritius back to Seychelles nor assets in the Seychelles. Yet, the Respondent had agreed to be bonded by the Applicant for service for five years, consequent to a sponsorship to complete a University degree in Australia. He was now leaving Seychelles for good without refunding a sum of R196.721 as agreed and that is why the Applicant successfully sought an interim injunction on 14 August 2003 to prevent him from leaving the jurisdiction until sufficient security was provided or until the matter was finally determined.

Those authorities should however be distinguished from the case at hand. In all these cases interim injunctions were granted on the basis of various reasons but common to all of them the equitable jurisdiction of the Court was invoked on a consideration of the impracticability of serving notice on the Respondents (in time before the Act or Event complained of occurs) to be able to hold an inter partes hearing, and returnable at a future date set for the said Defendants to appear in Court and show cause against the order. This is an ex parte application. Unlike in the present case the Applicants in the *Bonte*, *Deltel* and *Ramrushaya* cases had initiated the proceedings by way of a plaint. I wish to stress that ex parte injunctions should be for cases of real urgency where there has been a true impossibility of giving notice of motion. It is clear from the three cases cited that time was of the essence. In the *Bonte* case the next publication was due in three days while in the *Deltel* case the next sitting and voting at the Legislative Council was to be held the next day. And in the *Ramrushaya* case the Respondent was leaving the jurisdiction of the Court in two days' time, one of them being a public holiday.

Paragraph 5 of the Applicants affidavit of 6 July 2006 is pertinent:

> I have been reliably informed two days ago and verily believe that the said Rita Esparon is anytime soon about to leave the jurisdiction of Seychelles for good to settle in a foreign country, at any time soon.

From the foregoing, it cannot be said that this is a matter to be treated as one of urgency when no certainty is there with regard to the Respondents plans or time of leaving the jurisdiction of the Court. In no way can it be compared to the above cited authorities. This conclusion brings me to the second question which, like the first one, should be answered

in the negative. Yes, equity helps the vigilant but, again, a reading of the *Bonte, Deltel and Ramrushaya* cases vividly shows that the Applicant has a sufficient legal remedy provided by the laws of Seychelles and cannot therefore be heard or let alone allowed to invoke the equitable jurisdiction of the Court meant for those cases that are deserving. The reasoning that the Respondent will quit the jurisdiction if a plaint is filed and served on her is not tenable. Unless a plausible explanation is put across this Court is reluctant to interfere with the enjoyment of the Applicant's Fundamental Right of Freedom of Movement in these circumstances. See Art. 25 of the Constitution 1993. Being unable to grant this application and therefore orders I am left with one option of dismissing the application.

Record: Civil Side No 199 of 2006

Albert v Rose

Civil Code - estate – succession – property transferred prior to death

The Plaintiff was appointed executrix of estate. The Defendant claimed that there is no estate, as the property had already been transferred to him before the death of the testator. The issue is whether the property had in fact been transferred to the Defendant before the testator's death.

HELD:

(i) The executor is only able to be appointed if there is immovable property in the succession;

(ii) There is a presumption that if there is an authentic document which denotes the agreement between the contracting parties, that agreement is proof of the agreement. A notarial deed is an "authentic document";

(iii) An instrument of transfer made in accordance with the Land Registration Act is presumed to have been properly executed by the parties; and

(iv) The heirs could sue a third party if any fraud, duress or deceit had been carried out against the testator which resulted in their loss of rights of succession in the estate.

Judgment: Action dismissed without costs.

Legislation cited
Civil Code of Seychelles, arts 1026, 1319
Land Registration Act, s 63
Notaries Act, s 22

Cases cited

Foreign cases noted
Munasinghe v Vidanage (1966) 69 NLR 97
Rimmer v Webster [1902] 2 Ch 163

Bernard GEORGES for the Plaintiff
Frank ALLY for the Defendant

Judgment delivered on 24 February 2006 by:

PERERA J: The Plaintiff is the sister of one Charles Alphonse who died on 1 November 2000. After his death, the Plaintiff was appointed the executrix of his estate on 20 July 2001. In the application for appointment as executrix, it was averred that the appointment was sought inter alia to institute legal action against a third party.

The instant action was filed on 3 August 2001 by the Plaintiff in her capacity as an heir, and as the executrix of the estate, against the Defendant on the basis of a sale of a Parcel of land bearing no. C. 1087 with a house standing thereon at Les Cannelles, by the said Charles Alphonse on 29 September 2001. Admittedly there was no "estate" at the time the appointment of executrix was made. The Plaintiff's locus standi in the present matter is therefore more as an heir, rather than as the executrix.

In the plaint, the Plaintiff sought (1) to set aside the transfer on the ground of mistake on the part of Charles Alphonse, (2) in the alternative, to order recession of the transfer on the

ground of lesion, and (3) in the alternative to (1) and (2), to order the Defendant to pay the Plaintiff for the benefit of the estate of the late Charles Alphonse, the sum of R40,000, which on the face of the deed has been stated as having been paid previously. However, Mr Georges, Learned Counsel for the Plaintiff informed Court at the hearing, that upon subsequent instructions, the Plaintiff would proceed only on the third prayer. Hence the only issue to be decided is whether the Defendant paid the sum of R40,000 to the late Charles Alphonse prior to the execution of the deed of transfer executed on 29 September 2000, which was one month before his death.

The Plaintiff is a sister of Charles Alphonse, and a cousin of the Defendant. She testified that Charles told her that he would be selling the property, but that he would tell her when he was ready. However he became ill on a visit to the Defendant's house and was brought to her sister's house. The property was transferred to the Defendant by Charles on 29 September 2000, and he died on 1 November 2000. The Plaintiff further testified that Charles came to her house on 22 September and told her that he was selling the property on the 29 September 2000, but did not tell her to whom he was selling. However he told her that the Defendant was pressurizing him to sell it to her on condition that the purchase price would be paid in installments of R1000 per month. Subsequently when she visited Charles when he was sick, he told her not to talk about the money from the sale. From that reply she understood that the Defendant had not paid for the property. On being cross-examined, she stated that she gave Charles various amounts ranging from R25 to R100 whenever he asked, for his expenses or to pay the loan installments for the property to the Government. She denied that the Defendant paid R1000 per month towards the purchase price of R40,000 stated in the deed of transfer. She denied that the Defendant had paid R500 per month to Charles for 7 years prior to the sale of the property.

The Defendant was called by the Plaintiff on her personal answers. She subsequently, upon oath, adopted the answers given by her in the examination in chief, the cross-examination and the re-examination. Hence her testimony is considered as sworn evidence for purposes of the case. The Defendant stated that she paid the sale price of R40,000 in instalments of R500 monthly, until Charles told her that he was ready to sell the land to her. She was however unable to recall how much she had paid by then. No receipts were obtained. The transaction was known only to both of them. She claimed that she had paid R500 monthly for about 7 years. It was Charles who took her to the notary to effect the transfer. No money was paid before the notary as payment had been made before. The Defendant further stated that Charles was fit to travel to the notary. She also claimed that the loan installments to the Government were paid by Charles from the money given by her for the property.

Mr Francis Chang Sam, the notary who executed the deed of transfer on 29 September 2000 testified that the words "in consideration of R40,000 (which sum has been paid)" was inserted upon instructions from the vender and the vendee. It is trite law that a notary is the agent of both parties and that he takes instructions not only from the venders as to what is sold, but also from the vendees as to what is purchased and at what price. Mr Chang Sam further stated that he did not witness the exchange of any money and that Charles Alphonse told him that he had received the purchase price. He then explained the consequences and told the vendor that once he signed the deed he will not be able to challenge the payment. Mr Chang Sam also stated that Charles appeared to be physically and mentally fit at that time.

The cause of action of the executrix is now limited to an averment that although both the vendor and the vendee had instructed the notary to stipulate on the deed that the full sum

of R40,000 had been paid prior to the execution of the transfer on 29 September 2000, that amount had not been paid. In fact, Learned Counsel for the Plaintiff suggested to the Defendant that she pays the sum of R40,000 and to keep the property. She however declined and stated that she had already paid.

In case no. C.S. 132 of 2001, the Plaintiff was appointed executrix of the succession of Charles Alphonse, for the purpose of instituting legal action against a third party who had purchased property from the said deceased. The executor can be appointed under Article 1026 only where there is a succession consisting of immovable property, or of both immovable and movable property. In that case it was not averred that the deceased person owned any immovable property other than Parcel C 1087 which he sold to the Defendant on 29 September 2001, one month before his death. In this respect, Article 1319 of the Civil Code provides that:

> An authentic document shall be accepted as proof of the agreement which it contains between the contracting parties and their heirs or assigns. Nevertheless, such documents shall only have the effect of raising a legal presumption of proof which may be rebutted by evidence to the contrary evidence in rebuttal, whether incidental to legal proceedings or not, shall entitle the Court to suspend provisionally the execution of the document and to make such order in respect of it as it considers appropriate.

In terms of Section 22 of the Notaries Act (Cap. 149), a notarial deed is an "authentic document".

The 2nd paragraph of Article 1319, which is a new provision, did away with the procedure known as inscriptio falsi which

had to be followed in relation to acts or facts which were stated in the document to have happened in the presence of the notary or which the notary himself had performed. Now the legal presumption of proof casts the burden on the party who challenges the document to prove its falsity. This can be done whether the acts or facts happened in the presence of the notary or otherwise.

Section 63 of the Land Registration Act (Cap 107) provides that:

> An instrument, the execution of which is duly attested in accordance with Section 60 or Section 61, shall be presumed, unless the contrary is shown, to have been duly executed by the parties thereto. The attestation shall be evidence of the facts set out therein and such facts shall be presumed to be true unless the contrary is shown.

The 1st paragraph of Article 1319 of the Civil Code binds both the contracting parties and their heirs and assigns as to the validity of the deed.

Similar facts, as in the present case were considered in the Sri Lankan case of *Munasinghe v Vidanage* (1969) NLR (PC) 97. The deed stipulated that the property was sold for R20,500 “well and truly paid to the said vendors”.

The Notary, in the attestation clause also stated that the full consideration of R20,500 was acknowledged before him to have been previously received. The vendor subsequently sued the vendee on the ground that no consideration was received by him, and that, according to Roman Dutch Law, no beneficial interest in the property had passed to the vendee. The trial Judge, in accordance with the findings of fact, which involved assessment of the veracity of witnesses, held that no

consideration had passed. In Appeal, the Supreme Court reversed that finding on the basis of the attestation clause which recorded an admission of the vendor. The Privy Council conceded that the case was of "rather complicated and difficult facts", and that there was a good deal to be said on each side. However, Lord Pearson, delivering the judgment of the board, held that the decision of the trial Judge based on facts ought not to have been set aside as he had the advantage of seeing and hearing the witnesses. It was also held that although the statements of the Notary in the attestation clause of a deed of sale are admissible evidence, and may well be important evidence regarding consideration, it was not conclusive evidence. The decision of the Supreme Court was therefore set aside.

In that case, there was clear and convincing evidence to establish that there was no previous payment of the purchase price. In fact the Notary had testified that the vendor instructed him to "put it down as received beforehand". After the deed was signed, he asked the vendor why he took the money before hand and not pay it at the time of the execution of the deed. Then he admitted that he did not take the money. When asked why he then transferred the property, he stated "that is our business" and that it was all right between relations".

A somewhat stricter view was taken in the case of *Rimmer v Webster* [1902] 2 Ch 163 at 173 the Court held that:

> If a man acknowledges that he has received the whole of the purchase money from the person to whom he transfers property, he voluntarily arms the purchaser with means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of encumbrance or adverse equity, and he

> cannot be heard to say that he was not in fact received such purchase money.

In the present case, has the Plaintiff rebutted the presumption in Article 1319 as well as Section 63 of the Land Registration Act? As the issues of mistake, and lesion are not relied upon, the limited issue for consideration is whether in fact the vendor, Charles Alphonse had received the consideration of R40,000 in respect of the transfer.

The Plaintiff in her testimony stated that Charles Alphonse told her on 29 September 2003, that he had sold the property to the Defendant "on credit" and that she was supposed to pay R1000 per month. However she replied Counsel for the Defendant thus:

> Q. After Charles Alphonse died immediately after he died, didn't you go around to so many people in respect of this transfer?
>
> A. Yes, we went for a search, because we wanted to know when did my brother sell that land.
>
> Q. So, you wanted to know when and who had bought the land?
>
> A. I wanted to know his case.
>
> Q. What do you mean by his case?
>
> A. I wanted to know where his R40,000 had gone.

It is clear that the Plaintiff and the other heirs were unaware of the transactions between Charles Alphonse and the Defendant, and that she came to know of the sale only after the death of Charles. Hence the assertion of the Plaintiff that

Charles told her that the Defendant purchased on "credit" and that she was required to pay R1000 monthly, is contradictory, and therefore is not credible.

Both the Defendant and Mr Chang Sam have testified that Charles Alphonse executed the deed while in a fit mental condition. The Plaintiff admitted in evidence that Charles was a secretive type of person. If he did not receive money, why he stated to the Notary that he had received previously, and if he and received money, what he did with the money, would not be within the knowledge of the Plaintiff nor any of the heirs. Under Article 1319, the agreement between Charles and the Defendant are binding on them. In the cases of *Munasinghe* (supra) and *Rimmer* (supra), the vendors themselves sought recession of the transfers on the ground that no consideration had passed although it was stated otherwise in the deeds. In the present case, the heirs, in any event would have been entitled to the succession if any, available at the time of the death of the testator. However they could, sue a third party if any fraud, deceit or duress had been exercised on the testator which had resulted in depriving them of their legitimate dues. No such allegation has been made by the Plaintiff. The ground of mistake has also been abandoned.

The Plaintiff's evidence is therefore insufficient to rebut the presumption in Article 1319 and Section 63 of the land Registration Act. Hence the Plaintiff's action fails, and is accordingly dismissed with costs.

Record: Civil Side No 244 of 2001

Dugasse v Housing Development Corporation of Seychelles

Rent in arrears – eviction notice – rent board – exercise of discretion

Appeal from a decision of the Rent Board regarding the eviction of the Appellant and partner as they defaulted on rent payments from July 2007. Appellant testified to making payments up to June 2002, but defaulted after that until August 2002 due to unemployment. The Appellant testified that the Seychelles Housing Development Corporation (SHDC) had agreed to give her time to pay the arrears and would not evict her, as the Appellant indicated willingness to purchase the property. The Appellant asserted that she had fulfilled her obligations. The SHDC disputed this, saying that the payments were made pending a notice of eviction.

HELD:

(i) The Rent Board is able to specify grounds for ordering an eviction if the Board considers it reasonable to make such an order. The condition of "reasonableness" as a ground for making an order gives very wide discretion;

(ii) In exercising discretion regarding a question of eviction, the Board must take a common sense view of the circumstances;

(iii) The Board in this case did consider the reasonableness of making an eviction order;

(iv) Even if it were to exercise a broad commonsense approach, no tribunal is able to act on uncertain and disputed oral evidence;

(v) The Board exercised its discretion in a reasonable way;

(vi) The Board found that although the appellant had paid all arrears owing, she had nevertheless breached conditions of the lease and was liable for eviction;

(vii) A tenant who falls into arrears of rent is no longer protected by the Control of Rent and Tenancy Agreements Act (the Act);

(viii) The Act is designed to protect tenants who fulfil their obligations but the Act should not be construed to penalise landlords. If the landlord is a statutory body with the obligation to provide housing in the community, the need to evict tenants who fail to meet their obligations is greater; and

(ix) If an appellant has paid all arrears, this does not preclude the Board from making an order for an eviction.

Judgment: Appeal dismissed without costs.

Legislation cited
Control of Rent and Tenancy Agreements Act, s 10(2)

Cases cited
Horizon Trading v Srinivasan Chetty C App 8/1993
Julien Hoareau v Daniel Mousbe (1982) SLR 241

Foreign cases noted
Cumming v Danson [1942] 2 All ER 653

Bernard GEORGES for the Appellant
John RENAUD for the Respondent

Judgment delivered on 3 July, 2006 by:

PERERA J: This is an appeal from a decision of the Rent Board ordering the eviction of the Appellant for non-payment of rent. The matter originated with an application made by the Respondent (SHDC) on 2 October 2002 for an order of eviction on the ground that the Appellant and her concubine who had entered into a Tenancy Agreement on 9th November 1995 to pay a monthly rent of R1000, (which was later revised to R4000), had defaulted payment from July 1997 leaving arrears in a sum of R30,400 as at 1 October 2002.

At the hearing of the application before the Rent Board, it was revealed that the First Respondent (Darrel Larue) had vacated the premises, leaving the Second Respondent (Appellant in the present matter). The Appellant had testified that she had made payments intermittently up to June 2002, but defaulted thereafter until August 2002 as she was unemployed. She commenced payment from August 2002 after she had a new concubine who helped with the payments. She also testified that the SHDC had agreed to grant her time to pay the arrears and also agreed that no eviction would be done as she expressed her willingness to purchase the house with the financial help from her concubine. Subsequently, on 25 July 2003, when the case was taken up for hearing, Mr Georges, Learned Counsel for the Appellant informed the Board that all arrears of rent up to February 2004, amounting to over

R30,000 had been paid to SHDC, and that the Appellant was ready to sign the deed for purchase of the house on 27 October 2003. However the SHDC disputed that assertion and instead moved for eviction on the ground that although arrears had been paid, such payments were received pending an order of eviction.

The Rent Board observed that there was conflicting evidence of an alleged agreement or at least an arrangement for the Appellant to purchase the premises. The Board also observed that the SHDC had taken almost seven years to institute legal proceedings for eviction, when the Appellant had been arrears of rent for about five years from 1997 for valid or invalid reasons. Taking these matters into consideration, the Board held that the Appellant was in clear breach of her obligation to pay rent pursuant to the lease agreement, and hence by decision dated 19 March 2004 ordered vacation of the premises by 31 May 2004 as rent had been paid up to then.

The Appellant contends that the Rent Board erred in making the order despite evidence that the arrears of rent had been made up as soon as she was able to pay. Mr Georges, Learned Counsel for the Appellant also submitted that the grounds specified in Section 10(2) of the Control of Rent and Tenancy Agreements Act (Cap 47) for eviction are subject to the first proviso which reads "and in any case as aforesaid, the Board considers it reasonable to make such an order". He submitted that there was a statutory requirement for the board to consider reasonableness of making an order of eviction without being bound to the legal provisions of the contract of tenancy. It was also submitted that although the Applicant had been in arrears of rent for a long period for reasons she adduced before the Board, yet that situation had substantially changed by the time the matter was being heard by the Board, and all arrears and rent in advance up to May 2004 were paid. The order for eviction was made on 19 March

2004.

In the case of *Horizon Trading v Srinivasan Chetty* (Civil Appeal no. 8 of 1993), I considered the 1st proviso to Section 10(2) as regards reasonableness and held that it was an objective test and not a subjective one. I cited the case of *Cumming v Danson* [1992] AER 653 at 655 in which Greene M.R. propounding the objective test stated:

> In considering reasonableness under Section 3(1), it is, in my opinion perfectly clear that the duty of the Judge is to take into account all relevant circumstances as they exist at the date of hearing. That he must do in what I venture to call a broad, common-sense way as a man of the world, and come to his conclusion giving such weight as he thinks right to the various factors in the situation. Some factors may have little or no weight, others may be decisive, but it is quite wrong for him to exclude from his consideration matters which he ought to take into account.

This view was also taken by Seaton CJ as he then was) in the case of *Julien Hoareau v Daniel Mousbe* (1982) SLR 241 when he stated that:

> It will be noted that before <u>an order for eviction</u> may be made under Section 10(2), there must not only exist one of the conditions mentioned therein, but the further condition of reasonableness. On the question of reasonableness there is the widest discretion to the making of the order. The board must take into account the relevant circumstances at the date of hearing, bearing in mind that certain minimum standards are required of a statutory

> tenant, including that he should not fail to pay such sums as are legally due to his Landlord.

In that case, the application for eviction on the ground of “failure to pay rent properly due” was made on 8 September 1981. However during the hearing on 15 January 1982, the Landlord stated that he wanted the Tenant to vacate the house which was advertised for sale, and to pay all arrears of rent. The tenant replied that he had the intention to purchase, and that the Landlord’s proxy had already made an offer to him. Counsel for the Landlord then stated that the Tenant was free to purchase like anyone else. The board then made an interim order that –

> By the end of March, Respondent should have made all necessary arrangements to purchase the house. If by then all attempts have proved unsuccessful, the Applicant may sell her property to whoever wants to purchase it.

As regards the arrears of rent, the board directed the Tenant to sign a document agreeing to pay arrears by monthly instalments of R500 in accordance with Article 1326 of the Civil Code, and to pay the monthly rent in addition. The Tenant complied with that order. However, subsequent events showed that the Tenant had gone to the SHDC to obtain a loan to purchase the house and was asked to furnish necessary particulars of the premises including the survey plan, but the Landlord did not provide him with those documents. Consequently SHDC was unable to process the loan application. The board took that into consideration and found that it was unreasonable to make an order of eviction.

Seaton CJ, in considering whether the board had exercised its discretion under the 1st proviso to Section 10(2) correctly stated:

> A Court of Appeal should not disturb a finding on the issue of reasonableness if it is satisfied that every relevant consideration has been duly weighed, even if it might have to come to a different view thereon. With respect I do not consider as irrelevant the question of buying and selling the house occupied by the Tenant. Admittedly once the board had found that the Respondent was in arrears with his payment of rent, the onus shifted on the Respondent (Tenant) to prove it was not reasonable for the board to order his eviction.

In that respect, Seaton CJ stated that the only reasonable inference from the Board's decision was that it believed that the Tenant was in good faith negotiating to buy the house, and also as the Landlord's grievances, to receive arrears of rent and to have the house sold were redressed, there was no reason to order eviction. The Court however stated that the board in exercising its discretion on the question of eviction, must take a common sense view of the circumstances. Although the appeal of the Landlord was dismissed, the Court held that the Tenant must pay his rent regularly as it falls due and the arrears according to the document he had signed "acknowledging the debt". The Court further stated that so long he did so, no eviction order could be made, but if he defaulted he should vacate the premises.

In the present case did the board exercise its discretion as to reasonableness in a broad common sense manner? The Appellant testified before the board that arrangements for purchase of the house were being made with Mrs Julie, Legal Counsel of the SHDC. Learned Counsel for the Appellant had tried to call her as a witness, but failed as she had by then left employment. Mr Barry Cesar, an Accountant of SHDC, however denied any knowledge of such an arrangement. Hence unlike in the case of *Julien Hoareau* (supra) there was

no acceptable evidence before the board of any agreement to purchase the premises. Learned Counsel for the Appellant emphasized on the word "unfortunately" used by the board when ordering eviction, and submitted that the board was unaware of the requirement to consider the reasonableness of such order. With respect, I cannot agree. The board considered the reasonableness of making an eviction order and stated that although the Appellant claimed that Mrs Julie had stated that if all arrears would be paid, arrangements would be made to transfer the premises, there was conflicting evidence on that matter. Even exercising a broad commonsense view, no tribunal can act on unsubstantiated oral assertions. Hence it could not be said that the board did not exercise its discretion, nor it did so unreasonably.

The board therefore considered that although the Appellant had paid all the arrears and even rent in advance, she had breached a condition of the lease agreement and was therefore liable for eviction. Once a Tenant falls into arrears of rent, he forfeits the protection given to him under the Act, from being ejected. He cannot regain that protection by tendering the arrears. Rent act protects the Tenant who fulfils his obligations, but that does not mean that that Act should be interpreted in such a way as to penalize the Landlord, whether the Landlord is an individual or a statutory body. In the case of a statutory body vested with the obligation to provide for the housing needs of the community, the need to evict tenants who do not fulfill their obligations is greater, as there could be other deserving persons who are able and willing to become tenants and ready to fulfill their obligations. The fact that the Appellant paid all arrears and future rent up to May 2004 therefore does not oblige the board not to make an order of eviction. It is the duty of a tenant to pay rent regularly even during the pendency of the action for eviction from the premises. It was in that respect that the board ordered eviction only after May 2004. The Appellant has been in occupation for two years thereafter, and hence there is no

reason why this Court should grant any further extension of time to vacate.

The Appeal is accordingly dismissed with costs.

Record: Court of Appeal (Civil No 3 of 2004)

Mathiot v Mathiot

Matrimonial causes - matrimonial property - contributions

The Applicant sought a declaration regarding ownership of property before dissolution of marriage. The application was struck out. Applicant claimed that the Respondent made no contributions to the property during the marriage.

HELD:

(i) The initial decision to strike out the applications was erroneous as it said that the application should have been made under Section 25 of the Matrimonial Causes Act, when in fact Section 20(1)(g) of the Married Women Act was the appropriate law to resolve the claim;

(ii) The Respondent would have made indirect contributions towards the maintenance of the property;

(iii) The irresponsible conduct of the Respondent made it impossible for the Applicant and the Respondent to live in the same house; and

(iv) The land and house should be valued and the Respondent should be paid 15% of the value in compensation for indirect payments. Subject to this, the Applicant is declared the sole owner of the property.

Judgment in favour of the Applicant. Parties bear own costs.

Legislation cited

Civil Code of Seychelles, Art 5Married Women Act, s 21
Matrimonial Causes Act, s 25
Matrimonial Causes Rules 1993, rule 4(1)(f)

Cases cited
Figaro v Figaro (1982) SLR 200
Govinden v Govinden (1979) SLR 28
Peggy Confait v Clement Confait DV 7/1993
Renaud v Renaud SCA 48/1998

Foreign cases noted
Cowcher v Cowcher [1972] 1 All ER 943
Re Rogers Question [1948] 1 All ER 328

Antony DERJACQUES for the Petitioner
Anthony JULIETTE for the Respondent

Order delivered on 29 March 2006 by:

PERERA ACJ: Subsequent to dissolution of marriage and decree absolute being entered, the petitioner, in a previous application sought a declaration that she was the sole owner of Parcel V. 1575 and the house situated thereon. She also sought an order on the Respondent to vacate the house, as allegedly, no contribution was made by him towards the purchase of the land and the construction of the house. By an order dated 7 May 2004, Karunakaran J, struck out the application and held that the application should have been made under Section 25 of the Matrimonial Causes Act, read with Rule 4(1)(f) of the Matrimonial Causes Rules 1993. The Respondent also had filed a counter application under Section 20(1) (g) of the Matrimonial Causes Act. By the same order, that application was also struck out on the basis that in *Renaud v Renaud* (SCA no 48/98) the Court of Appeal had held that when the purpose of the proceedings was to ascertain and declare property rights, it was inappropriate to invoke the jurisdiction of the Court under Section 20(1) (g) of

the Act.

With respect, that view was expressed by the Court of Appeal on two erroneous interpretations of Section 21 of the status of Married Women Act, and Section 25 of the Matrimonial Causes Act. Hence this Court, pursuant to Article 5 of the Civil Code would depart for good reason. That Court held that where the objection is to ascertain the respective rights of the husband and wife to disputed property, the appropriate jurisdiction to invoke was under Section 21 of the status of Married Women Act. With respect, that Section specifically applies where parties have not been divorced, but questions as to Title or possession of property arise while living separated or otherwise. In the case of *Govinden v Govinden* (1979) SLR 28, it was held that that Section applied to a married couple who were living separated.

Section 25 of the Matrimonial Causes Act provides interim relief to protect a party, child, or property. Section 20(1) provides that:

> Subject to Section 24, on the granting of a provisional order of divorce or nullity or an order of separation, or at anytime thereafter, the Court may, after making such inquiries as the Court thinks fit and having regard to all the circumstances of the case, including the ability and financial means of the parties to the marriage –
>
> ………………….
>
> (g) make such order, as the Court thinks fit, in respect of any property or a part to a marriage or any interest or right of a party in any property for the benefit of the other party or a relevant child.

The Court of Appeal, in the *Renaud* case further observed that Section 25 was wider than Section 20(1) (g) but made no finding thereon. With respect, after dissolution of marriage, Section 20(1) enjoins the Court to make inquiries as regards the ability and financial means of the parties and all the circumstances of the case, and make orders regarding alimony, maintenance, and any property of a party to the marriage. Hence the appropriate jurisdiction to invoke after dissolution of marriage is under Section 20(1)(g) of the Matrimonial Causes Act. The petitioner and the Respondent have filed fresh pleadings under Rule 4(1) (f) of the Matrimonial Causes Rules, for ancillary relief in the form of an order "in respect of property of a party to a marriage or any interest or right of a party in any property for the benefit of the other party or a relevant child". This is the same relief envisaged in Section 20(1) (g) of the Act. Hence, as for the reasons stated, the Ruling dated 7 May 2004 in this case had been based on an erroneous decision of the Court of Appeal, the present pleadings, are accepted as being competent.

In the application dated 10 May 2004, the petitioner seeks the following orders:

1. An order declaring the full lawful and beneficial ownership of land Parcel V. 1575 and the house be with the petitioner in accordance with Rule 4(1) (f).

2. An order that the petitioner shall have sole occupancy of the said property in accordance with Rule 4(1) (j).

3. An order restraining the Respondent from entering and remaining in the said property, in accordance with Rule 4(1)(h) (i).

The Respondent has filed objections to the above claims and

has also cross petitioned for the following.

1. That ½ share of the land and house, registered in the name of the petitioner be transferred to him upon conditions decided by Court.

2. That the house be protected for his benefit.

3. That he be given right of occupancy until he has been paid for his share or vice versa.

4. That the Respondent be restrained from entering and remaining in the house.

Section 20(1) of the Matrimonial Causes Act (Cap 124) in respect of financial provisions is based on Section 23 of the Matrimonial Causes Act 1973 of the United Kingdom. Section 20(1) (g) in respect of property adjustments is based on Section 24(a) and (b) of the Act. As the nature of the inquiry envisaged in Section 20(1), has not been specified in detail, in would be relevant to follow Section 25 of the U.K. Act as providing the guidelines. That Section authorises the Court to have regard to all the circumstances of the case, including the following:

(a) The income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future,

(b) The financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) The standard of living enjoyed by the family before the breakdown of the marriage;

(d) The age of each party to the marriage and the duration of the marriage;

(e) The physical or mental disability of either of the parties to the marriage;

(f) The contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(g) In the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring; and so to exercise those powers as to place the parties, so far as it is practicable, and having regard to their conduct just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards each other.

The inquiry in the present case revealed that the parties were married on 15 November 1973. The petition for divorce was filed on 28 July 1999. Hence they were married for 26 years. Two children were born in 1974 and 1975 respectively. The

petitioner purchased land Parcel V. 1575, which forms the subject matter of this inquiry, on 30 April 1976 for a sum of R9000, which sum was a loan obtained from Barclays Bank (*P10*). That loan was repaid, and the charge was removed on 25 August 1977 (P23). Subsequently on 8 April 1978 the land was charged to the Government for two sums of R25,000 and R12,000, for the purpose of "completing construction of the house" (P10a). The Respondent was the guarantor to that loan. That loan was fully repaid by August 1993, and the charge was removed on 20 September 1993 (P12). The S.H.D.C. loan statement for the period 29 July 1992 to 21 December 1992 shows that it was the petitioner who repaid the loan during that period. The petitioner also obtained a "staff loan" of R4000 from her employer Cable & Wireless Limited (P18). A further "staff" loan of R4000 was obtained on 2 March 1995(P19). A further loan of R40,000 was obtained by the petitioner from the S.H.D.C. on 19 May 1996 for construction of the house (P13). The petitioner obtained another loan of R57,234 from Barclays Bank on the basis of a lien on her fixed deposit account for R65,000. That loan was repaid by her on a standing order with the bank in a sum of R1580 monthly (P17). The petitioner once again obtained a "staff loan" of R3000 on 22 April 1996. (P20). The petitioner also produced two pro-forma invoices dated 24 March 1998 for R2247 and R533 for building materials from S.M.B. Trading Division (P21) and (P22) and claimed that she purchased them for the construction of the house.

The Respondent testified that he paid for the purchase of the land, but the receipt was made in the name of the petitioner. However exhibit P10 shows that it was the petitioner who obtained the loan of R9000 from Barclays Bank where she had an account, and that it was she who charged the property as security. The Respondent also stated that he, his father and a cousin constructed the house. No proof in any form was adduced. He also claimed that he contributed towards the payment of the loans. The documents produced by the

petitioner show that the loan repayments to Barclays and the SHDC were made from deductions on her salary. The Respondent has therefore produced no proof of contributions towards the purchase of the land or towards the construction of the house. The Respondent stated that as she was now 60 years of age and has no financial means except his salary which he receives from the P.U.C, he has no possibility of obtaining alternative accommodation. He further stated that he was prepared to work hard and repair the house if he is given right of occupancy. He contradicted himself and stated that he would be retiring next year. He also stated that he could obtain assistance from the District Administration Office to repair the house.

The petitioner testified that although both of them were employed at the time of marriage, the Respondent did not make any contributions towards the purchase of the land or to construct the house. She stated that he squandered his earnings on alcohol, cigarettes and in entertaining friends. Often she had to repay his creditors. Since her divorce in 2001, she has not fixed place of abode. For some time she lived with her mother, and at times with friends. Off and on she returned to the matrimonial home only to sleep, but that was not possible as the roof leaked and the building is in a dilapidated condition. The Respondent however continues to live there.

The petitioner is 56 years old, while the Respondent is 60 years of age. Both are nearing the age of retirement. Hence their earning capacities in the foreseeable future are bleak. The petitioner obtained a dissolution of marriage on the ground that the Respondent had behaved in a way that she could not reasonably be expected to live with him. He drank heavily and was violent and aggressive to the extent that the petitioner left the matrimonial home. The Respondent was unable to establish that he contributed towards maintenance of the household. On the other hand, the petitioner adduced

overwhelming evidence to establish that she was the person who purchased the land and constructed the house from her own funds and also maintained the household. It was submitted that the Respondent was the guarantor to the loans taken by the petitioner from the Government on 5th April 1978. That was insufficient to hold that he contributed towards the construction of the house indirectly. In fact in the case of *Cowcher v Cowcher* [1972] 1 All ER 943, Bagnall J stated:

> ……. the mere payment by one beneficial owner of a mortgage instalment properly payable by the other could not alter the beneficial interest, or in my view, imply an agreement to alter those interest.

In the present case, apart from being the guarantor, the petitioner did not make any financial contribution towards repayment. The conduct of the Respondent as a husband does not merit any declaration of a beneficial interest in the property in his favour. Section 20(1) (g) gives the Court a discretion to make such order as it thinks fit upon considering all the circumstances.

In the case of *Peggy Confait v Clement Confait* (Civ no. 7 of 1993), the petitioner (wife) established that she obtained a loan of R147,000 from SHDC and that the whole sum was paid in installments of R1189.86 deducted monthly from her salary. However the land was transferred in the joint names of herself and her husband. In that case, I cited with approval the dicta of Lord Evershed *In Re Rogers Question* [1948] 1 All ER 328 that the duty of the Judge in making enquires is to:

> Try to conclude what at the time was in the parties mind and then to make an order which, in the changed conditions now, fairly gives effect in law to what the parties, in the judge's findings, at the time of the transaction itself.

In that case I took into consideration the contributions made by the Respondent, who was a taxi driver, towards the maintenance of the family and declared that the parties should adjust the property in the proportion of 80% to the petitioner and 20% to the Respondent. The petitioner in that case had also sought an order to exclude the Respondent from the matrimonial home. In the case of *Figaro v Figaro* 1982 SLR 200, it was held that:

> Before an order is made excluding a spouse from the matrimonial home, it must be shown that it would be impossible or intolerable for both spouses to live in the same house.

In *Confait*, there was evidence that the Respondent came home drunk every night, and disturbed the petitioner and the children. The petitioner had to receive treatment for depression and stress. On a consideration of those circumstances, the Court granted the Respondent one month to vacate the house as there was evidence that he had alternative accommodation.

In the present case, the Respondent would have made indirect contributions towards the maintenance of the family during the long period of the marriage. On the basis of the averments in the petition for divorce, the Respondent's intolerable behaviour giving rise to the irretrievable breakdown of the marriage commenced in 1999. The Court is satisfied that the Respondent, by his own irresponsible conduct has made it impossible for both of them to live in the same house. The circumstances of the case do not permit the placing of the parties in their respective financial positions in which they have been if the marriage had not broken down, as the Respondent had failed to properly discharge his financial obligations and responsibilities towards the petitioner. Hence exercising the discretion in a just and equitable basis, I order that the land and house be valued, and that the Respondent

be paid 15% of such value by the petitioner to compensate him for his indirect contributions.

Subject to such payment, the petitioner is declared the sole owner of the property. She shall have the right to occupy the house and property immediately from today. The Respondent is given three months to find alternative accommodation and vacate the house. Such vacation will not be conditional on the receipt of the money from the petitioner. If he interferes with the right of occupation of the petitioner in any manner or harasses her during the period of the said three months, he will be liable to be excluded forthwith.

Order made accordingly. Parties will bear their own costs.

Record: Divorce Side No 56 of 1999

Gabriel v The Government Of Seychelles

Civil Code – civil procedure - res judicata – medical negligence

The Plaintiff claimed that doctors at Victoria Hospital were medically negligent. The Plaintiff first filed an action in 1997 against the Defendant. Damages were awarded in favour of the Plaintiff. The Plaintiff now claims damages against the employees of the Defendant in respect of the same injury. The Plaintiff also claims he has sustained a permanent disability in his hand. He claims damages: R250,000 for permanent total loss of left hand; R50,000 for loss of amenities of life; R10,000 for aesthetic loss; R50,000 for pain, suffering, discomfort, inconvenience and anxiety; R100,000 for moral damages; and R30,000 for loss of earnings from the date of operation to the date of plaint: totalling R490,000. The defence raises a plea of in limine litis as the second suit is barred by res judicata.

HELD:

(i) A plea of res judicata will be upheld if

a. the claim in the second action is regarding the same subject matter as the first action;

b. the Plaintiff seeks an additional or alternative remedy to the earlier one; and

c. the claim could have been made in the first action.

(ii) The subject matter of both suits is identical;

(iii) In order to determine the standard of care that a skilled professional such as a doctor must have, the reasonable person test should not be used, but rather the test should be the standard of the ordinary skilled person exercising and professing to have that special skill.

Judgment in favour of the Defendant. The Plaintiff has failed to make out the claim of medical negligence. The suit is dismissed. No order is made as to costs.

Legislation cited
Civil Code of Seychelles, art 1382(2)

Cases cited
Charles Ventigadoo v Government of Seychelles CS 407/1998 (Unreported)
Nathaline Vidot v Joel Nwosu CS 12/2000 (Unreported)

Foreign cases noted
Bolam v Friem Hospital Management Committee [1957] 2 All ER 118
Cassidy v Ministry of Health [1951] 2 KB 348
Hotson v East Berkshire Health Authority [1987] 2 All ER 909
Lanphier v Phipos (1838) 8 C & P 475

Frank ALLY for the Plaintiff
Fiona LAPORTE for the Defendant

Judgment delivered on 20 September 2006 by:

KARUNAKARAN J: The Plaintiff has brought this action against the Defendant namely, the Government of Seychelles - based on vicarious liability - claiming compensation in the sum of R490,000 for loss and damage, which the Plaintiff suffered as a result of a “fault” allegedly committed by the

employees of the Defendant through its Ministry of Health. The fault alleged emanated from medical negligence of the doctors/surgeons employed by the Defendant at the Victoria Central Hospital, when they medically diagnosed, operated and treated the Plaintiff for a cut injury to his left wrist.

The facts

The Plaintiff, aged 50, is a resident of Pointe Larue. He is a mason by profession. He is a right handed person. He lives with his wife and has fathered five children. All the children are now adults save the youngest. In the middle of 1990s, the Plaintiff was a self-employed mason. He was then earning around R5,000 to R6,000 per month. Admittedly, on 1 January 1997, the Plaintiff sustained a cut injury on his left wrist. According to the medical history/report - vide exhibit P2 - the Plaintiff received that injury following an assault by a known person with a piece of metal whilst fighting. However, the Plaintiff testified in Court that he received that injury while he accidentally fell down on a corrugated iron sheet at his mother's place. Be that as it may. He immediately went to the hospital at Anse Royale for medical assistance. The medical officer therein sutured the wound and advised the Plaintiff to go home and return next day for the follow-ups. The Plaintiff accordingly, went home and returned to the hospital next morning. There was another doctor on duty by name Dr Tensing. This doctor examined and told the Plaintiff that the wound was in the process of healing. He therefore, advised him to go home. The Plaintiff went home. As the night fell, the Plaintiff gradually, developed severe pain in his left hand.

The next morning that was on 3 January 1997, the Plaintiff again went to Anse Aux Pins Clinic. He was seen by another medical officer by name Dr Jivan. This doctor examined the wound. He found something wrong in the healing process of the wound and so referred the Plaintiff to the Central Hospital in Victoria, for specialized treatment. At the Central Hospital,

the Plaintiff was seen by Orthopaedic Surgeon Dr A. Korytnicov On examination, the surgeon noticed a traverse laceration of 4 cm in the left wrist of the Plaintiff with numbness in the 2nd and 3rd fingers of the left hand. The left median nerve and the tendon of the muscular flexor digitorum longus had also been damaged by the cut injury. On the same day that is, on 3 January 1997, the surgeon immediately carried out an operation to repair the damaged median *nerve* and the *tendon*. During the postoperative period there was tenderness over the scar on the left wrist. There were restricted movements of the 2nd, 3rd, and 4th fingers. Despite the surgical operation and physiotherapy, the Plaintiff's symptoms did not show any improvement. Again on 24 March 1997, Surgeon Korytnicov carried out a second operation for the exploration of the median nerve and the tendon. The Plaintiff again developed pain and scar hypersensitivity with reduced grasping power and sensation, to the first, second and third fingers. He had also developed "neurinoma" of the median nerve, which means a benign growth found on the sheath of the nerve due to trauma. Hence, on 7 July 1997, Surgeon Korytnicov had to carry out a third operation for the excision of the "neurinoma". He also did grafting to the median nerve using a part of the nerve taken from Plaintiff's left leg. Despite the third operation, the Plaintiff was not completely healed of the posttraumatic symptoms. The Plaintiff was unhappy over the results of the surgical treatments. He was rather abusive to Dr Korytnicov and threatened him with legal action for damages. The Plaintiff also refused to accept further treatments from him. Therefore, the surgeon had no other option but to refer the Plaintiff to another surgeon - Dr Browne - who subsequently, took over the case and continued the treatment.

Following the revision of the said three consecutive operations to compress the damaged left median nerve and the grafting exercise, the Plaintiff experienced relief of symptoms only for about ten months. Again, he developed recurrence of

"neurinoma" and pain. He also suffered loss of grasping power and sensation to the first and second fingers in his left hand. These symptoms showed no improvement despite adequate physical and occupational therapy.

In the circumstances, the Plaintiff, being dissatisfied with the said three surgical interventions and nerve-grafting treatments, felt that those treatments did not bring the desired result because of the fault of the doctors, who treated him. Hence, by a plaint dated 19 December 1997, the Plaintiff filed a suit in Civil Side No. 432 of 1997 - hereinafter called the "first suit" - against the Defendant for damages. In that suit, he claimed compensation for loss and damage, which he suffered due to a "fault" allegedly committed by the employees of the Defendant. The fault that gave rise to the cause of action in the "first suit" allegedly emanated from medical negligence on the part of the employees of the Defendant, who failed to provide the Plaintiff with required standard of care and attention. The doctors/surgeons committed a *"fault"* in their medical diagnosis, operation and treatment given to the Plaintiff for the injury. In the "first suit", paragraph 4 of the plaint - vide exhibit D1 - reads thus:

> As a result of a wrongful diagnosis and /or error of judgment as to the nature and extent of the Plaintiff's injury, the Defendant failed to provide the Plaintiff with the proper standard of care and attention that is expected from the Defendant as a result of which the Plaintiff was subjected to three separate surgical operations on his wrist on the 3rd January, 24th March and 7th July 1997, such failure amounting to a fault in law.

Moreover, the particulars of the injury, loss and damage, which the Plaintiff claimed in the first suit, under paragraph 7 and 8 of the plaint therein - vide exhibit D1 - read thus:

Particulars of injury

i) Loss of sensation and median nerve in left hand
ii) Restricted movement in the left hand
iii) Pain in left leg
iv) Scars on both sides of left ankle

Particulars of loss and damage

• *Partial loss of use left hand*	*R50, 000. 00*
• *Scars on left ankle*	*R5, 000. 00*
• *Pain and suffering, anxiety, distress and discomfort*	*R20, 000. 00*
• *Moral damages*	*R20, 000. 00*
Total	**R95,000. 00**

The Court adjudicated the "first suit" and awarded damages in favour of the Plaintiff.

The second suit

Nearly two years after filing the "first suit" and obtaining a judgment, the Plaintiff has now come before this Court with the present suit - hereinafter called the "second suit" - in which he claims again damages from the Defendant for medical negligence of its employees in respect of the same injury. In the second suit, the case of the Plaintiff is that following the first three operations, the Plaintiff developed pain and hypersensitivity with reduced grasping power and sensation to his first and second fingers. When the first suit was pending in Court, the surgeons of the Defendant again carried out two more operations on the injured hand. One on 29 April 1999, in which the surgeons partially removed the Plaintiff's medial nerve. The other operation was carried out on 20 May 1999, in which they totally removed the Plaintiff's median nerve. According to the Plaintiff, despite the last two operations,

namely the 4th and 5th in the series of operations the surgeons carried out on the Plaintiff, there was no improvement. Since then, the condition of the injury has deteriorated. The last two operations have only resulted in permanent total disability of his left hand. The Plaintiff claims that such disability was caused due to the fault on the part of the surgeons, who treated the injury, in that they failed to make a proper diagnosis and give proper treatment to the Plaintiff as well as failed to provide the required standard of medical care. According to the pleadings in the second suit, the cause of action arose as and when the surgeons carried out the 4th and the 5th operations on the Plaintiff for the same injury but without success.

The Plaintiff has also averred in the plaint of the present suit that as a result of the medical negligence of the Defendant's employees, he sustained a permanent total disability of his left hand. Hence, he claims compensation in the sum of R490,000 from the Defendant towards loss and damage as particularized below:

(i)	Permanent total loss of use of left hand	R 250, 000.00
(ii)	Loss of amenities of life	R 50, 000.00
(iii)	Aesthetic loss	R 10, 000.00
(iv)	Pain, suffering, discomfort, Inconvenience, anxiety	R 50, 000.00
(v)	Moral damages	R100,000.00
(vi)	Loss of earnings from the date of Operation to the date of plaint (Rs 5,000 x 6 mths)	R 30,000.00
	Total	**R490,000.00**

In the present suit, the Plaintiff testified in essence that following the first three unsuccessful operations, he again in 1998 underwent another operation by surgeon Dr Jerome.

This surgeon told the Plaintiff that he had fixed the main nerve but the thinner nerves could not be attached since the equipment necessary for that treatment were not available in Seychelles. He also informed the Plaintiff that one Dr Lee, a visiting orthopaedic consultant-surgeon from Singapore would see him during his visit to Seychelles. After a couple of months, Dr Lee on his visit examined the Plaintiff's hand and advised him that he should undergo another operation. The Plaintiff retorted saying that according to Dr Jerome there was no need for him to go for another operation. But, Dr Lee insisted that if the Plaintiff really wanted to get relief from the pain, he should undergo another operation.

Dr Lee accordingly, advised the surgeon in charge of the Victoria Hospital namely, Dr Kosmider to perform the operations to the Plaintiff in furtherance of his expert opinion and consultancy. Dr Kosmider, after taking the opinion from the visiting consultant, performed the last two operations. from which the cause of action allegedly arose for the second suit. It is evident from the medical report - exhibit P3 - dated 5 August 1999, prepared by Dr Kosmider that he performed the said two operations - hereinbefore referred to as the 4th and the 5th operations - only for the purpose removing the neurinoma that had developed on the median nerve, in line with the opinion of the consultant-surgeon. The Plaintiff further testified that despite all those treatments, his hand is still bad and painful until today. At present, he is not able to use his left hand at all. He does not work as he cannot and so sitting at home. As a result, he suffered loss of earnings, pain, discomfort, inconvenience and anxiety besides, loss of amenities of life and aesthetics. Although he approached some of the doctors in Seychelles for effective medical treatment, they were not able to do anything to improve the condition. Now he is physically disabled and getting a monthly sum of R850/- from Means Testing Scheme. According to the Plaintiff, all the loss and damage he sustained simply because of the "fault" of the Defendant's medical staff and their

professional negligence. In the circumstances, the Plaintiff has averred in his plaint - vide paragraph 8 - that the said medical employees of the Defendant, whilst treating him for the injury omitted to do the following, which constitute a "fault" in law namely:

(a) Failed to make proper diagnosis and give proper treatment to the Plaintiff; and

(b) Failed to take proper medical care and attention to the required standard.

Therefore, the Plaintiff now claims that the Defendant is liable to compensate him for the consequential loss and damage hereinbefore particularised.

The defence case

On the other side, the Defendant has raised a plea in limine litis on a point of law stating that the present suit namely, the second suit is barred by res judicata in view of the judgment given in the previous suit that is, in the "first suit" Civil Side No. 432 of 1997, between the same parties on the same cause of action. On the merits, the Defendant has averred in the statement of defence that although the Plaintiff was medically treated by the employees of the Defendant at the Victoria Hospital, they never committed any act of medical negligence in treating him for the injury. They did not commit or omit anything that amounts to a ''faute" in law. Therefore, the Defendant denies medical negligence, liability and so disputes the claim of the Plaintiff for consequential loss and damages.

Dr Salomon Gonalro - DW1 - an Orthopaedic Surgeon with 21 years of experience in his specialised field, having studied all the medical reports, gave his expert opinion on the nature of the Plaintiff's injury and as to the correctness of the medical

decisions taken and the accuracy of the surgical treatments given by the Defendant's employees. He also expressed his opinion on the alleged medical negligence or otherwise of the Defendant's employees in diagnosing and treating the Plaintiff for the injury. According to this expert, when a median nerve is damaged it is not medically possible to get complete recovery or cure by a single surgery. Especially when neuroma develops it inevitably requires a revision of operations performed repeatedly to improve the syndrome that affects the function of the hand. Moreover, the development or condition of neuroma is inherent to the injury. The surgical intervention or the treatment has nothing to do with such developments, nor can this be attributed to any medical negligence on the part of the surgeons. Since "nerve grafting" is the common and the only option medically available to elongate the affected nerve, the surgeons in this case, have done what they are required and what they could reasonably do to improve the function of the hand in the given circumstances. Even in nerve grafting techniques, the degree of recovery depends upon the type of the nerve involved and the physiology of the patient. Full recovery to normalcy is not possible; it will only be partial as has happened in the case of the Plaintiff. There has been no negligence on the part of the surgeons Dr Jerome or Dr Kosmider in treating the Plaintiff for the injury. Their diagnostic procedure and decisions were correct even though the result was not satisfactory. Each individual has different physiological response, certain people can recover fast and some will take a long time. In the circumstances, Dr Salomon Gonalro opined that there had been no medical negligence on the part of the Defendant's employees in respect of the surgical diagnosis and treatment given to Plaintiff. For these reasons, the Defendant urged the Court to dismiss the instant suit.

Res judicata

Before I proceed to examine the merits of the case, I believe, it is important to determine the preliminary issue namely, the

plea of res judicata raised by the Defendant in this matter. The general rule is that a Plaintiff who has prosecuted one action against a Defendant and obtained a valid final judgment is barred by res judicata from prosecuting another action against the same Defendant where (a) the claim in the second action is one which is based on the same factual transaction that was at issue in the first; (b) the Plaintiff seeks a remedy additional or alternative to the one sought earlier; and (c) the claim is of such a nature as could have been joined in the first action. Underlying this standard is the need to strike a delicate balance between the interests of the Defendant and of the Courts in bringing litigation to a close and the interest of the Plaintiff in the vindication of a just claim.

For the plea of res judicata to be upheld, although it is trite, I have to restate that there must be the threefold identity of (i) subject matter, (ii) cause and (iii) parties in both cases namely, the first and the second one. In this respect, I carefully examined the pleadings in the plaints filed in both suits, with particular focus on the nature of the alleged injury, cause of action and the damages claimed in each case. First of all, as I see it, the “subject matter” at issue in the previous suit was nothing but a posttraumatic disability/dysfunction of the Plaintiff’s left hand, despite surgical treatments by the Defendant’s employees. Obviously, the “subject matter” at issue in the second case is also based on the same factual transaction, which had been at issue in the first suit. Hence, I find the “subject matter” in both suits, are identical in pith and substance to wit: disability/dysfunction of the Plaintiff’s left hand. Secondly, as regards the identity of cause, the question to be determined here is whether the disability/dysfunction of the Plaintiff’s left hand, has deteriorated resulting in new loss or damage since the previous judgment was given in the first suit so as to give rise to a “new cause of action” for the Plaintiff to institute the second suit. Indeed, the pleadings in both cases and the evidence on record clearly show that the Plaintiff’s left hand has been dysfunctional because of the

injury to the median nerve and neuroma. This has been the case ever since the institution of the first suit - See, paragraph 7 and 8 of the plaint filed in the first suit in exhibit D1. Although the pleading in the second suit describes the injury as a "total permanent loss of use of the left hand", the medical evidence reveals no such loss. In fact, the medical report dated 22 February 1999, which forms the basis for the second suit, does not disclose any material fact anew, to show that the Plaintiff's condition has deteriorated since the previous judgment was given in the first suit. In fact, medical report of 1999 rather indicates that there has been some improvement in the condition, since 1997. This is evident from the fact that the medical report of 1997 which formed the basis for the first suit stated that there was restricted movements of 2nd, 3rd, and 4th fingers of the Plaintiff', whereas medical report of 1999 states that only two fingers the 1st and the 2nd one have lost simply grasping power and sensation. In the circumstances, I find the disability/dysfunction of the Plaintiff's left hand, has not deteriorated resulting in any loss or damage anew since the previous judgment was given in the first suit so as to give rise to a "new cause of action" for the Plaintiff to institute the second suit. Therefore, the causes of action in both suits are one and the same. Needless to say, the parties are also the same. Hence, in my judgment the present suit is barred by res judicata in this matter. Hence, I uphold the plea of res judicata and rule that the instant suit is not tenable in law and liable to be dismissed. Although the finding on the issue of res judicata substantially disposes of the suit, considering the aspect of appeal, it seems necessary that this Court should also proceed to examine and determine the case on the merits.

Medical negligence

Before one proceeds to analyse the evidence, it is important to identify and ascertain the law applicable to cases of medical negligence as it stands in our jurisprudence. Obviously, this action is based on Article 1382(2) of the Civil Code, which defines fault as "an error of conduct which would

not have been committed *by a prudent* person in the special circumstances in which the damage was caused. It *may* be the result of a positive act or omission.” In this respect, Amos and Walton in *Introduction to French Law* states:

> It also indicates the standard of care required of persons exercising a profession. A prudent man knows he must possess the knowledge and skill requisite for the exercise of his profession, and that he must conform at least to the normal standards of care expected of persons in that profession.

Standard of Care

On the question of the standard of care and the principles governing medical negligence, I would like to restate what I have enunciated in *Charles Ventigadoo v Government of Seychelles* Civil Side No: 407 of 1998 (Judgment delivered on 28 October 2002), endorsing the formula, which Perera J applied in *Nathaline Vidot v Dr Joel Nwosu* Civil Side No: 12 of 2000.

Tindal CJ while summing up to a jury in *Lanphier v Phipos* (1838) 8 C&P 475, in a medical negligence action, formulated the following principle:

> Every person who enters into a Learned Profession undertakes to bring to the exercise of it, a reasonable degree of care and skill. He does not undertake, if he is an Attorney, that at all events you shall gain your case, nor does a Surgeon undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable and competent degree of

> skill and you will say whether, in this case, the injury was occasioned by the want of such skill in the Defendant.

In *Cassidy v Ministry of Health* [1951] 2 KB 348 at 359, Denning LJ stated thus:

> If a man goes to a doctor because he is ill, no one doubts that the doctor must exercise reasonable care and skill in his treatment on him; and that is so whether the doctor is paid for his services or not.

The accepted test currently applied in English Law to determine the standard of care of a skilled professional, commonly referred to as the *"Bolam"* test, is based on the dicta of McNair, J in his address to the jury in *Bolam v Friem Hospital Management Committee* [1957] 2 All ER 118 at 121. He stated:

> … But where you get a situation which involves the use of special skill or competence, then the test whether there has been negligence or not is not the test of the man on the Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill A man need not possess the highest expert skill at the risk of being found negligent. It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art" This test is a departure from the previous test of the hypothetical "reasonable skilled professional", which placed emphasis on the standards adopted by the profession. The "Bolam test" concerns itself with what ought to have been

done in the circumstances.

The principles thus enunciated in these authorities have one thing in common with the French Law of delict. That is, the relevant test is that of the reasonable or prudent man in his own class or profession, as distinct from the ordinary man in the street or Clapham. This is the test, which in my view, ought to be applied to the case on hand. It is on this basis that the Defendant's liability has to be determined in this action.
Now, I will proceed to examine the merits of the case applying the above principles to the facts of the case on hand. Firstly, the case of the Plaintiff herein, is that the following two material facts constitute medical negligence on the part of the Defendant and which amounts to a "fault" in law. They are:

i) The employees of the Defendant failed to make proper diagnosis and give proper treatment to the Plaintiff; and

ii) they also failed to take proper medical care and attention to the required standard.

As regards the allegation of "improper or wrong diagnosis", obviously, there is not even one iota of evidence on record to show that the surgeons either Dr Jerome or Dr Kosmider, who performed the last two operations, made any wrong diagnosis at any point in time in their surgical procedure or medical treatment given to the Plaintiff. I accept the evidence of the expert witness, the Orthopaedic Surgeon, Dr Salomon Gonalro - DW1 - in that there has been no professional negligence on the part of the surgeons in treating the Plaintiff for the injury. Their diagnostic procedure and decisions were correct even though the result was not satisfactory. As he rightly pointed out that each individual has different body, certain people can recover fast and some will take a long time. In the absence of any other evidence to the contrary, I accept the expert opinion of Dr Salomon Gonalro and so find

that there had been no medical negligence in respect of the surgical treatment the Plaintiff received from the Defendant for the injury. It is also pertinent to note that development or condition of neurinoma is inherent to the injury and inevitable. Nothing could have prevented its development. The surgical intervention or the surgeon has nothing to do with it nor can this be attributed to any medical negligence on the part of the surgeon. In *Hotson v East Berkshire Health Authority* [1987] 2 All ER 909 the claimant suffered an injury and was referred to hospital where a doctor negligently failed to diagnose his condition. The House of Lords rejected the claimant's claim because the vascular necrosis which developed was found to have been inevitable and there was nothing that could have been done even had the Defendant made a correct diagnosis.

Having said that I note that an allegation of negligence against medical personnel should be regarded as serious and that the standard of proof should therefore, be of a high degree of probability per *White House v Jordan* [1980] All ER 650*.* I find the evidence of Dr Salomon Gonalro is uncontroverted, strong and credible in every aspect of the case for the defence. In my judgment, the surgeons, doctors and other medical personnel who operated and medically treated the Plaintiff for the injury did exercise reasonable care and the necessary skills required of them in their treatment on the Plaintiff. As I see it, the development of neuroma that necessitated the revision of surgeries was occasioned not through medical negligence of the employees of the Defendant at the Victoria Hospital or by the want of any skill in the surgeon who treated the Plaintiff for the injury. In fact, as a consequence of *Hotson* (supra), in many medical negligence actions the dispute between the parties is whether the Defendant's negligence has, on a balance of probabilities, had a material effect on the outcome of the claimant's injury/disease or not. In the present case, even if one assumes, for the sake of argument that the Defendant had been negligent in providing surgical treatment and medical care, still there is no causal link between the

"development of neuroma" and the "medical negligence". Indeed, neuroma is the outcome of the Plaintiff's injury and his physiological constitution, not that of any medical negligence on the part of the surgeons or any other employee of the Defendant, who treated the Plaintiff for the injury in question and so I conclude.

In the final analysis, I find that the Plaintiff has failed to show on a preponderance of probabilities that any of the employees of the Defendant namely, surgeons, doctors, and staff of the Victoria Central Hospital, who treated the Plaintiff for the injury, committed any negligent act or omission in the course of medical or surgical treatment given to the Plaintiff during the relevant period. Therefore, the suit is dismissed. I make no order as to costs.

Record: Civil Side No 441 of 1999

Francourt v Didon & Ors

Police officers – bodily injury - cruelty

The Plaintiff claimed R1.5 million for damage suffered because of bodily injuries inflicted upon him. The Defendants were police officers. The Defendants denied liability claiming that the Plaintiff contributed to the injury. There is a question as to the liability of the Defendants and establishing intention to carry out the act.

HELD:

(i) The use of unreasonable, unnecessary and unlawful force constitutes a fault, even if it was done in the exercise of a legitimate interest. Causing grievous bodily harm cannot be said to be done in the course of duty;

(ii) The actions of employees, such as police officers, if done contrary to express instructions of their employer, does not render the employer liable;

(iii) A police officer's authority is original and exercised at his own discretion and therefore not under the direct control of the supervisor; and

(iv) In tort, damages must be compensatory and not punitive. The Plaintiff should suffer no loss but make no profit.

Judgment: for the Plaintiff. R80,000 is awarded for pain and suffering. R60,000 is awarded for moral damages. R60,000 is awarded for loss of amenities, enjoyment of life and earnings.

Legislation cited
Civil Code of Seychelles, arts 1382(3), 1384(3)
Criminal Procedure Code, s 10(2)
Penal Code, ss 23, 219 (a)

Cases cited
Antoine Esparon v UCPS CS 118/1983 (Unreported)
Fanchette v Attorney-General (1968) SLR 111
Francois Savy v Willy Sangouin CS 229/1983 (Unreported)
Harry Hoareau v Joseph Mein CS 16/1988
Jude Bristol v Sodepak Industries Limited CS 126/2002 (Unreported)
Payet v Attorney-General (1956-1962) SLR 235
Sedgwick v Government of Seychelles (1990) SLR 220

Foreign cases noted
Robinson v Leyland Motors CA 357A of 1974

Anthony JULIETTE for the Plaintiff
France BONTÉ for the First and Second Defendants
Pesi PARDIWALLA for the Third Defendant
Ronny GOVINDEN for the Fourth Defendant

Judgment delivered on 1 March 2006 by:

KARUNAKARAN J: This is an action in delict. The Plaintiff in this action claims a sum of R1.5 million from all four Defendants jointly and severally towards loss and damage, which the former allegedly suffered from bodily injuries the latter had unlawfully inflicted on him. The Defendants contested the entire claim of the Plaintiff denying liability and disputing the quantum of damages.

It is not in dispute that the Plaintiff was at all material times a 44 year-old mason of La Louise, Mahé. The First, Second and Third Defendants were at all material times employed as police officers and the Fourth Defendant was and is the

Commissioner of Police. It is averred in the plaint that on 14 March 1998, the First, Second, and Third Defendants during the course of their employment, unlawfully assaulted and wounded the Plaintiff at Inter Island Quay, Victoria, Mahé. The said unlawful acts of the First, Second and Third Defendants, who were the préposés, agents, employees and or servants of the Fourth Defendant, amount to a “faute” in law for which according to the Plaintiff, all the four Defendants are jointly and severally liable including the Fourth Defendant, who is vicariously liable for the acts of the first three. It is the case of the Plaintiff that as a result of the said unlawful acts of the Defendants, the Plaintiff sustained bodily injuries to his penis and head. Consequently, the Plaintiff claims that he suffered loss and damages as follows:

Moral damage for pain and suffering	R500, 000-00
Moral damage for permanent disability	R500, 000-00
Moral damage for inconvenience, anxiety, Stress, embarrassment and anguish	R300, 000-00
Loss of earnings on account of inability to work	R200, 000-00
Total	**R1500, 000-00**

Moreover, it is the case of the Plaintiff that on 19 of January 1999 the First, Second, and Third Defendants were convicted by the Supreme Court of the offence of committing acts intended to maim, disfigure disable or to do grievous harm to the Plaintiff, contrary to section 219 (a) of the Penal Code, read with section 23 thereof. The convicted Defendants appealed to the Seychelles Court of Appeal against the said conviction and the Court of Appeal on the 12 August 1999 dismissed the said appeal. In these circumstances, the Plaintiff seeks this Court for a judgment against the Defendants jointly and severally in the sum of R1.5 million with costs.

On the other hand, the First, Second, and Third Defendants in their statement of defence have denied liability stating that on 14 March 1998, they were only acting in the course of their employment with the Fourth Defendant. Besides, according to the Defendants, if the Plaintiff had been injured at all as alleged it must have been either solely through his own acts or through his contributory negligence. The Fourth Defendant also denies liability stating that the First, Second and Third Defendants were not at all acting within the scope of their employment at the material time and place and the alleged act was not incidental to the service or employment of the Fourth Defendant. In any event, according to the Defendants the sums claimed by the Plaintiff under each head are excessive and grossly exaggerated. Thus the Defendants deny total liability and seek dismissal of the action.

The facts that transpire from the evidence on record including the exhibits are these.

The Plaintiff, a resident of Mahé wanted to participate in a political rally, which had been organised in Praslin for 14 March 1998. The previous night, on 13 March 1998, at about 7.30 p. m, the Plaintiff went to the Inter Island quay with the intention of taking an early morning boat to Praslin. He slept inside a boat until about 3 p. m and woke up. After some time, he wanted to buy lemonade from “Le Marinier” and hence was walking towards the yachts near the “Sunsail” office. As he was walking he heard someone, whom he identified as the First Defendant Gaetan Didon shouting “La I la” (Here he is!). The First Defendant grabbed the Plaintiff by the collar of his T-shirt and dragged him towards a cargo container near the “Sunsail” office, where the Second Defendant was standing. The Second Defendant Desire Boniface, held him by the arm, and the Third Defendant Gaetan Rene came from behind saying “This is the brother of Jimmy Francourt, we have to kill him.” Then all the three Defendants started to assault and kick him. The First Defendant punched his left eye causing the

lens of his spectacle to crack and also causing an injury close to the bridge of his nose. The Third Defendant grabbed his head and hit it against the container. He felt faint, but did not lose consciousness. The Third Defendant then started to remove the Plaintiff's pair of shorts. The Plaintiff asked him "What are you doing to me?" The three Defendants kept on asking him to speak, but the Plaintiff replied that he had nothing to say except that he was going to Praslin to attend a political rally. The Plaintiff then felt his underwear being cut or torn and something cold touching his body. Then someone started to cut his penis with a sharp weapon like a knife. After the wounding was done, he pretended to be dead. He heard someone saying "stop beating him up, don't you see he is dead." Thereupon the three Defendants left him lying there and one of them said "Let us go that fool is dead."

After the injury had been inflicted upon him, the Plaintiff got up and went to the bench where some people were seated, told them that he was assaulted by "police officers" and showed them the injury to his penis. Two police officers on patrol duty arrived at the quay and the Plaintiff showed them the injury and told them that it was caused by three police officers. He was taken to the Central Police Station where he gave the names of the assailants. The Plaintiff was thereafter taken to Victoria Hospital where he was treated by one Dr Layo Ajewole (PW2), the medical officer on duty at the casualty. In fact, the doctor sutured the cut injury seen over the shaft of the penis of the Plaintiff and allowed him to go home with advice that he should have follow-ups at Les Mamelles Clinic. After two days the Plaintiff started to feel severe pain over his private part as the wound got infected. On 16th of March 1998 the Plaintiff was admitted in Victoria Central Hospital for further treatment. According to the medical report dated 26 March 1998 in exhibit P3 since the wound, which was sutured in casualty, had been infected, the Plaintiff presented with cellulitis necessitating further treatments. However, the Plaintiff was passing urine well. Intravenous antibiotics and

daily saline soaking of the infection were given as treatment. He was discharged on 18 March, with oral antibiotics. The Plaintiff was readmitted with the same problem. The infection got worse and the penis was swollen. Soluble penicillin and flucloxacillin were given intravenously. Later he developed paraphymosis which was reduced on the ward on 24 March 1998 and was discharged on 25 March 1998 with an appointment for review in surgical Outpatient Department. On 1 December 1998 the Plaintiff's condition was reviewed. The wound was completely healed and the Plaintiff had come back to his normal life. However, the Plaintiff claimed that as a result of the injury he suffered pain, permanent disability, inconvenience, anxiety, stress, embarrassment, anguish and loss of earning on account of inability to work. Besides, the Plaintiff testified that he had difficulty passing urine and also could not enjoy his sex-life and became impotent as his penis did not get erection, which according to him, is a permanent disability affecting his normal life. Hence, he claims damages from the Defendants as hereinbefore mentioned.

With regard to the nature of injury to the private part, Dr Layo Ajewole testified that the injury was only superficial and was not so deep to affect the urethra. The secondary infection the Plaintiff had developed after suturing was due to Plaintiff's own unhygienic practice and conduct, which indeed, had led to swelling and undesirable post-traumatic consequences. The doctor further stated that the injury in question had nothing to do with the passage of urine. The doctor also testified that the superficial laceration the Plaintiff had suffered over the penis could not have been the cause for his alleged impotency and loss of an erection. According to doctor the process of sexual intercourse involves a very complicated psychological process. Erection is only one of the phases of successful sexual intercourse. When a man gets erection it is a combined product of several stimulants that emanate from proper functioning of the heart, brain and spinal cord. These stimulants cause the desire to have sex. It also depends upon

the perception and the psychological input from the woman and the environment. If the man is alcoholic or even diabetic he may not get libido and erection. Therefore, the doctor concluded that the alleged loss of erection, loss of libido and impotency have nothing to do with the injury to the genital organ.

On the other side, the Defendants did not dispute the fact that the Plaintiff sustained the alleged injury and the Defendants were convicted by the Supreme Court of the offence of causing grievous harm to the Plaintiff in this matter. The first three Defendants however, claimed that at the time of the alleged incident they were all police officers and were attempting to apprehend the Plaintiff in performance of their duties in the scope of their employment. As the Plaintiff at the time of apprehension, had a knife in his possession, that, had allegedly caused the injury to his private part as they were arresting the Plaintiff. In any event, the Defendants in effect claimed that at the material time since they were employed by the Government of Seychelles, their employer is vicariously liable for their acts.

Firstly, as regards the alleged infliction of the injury, the Plaintiff categorically testified that the first three Defendants did inflict the injury on him deliberately, at the material time and place, apparently for no reason. The Defendants on the other hand, denied the version of the Plaintiff and joined issue stating that they did not inflict the injury, but it was the Plaintiff, who through his own fault, caused the injury to himself, when the Defendants were arresting him in the execution of their duties. Obviously, the issue herein revolves around the credibility of the witnesses, who gave contradictory versions as to how the Plaintiff sustained the injury in question. Having observed the demeanour and deportment, I believe the Plaintiff in every aspect of his testimony. He appeared to be credible and speaking the truth to the Court. On the other hand, I disbelieve the Defendants, whose version seems to be

unbelievable, inconsistent and illogical considering the entire circumstances of the case. Given the nature, extent and location of the wound, it is physically impossible for the Plaintiff or anyone for that matter to self-inflict such an injury on oneself accidentally or otherwise. In any event, the Plaintiff's version as to the circumstances and the manner in which he claimed to have received that injury, to my mind, is more probable, more accurate, more reliable, more consistent and more logical than the version given by the Defendants in this respect. Hence, I find that the first three Defendants did inflict the said injury on the Plaintiff deliberately at the alleged place and time for reasons best known to them only. The finding of this Court based on a civil standard of proof in this respect is aptly corroborated by the finding of Perera, J. in the related Criminal Case No. 28 of 1998. Be that as it may. As regards the Plaintiff's claim as to lack of erection and sex-life and the alleged permanent disability due to the injury to his private part, I accept the medical opinion given by the doctor. In that respect, I find that the alleged loss of erection, loss of libido and impotency have nothing to do with the injury in question. Dr Layo Ajewole in fact, testified that the injury was only superficial and was not so deep to affect the urethra. The secondary infection the Plaintiff had developed after suturing was solely due to Plaintiff's own unhygienic practice and conduct and so I find. As regards the alleged contributory negligence, I find on record not even a scintilla of evidence to substantiate this defence.

I now turn to the question of liability. Whatever might have been the reason, whether the Defendants had been acting at the material time in the execution of their duty as police officers or not, whether their common intention was to apprehend the Plaintiff or not, the fact remains, they have indeed, committed an unlawful act as they jointly inflicted a grievous bodily harm to the Plaintiff without any justification - at any rate - there is no evidence on record to show any justification recognised by law. Even if one assumes for a

moment that the Defendants being police officers, were only apprehending the Plaintiff using force as contemplated in section 10 (2) of the Criminal Procedure Code, at the material time in the legitimate interest of performing their duties, obviously the degree and nature of force they used with such a lethal weapon - to say the least - has been totally unreasonable, brutally unnecessary and glaringly unlawful. Undoubtedly, the dominant purpose of the Defendants' unlawful act in the circumstances was to cause harm to the Plaintiff rather than effecting the arrest and so I find. Besides, the very use of such unreasonable, unnecessary and unlawful force to the extent of causing a grievous harm to the private part of the Plaintiff, ipso facto, in my judgment constitutes a faute - even if it appears to have been done in the exercise of a legitimate interest - in terms of article 1382 (3) of the Civil Code, which inter alia, reads thus:

> Fault may also consist of an act or an omission the dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise of a legitimate interest.

I will now move on to the question of vicarious liability alleged against the Fourth Defendant. Although the first three Defendants were in service or employment as police officers during the relevant period, the act of "causing grievous bodily harm" to the Plaintiff or to anyone for that matter, can no way be said to form part of their duty nor was that act incidental to the service or employment or performance of their duties as police officers in maintenance of law and order in the country. Therefore, I find that the first three Defendants were not acting within the scope of their employment when they had engaged themselves in the unauthorised and unlawful act of causing bodily harm to the Plaintiff. Neither were the first three Defendants the "préposés" of the Fourth Defendant nor was the Fourth Defendant the "Commettant" of the first three Defendants at the material time. Hence, as I see it, the said

unlawful act shall not render the master or employer liable in law in view of Article 1384 (3) of the Civil Code, which reads thus:

> Masters and employers shall be liable on their part for damage caused by their servants and employees acting within the scope of their employment. A deliberate act of a servant or employee contrary to the express instructions of the master or employer and which is not incidental to the service or employment of the servant or employee shall not render the master or employer liable.

Moreover, for a person to be a préposé of another, three elements are required: (i) the employer must have chosen his servant (ii) the servant must be under the control and supervision of the employer, and (iii) the servant must have done the act in the exercise of his functions. A policeman's authority is original, not delegated and is exercised at his own discretion by virtue of his office, and he is accordingly not a servant under the direct control of his supervisor. Hence, in the case of *Payet v Attorney-General* (1956-1962) SLR the Court held that the policeman was not the préposé of the Government. In view of all the above, I conclude that the Fourth Defendant is not vicariously liable for the unauthorised and unlawful acts committed by the first three Defendants against the Plaintiff in this matter. For these reasons, I hold that only the first three Defendants are jointly and severally liable in tort to compensate the Plaintiff for all the consequential loss and damages he suffered.

The only issue that now remains to be determined is the quantum of damages payable to the Plaintiff. Needless to say, the Plaintiff is not relatively young. He is above 50. He has 7 children all of them are now adults. In the past, he was working as mason; presently, unemployed. Apart from loss of

employment at present, the Plaintiff's employability and prospects of getting a normal job in the world of work, in my view, is not as bright as that of any other able man in good health, because of his drinking habit and alcoholism as transpired from evidence.

Coming to the principles applicable to assessment of damages, it should be noted that in a case of tort, damages are compensatory and not punitive. As a rule, when there has been a fluctuation in the cost of living, prejudice the Plaintiff may suffer, must be evaluated as at the date of judgment. But damages must be assessed in such a manner that the Plaintiff suffers no loss and at the same time makes no profit. Moral damage must be assessed by the Judge even though such assessment is bound to be arbitrary, as was held in *Fanchette v Attorney-General* (1968) SLR. Moreover, it is pertinent to note that the fall in the value of money leads to a continuing reassessment of the awards set by precedents of our case law. See*, Sedgwick v Government of Seychelles* (1990) SLR.

In the instant case, for the right assessment of damages, I take into account the guidelines and the quantum of damages awarded in the following cases of previous decisions:

(1) *Harry Hoareau v Joseph Mein*, CS No: 16 of 1988, where the Plaintiff was awarded a global sum of R30,000 for a simple leg injury caused by a very large stone. That was awarded about 18 years back.

(2) *Francois Savy v Willy Sangouin*, CS No: 229 0f 1983, where a 60 year old Plaintiff was awarded R50,000 for loss of a leg. That was awarded about 21 years back.

(3) *Antoine Esparon v UCPS,* CS No. 118 of 1983, where R50,000 was awarded for hand

injury resulting in 50% disability and the Plaintiff was restricted to light work only. This sum was awarded about 22 years back.

(4) In an English case, *Robinson v Leyland Motors Ltd* C. A 357A of 1974 (see Kemp & Kemp on *Damages* Vol 2 at 9164 - the Plaintiff was aged 21 years and was employed by the Defendant as a fitter. As a result of the accident at work the Plaintiff's left arm was amputated above the elbow. The Court awarded a total sum of £13,000 as damages in respect of pain and suffering and loss of amenity and earning capacity.

(5) In *Jude Bristol v Sodepak Industries Limited,* Civil Side No.126 of 2002, where R160,000 was awarded for an injury that resulted in amputation of distal part of the right forearm of the Plaintiff.

The injury in the present case is relatively, not severe in degree or nature. The wound is now completely healed and the male organ remains intact except for a circular scar, which stays just close to the pubic area. The injury, in my finding did not affect the Plaintiff's sex life nor has it deprived him of his erotic experiences. In the circumstances, the amount claimed by the Plaintiff under each head for loss and damages is highly exaggerated and unreasonable. Having regard to all the circumstances, for pain and suffering I would therefore, award R80,000 In respect of moral damage for inconvenience, anxiety, stress, embarrassment, anguish and distress the sum of R60,000 would in my view, be reasonable and just. For loss of amenities, loss of earnings and loss of enjoyment of life, due to temporary partial disability suffered during the period of hospitalisation and recuperation I would award the sum of R60,000, which figure in my considered

opinion, is reasonable, in view of the fact that the Plaintiff did not suffer any permanent disability due to the injury in question. Moreover, I find the Plaintiff through his unhygienic practice, had partly contributed to the secondary infection that developed from the injury. This should proportionately reduce the quantum of damages payable to the Plaintiff.

In the final analysis, and for the reasons stated hereinbefore, I enter judgment for the Plaintiff and against the First, Second, and Third Defendants jointly and severally in the sum of R200,000 with interest on the said sum at 4% per annum - the legal rate - as from the date of the plaint, and with costs.

Record: Civil Side No 273 of 1998