# THE
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# LAW REPORTS

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## Republic v Agathine

*Drugs - Referral to Constitutional Court*

The accused was charged with importation and possession of drugs. The accused averred that his luggage was packed by his wife, who was a prohibited immigrant. The accused sought to refer the matter to the Constitutional Court.

**HELD:**

(i) In questions of constitutional importance, proceedings will be adjourned and the matter referred to the Constitutional Court if

a. The matter is not frivolous or vexatious;

b. The matter has not already been the subject of a decision of the Constitutional Court.

The terms “frivolous” and “vexatious” mean cases or issues that are obviously unsustainable; and

(ii) For the Constitutional Court to hold that article 19(2) of the Constitution of Seychelles was contravened in this case, it would have to determine that the deportation was illegal. That is a matter for the Supreme Court, not the Constitutional Court.

**Judgment:** For the Republic.

**Legislation cited**
Constitution of Seychelles, arts 19(2)(e), 19(10), 46(7), 125(1)(c)

**Foreign cases noted**
*R v Young* [2003] NZLJ 414; (2004) 4 CHRLD 389

David ESPARON for the Republic
Frank ELIZABETH for the accused

**Ruling delivered on 21 June 2007 by:**

**PERERA J:** The accused has filed a motion under article 46(7) of the Constitution for a referral of a constitutional issue, to the Constitutional Court. The issue is based on article 19(2) (e) which provides –

> (2) Every person who is charged with an offence –
>
> ……
>
> (e) Has right to examine, in person or by a legal practitioner, the witnesses called by the prosecution before any court, and to obtain the attendance and carry out the examination of witnesses to testify on the person's behalf before the court on the same conditions as those applying to witnesses called by the prosecution.

Article 19(10) contains the following derogation-

> 10 Anything contained in or done under the authority of any law necessary in a democratic society shall not be held to be inconsistent with or in contravention of-

(a) Clause (1)(2)(e), or 8, to the extent that the law in question makes necessary provision relating to the grounds of privilege or public policy on which evidence shall not be disclosed or witnesses are not competent or cannot be compelled to give evidence in any proceedings.

The accused stands charged on four counts involving alleged offences of importation and possession of 3 g and 499 mg of cannabis resin and 75 ml grams of cocaine. The prosecution case is that the said drugs were concealed in clothes in the luggage of the accused when he disembarked at the Seychelles International Airport from a flight from Johannesburg on 4 June 2005.

The accused has, in an affidavit filed with the motion for referral, averred that he is married to one Vanessa Agathine, a South African national and that she was deported from Seychelles two years ago. The order of deportation is being canvassed in an application for judicial review, in case no 142 of 2006 which is still pending disposal. In that case, it is averred that the deportation order was made on 18 June 2005.

In the present motion, the accused further avers that his entire luggage on his trip to Seychelles on 4 June 2005, was packed by his wife, and hence he had no knowledge of its contents. Relying on article 19(2)(e), he avers that if his wife cannot testify in this case he will not have a fair trial.

Pursuant to article 46(7) of the Constitution, where in the course of any proceedings, a question arises with regard to whether there has been or is likely to be a contravention of the Charter, the Court shall, if it is satisfied that the question is not frivolous or vexatious or has (not) already been the subject of

a decision of the Constitutional Court of the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court.

This issue has not been the subject of a decision of the Constitutional Court or of the Court of Appeal. However, is it frivolous or vexatious?

The terms "frivolous" and "vexatious," in their legal connotations mean, cases or issues that are obviously unsustainable. In this respect, the Court has to consider how the alleged likely contravention of article 19(2)(e) relates to a defence witness who is unable to attend court due to a legal incapacity.

In this case, the prosecution has closed its case. Upon the Court finding that the prosecution has established a prima facie case, the accused was called upon to present his defence. He elected to give evidence on his own behalf and also to call witnesses. Mr Elizabeth informed the Court that he intended to call two witnesses from South Africa, one being the wife of the accused who cannot come to Seychelles as she has been declared a prohibited immigrant. Hence she has a legal incapacity to attend this Court to testify, and therefore is not competent nor compellable while the deportation order subsists. The powers of the Constitutional Court relate to the application, contravention, enforcement or interpretation of the Constitution. Hence, for the Constitutional Court to hold that article 19(2)(e) has been contravened in relation to the accused, it must necessarily determine that the deportation order was illegal. That is not a matter for the Constitutional Court, but for the Supreme Court exercising its supervisory jurisdiction under article 125(1)(c) of the Constitution.
Article 19(2)(e) recognises the principle of "equality of arms". Both the prosecution and the defence must have equal opportunities to present their cases. In the case of *R v Young*

[2003] NZLJ 414; (2004) 4 CHRLD 389, (a decision of the Court of Appeal of New Zealand) a vital defence witness had gone to Sweden and was not available to testify. An application to the legal services agency to meet the costs of funding the return of that witness was refused, but was prepared to fund a video link. Later that arrangement also failed due to the costs involved. The accused was convicted. On appeal, it was held that if such facilities were available to prosecution witnesses, the defence witnesses were equally entitled to such facilities, on the principle of equality of arms. However as the prosecution in that case had not used such facilities, it was held that there was no breach of that principle. The Court observed that in those circumstances, the statement made by that witness to the Police would have been admitted in evidence.

In the present case, the circumstances are different. The defence witness cannot be called due to a legal incapacity which has first to be cured before a different forum. There is therefore no nexus between the deportation order, which was based on an alleged false statement made by Vanessa Agathine to the Immigration Authorities, the charge against the accused, and the right of the accused under article 19(2)(e). Under article 46(1), the alleged contravention, or likely contravention in relation to the applicant, must be based on an "act or omission" which has a nexus. In these circumstances, the motion to refer the likely contravention of article 19(2) (e) of the Constitution to the Constitutional Court is frivolous and vexatious in the sense that that question is unsustainable. If the Supreme Court in the application for judicial review (Case no 142 of 2006) quashes the declaration of Vanessa Agathine as a prohibited immigrant, then she would not have any legal incapacity to be summoned by the accused to testify on his behalf. There would then be no contravention of article 19(2)(e).

For these reasons, the motion dated 14 May 2007 is dismissed.

**Record: Criminal Side No 38 of 2005**

## Nourrice v Republic

*Penal Code - Assault on child – Witness testimony – Corroboration*

The appellant was convicted of assaulting a child under section 70(1)(a) of the Children Act. She appealed on the grounds that the witness testimony did not corroborate.

The child had testified that the appellant held the child's collar, hit him on the back, and hit his head with a stone. Another witness testified that the appellant had hit the child on the head with a brick, but did not mention that the appellant had held the child's collar or hit him on the back.

**HELD:**

(i) The offence required that the child be in the custody or care of the accused;

(ii) Corroboration of evidence between the witness testimony and that of the child is necessary.

**Judgment:** For the appellant.

**Legislation cited**
Children Act, s 70(1)(a), 70(b)

Somasundaram RAJASUNDARAM for the appellant
Joel CAMILLE for the respondent

**Judgment delivered on 1 February 2007 by:**

***a*** **RENAUD J:** The appellant was convicted and sentenced by the Senior Magistrate on 10 December, 2003 for the offence of assaulting a child contrary to section 70(1)(a) and

***e***

punishable under section 70(b) of the Children Act. The Appellant entered her appeal after 8 months and 23 days and she sought the indulgence of this Court to condone the delay. After due consideration this Court in its ruling dated 31 January 2005 condoned the delay, granted leave and allowed the appellant to proceed with her appeal.

Section 70(1) states that -

> Without prejudice to sections 162 (Desertion of Children) or 163 (Neglecting to provide food etc for children) of the Penal Code, a person who has the custody, charge or care of a child and who willfully
>
> (a) assaults or ill treats that child; or
>
> (b) neglects, abandons or exposes that child, in a manner likely to cause him unnecessary suffering, moral danger or injury to health (including injury to or loss of sight, hearing, limb or organ of the body and any mental derangement) is guilty of an offence.

The prosecution therefore has to prove the following elements of that offence:

(1) That the accused had the custody, charge or care of the child, and

(2) That the accused wilfully assaulted or mistreated that child.

If these two elements are not proved beyond reasonable doubt by the prosecution the charge against the accused is liable to be dismissed.

***a***

***e***

The appellant advanced the following grounds of appeal:

1. The Magistrate failed to observe the inconsistency of the statements of witness PW1, PW2 and PW3 as to the material issue of hitting with the stone.

2. The Magistrate erred in his findings that the accused hit PW1 while PW2 and PW3 testified that they did not see the accused hitting PW1 in that the Magistrate failed to observe the lack of corroboration.

3. The Magistrate has wrongly appreciated the child witness PW1 while the other two witnesses failed to corroborate as to the commission of the offence.

4. The Magistrate failed to appreciate the lack of independent witnesses to support the prosecution case whilst all the witnesses are from the same families and are related to each other.

5. The Magistrate erred in presuming that it could not be anybody other than the accused who committed the offence.

6. The fine imposed of R2,500 is manifestly high and excessive.

Inconsistencies in the witnesses' testimony may occur even if each witness may have observed the same transaction. This is a natural phenomenon. However, the trial court ought to assess the inconsistencies and establish whether it has any significant bearing on the material issues which may lead the court to entertain a reasonable doubt as to the proof of all the

elements of the charge. Inconsistencies when viewed singly may be excusable and have no bearing on the material issue but when these are viewed globally it may be considered otherwise as having an effect on the finding of guilt of an accused.

The appellant argues that the inconsistencies in the statements of the prosecution witnesses as to the material issue of hitting with the stone amounted to a lack of corroboration. I have carefully perused the record of the proceedings and I have observed certain inconsistencies which I have considered in the light of the aforementioned observations.

The Senior Magistrate concluded that - "the fact remains that PW1 was assaulted by someone, who, as per the evidence adduced in Court, could not be anybody else than the Accused herself". The judgment however does not make the finding as to what constituted the assault on PW1. Was it the holding of the virtual complainant by his collar; was it the giving of 4 slaps on the back of PW1; was it the hitting with stone; or was it the holding by the accused of the hand of PW1; or, was it all the instances mentioned. It is my considered view that the trial court ought to have found what constituted the assault for which the accused was charged.

I find that none of the prosecution witnesses corroborated the evidence of the virtual complainant Kelly Simeon that the accused held him by his collar. Similarly, I find that there is no corroboration of the evidence of Kelly that the accused gave him 4 slaps on his back.

PW3 Brianson Pharabeau testified that he saw the accused hit Kelly on the head with a piece of brick whereas the virtual complainant said that the accused hit him with a stone.

The accused was not represented by counsel at the trial. The

tenor of her cross-examination of PW3 Brianson Pharabeau was that that witness was not present at the scene of the incident and that he was relating to the court what others may have asked him to say.

I note that PW3 Brianson Pharabeau neither mentioned that he saw the accused holding PW1 Kelly by his collar nor that he saw the accused giving four slaps on the back of PW1. That witness testified that he saw the accused hitting PW1 Kelly with a piece of brick whereas Kelly said that the accused hit him with a stone. The mother of Kelly further stated that she sent Kelly and Michelle to the shop but did not mention PW3 Pharabeau. In the light of these inconsistencies, could it be said beyond reasonable doubt that PW3 Pharabeau was there? I believe that there is a reasonable doubt as to the presence of Pharabeau at the scene of the incident at the material time. The benefit of the doubt should be given to the accused.

The mother of Kelly stated that she picked up the stone/brick and took it to the Police Station. The stone/brick was not produced in court. She also testified that she took Kelly to the Police Station and Hospital. It is common practice in such cases for the Police to give the victim a Police Medical Report Book that is then completed by the examining doctor. There is no evidence of such being done, and if it was done, the Police Medical Certificate was not produced. Furthermore, the doctor who allegedly examined Kelly did not testify. The Prosecution produced a handwritten medical report which was admitted without objection. That medical report was signed by Dr Carlos and states as follows:

> Beoliere Clinic, Mahe.
>
> Patient: Kelly Gino Kneel SIMEON
> DOB: 06.11.1991
> Age: 10yrs

> A male patient of 10 years old, past history good, arrived in Beoliere Clinic today, the mother referred child, pain in head, skull occipital, accompanied mild swelling in site, not presenting unconsciousness, not vomiting.
>
> Child was in attendance, excluded this problem to carry treatment.
>
> Dr Carlos

That medical report is dated 15 February 2002. I find that this medical report has no relevance to the incident that happened on 6 January 2002.

For the reasons stated above, I conclude that a fundamental element of the offence was not proved by the prosecution in that there is no evidence that goes to prove that the accused had the custody, charge or care of the child in issue at the material time. Further, I find that there is a lack of corroboration as to the alleged assault, be that the holding by the accused of the virtual complainant by his collar, or the accused giving four slaps on the back of the virtual complainant. With regard to the accused allegedly hitting the virtual complainant with a stone/brick on his head, I find that the evidence adduced is not corroborated and is therefore inconclusive, hence, a reasonable doubt persists and the benefit of the doubt is in favour of the accused.

In the circumstances, I find that it is unsafe to uphold the conviction of the Accused. I accordingly dismiss the charge against the accused and set aside the sentence. I order that any fine that the accused had paid be refunded to her.

**Record: Court of Appeal (Criminal No 14(c) of 2004)**

## Germain v Republic

*Criminal procedure - Leave to appeal out of time – Ignorance of the law*

The appellant was convicted but sought leave to appeal out of time on the basis that he was ignorant of the law.

**HELD:**

(i) Non-compliance with a procedural requirement is not fatal to an appeal, provided that the appellant shows "good cause" to justify the non-compliance; and

(ii) In deciding whether to grant leave to appeal, the court should take into account all the circumstances of the case, including the intention of the applicant, diligence of counsel, proper explanation for delay, extent of delay, undue prejudice, and the merits of the application for leave to appeal.

**Judgment:** Leave denied.

**Legislation cited**
Criminal Procedure Code, ss 289, 309(1), 310(1), (2), (3).

**Foreign cases noted**
*Lagesse v CIT* 1991 MR 51
*Pendo v Lutchman* 1886 MR 48
*Solamalay v R* 1920 MR

Charles LUCAS for the appellant
David ESPARON for the respondent

**Ruling delivered on 5 March 2007 by:**

**KARUNAKARAN J:** This is an application for leave to appeal out of time against the judgment of the Magistrate's Court, in which the applicant was on 18 March 2005, convicted of the offence of burglary contrary to and punishable under section 289 of the Penal Code as amended by Act 16 of 1995. Following the conviction, he was sentenced to undergo a mandatory minimum period of seven years imprisonment. This all happened a year ago. Since then he has been in prison serving the sentence. Now, he intends to appeal to this Court against the said conviction and sentence. This application is made in terms of section 310 of the Criminal Procedure Code, which reads thus:

> 310 (1) Every appeal shall be brought by notice in writing which shall be lodged with the Registrar within 14 days after the date of the order or sentence appealed against.
>
> (2) Such notice shall be signed or marked by the appellant or, if the appellant is represented by an advocate, the notice may be signed by such advocate
>
> (3) Within 14 days after the filing of his notice of appeal, the appellant shall lodge with the Registrar a memorandum of appeal
>
> (4) Every memorandum of appeal shall be signed or marked by the appellant or signed by his advocate and shall contain particulars of 'the matters of law or of fact in regard to which the Magistrates' Court appealed from is alleged to have erred, and, except by leave of the Supreme Court the appellant shall not be permitted

> on the hearing of the appeal, to rely on any ground of appeal other than those set forth in the memorandum:
>
> Provided that nothing in this subsection shall restrict the power of the Supreme Court to make such order as the justice of the case may require.
>
> (5) If a memorandum is not lodged within the time prescribed by subsection (3), the appeal shall be deemed to have been withdrawn but nothing in this subsection shall be deemed to limit or restrict the power of the Supreme Court to extend time. The Supreme Court shall have power to extend any time herein provided for the taking of any necessary step in appeal, as it may deem fit.

According to the affidavit dated 29 March 2006 filed by the applicant in support of this application, he was ignorant of the law relating to mandatory sentences. Neither the court nor the police advised him about the consequences of a guilty plea, rather the police induced him to plead so. Therefore, he pleaded guilty to the charge in the Magistrates' Court. After a year, while he was in prison serving the sentence, he accidentally met with his counsel in another case, who advised him to file an appeal against the conviction and sentence in this matter.

Therefore, the applicant's counsel now invites the Court to exercise its discretion, condone the delay and grant leave to appeal out of time against the judgment..

On the other side, the respondent vehemently objects to this application submitting in essence, that the reason given by the

applicant for the inordinate delay of one year is not valid in law. According to the respondent, the laches on the part of the applicant or his counsel cannot and do not constitute a valid ground for the Court to condone the delay which occurred in this case. At some stage the finality of judicial decisions should be certain and procedural requirements governing appeals from those decisions should not be disregarded so as to prolong uncertainty. Hence, State counsel urged the Court to dismiss the application.

I gave diligent thought to the submissions made by counsel for and against this application. First, I will begin by saying that it is wrong to assume that the appellate courts by virtue of section 310(5) of the Criminal Procedure Code have unfettered discretion or power to condone laches, override the procedural requirements and grant arbitrarily the extension of time to an intended appellant for filing his appeal out of time; that is, beyond the period prescribed by the relevant statute or appeal rules. Here, one should note, the delay, which is allowed by the statute in favour of the appellant, is peremptory, and if such delay exceeds the prescribed period, then the appeal is obviously incompetent. This is the rule. The Court cannot and should not use its discretion arbitrarily to infringe the rule and defeat the very purpose for which the legislature has prescribed such time limits for appealing against judicial decisions. As wisely summed up in *Lagesse v CIT* 1991 MR 51 "at some stage the finality of judicial decisions should be certain and the procedural requirements governing appeals from those decisions should not be disregarded so as to prolong uncertainty". Besides, justice should not be delayed by frivolous or vexatious appeal attempts by unscrupulous parties by abusing the right of appeal. At the same time, a party, who is genuinely aggrieved by a judicial decision should never be denied his right of appeal by strict adherence to the procedural requirements. Indeed, in considering an application of this nature, the Court has the task before it of separating the chaff from grain and

doing justice to the genuine applications by condoning the delay.

For a strict constructionist non-compliance with any of the procedural requirements for an appeal within the prescribed period is "fatal" to the hearing of the appeal unless such non-compliance was due to no fault of the appellant. This is the traditional approach, which the courts have adopted in the past vide *Pendo v Lutchman* 1886 MR 48 and *Solamalay v R* 1920 MR. However, for an intention seeker who subscribes to the liberal interpretation of law, non-compliance with any of the procedural requirements within the prescribed period is not "fatal" to the appeal, provided the Appellant shows a "good cause" to the satisfaction of the Court in justification of such non-compliance, whether it relates to the filing of notice or even memorandum of appeal as contemplated under section 310(1) and (3) of the Criminal Procedure Code, rehearsed supra. This is the modern approach the Courts ought to use- in order to steer the procedural law towards the administration of justice, rather than the administration of the letter of the law. Having said that, in deciding whether to grant an extension of time, the Court in my considered view, ought to take into account the entire circumstances of the case including:

- whether the applicant formed a bona fide intention to seek leave to appeal and communicated that intention to the opposing party within the prescribed time;

- whether counsel moved diligently;

- whether a proper explanation for the delay has been offered;

- the extent of the delay;

- whether granting or denying the extension of time will unduly prejudice one or the other of the parties; and
- the merits of the application for leave to appeal.

Coming back to the case on hand, the applicant states that he was ignorant of law as to mandatory sentence and of the consequences of his guilty plea, whilst he was asked to plead to the charge in the Court below. Indeed, "ignorance of law is not an excuse" - ignorantia juris non excusat. It is a public policy that a person who is unaware of a law whether substantive or adjectival may not escape liability for violating that law or failing to comply with the rules merely because he or she was unaware of its content; that is, persons have "presumed knowledge" of the law including the provisions pertaining to mandatory terms. The rationale behind this doctrine is that if ignorance was an excuse, persons charged with criminal offences or the subject of civil lawsuits would merely claim they were unaware of the law in question to avoid liability, whether criminal or civil. Thus, the law imputes knowledge of all laws to all persons within the jurisdiction no matter how transiently. Even though it would be impossible, even for someone with substantial legal training, to be aware of every law in operation in every aspect of the legal process, this minor injustice is the price paid to ensure that wilful blindness cannot become the basis of exculpation. Thus, it is well settled that persons whether inside or outside the prison, what is applicable to a common man in the street will be applicable to them as well. Hence, on the face of it, the reason given by the applicant for ignorance of law, is not satisfactory to the Court and so I find. In any event, section 309(1) of the Criminal Procedure Code reads:

> No appeal shall be allowed in the case of any accused person, who has pleaded guilty and has been convicted on such plea by the

> Magistrates' Court, except as to the extent or legality of the sentence.

In the instant case the applicant has pleaded guilty and has been convicted by the Magistrates' Court. Moreover, the extent and legality of the mandatory sentence imposed by the Magistrate in this matter, is not a ground of challenge. Therefore, the right of appeal, which forms the basis of this application, itself, is questionable. In the normal course of events, the applicant should have filed the notice of appeal within 14 days from the date of conviction. However, having slept on his right of appeal for more than a year, he has now come before this Court with the instant application. As I see it, the applicant has failed to show any good cause to the satisfaction of the Court to condone the inordinate delay. In these circumstances, the extension of time sought by the Appellant in this case is not justified and his application should be refused. I do so accordingly. I make no order as to costs.

**Record: Court of Appeal (Criminal No 1(a) of 2005)**

## Alcindor v Republic

*Penal Code – Sentencing – Concurrent sentences*

The appellant was charged with robbing two rooms in a guest house. He pleaded guilty to receiving stolen property in both cases. He was sentenced to 4 years for each case, to run consecutively.

**HELD:**

Where two or more cases are, in reality, one transaction, sentences can be run concurrently.

**Judgment:** Appeal allowed; Sentences to run concurrently.

**Legislation cited**
Penal Code, ss 36, 280, 281, 283, 309(1)

**Cases referred to**
*Rene Laporte & Ors v R* (unreported) SCA 1/1980
*John Vinda v R* (Unreported) SCA 1995

Wilby LUCAS for the appellant
David ESPARON for the respondent

**Judgment delivered on 24 September 2007 by:**

**PERERA J:** This is an appeal against sentence.

The appellant was charged before the Magistrates' Court in two separate cases, as follows-

**(1) <u>Case No 595/04</u>**

Count 1 - Robbery contrary to section 280 and 281 of the Penal Code.

**Particulars of the offence**
Brian Alcindor of Cascade, Mahe, during the day of 24 May 2004, at Anse Gaulette, Mahe, robbed Mr Berno Schwenic and wife Anne-Marie Landmann of R2000 in Seychelles currency, 1 note of 100 euro, a nokia mobile phone with charger, jewellery including rings and necklaces, at their residence, namely room 2 of "Lazare Picault" Guest House.

**Count 2**
Assault with intent to steal contrary to section 283 of the Penal Code.

**Particulars of the Offence**
Brian Alcindor of Cascade, Mahe on 24 May 2004 at "Lazare Picault" Guest House, Anse Gaulette, Mahe, after committing robbery in room 2, as particularised above, assaulted Gilbert Quatre with a dagger with intent to steal the stolen items.

**Count 3**
Receiving stolen property contrary to section 309(1) of the Penal Code.

**Particulars of the Offence**
Brian Alcindor, on a day unknown between 24 and 26 May 2007, did receive 3 gold rings and 1 gold necklace, 1 charger for a mobile, knowing or having reason to believe the same to have been stolen or unlawfully obtained.

**(2) Case No 596/04**

The appellant was charged with two counts of housebreaking and stealing from a dwelling house. It was alleged that the said offences were committed by

the appellant in the course of the same transaction on 24 May 2004 at the "Lazare Picault" Guest House, after entering room no 8 occupied by Mr Jurgen Bischoff and Krishtina Marquardt. It was particularised in the charges that the appellant stole local and foreign currency, a mobile phone, 1 CD Player and 20 CDs, a watch, a camera and a pair of sunglasses.

In case no 595/04, the accused pleaded guilty to the charge of receiving stolen property under count 3, and consequently, the prosecution withdrew counts 1 and 2. The Senior Magistrate (Mr V Ramdonee) convicted the accused for the offence of receiving stolen property and imposed a sentence of 4 years imprisonment, although section 309 prescribed a possible sentence up to 14 years.

In case no 596/04, the accused pleaded guilty to the offence of receiving stolen property under count 2. Consequently, the prosecution withdrew the charge of housebreaking under count 1. The Senior Magistrate, after recording a conviction under count 2, imposed a sentence of 4 years, to run consecutively to the sentence of 4 years imposed in case no 595/04.

The appeal against sentence is based on the ground that the sentence, which when taken consecutively would be for 8 years, is harsh and excessive as the prosecution withdrew the charges of robbery, housebreaking and assault, and accepted the guilty plea on the count of receiving stolen property in both cases. Mr Wilby Lucas, counsel for the Appellant submitted that only a few items, such as 1 necklace, 2 mobile phones, a charger and a lamp were found on the appellant, and that hence, in these circumstances, the sentences should have been ordered to run concurrently.

Mr. Esparon, Senior State Counsel, submitted that, admittedly, the items were stolen from German tourists. He

also submitted that the Senior Magistrate had the record of previous convictions of the appellant at the time of sentencing, and hence, in these circumstances, the discretion exercised by him under section 36 of the Penal Code to order consecutive sentences cannot be faulted.

According to the proceedings recorded in case no 595/04, the appellant denied that he committed robbery or that he was present at the alleged place of the robbery. In case no 596/04, he denied breaking into the building and stated that he had made a statement to the police giving the name of the person who broke in. He only pleaded guilty to receiving some of the items stolen. It was in these circumstances that the prosecution withdrew the charges in respect of those offences, and accepted the guilty plea in both cases for receiving stolen property. In these circumstances, should the offences be considered as one incident or transaction or different transactions for purposes of punishment, as the items found in the possession of the appellant were those of both sets of complainants in two cases. In the case of *Rene Laporte v R* (unreported) SCA 1/1980, the Court of Appeal stated -

> On the issue of consecutive sentences, main reliance was placed on the principle, again stated in *Thomas on Sentencing* 47 and 48, that sentences imposed for what is essentially one incident or transaction should run concurrently and that, in determining whether offences are part of one incident or transaction, the Courts take a broad view.
>
> This argument gains impetus from the apparent inequity of treating the incident, for the purpose of inferring guilt on the damages charged, and then as distinct and separate, for the purpose of punishment.

In the case *John Vinda v R* (unreported) SCA the appellant was charged before the Magistrates' Court with several offences of housebreaking and stealing. The charges were filed in three different cases, as different complainants were involved. He was sentenced to terms totaling 7 years, but as they were ordered to run concurrently, he would in effect serve only two years. The Attorney-General sought revision of the sentences. The Supreme Court reversed the order for concurrent execution and ordered that the convict would serve a total of 5 years and 3 months instead of 2 years. In doing so, the Supreme Court took into consideration that the offences were serious, and that the maximum sentences prescribed were 7 years for housebreaking and 5 years for stealing. Further, it was considered that although the offences were committed by the appellant within a radius of 2 miles from one another, they were committed on separate days and occasions. Upon an appeal being filed before the Court of Appeal, the variation of sentence was maintained. The Court held that under section 36 of the Penal Code, consecutive execution of sentences was the rule and concurrent execution was the exception. That Court, observed that the Magistrate had applied the principle of totality of sentence on humanitarian grounds, and that that was not a valid reason to exercise the discretion when imposing a concurrent sentence. The Court of Appeal (Ayoola JA) stated -

> …where a directive which is the exception is made by the Trial Court, the factors and special circumstances for such directive should be manifest from the order or demonstrated by the Trial Court in its Ruling. One such circumstance which may justify the application of the exception would be the disproportionality of consecutive sentences to the totality of the behaviour of the convicted person or the gravity of the offence.

In the present case, the Senior Magistrate in sentencing the appellant in Crim Case 596/04 stated thus -

> This Court has considered all the relevant circumstances of this case including what accused has stated in mitigation. The Court takes a serious view with regard to the present charge in as much as the offence is connected with dishonesty. After doing so, I accordingly sentence the Accused to undergo a term of four years imprisonment. This prison term is take effect after the prison term in case no 595/04.

It has to be considered that the appellant was convicted upon pleading guilty in both cases, only for the offence of receiving stolen property under count 3. Count 1 for robbery, and count 2 for assault with intent to steal, were withdrawn by the prosecution. Hence in essence, for the purposes of sentencing, there was only one transaction. The Senior Magistrate should therefore have exercised his discretion to apply the exception and imposed a concurrent sentence in case no 596/2004.

In these circumstances, the Court varies the sentencing order in case no 596/2004 by substituting an order that the sentence of 4 years imprisonment imposed in that case shall run concurrently with the sentence of 4 years imprisonment imposed in case no 595/2004.

The appeal is accordingly allowed.

**Record: Court of Appeal (Criminal No 14 of 2006)**

## Medine, Ex Parte

*Civil Code - Paternity order – Procedure*

The applicant applied for a declaration to establish that a deceased man was his father. His affidavit was attested by his counsel, Mr Lucas, in Mr Lucas' capacity as a notary public.

**HELD:**

(i) A person seeking declaratory relief under article 340 of the Civil Code of Seychelles must commence the action by way of plaint; and

(ii) It is not proper for a solicitor to act as commissioner for oaths and attest an affidavit of his client in a case in which he is counsel.

**Judgment**: Application denied.

**Legislation cited**
Civil Code of Seychelles, art 340
Children Act, sch 4
Seychelles Code of Civil Procedure

**Foreign legislation noted**
Supreme Court Rules (UK), ord 41 r 8

**Cases referred to**
*Choppy v Choppy* (1956) SLR 161
*United Opposition v Attorney-General* (unreported) CC 8/1995

Charles LUCAS for the applicant
Conrad LABLACHE for the third party

**Ruling delivered on 28 March 2007 by:**

**KARUNAKARAN J**: One Allen Jude Medine, hereinafter referred to as the "applicant", makes this application seeking a declaration to establish his paternal descent. The cause title herein reads as "Application under article 340 of the Civil Code of Seychelles as amended by the 4th Schedule of the Children Act". Article 340 of the Civil Code runs thus -

> 1. It shall not be allowed to prove paternal descent, except:
>
> (a) In cases of rape or abduction, provided that the time when the rape or abduction took place coincides with that of the conception.
>
> (b) When an illegitimate child is in possession of status with regard to his natural father or mother as provided in article 321.
>
> (c) In cases of seduction, provided that the seduction was brought about by fraudulent means, by abuse of authority or promise of marriage.
>
> (d) When there exist letters or other writings emanating from the alleged father containing an unequivocal admission of paternity.
>
> (e) When the alleged father and the mother have notoriously lived together as husband and wife, during the period of conception.
>
> (f) When the alleged father has

provided for or contributed to the maintenance and education of the child in the capacity of father.

2. The right to prove paternal descent under this article is for the benefit of the child alone, even if born of an incestuous or adulterous relationship.

3. An action (underlining mine) under this article may be brought:-

   (a) by the child's mother, even if she is under age, or by his guardian, at any time during the child's minority; or

   (b) if action has not been brought under sub-paragraph (a), by the child within 5 years of his coming of age or within 1 year of the death of the alleged father whichever is the later.

4. A child whose paternal descent has been proved under this article is entitled to bear his father's name (in addition to a share in his father's succession under the title Succession).

Article 321 referred to, in the above article read as follows:

1. Possession of status may be established when there is a sufficient coincidence of facts indicating the relationship of descent and parenthood between a person and the family to which he claims to belong.

The principal facts are:

That that person has always borne the name of the father whose child he claims to be;

That the father has been treating him as his child and that, in capacity as father, he has provided for his education, maintenance and start in life;

That he has always been recognised as a child of that father in society;

2. Natural descent may also be established by the possession of status, both as regards the father and the mother in the same manner as legitimate descent.

In this matter, the applicant, who is a natural child, claims that he is the child of the late Jean Claude Guy Vidot, hereinafter referred to as the "deceased", who died testate in Seychelles on 26 October 2004. According to the applicant, he is in possession of status as the child of the deceased. Hence the applicant intends to prove his paternal descent in terms of article 340 (1) (b) of the Civil Code with regard to his alleged natural father and so seeks the declaration first-above mentioned.

The applicant has averred in his application that he was born on 18 November 1982 and the deceased was his father. In the birth register, only his mother's name has been registered as "Marie Lourdes Medine", who is still alive, whereas his father's name has not been recorded. According to the applicant, since his childhood he had known the deceased as

his father, who had also been providing maintenance during the former's childhood. Furthermore, it is averred in the application that the deceased had throughout his life, referred to the applicant as his son.

In the circumstances, the applicant claims his paternal decent through the deceased and hence, prays this Court for a declaration accordingly.

Although the application was initially sought to be heard ex parte, since the legal heirs to the estate of the deceased had an interest in this matter, the Court issued a notice to one Mr Melchior Vidot, who is admittedly a legal heir as well as a joint-executor to the estate of the deceased. Following that notice Mr Melchior Vidot intervened in the proceedings. His counsel Mr C Lablache raised a preliminary objection to this application based on two points of procedural law and in that he submitted in essence, as follows:

(i) The procedure adopted by the applicant in this matter is improper, as this action must be commenced by way of a plaint, not by way of an application. Moreover, a remedy of this nature cannot be sought through an ex parte proceeding but should be heard inter partes joining all the heirs to the estate of the deceased as parties to the proceedings.

(ii) The affidavit filed in support of this application is improper and incompetent since the counsel himself having acted as a notary, has administered the oath to the applicant for deponing the said affidavit.

On the other hand, Mr C Lucas, counsel for the applicant, contended that the procedure adopted by the applicant in this matter is proper and notice of this application has already

been given to Mr Melchior Vidot, a co-executor to the estate of the deceased. Hence, Mr Lucas submitted that the preliminary objections are baseless and so urged the Court to dismiss the objections and proceed to hear the case on the merits.

I meticulously analysed the submissions made by both counsel in this matter. Indeed, the preliminary objection raised by the intervener involves two fundamental questions of procedural law, which require determination in this matter. They are:

(i) What is the proper procedure that should be adopted by a party to seek declaratory relief in respect of paternal descent under article 340 of the Civil Code?

(ii) Is it proper for an attorney to act as commissioner for oaths and attest an affidavit of his client in the case in which he himself appears as counsel?

As regards the first question, it is truism that neither the Civil Code nor the Seychelles Code of Civil Procedure contains any explicit provision stipulating the procedure that should be adopted by a party while seeking declaratory relief in respect of paternal descent under article 340 of the Civil Code. It could even be perceived as an ambiguity in the statute. However, the intention of the makers as to the procedural requirement in this regard, is evident from paragraph 3 of article 340, which reads thus – "An action (underlining mine) under this article may be brought .... etc"

Now the question arises: What does the term 'action' mean in civil proceedings? The answer lies in the "Definitions" clause under section 2 of the Seychelles Code of Civil Procedure, which read as follows -

> "Suit" or "action" means a civil proceeding commenced by plaint.

Therefore, in our civil jurisprudence the terms "suit" and "action" are synonymous and interchangeable. Whichever terminology one elects to employ, whether "suit" or "action" in a civil matter, the fact remains that it should be commenced only by way of a plaint. That is mandatory. Hence, the very use of the term "action" in article 340 reveals the unequivocal intention of the legislature in that, any civil matter brought under this particular article for proving paternal descent, ought to be commenced by a plaint. Now, one may arguably ask,

> **Is it proper for the Court to find the intention of the legislature, when there is no explicit provision or when an ambiguity appears in a statute?**

As I see it, whenever a statute comes up for consideration it must be remembered, as Lord Denning once mentioned, that it is not within human power to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. In such situations, a judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the statute has not provided for this or that or complaints that it is silent or defective of some or other ambiguity. It would certainly save the judges trouble, if statutes were drafted with divine prescience and perfect clarity providing for all contingencies. In the absence of it, when an ambiguity or silence or defect appears in a statute a judge cannot simply blame the draftsman or the lawmaker. He must set to work on the constructive task of finding the intention of the legislature, and he must do this, not only from the language of the statute, but also from a consideration of the fact that if the makers of the statute had themselves come

across this ambiguity, how they would have cleared it up. The judge must do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases in the structure of the statute.

Approaching the case in that way, I cannot help feeling that if the legislature had known that someone might in future misconceive the procedure and seek relief under article 340 by way of an application, the legislature would have certainly, expressly stated in the statute itself that such a relief should be sought by way of plaint. In the circumstances, I conclude that a party seeking declaratory relief in respect of paternal descent under article 340 of the Civil Code, should commence the action by way of plaint. In my view, this is the proper procedure, which must be adopted in all cases of this nature, and failure to follow this procedure means that the Court has no jurisdiction to try the matter: see *Choppy v Choppy* (1956) SLR 161. For these reasons, I find that the present application is not proper. It is procedurally not maintainable in law and liable to be struck off.

As regards the second question as to the alleged affidavit, undisputedly Mr C Lucas represents the applicant in his capacity as an attorney and counsel in this matter. At the same time, Mr C Lucas, in his capacity as a notary public and commissioner for oaths, has also signed the affidavit filed in support of the instant application.

It is a well settled position in our case law that a commissioner for oaths cannot act as such in cases in which they or their principals or partners are solicitors, agents or parties respectively: see *United Opposition v Attorney-General* (unreported) Const. Case 8/1995. Herein, it is pertinent to note Order 41 Rule 8 of the Supreme Court Rules of UK:

> No affidavit is sufficient if sworn before the solicitor of the party on whose behalf the affidavit

> is to be used or before any agent, partner, or clerk of the solicitor.

However, Order 41, Rule 4 of the White Book, provides that the affidavit may, with the leave of the court, be filed or used in evidence notwithstanding any irregularity in the form thereof. In the instant case, the applicant has not obtained any leave from the Court condoning the said irregularity or impropriety. Hence, I find the affidavit filed in support of this application is improper, insufficient and irregular. Mr C Lucas, the attorney of the applicant, has also acted as a notary for executing the affidavit in question.

For these reasons, I uphold the preliminary objections raised by the intervener on both grounds of procedural law. Accordingly, I strike out the application but make no orders as to costs.

**Record: Civil Side No 266 of 2004**

**An order authorising emergency lifesaving medical treatment to a child without parental consent, In Re**

*Parental authority – Consent to medical procedure*

A child was in an accident and required a blood transfusion to save his life. The child's parents were Jehovah's Witnesses. In accordance with their beliefs, the parents refused to consent to a blood transfusion. The Victoria Hospital Authority sought an order to authorise the transfusion.

**HELD:**

(i) Article 372(2) of the Civil Code of Seychelles requires parental authority to be exercised in the interest of the child;

(ii) Sections 4(d) and 4(e) of the Children Act states that children under the care of a person must be protected against illness, and not neglected in a way likely to cause the child unnecessary suffering or injury to health; and

(iii) The refusal of consent was a breach of both statutory obligations.

**Judgment:** Order granted.

**Legislation cited**
Children Act, ss 4(d), (e)
Civil Code of Seychelles, art 372(2)
Courts Act, s 6

**Ex Parte**
Ronny GOVINDEN for the applicant

**Order delivered on 17 April 2007 by:**

**KARUNAKARAN J:** Last night, Monday 16 April 2007, at around 23:00 hrs whilst I was at home, an urgent request was made over telephone by the Victoria Hospital Authority seeking an urgent order for a blood transfusion desperately required to save the life of a child, an eleven-year-old boy, Christopher Albest. The parents of the child being Jehovah's Witnesses with firm religious convictions allegedly refused to give consent for the child to receive any blood transfusion.

In fact, the consultant surgeon, who was treating the child for serious bodily injuries, observed the haemoglobin level of the child had reached a critical point due to severe blood loss. Although it was a life-threatening situation, the parents of the child were so adamant because of their religious beliefs and strongly refused to give their consent for the blood transfusion.

Hence, the surgeon had no other choice but to get an urgent court order so that he could carry out an immediate blood transfusion to the child dispensing with parental consent. Indeed, speed was of the essence. The request was so urgent and there was no time for me to give notice to any interested party nor was it possible to convene the court in the nocturnal hours. Obviously, any delay would have resulted in disastrous and irreversible consequences. The situation facing me as a judge was so urgent, unfortunate and the consequences so desperate that it was impracticable for me to attempt anything other than making an ex parte order over telephone authorising the surgeon to carry out the necessary blood transfusion without parental consent. I did so accordingly eschewing the procedural delays. I made a brief telephonic order in the interest of justice authorising the surgeon to proceed with the blood transfusion. Besides, I directed the Hospital Authority to file the necessary documents in the Registry of the Supreme Court the following morning, so that

the order made earlier over telephone could be formalised and documented for record purposes.

In pursuance of the directive, the documents are filed and the matter is now before the Court for consideration. Principal State Counsel Mr Govinden by a notice of motion dated 17 April 2007 accordingly moved the Court for an order, which would in effect confirm and ratify the telephonic order I made the previous night in this matter. In fact, the urgency and the circumstances surrounding this episode did not allow me time to give reasons before making the said order. I now set out the facts and explain why I made the order I did.

On the strength of the affidavit and documentary evidence adduced by the applicant in this matter, I find that the following facts have been established to my satisfaction:

(i) On 13 April 2007, Christopher Albest, a minor, an eleven-year old boy, hereinafter referred to as the "child", was involved in a motor vehicle accident and sustained serious bodily injuries.

(ii) The child was immediately admitted to Victoria Hospital and had to undergo urgent multiple surgeries on the same day.

(iii) As the child had lost a significant amount of blood from the injuries he sustained, an urgent blood transfusion was the only medical option available to the consultant surgeons/medical officers to save his life.

(iv) The parents of the child were followers of a particular religious denomination - Jehovah's Witnesses - who have resolutely decided to obey the Bible "Keep abstaining ... from blood” (Acts 15: 28, 29) with full realisation of the implication of

this position.

(v) Hence, the parents in exercise of their parental authority refused to give consent for the child to receive the necessary blood transfusion, having no regard to the very life, welfare and interest of the child.

(vi) Obviously, the said refusal of the parents constitutes a neglect and breach of their statutory obligation stipulated under the provisions of the Civil Code and the Children Act to wit:

Article 372(2) of the Civil Code reads thus:

> The authority of the parents shall be exercised in the interest of the child.

Section 4 (d) and (e) of the Children Act read thus:

> A person under an obligation, by virtue of the Civil Code or otherwise to maintain a child must ensure that the child is -
> *(d)* protected to the best of that person's ability against illness;
> *(e)* not neglected or exposed to danger, in the home or elsewhere, in a manner likely to cause the child unnecessary suffering or injury to health.

Furthermore, I find that it is an appropriate case, where the Court should exercise its equitable jurisdiction conferred by section 6 of the Courts Act and make an urgent ex parte order, which is absolutely necessary for the ends of justice.

In the light of the above and having regard to all the circumstances of the case, I hereby make an order confirming and ratifying the ex parte order made on 16 April 2007 at

around 23.00hrs over the telephone, whereby the Court authorised the surgeons/medical officers in charge to carry out the necessary blood transfusion to the child Christopher Albest dispensing with parental consent.

**Further Order**

A copy of the order made herein to be served on the following:

*(i)* Mr. Ronny James Govinden, Principal State Counsel, AG Office, National House;

*(ii)* The Principal Secretary, Ministry of Health, Victoria Hospital, Mont Fleuri;

*(iii)* Mr Claude Albest of Anse Royal, Mahe

**Record: Civil Side No 130 of 2007**

## Hodoul v Kannu's Shopping Centre

*Leases – Possession – Habere facias possessionem*

The appellant leased premises to the respondent. The respondent claims that the lease was extended orally, but the appellant averred that it was not extended. The respondent continued to pay rent. The appellant seeks a writ of possession.

**HELD:**

(i) The writ of possession is a special remedy available in urgent circumstances where no alternative legal remedy is available. The remedy will not be granted if the respondent raises substantial grounds that they have a bona fide, genuine, serious and valid defence. The applicant should then pursue a regular action to get a remedy. The remedy should not be used as an instrument to evade the necessity of pursuing a regular action;

(ii) The plaintiff has an alternative remedy; and

(iii) Earlier Acts are repealed by later, irreconcilable Acts, either by express words or by implication. General statutes will be presumed not to repeal specific statutes.

**Judgment:** For the respondent.

**Legislation cited**
Civil Code of Seychelles
Control of Rent and Tenancy Agreement Act, s 12
Land Registration Act

Seychelles Code of Civil Procedure, sch C
Seychelles Independence Order, ss 4(1) and 4(6)

**Foreign legislation noted**
French Code of Civil Procedure, arts 806–811
Rules of the Supreme Court of Mauritius, form 87

**Cases referred to**
*Ah-Tou v Dang Kow* (1987) SLR 117
*Barbe v Ernesta* (1986) SLR 69
*Cedric Petit v Christa Margitta Bonte* (unreported) CS 194/1998
*Delphinus Tristica Maritime S A v Villebrod* (1978) SLR 28
*Dhanjee & Ors v Habib Bank* (1989) SLR 169
*Pike v Vardin* (Seychelles Digest 1979–1996) 136

**Foreign cases noted**
*Daw v Metropolitan Board of Works* (1862) 12 CBNS 161
*Dobbs v Grand Junction Waterworks Co* (1883) 9 App Cas 49
*Ex parte St Sepulchre* (1873) LR 8 CP 185
*Kutner v Phillips* [1891] 2 QB 267
*Great Western Railway Co v Swindon & Cheltenham Extension Railway Co* (1884) 9 App Cas 787
*Lyn v Wyn* (1665) O Bridg 122
*Ragoonaden v Rampergass* 1956 MR 110
*Seward v Vera Cruz* (1884) 10 App Cas 59

Somasundaram RAJASUNDARAM for the applicant
Basil HOAREAU for the respondent

**Ruling delivered on 23 February 2007 by:**

**GASWAGA J:** In this application for a writ of habere facias possessionem, the respondent is the lessee of a commercial building known as Bel Etang standing on Parcel V7069 situated at Mont Fleuri, Mahe and owned by the applicant, lessor. The uncontested facts leading to this application and

Civil Suits no 301 of 2006 filed in this Court by the present applicant against the respondent and no 293 of 2006 where the respondent herein is the plaintiff and the applicant is the Defendant are as follows:

Pursuant to a lease deed dated 1/7/2004 the respondent took possession of the said premises and at the expiry of one year. By way of endorsement, that lease was extended for a further period of one year until 31/7/2006. In a letter dated 30/3/2006 the applicant terminated the lease. This led to a series of letters being exchanged.

The applicant on 8/8/2006 lodged the present application after the plaint and injunction application dated 3/8/2006 had been filed and served on her by the respondent herein.

The respondent maintained that they were not only in possession of the premises but also paying rent promptly and will continue occupation thereof since the applicant had orally allowed another extension of the lease till July 2007.

Hence, the respondents contend that they are statutory tenants and are covered by section 12 of the Control of Rent and Tenancy Agreement Act. Mr. Hoareau for the Applicant submitted that section 12 stands repealed (impliedly) while the lease herein was not tacitly renewed but terminated. Alternatively, he argues that the purported lease was not registered as required by the Land Registration Act and as such it is not a valid lease. Therefore, this leaves the respondent, who is considered to have no serious or valid defence, as a trespasser who should be ordered to quit and vacate the premises. In *Barbe v Ernesta* (1986) SLR 69 it was held that a formal lease or agreement was not a prerequisite to establish a lessor and lessee relationship under the Control of Rent and Tenancy Agreement Act otherwise the Act would have been so drafted and, further, that when the lease or agreement for a lease concerns a dwelling-house or business

premises no ejectment may be resorted to unless an application is first made to the Rent Board and an ejectment order obtained.

A wealth of authorities in this jurisdiction has settled the law, procedure and circumstances under which this writ can be granted. The Supreme Court of Seychelles derives its powers to determine, in a summary manner, applications for a writ habere facias possessionem, under articles 806-811 of the French Code of Civil Procedure. The practice of the Court generally is to determine application for such writ on affidavit of the petitioner and the respondent's affidavit inreply.

The Court may proceed on the basis of affidavits only and issue or refuse to issue the writ. Issue of a writ of habere facias possessionem (that you be caused to have possession) is a special remedy available to anyone who is dispossessed otherwise than by a process of law and it is available to a party whose need is of an urgent nature and who has no other equivalent legal remedy at his disposal. The Court may issue such writ, upon an application by the owner or the lessor of property. If the Court is satisfied that the respondent has raised substantial grounds indicating that he or she has a bona fide, genuine, serious and valid defence, the application shall be refused and the petitioner may pursue a regular action to obtain an alternative remedy. See *Delphinus Tristica Maritime SA v Villebrod* (1978) SLR 28 at 121*; Dhanjee v Habib Bank* (1989) SLR 169*; Ah-Tou Vs Dang Kow* (1987) SLR 117*.*

The case of *Ragoonaden v Rampergass* 1956 MR 110 elucidates the position in Mauritius in the following terms:

> The writ habere facias possessionem is, I apprehend, the old name for the writ of possession referred to in order 17 of the English Rules of the Supreme Court. I

> cannot find a reference to the writ in the body of our Rules of 1903, but in Schedule A there are three forms for it; 79, 86 and 87. Form 79 is for the enforcement of a judgment by default. Form 86 for the enforcement of a judgment of the Supreme Court, and form 87 for the enforcement of an award by the Master at a sale by licitation, the last being headed "(On judge's order)". The common factor in the concept of the writ as contemplated by the English Rules and our own is that it is a means of enforcing a judgment or order for possession, but it seems that this Court puts the remedy to a different and more extensive use.

Citing the above authority, Perera, J found the position in Seychelles to be similar to that of Mauritius. This was in the case of *Cedric Petit v Christa Margitta Bonte* (unreported) CS 194/1998. The learned Judge then went on to explain that although there is no statutory provision for an application for a writ habere facias possessionem, the framers of the Seychelles Code of Civil Procedure had thought it fit to prescribe a form to be used in executing the writ as form number 26 under Schedule C of that Code. This form which appears in the 1952, 1971 and 1991 Revised Editions of the Laws of Seychelles is the same as form 87 of the Rules of the Supreme Court of Mauritius. Though headed "writ habere facias possessionem" the form is worded in a manner to evict a person who prevents a purchaser of land at a sale by licitation from obtaining possession. But the Courts have further extended this writ to order persons who have no manner of right or title like trespassers or squatters to "quit, leave and vacate" immovable property.

The parties have opted to file affidavits and also make submissions. It emerged clearly from the record that the applicant has good title to the premises but did not however demonstrate before the Court that her need for these commercial premises was of an urgent nature. Her intention to use the unit occupied by the respondents for personal business was first made mention of only in the applicant's affidavit of 8/8/2006. All earlier communication, including the termination letter did not bring this to light. In these circumstances I cannot but say that the applicant has other equivalent legal remedies available at her disposal. She could pursue an order before the Rent Board or prosecute the civil suit already filed before the Supreme Court. The writ should, however, not be used as an instrument to evade the necessity of pursuing a regular action: see *Pike v Vardin* (The Seychelles Digest 1979-1996) 136.

At the centre of this application however lies the crucial question of section 12 of the Control of Rent and Tenancy Agreement Act (Act) being impliedly repealed by the Civil Code of Seychelles (Code), as asserted by Mr Hoareau, which I feel should be given special attention since it strikes directly at the root of the respondent's defence. The Code came into force on 1/1/1976 much later after the Control of Rent and Tenancy Agreement Ordinance that was enacted in 1952 to, among other things, deal specifically with the relationship between lessor and lessee in respect of control of rent and tenancy agreements. The Seychelles Independence Order (no 894/1976) that came into operation on 29/6/1976 upheld the existing laws to continue in force and thereafter the word 'Ordinance', wherever it appeared, was substituted with the word 'Act'. Section 4 (1) and (6) thereof provide thus -

> *(*1) Subject to the provisions of this section, the existing laws shall. notwithstanding the revocation of the existing Orders or the establishment of a Republic in Seychelles,

continue in force after the commencement of this Order as if they had been made in pursuance of this Order.

(2) …
(3) …
(4) …
(5) …
(6) For the purposes of this section, the expression "the existing laws" means all Ordinances, laws, or statutory instruments having effect as part of the law of Seychelles or any part thereof immediately before the commencement of this Order (including any Ordinance, law or statutory instrument made before the commencement of this Order and coming into operation on or after the commencement of the Order) which were made or had effect as if they were made in pursuance of the existing Orders.

It is, then, an elementary rule that an earlier Act must give way to a later, if the two cannot be reconciled - lex posterior derogat priori - and one Act may repeal another by express words or by implication; for it is enough if there be words which by necessary implication repeal it. But a repeal by implication is never to be favoured, and must not be imputed to the legislature without necessity (*Dobbs v Grand Junction Waterworks Co* (1883) 9 App Cas 49), or strong reason (per Lord Bramwell in *Great Western Railway Co v Swindon and Cheltenham Express Railway Co* (1884) 9 App Cas 787 at 809) to be shown by the party imputing it. It is only effected where the provisions of the later enactment are so inconsistent with, or repugnant to, those of the earlier that the two cannot stand together; unless the two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time a repeal cannot be implied; and special Acts

are not repealed by general Acts unless there be some express reference to the previous legislation, or a necessary inconsistency in the two Acts standing together (per AL Smith J in *Kutner v Phillips* [1891] 2 QB 267 at 272), which prevents the maxim generalia specialibus non derogant from being applied (per Willes J. in *Daw v Metropolitan Board of Works* (1862) 12 CBNS 161 at 178). For where there are general words in a later Act capable of reasonable application without being extended to subjects specially dealt with by earlier legislation, then, in the absence of an indication of a particular intention to that effect, the presumption is that the general words were not intended to repeal the earlier and special legislation (per Lord Selborne in *Seward v Vera Cruz* (1884) 10 App Cas 59 at 68), or to take away a particular privilege of a particular class of persons. (See Brooms Legal Maxims, 10th Edition, By R. H. Kersley p. 347 to 350)

It was held in *Lyn v Wyn* (1665) O Bridg 122 at 127 that "the law will not allow the exposition to revoke or alter by construction of general words any particular statute, where the words may have their proper operation without it". Lord Chancellor Westbury's holding in *Ex Parte St Sepulchre* (1873) LR 8 CP 185 at 189 too is instructive.

The Court said “if the particular Act gives itself the *complete rule on the subject, the expression of that rule would undoubtedly amount to an exception of the subject matter of the rule out of the general Act”* (emphasis added). Generalia specialibus non derogant is one of the leading and guiding maxims applied to legislative texts, which embody canons of construction applicable to any type of prose, and are mainly based on logic. This maxim, meaning 'general provisions do not derogate from particular ones' may save the particular or specific Acts in similar or related situations such as the one faced by this Court now. The rule can also apply to conflicting provisions in general Acts: see *Francis Bennion on Statute Law* 84**.** From the above discourse it cannot be said that the

framers of the Code particularly intended to repeal section 12 of the Act otherwise the Code would have made specific reference to the Act by expressly stating so.
I think the intention of the proceedings for the writ of habere facias possessionem and the relevant law was to provide an owner who has been dispossessed unlawfully with a quick executory measure or remedy against intruders with no colour of right whatsoever. At the same time Courts have extended the writ to protect the rights of tenants (lessees) especially against getting ejected from the landlord's property unfairly. The lengthy submissions of both counsel addressing several pertinent aspects is a clear testimony to the fact that there are a number of triable issues between the parties that would need more careful and detailed analysis than being entertained and determined in a summary manner. The respondent, who continues to enjoy possession, occupation and the use of the premises, contends that there is in place a subsisting lease that was verbally extended by the lessor but the applicant submits otherwise. An inquiry into the validity of the lease would be handled well in a trial proper. Moreover, the duty of the Court at this point is to look at the evidence before it and satisfy itself whether the respondent has a bona fide defence.

Even if one was to say that the lease in question was invalid and therefore never existed, the relationship between the parties, especially how the respondent came to take possession of the premises, cannot just be swept under the carpet and the respondent suddenly declared a trespasser or squatter. It should be recalled and, for that matter, stressed that payment of rent was not in issue at all as the applicant continued to receive the rent. Further, the *Barbe* case (supra) emphasised "[e]njoyment of the use and occupation i.e. there must be invitation or acceptance."

For these reasons, and after diligently considering the authorities cited by both counsel, I find myself unable to agree with the applicant that the respondent has no genuine or serious or bona fide defence. The application is accordingly refused.

**Record: Civil Side No 293 of 2006**

## William v Dogley

*Civil Code – Encroachment – Damages*

The defendants built structures on the plaintiffs' land. The defendants knew that the structures were an encroachment. The plaintiffs did not suffer inconvenience until they knew that the encroachment existed.

**HELD:**

(i) The defendant knew that structures were an encroachment. Therefore the defendant was not a 'tiers de bonne foi" under article 555 of the Civil Code of Seychelles; and

(ii) The encroachment caused the plaintiffs inconvenience and stress after the encroachment was discovered.

**Judgment** for the plaintiffs. Defendant to remove structures within two months. R1,000 damages awarded.

**Legislation cited**
Civil Code of Seychelles, art 555

**Cases referred to**
*Coelho v Collie* (1975) SLR 78
*Cupidon v Florentine* (1978) SLR 46
*Dubignon v German* (1985) SLR 78
*Elina Pirame v Jeanine Simeon* (unreported) CS 365/1995
*Lay-La Ltd v Lionel Adelaide* (unreported) CS 185/2000
*Samson v Mousbe* (1977) SLR 158

France BONTE for the plaintiffs
Antony DERJACQUES for the defendant

**Judgment delivered on 30 May 2007 by:**

**GASWAGA J:** The plaintiffs are co-owners and fiduciaries for themselves of parcels H 2554 and H 2555 at Quincy Village, Mahe which land is adjacent to parcel H 547 owned by the defendant. In this suit the plaintiffs pray the Court to order the defendant to remove the encroachment on their said land. In his statement of defence dated 11 October 2005, the defendant denies any encroachment thereof.

It is averred on behalf of the plaintiffs that the said encroachment is by way of concrete wash basins, a temporary shed and water tank and other facilities for washing clothes owned by the defendant and partly built, erected on, and/or standing over and above a portion of the plaintiffs' land. That portion is located between boundary beacons MB 303 and MC 81 while beacon QX 96 is right under and covered by the wash basins. See survey plans, exhibits P1 A and B drawn by Gerald Pragassen (PW2).

The defendant testified that he bought parcel H547 in 1975 and started living on it in 1976. That the structures complained of were constructed in 1977 before the plaintiffs acquired their land in around the year 1987 and subsequently asked him to remove the alleged encroachment in 2003. The water tank is used for storing water while under the outside kitchen or shed there are wash basins and concrete on which to clean fish and also prepare food for the dogs. He also stated that the water does not smell nor spill over to the plaintiffs' land and that his activities have not in any way inconvenienced or caused harm to the plaintiffs and they have never complained.

Later on during the hearing Mr Derjacques moved the Court and submitted that the constructions (encroachments) complained of were made by the defendant who honestly believed that portion of the land to be his and as such he

should be compensated. He relied on article 555 of the Civil Code and the authority of *Lay-La (Pty) Ltd v Lionel Adelaide* (unreported) CS 185/2000 which he said is on all fours with the facts of the case at hand.

Article 555 provides thus -

> When plants are planted, structures erected, works carried out by a third party with materials belonging to such party, the owner of land, subject to paragraph 4 of this article, shall be empowered either to retain their ownership or to compel the third party to remove them."

First of all, it is imperative to interpret this provision of the law before determining whether It is applicable to the present facts. I find that the concrete wash basins and other encroachments affixed on the land fall under the category of 'structures' referred to in article 555 and should therefore be considered as such while the words "third party" should be viewed conceptually to mean "any other party" that is other than the owner of the land. Normally, the phrase "third party" presupposes the existence of parties to an agreement or transaction and of one who is not a party to such an agreement or transaction but who claims a right or interest under the agreement. Article 555 would then apply notwithstanding that there are only two parties involved viz the owner of the land and the person who has erected a structure thereon with his own materials: see *Cupidon v Florentine*. (1978) SLR 46 and *Samson v Mousbe* (1977) SLR 158. But in these circumstances can the Defendant be assimilated to a "tiers de bonne foi" under Article 555?

In the case of *Elina Pirame v Jeanine Simeon* (unreported) CS 365/1995 the Court found that the defendant lived in a house and undertook substantial repairs, renovation and extension thereto in the bona fide, although erroneous belief

that she was renting the house from the landowner who consented or had granted her permission to do so. The defendant had an option to remove the constructions and additions that she had made to the house or leave them and claim compensation, for the value of the materials and costs of labour or the payment of an indemnity equivalent to the value given to the land. As for *Lay-La (Pty) Ltd v Lionel Adelaide* (supra), the Court ordered the defendant who had undertaken rebuilding works on his house constructed on the plaintiff's land without permission to vacate the said land and remove his house thereupon within six months and with costs. The defendant could not be assimilated to a "tiers de bonne foi" because the issue of compensation had not been pleaded. Further, in *Coelho v Collie* (1975) SLR 78, the defendant erected a building on the land of another in the bona fide although erroneous belief that her grandmother's joint proxies had the power to grant her permission to build on the land. The Court held that the defendant was assimilated to a "tiers de bonne foi". Additionally, in *Dubignon v Germain* (1985) SLR 78, the first defendant built his house on the plaintiff's land in the erroneous belief that he had permission to do so from the consent of the usufructory, which consent was not within the power of the usufructory to give. The Court held that the first defendant was assimilated to a "tiers de bonne foi.

With due respect it cannot be said that the facts in the *Lay-La* case are similar to those of the current one which is a clear case of encroachment as submitted by Mr Bonte. The facts of *Pirame* are those of a lessee who honestly believed he had permission of the landowner to effect repairs. In the *Lay-La* case the defendant's parents had been granted possession by the previous owners to construct the house on the said property. Further, the facts show that the defendant's mother renovated the said house wherein she granted the defendant permission to reside. Worth noting and of relevance to us is the Court's finding that the defendant had no permission to rebuild the house although he claimed he believed to have

such authority since there was no one for him to ask. The renovations started in the 1970s at a time when Mrs Fontaine, who could have granted any permission or authorisation, had already died in 1968. The facts show that the defendant and his parents originally had permission to build the house and subsequently effect repairs on it but in the case at hand there was no such or any permission granted at any one point in time to the dxefendant.

Further, unlike in the prior authorities where the element of 'erroneous belief' existed, in the pleadings and evidence of the present case the defendant was aware of and alive to the encroachment as no permission whatsoever had been sought and/or obtained for him to erect any structures on the plaintiffs' land. It was deposed by Mr Pragassen and corroborated by both PW1 and PW2 as was also clearly stated in the surveyor's report (exhibit (P I) dated 2/2/2004) that during and after the field (site) visit by the surveyor, and in the presence of all the parties Mr Pragassen pointed out the alleged encroachment to the defendant. Subsequently, letters dated 21/10/2004 and 25/10/2004 to that effect and warning of an imminent Court action in case of non-compliance were sent to the defendant by the plaintiffs' lawyer. Indeed a plaint was lodged to which the defendant filed a statement of defence dated 11/10/2005 denying any encroachment.

This evidence shows that the defendant was aware of the encroachment as brought to his notice well in time before the filing of the suit. There is nothing to suggest any 'erroneous belief' for the encroachment like in the cases cited. This being so, I find that the defendant cannot be assimilated to a "tiers de bonne foi" under article 555 of the civil code.

The following orders are sought in the plaint:-

1. To remove the encroachment on the plaintiffs'

portion of land,
2. To award a sum of R25,000 as moral damages
3. And such other reliefs as this Honourable Court deems fit and proper.

Article 55 (2) of the Civil Code further states that:-

> If the owner of the property demands the removal of the structures, plants and works, such removal shall be at the expense of the third party without any right of compensation; the third party may further be ordered to pay damages for any damage sustained by the owner of land.

The plaintiffs noticed the encroachment not long before 2004 when the surveyor was called upon to relocate the boundaries and beacons. The first plaintiff stated in cross-examination that her house is located far away from the said encroachment and that although that portion of land is not used now she intends, in the near future, to construct a perimeter wall around her said property to run through the encroachment. Further, that that portion has been given to her daughter whose loan to construct a house thereon has now been approved. Obviously the plaintiffs could not have suffered any inconvenience before knowing that the encroachment existed. Mr Bonte submitted that encroachment per se is actionable. However the plaintiffs have not demonstrated how the encroachment inconvenienced them to warrant or justify the moral damages of R25,000 claimed.

It is however noted that prior to coming to Court the plaintiffs laboured to communicate to and convince the defendant to ameliorate the encroachment in vain. More stress was suffered when services of a lawyer had to be engaged and paid for to prepare and file this case. I find a sum of R1,000 to be suitable as moral damages.

Judgment is accordingly entered in favour of the plaintiffs. The defendant is to remove the structures forming the encroachment herein above within a period of two (2) months from the date hereof at his own expense. The plaintiff is also awarded moral damages of R1,000 and costs of the suit.

**Record: Civil Side No 61 of 2005**

## Dodin v Barbier

*Personal injury – Unlawful detention – Damages*

The plaintiff was shot in the knee by the defendants. He was hospitalised with a police sentry, and then detained at the police station for four days.

**HELD:**

(i) The plaintiff was hospitalised for necessary medical treatment. The presence of a police sentry was not enough to constitute unlawful detention; and

(ii) Damages should be calculated, not on a tabulated scale, but by taking all the circumstances into consideration.

**Judgment:** For the plaintiff. Damages awarded R20,000 for 4 days unlawful detention, R30,000 for personal injury.

**Cases referred to**
*Cesar Marie v Attorney-General* (unreported) CS 424/1998
*Eric Deriacques v Commissioner of Police* (unreported) SCA 17/1995
*Gerard Canaya v Government of Seychelles* (unreported) CS 42/1999
*Giovanni Marimba v Superintendent of Prisons* (unreported) CS 21/2004 (unreported)
*Kirt Telemaque v Jean Vardin and Government of Seychelles* (unreported) CS 332/1999

Lucie POOL standing on behalf of
Alexia ANTAO for the plaintiff
Elvis CHETTY for the defendants (Present)

**Judgment delivered on 28 September 2007 by:**

**PERERA J:** The plaintiff sues the first and second defendants, who are members of the Police Force, and the third defendant, the Government of Seychelles in its vicarious capacity, for damages arising from personal injuries caused to him and for an alleged unlawful detention for 11 days. The defendants, who were duly served with notice of action defaulted appearance on 18 October 2005, and consequently on the application of counsel for the plaintiff, the case was fixed for ex parte hearing on 11 February 2006. The defendants were informed of the date of the ex parte hearing. However, as there was default of appearance once again, the Court proceeded to hear evidence adduced by the plaintiff.

The plaintiff testified that on 6 January 2005 at around 10.00 am he was seated in an old house at English River, when the first and second defendants shot at the house without asking him and others with him what they were doing. Consequently he was shot in the knee. He stated that while he was warded in hospital for 5 days, he was guarded by police officers. Later, on being discharged he was detained at the Police Station for 6 days. He further stated that he was not charged for committing any offence, and that hence his detention for 11 days was illegal.

Dr Vijay Kumar Gupta produced a medical report (P1). According to this report, the plaintiff was admitted to the Casualty Unit on 6 January 2005 with a gun shot injury on his right knee. There was an entry and exit wound of 1 cm. The bullet was not embedded, and there was no fracture. He was admitted to the D'offay Ward, and the wound was explored and treated in the Operating Theatre. He was discharged on 13 January 2005.

Questioned by counsel for the plaintiff, the doctor stated -

Q. Did you notice if there were any police officers who accompanied him?

A. Yes, I remember, he was a prisoner.

As regards the claim for pain and suffering, hospitalisation and surgery, the claim for R150,000 is exaggerated. In the case of *Kirt Telemaque v Jean Vardin and Government of Seychelles* (unreported) CS 332/1999 for a similar entry and exit bullet wound, this Court awarded a sum of R45,000 for pain and suffering. In that case, an x- ray of the femur showed bone splinters in the soft tissue with an apparent fracture in the lower end of the femur, above the femeral condyles.

In the present case however, according to the medical report, there were no fractures. Hence I awarded a sum of R30,000 to the plaintiff under that head.

The plaintiff also claims R1,320,000 for 11 days illegal detention at the rate of R5000 per hour. The evidence discloses that the plaintiff was under police detention, on suspicion for committing an unlawful offence. Hence even if he was guarded by a police sentry in hospital from 6 January 2005 to 13 January 2005, hospitalisation was primarily for necessary medical treatment. The placing of a sentry in such circumstances could not be considered as "illegal detention".

In the absence of evidence to the contrary, the Court accepts that the plaintiff was detained in custody at the Police Station for 4 days upon being discharged from Hospital. Counsel for the plaintiff relied heavily on the case of *Eric Deriacques v Commissioner of Police* (unreported) SCA 17/1995. In that case, the Supreme Court (Bwana J) dismissed the claim of the plaintiff for illegal detention for 26 hours.

The Court of Appeal held that the detention became illegal after the lapse of 24 hours. That Court held inter alia that -

> The appellate courts are loathe to upset the findings of fact of trial judges. However, in the present case, there are many disturbing features and we feel constrained to reverse the findings of the trial judge. The appeal is allowed, and we assess the damages at R10000.

There is no specific quantification of that award on the basis of R5000 per hour. In the case of *Cesar Marie v. Attorney General* (unreported) CS 424/1998 the plaintiff was illegally detained for 1 hour. I awarded him R15,000 as damages, taking all other circumstances into consideration.

In the case of *Gerard Canaya v Government of Seychelles* (unreported) CS 42/1999, the Court awarded R5000 for illegal detention for 18 hours. More recently in the case of *Giovanni Marimba v Superintendent of Prisons* (unreported) CS 21/ 2004, decided on 16 July 2007, the plaintiff inter alia claimed R75,000 for illegal detention for 75 hours at the rate of R1000 per hour. Counsel in that case relied on the awards in *Eric Deriacques* (supra) and *Cesar Marie* (supra) as authority for awarding damages by the hour. In that case, I held that the Court does not act on any tabulated scale of compensation, but on the facts and circumstances of each case. I also held that the claim for moral damages based on R1000 per hour for 75 hours was contrary to delictual principles. On the basis of these findings, I award a sum of R20,000 for the illegal detention for 4 days.

Accordingly, judgment is entered in favour of the plaintiff in a total sum of R50,000 together with interest and costs.

**Record: Civil Side No 222 of 2005**

**Krishnamart & Company v Opportunity International**

*Civil procedure - Affidavits*

The applicant filed a motion for incidental demands. The accompanying affidavit was signed by Ms Pool, notary, but stamped with her attorney-at-law stamp. Ms Pool is a well-known attorney and notary public.

**HELD:**

(i) Affidavits must be sworn before a Judge, Magistrate, Justice of the Peace, Notary, or Registrar, in that capacity;

(ii) There must be a clear indication on the face of the affidavit to the effect that the facts adduced have in fact been sworn by the deponent and before a person authorised by law to attest or commission such documents, otherwise it loses its legal cogency. A legal document must speak for itself without requiring any follow up or explanation; and

(iii) The fact that a person who signed the document is a well-known notary public does not remedy the fact that she attested to the document in her capacity as an attorney and not as a notary.

**Judgment:** For the respondent

**Legislation cited**
Seychelles Code of Civil Procedure, ss 121, 122, 171

**Cases referred to**

*Mrs Mersia Chetty v Krishna Levy Chetty* (unreported) CS 417/2006
*Paul Chow v The Commissioner of Elections* (unreported) CC 3/2007
*United Opposition v Attorney-General* (unreported) CC 8/1995

Charles LUCAS for the applicant/defendant
Francis CHANG-SAM for the respondent/plaintiff

**Ruling delivered on 20 July 2007 by:**

**GASWAGA J:** A notice of motion dated 29/01/2007 was filed by the defendant, now applicant, for the orders that:

*a)* The cause of action for failure to comply with the Court's orders for the respondent to pay costs of the petition for a new trial filed by the applicant at the rate of R4,310 to be dismissed.

*b)* The R500,000 paid by the applicant to respondent's counsel in part-satisfaction of the first judgment which was set aside is refunded.

When the same came up for hearing Mr Chang-Sam, who was appearing for the plaintiff, now respondent, raised an objection that the said application does not comply with the requirements of sections 121 and 122 of the Civil Procedure Code and therefore no proper motion is before the Court.

Although such a motion for incidental demands must be accompanied by an affidavit, the present application has what he called a 'document' attached to it titled 'Affidavit' and signed at the bottom by Ms Lucy Pool as an attorney-at-law instead of a notary public or somebody qualified and authorised to attest.

The relevant sections of the law provide thus:

> 121. Either party of a suit may, in the course of such suit, apply to the Court by way of motion to make an incidental demand."
>
> 122. The motion shall be accompanied by an affidavit of the facts in support thereof and shall be served upon the adverse party.

The relevant part of the document 'Affidavit' is reproduced below:

> (Signature of P. K. Pillay)
> DEPONENT
>
> Sworn Before Me
> This 29th day of January, 2007.
> At Victoria, Mahe, Seychelles.
>
> (Signature and stamp of Lucie Pool Attorney-At-Law)

Mr Charles Lucas submitted that the stamping of the affidavit by Ms Lucy Pool with her attorney-at-law stamp instead of the notarial stamp was a human error which he conceded and at the same time regretted. He further stated that the said error was not fatal per se as Ms Pool was in a position to rectify it after filing an affidavit or offering an explanation on oath to the Court. The Court was also invited to take note of the fact that Ms Pool is a notary public well-known to all agencies, authorities, and ministries of the Republic of Seychelles and the judiciary and she always signs documents in that capacity some of which are filed and accepted in Court.

In relation to affidavits, Mr Lucas cited the authority of *Paul*

*Chow v The Commissioner of Elections* (unreported) CC 3/ 2007 wherein the Constitutional Court allowed the petitioner's affidavit despite certain flaws in it. He then concluded that it was the signature of Ms Pool and not the stamp that is proof of authenticity of her status as a notary and since the trial Judge can identify her signature then it ought to be accepted as a notary's signature irrespective of the erroneous stamping.

The law regarding commissioning of affidavits is enshrined in section 171 of the Civil Procedure Code which reads as follows:

> 171. Affidavits may be sworn in Seychelles-
>
> (a) Before a Judge, a Magistrate, a Justice of the Peace, a Notary or the Registrar; and
>
> (b) In any cause or matter, in addition to those mentioned in paragraph (a) before any person specially appointed for the purpose by the Court.

Section 122 (supra) provides for an 'affidavit of fact' in support of the motion. This affidavit of fact is actually evidence given on oath whose purpose is to obviate the necessity for the Court to hear oral evidence (on oath). Therefore, there must be a clear indication on the face of the affidavit to the effect that the facts adduced have in fact been sworn to by the deponent and before a person authorised by law to attest or commission such documents, otherwise it loses its legal cogency. It should be stressed that a legal document must speak for itself without requiring any follow up or explanation from its Commissioner (notary), author or deponent. Even in a small jurisdiction like ours where everybody knows everyone, it is immaterial whether the Judge or the reader encountering such document knows the status of its Commissioner or the circumstances under which it was prepared.

Suffice it to say that although in Seychelles the functions of a notary public and attorney-at-law can be fused and embedded in one and the same person, there is a clear and distinct demarcation when it comes to executing the two independent roles. Indeed there is no doubt that Ms Pool is both an attorney-at-law and a notary public and has signed various court documents in the different capacities, each capacity with a distinct role to play.

Regarding the affidavit or document in question, she signed it in her capacity as attorney-at-law and proceeded to stamp it as such. It would be unfair for the Court to take on the onerous duty of speculating or venturing to look into the intention of Ms Pool when she signed the affidavit in that capacity other than that of notary public. That document has not passed the above test since its purported commissioner is precluded by section 171 (supra) and as such cannot qualify as an affidavit of fact envisaged in section 122 (supra). The applicant and his counsel ought to have acted with more diligence and responsibility by at least perusing the pleadings for possible defects before filing the same in Court.

In my view no amount of explanation can remedy the situation apart from rectifying it by way of amendment or filing a new affidavit.

Unlike in the present case, in *Paul Chow v The Commissioner of Elections* and *United Opposition v Attorney-General* (unreported) CC 8/1995, the Constitutional Court was prepared to put up with the defects in the affidavits on the reasoning that

> ... petitions seeking redress of infringements of fundamental rights and contraventions of provisions of the constitution should not generally be defeated by procedural deficiencies, unless such deficiencies are fundamentally fatal to the maintenance of such

petitions.

Further, the former case was of a very urgent and sensitive nature calling for an immediate solution. It involved a challenge of the constitutionality of an impending general election which affects the whole country.

In the case of *Mrs Mersia Chetty v Krishna Levy Chetty* (unreported) CS 417/2006 I stated that -

> ....merely not being supported by an affidavit is not enough reason to warrant a dismissal of a motion especially where the grounds to be argued require no evidence and are, for instance, purely matters of law. A motion drawn in the prescribed form and in general terms sufficiently setting out the grounds on which it is made would suffice where no evidence is required. (see *Odongokara v Kamanda* (1968) EA 210).

This is an application for incidental demands which, by their very nature and as seen above would require adducing of evidence. There being no accompanying affidavit this application must be found incompetent and dismissed as prayed by Mr. Chang-Sam but without costs. Unless for academic purposes this Court sees no reason in dealing with the other matters raised in the defective application.

**Record: Civil Side No 111 of 2003**

## Labonte v Government of Seychelles

*Civil Code - Negligence – Vicarious liability – Heirs' capacity to sue*

A psychiatric in-patient was confined in a small room. The duty nurse was to administer an injection. Three security guards, two police officers and an armed army officer came to assist the nurse. As the door was opened the patient escaped and climbed out a window onto a ledge. The hospital staff put mattresses below the ledge and tried to coax the patient off the ledge. The patient fell off the ledge and was badly injured. He died of complications 70 days later. The relatives sued for moral damages.

**HELD:**

(i) Heirs can sue on behalf of the deceased for prejudice caused to the deceased before death. They cannot sue on behalf of the deceased if the prejudicial act and the death were concomitant;

(ii) Heirs can also sue in their own capacity;

(iii) The security guards were professional security guards. The requisite standard of care is that of an ordinary skilled man exercising and professing to have that special skill;

(iv) If the security guards had acted with due diligence with the required standard of professional skill and competence, the patient would not have escaped; and

**Judgment:** For the plaintiff. Damages awarded R240,000.

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

**Cases referred to**
*Hardie v Costain Civil Engineering Ltd* (1972) SLR 74
*Pon Waye v Chetty* (1971) SLR 209
*Dubois v Albert* (1988) SLR 189
*De Sylva v D'Offay* (1970) SLR 99

**Foreign cases noted**
*Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118

Bernard GEORGES for the plaintiffs
David ESPARON for the defendant

[Appeal by the defendant was allowed on 14 December 2007 in CA 24/2007]

**Judgment delivered on 9 July 2007 by:**

**KARUNAKARAN J:** The plaintiffs have brought this action against the defendant, namely the Government of Seychelles, based on vicarious liability. In this action, they claim moral damages in the sum of R550,000 for pain, suffering and loss, which the plaintiff sustained because of a "fault" allegedly committed by the employees of the defendant through its Ministry of Health.

The alleged fault emanated from an act of negligence of the workers employed by the defendant at the Victoria Central Hospital, in that, they allowed through negligence, a psychiatric inpatient (now deceased) to jump out of a window that resulted in his death. Indeed, the plaintiffs claim damages in this matter in their own capacity as well as heirs, legal representatives and ayants droit of the deceased.

**The facts**

The first and second plaintiffs are the father and mother, whereas the third to ninth plaintiffs are brothers of one Alex Labonte (now deceased), hereinafter called the deceased, who was born on 13 July 1981. In 2004, the deceased was a young man and was 23. Since birth, he had been living with his parents and brothers in a joint family. He was very close and affectionate to his parents and brothers, with some special affinity particularly towards one of his brother Hansel Labonte (PW2). However, all members of his family loved him very much.

The deceased was sometime working for Laxmambai, a construction company and used to share his earnings with his parents.

In early 2002, he developed some psychiatric disorder; presumably due to substance abuse: vide medical report dated 30 September 2004 in exhibit P2. In the middle of 2002, he had disturbed sleep, showed odd behaviour, at times became abusive, aggressive, and even turned violent. This caused concern to all members of his family.

On 24 June 2002, he was first taken to Victoria Hospital for medical examination and treatment. His mental status examination revealed that he was having flights of fancy, delusions of grandeur and increased psychomotor activity. He was admitted to the Psychiatric Ward and given medical treatment. However, he was not completely cured of his mental illness. He exhibited the same problem from time to time. He had been intermittently on treatment since 24 June 2002 for the recurrence of similar problems.

On 26 May 2004, he was hospitalised and kept in the Psychiatric Ward. In fact, he was admitted that day with a history of having odd behaviour, was abusive, and tried to kill

a dog that morning. He was very disturbed and unpredictable. He managed to escape from hospital on 28 May 2004.

However, he was brought back to hospital by his father on 31 May 2004. He was subsequently discharged from hospital as the father informed them that the deceased was manageable at home. Again, at one stage, he had been admitted to Les Cannelles Mental Hospital for safe custody and treatment. The parents and brothers used to make regular visits to see the deceased in the Psychiatric Unit at the Victoria Hospital as well as at the Les Cannelles Hospital. Subsequently, he was discharged but continued treatment as an outpatient while he was staying with his parents and brothers at home.

Again, on 14 May 2004 the deceased showed the recurrence of the same disorder, as he was not taking the treatment. He had disturbed sleep, became abusive and more so disturbed others. He was immediately taken to hospital. On that day, whilst the nurse was talking to him, the deceased managed to escape from her custody and was never brought back to hospital by anyone. Therefore, the hospital authorities treated the said "escape" as discharge (vide exhibit P2).

Again, on 7 June 2004, the police arrested the deceased for disturbing others, abusing cannabis and for exhibiting abnormal and aggressive behaviour. The police obtained a Court order for medical examination and confinement. Consequently, the deceased was admitted to the Psychiatric Unit of the Victoria Hospital for care, custody and treatment. The deceased was again having flights of fancy, delusions of grandeur, increased psychomotor activity, and was disoriented as to time, place and person. He showed elated mood and unpredictable behaviour. He was given treatment and kept in confinement because of his escaping tendency. He was still excited, agitated, violent, over talkative, banging the door on and off, uncooperative and throwing water on himself. Hence, he was kept in confinement on 8 and 9 June

2004.

On 10 June 2004, an unfortunate event happened. The deceased was kept as usual in the confinement room under lock and key. This special room was meant only to keep the patients who are very aggressive and uncontrollable. This is situated in the Psychiatric Ward on the ground floor. It is a small square room with four walls, a side window, a ceiling and only a mattress on the floor. In normal circumstances, the patient who is kept in that room is given water every fifteen minutes and checked.

On the door, there is a square - open area - like a small window, which one can open and close in order to look at the patient inside and check his condition. The deceased was placed in that room for his own safety and security and for the safety of the staff because he was threatening them.

At 12.30 pm that day, the deceased suddenly became aggressive; started shouting, swearing at the staff and banging on the door. Later on he settled for a while. But again, he became aggressive, started shouting and was banging on the door. The duty nurse Ms Florence Baccari (DW2) was supposed to give an injection to the deceased for sedation that night. As the deceased was aggressive and had already shown a propensity to escape, she had to get assistance from police and other security guards to prevent him from escaping when she opened the room to give him the injection. Ms Amy Thelermont (DW1), the chief nursing officer in charge that night, had also advised her to get police assistance before she attempted to give any injection to the deceased. Hence, DW2 called the police for assistance.

It was around 9.30 pm. Two police officers and an armed army officer came to assist the nurse. Already there were three security guards at the hospital for assistance. In all there were six strong men to assist the nurse so that they

could open the confinement room, physically immobilise the deceased and then the nurse would be able to give the sedative injection.

Did this materialise? The evidence given by the nurse, Ms. Florence Baccari (DW2) is crucial in this respect, which shows thus:

> The door of the confinement room is about two and a half feet wide. Its hinges are on the left. The handle on the right and there is a bolt on the top. The security guard was opening the door, so I was on the right. And I was behind him with the syringe in my pocket. There were two police officers one on my left another on my right side. The army officer was to the right of the security officer. As the door would open, the first person to see inside was the army officer because he was where the door would open.
>
> As the door was opened I told the deceased "Alex, it is time for your injection". He refused and said that he was not going to take any injection. Then he tried to come out of the room and the security guard tried to push him back inside. The police officers tried to grab him. However, Alex managed to break free. All the officers were running after him. I was bit disappointed that they had allowed Alex to run away. And went to the corridor. The security, police officers and the army officer all were running after him. He ran to the other block of the hospital building.

According to eyewitness DW1, the deceased ran into the maternity ward, which is on the 2nd floor. He went into one of the cubicles where there was a lady with a baby. She screamed. He opened the window, broke the window open and went outside onto a small concrete and stood there. They tried to sweet-talk him to come down but he walked to the

edge of that piece of concrete. The chief nurse (DWI) called the Fire Brigade. They arrived at the scene with about eight men and a ladder. DW1 got the security guard to bring mattresses and put them under where the deceased was standing. They brought about eight mattresses. At the same time, they were trying to talk to him; but he did not answer. He asked for water. One of the staff gave him water. He was standing on the edge. DW1, went down and got the telephone number of his father and told him what was happening and asked him to come down to hospital. But, his father said that even if he talked to Alex, he would not listen. Hence, he declined to come down to the hospital.

The evidence of the chief nursing officer in charge (DW1) in this respect reads thus:

> So we tried whatever we could. Alex did not come down. He just lay down on that piece of concrete. It was a very narrow piece of concrete. He was there for some time. Then I think at some point he fell asleep and then he fell down from there. He fell half on the mattresses and half on the rough ground. He hit all his left side. People came with a stretcher to take him to casualty. When we took him to casualty he was not conscious. We ran with him to ICU.
>
> I phoned his father again and told him Alex had fallen down and is in ICU. He did not answer. We did everything we could for Alex.

Despite intensive medical treatments at the Victoria Hospital, the deceased did not regain consciousness. After a month, on 9 July 2004, he was transferred to North East Point Hospital. At that time, he was unconscious responding to only painful stimuli - as per medical report exhibit P2 - with the following diagnosis:

- Fracture in right frontal sinus wall
- Fracture of the left maxillary sinus wall
- Fracture of the humerus of the left arm
- Fracture of the pelvis left side

At the North East Point Hospital, he was receiving palliative care, physiotherapy treatment and occupational therapy attention. However, on 20 August 2004, his general condition continued worsening and he died due to complications of the Immobility Syndrome.

In view of the above, the plaintiffs contend that the omission of the employees of the defendant in allowing the deceased, who was in their care and custody, to evade them or their omission to prevent his evasion, or both, constitute a "fault" for which the defendant is vicariously liable to them. By reason of the death of the said deceased the plaintiffs have been caused pain, suffering and loss, which they estimate at R550,000 made up of as follows -

- R100,000 for each of the first and second plaintiffs for the loss of a child

- R50, 000 for each of the third to ninth plaintiffs for the loss of a brother

Hence, the plaintiffs claim that the defendant is liable in damages in the total sum of R550,000 for their pain, suffering and loss.

**The defence case**

On the other side, the defendant denies liability. The contention of the defendant is in essence that the deceased died because of his own acts and doings. The deceased evaded the authorities of his own doings and the defendant took all reasonable precautions as a reasonable prudent person in a similar situation would have taken to prevent his

escape. Hence, the defendant avers that it is not liable to pay any damages to the plaintiffs. However, the defendant does not dispute the fact that it owns and manages the Victoria Hospital and employs all staff working therein. It also does not dispute the fact that the deceased had been admitted to the Psychiatric Ward of the hospital and escaped whilst he was in their care and custody. Its only contention is that it did not commit any fault in law, as it took all the reasonable precautions tjat a reasonable prudent person in a similar situation would have taken to prevent his escape.

To establish this defence the defendant called two witnesses, DWI and DW2 to testify as to the circumstances which led to the escape, fall and to the death of the deceased. In any event, according to the submission of the State Counsel, having regard to all the circumstances of the case the quantum of damages claimed by the plaintiffs is excessive.

**Does it involve any medical negligence or any other professional negligence?**

Before one proceeds to analyse the evidence, it is important to identify and ascertain the law applicable to the case on hand. It is settled in case law that the heirs of a deceased person who died as a result of the negligence of the defendant are entitled to claim in that capacity damages for the prejudice, material or moral, suffered by the deceased before and until his death and resulting from a tortious act before his death, provided he had not renounced his claim. However, when the death is concomitant with the injuries resulting from the tortious act, heirs cannot claim in that capacity, and may only claim in their own capacity: vide *De Sylva v D'Offay* (1970) SLR 99; *Pon Waye v Chetty* (1971) SLR 209; *Hardie v Costain Civil Engineering Ltd* (1972) SLR 74; *Dubois v Albert* (1988) SLR 189.
Be that as it may. Although the incident which gave rise to the cause of action in this matter occurred on the hospital

premises and apparently involved medical staff, like nurses of the hospital, this case admittedly, does not attract medical negligence.

In any event, it is also not pleaded as such in the plaint. As I see it, the police officers, the army officer and the security guards involved in the entire episode, had one thing in common. They were all security personnel engaged by the defendant for a specific service of safely securing the corpus and effectively arresting the movement of the patient (the deceased) so that the nurse on duty would be able to give the necessary injection to him at the material time and place.

Although the security personnel of these categories are employed by different specialised agencies, like the Police Force, National Guard, Private Security Companies, SPDF and the like, they are all indeed, service providers. They obviously provide professional security services to the public or to other government agencies, ministries, departments, private people, or companies either by virtue of their contract of employment or by virtue of some statutory obligation or by any other private contract with their clients.

Whatever may be the case, whoever they may serve, whether for a fee or not, as long as they expressly or impliedly agree to provide their professional services on security related matters, they are under an obligation to provide that service to the required standard using their special skill and competence. Needless to say, any professional service for that matter requires and involves the use of special skill, knowledge and competence.

Obviously, the members of the police force and other disciplinary forces are trained only to acquire that special skill and competence before they are employed for that job. The service provided by the security guard or security officer, also similarly involves the use of such special skill and

competence. In the circumstances, I find on a point of law, the standard of care required of the security personnel engaged in the task of preventing the escape of the deceased from the confinement room must conform at least to the normal standards of care expected of persons in that particular profession.

Hence, I hold that the test required to be applied to determine the standard of care in this matter, is that of a skilled professional, not that of the man on the Clapham omnibus. In other words, the relevant test is not that of the ordinary man in the street or Clapham or that of a prudent man, as submitted by State Counsel but that of a skilled professional.

Admittedly, this action is based on "fault". Article 1382(2) of the Civil Code 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**

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 I have formulated supra, in respect of the security personnel and their standard of care, which they ought to exercise in the performance of their professional duty or service.

As I see it, this is the test which ought to be applied to the case in 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 plaintiffs is that the following two material facts constitute

"negligence" on the part of the defendant and which amounts to a fault in law. They are:

(i) The employees of the defendant allowed the deceased, a psychiatric patient, to evade and go out of their care, custody and control and to jump out of a window that resulted in his death; and/or

(ii) The security personnel, as the employees of the defendant omitted or failed to take the necessary duty of care and attention to the required standard to prevent the deceased from evasion.

As regards the first limb of the allegation as to the act of "allowing the deceased to evade", obviously, there is not one iota of evidence on record to show that the defendant employees deliberately allowed the deceased to escape from the confinement room. However, the second limb of the allegation needs careful consideration in the light of the entire circumstances of the case.

In fact, the police officers, the armed army officer and the security guards, in all six strong security personnel are, in my view, "skilled professionals". They constituted the security team that was engaged by the defendant for a specific service of safely securing the corpus and effectively arresting the movement of the patient (the deceased) so that the nurse on duty would be able to give the necessary injection to him at the material time and place. When they provide such service, they are legitimately expected to use their special skill and competence to the standard of a "skilled professional".

Obviously, if six of those strong men had properly positioned themselves and had acted with due diligence with the required standard of their professional skill and competence as security

personnel the deceased could not have escaped from the small room where he had been confined.

Viewing the evidence hereinbefore rehearsed, and in the light of all the circumstances I find that the said security personnel were the employees or agents of the defendant at the material time. They obviously omitted to take or exercise the necessary duty of care and attention to the required standard of any skilled professional of their class; when they were engaged to provide a specialised service at the material time and place. As a result, they failed to prevent the deceased from evasion.

In my view, the failure on the part of the security personnel in this respect constitutes a fault in terms of article 1382 of the Civil Code. The defendant is therefore vicariously liable to compensate the defendants for the consequential damages. In passing, I should mention here that it is reasonably foreseeable that a patient by reason of his mental or emotional illness may attempt to injure himself or even attempt to commit suicide, those in charge of his care owe a duty to safeguard him from his self-damaging potential. This duty contemplates the reasonably foreseeable occurrence of self-inflicted injury regardless of whether it is the product of the patient's volitional or even negligent act. The degree of care, the competency and foreseeablilty of skilled professionals in this respect is required to be higher than that of a prudent man, who commits an act in the special circumstances, in which the damage was caused.

Moving on to the assessment of quantum in this case, I find that the death was not concomitant and the deceased died about 70 days after sustaining the serious bodily injuries. During that period, he had been unconscious but responding to only painful stimuli: vide exhibit P2.
In the circumstances, the deceased obviously must have suffered considerable pain and suffering throughout that

period. I am satisfied that the deceased formed part of a very close household and that the parents and brothers must have suffered much grief and shock at his sudden and untimely death. Needless to say, the first and second plaintiffs, being parents of the deceased, must have gone through a lot of pain because of the unexpected death of their young son and irreparable loss of their loved one. Likewise, the brothers of the deceased should also have gone through the same.

In my final analysis, I take into account that:

(i) the plaintiffs in their capacity as the heirs of the deceased are entitled to their respective share from damages payable to the deceased for the pain and prejudice suffered by the deceased himself before his death; and
(ii) the plaintiffs are entitled to moral damages in their own right resulting from the death of the deceased.

Having regard to all the circumstances of the case, I award the following covering both aspects of their entitlement to moral damages

- R50, 000 for each of the first and second plaintiffs namely, the parents for the loss of their son; and

- R20,000 for each of the third to ninth plaintiffs, namely the siblings for the loss of their brother

In the final analysis, therefore, I enter judgment for the plaintiffs and against the defendant in the total sum of R240,000 and with costs.

**Record: Civil Side No 46 of 2005**

## Mahoune v Attorney-General

*Limitation – Public Officers (Protection) Act – Constitution*

The plaintiff injured her knee while still a minor. The defendant's employees failed to properly diagnose and treat her, so she was taken to Germany to remedy her condition. Her guardian filed an action for damages against the defendant outside the six months prescription period. The plaintiff claimed the Public Officers (Protection) Act was unconstitutional.

**HELD:**

(i) Section 3 of the Public Officers (Protection) Act does not contravene the Constitution; and

(ii) The plaintiff has a remedy against her guardian.

**Judgment:** For the Defendant.

**Legislation cited**
Public Officers (Protection) Act, s 3
Constitution of Seychelles, arts 27, 29, 30, 46
Civil Code of Seychelles, art 2278

**Cases referred to**
*Gervais Amiee v Philip Simeon* (unreported) CC 4/1997

Lucy POOL for the plaintiff
David ESPARON for the defendant

**Ruling delivered on 24 September 2007 by:**

**GASWAGA J:** A plea in limine litis has been raised by Mr

Esparon to the effect that the plaintiff's claim is prescribed by Section 3 of the Public Officers (Protection) Act (hereinafter referred to as the Act) which stipulates a shorter period of six months in respect of actions against public officers.

Ms Pool, who represents the plaintiff, submitted that that Act does not protect doctors who are employed by the defendant and yet are not under its control and supervision. That a doctor exercises the skill and care of a competent doctor in the diagnosis and treatment of patients and that although he is an employee of the Government, there exists no master/servant relationship between them. She cited article 27 of the Constitution providing for the right to equal protection of the law, article 29 regarding the right to health care and article 30.

With due respect article 30 is not applicable to the matter at hand as it caters for the rights of working mothers. Ms Pool further contends that the state used an archaic statute enacted during the colonial days to deprive the plaintiff of her right to claim compensation from the tortfeaser, the medical practitioners employed by the Ministry of Health.

In conclusion she submits that the Public Officer's (Protection) Act is inconsistent with the provisions of the Constitution, which is the supreme law of the land.

It is however Mr Esparon's contention, and rightly so, that the duty to declare a law unconstitutional is entirely in the province of the Constitutional Court and not the Supreme Court. He then submitted that since the Constitutional Court had not pronounced itself on this matter, though my research revealed otherwise, the Act in question still remains good law.

Briefly the facts are that the plaintiff, who was a minor at the time, suffered an injury to her left knee on 6 October 1995 and because of an alleged failure on the part of the defendant's

employees to properly diagnose and treat her she was taken to Germany where her condition was remedied by an operation. She filed an action (CS 261/1997) through her father as guardian on 30 July 1997 which was dismissed on the ground that it was outside the six months period of prescription (vide section 3 of the Act), admittedly the cause of action having arisen on 2 November 1995. Now the plaintiff, in her own name and capacity, has filed this suit holding the defendant vicariously liable for the acts or omissions on the part of the employees of Victoria Hospital when the said employees refused, failed or ignored to carry out appropriate diagnostic tests and treatment on the plaintiff for which she claims a total sum of R875,000 as damages with interest and costs. The claim is similar in nature to the one in the earlier case.

Section 3 of the Act reads as follows -

> No action to enforce any claim in respect of...
>
> (a) Any act done or omitted to be done by a Public Officer in the execution of his Office.
>
> (b).....
>
> (c)... ....
>
> Shall be entertained by a Court unless the action is commenced not later than six months after the claim arose.

The said section 3 was judicially interpreted by the Constitutional Court in the case of *Gervais Amiee v Philip Simeon* (unreported) CC 4/1997. This was a referral to the Constitutional Court under article 46 (7) arising from a matter before the Supreme Court in which the plaintiff, a minor, sued the defendants in respect of the personal injuries allegedly

caused to her by the first defendant in the course of his employment with the Government on 20 October 1990. The plaint was filed on 4 May 1995. The defendants raised the issue of prescription as a plea in limine litis to which the plaintiff's counsel responded by seeking a challenge of the constitutionality of section 3 of the Act.

So the question for determination before the Constitutional Court was whether section 3 of the Act contravenes article 27(1) of the Constitution.

Article 27(1) provides thus -

> Every person has a right to equal protection of the law including the enjoyment of the rights and freedoms set out in this Charter without discrimination on any ground except is necessary in a democratic society.

The Court found

> that basically, equal protection of the law guaranteed in Article 27 (1) implies that any person will have free access to the Courts for a remedy. Section 3 of the Act does not take away that right, it only limits it.

Further,

> it was a matter for the legislature in Seychelles to decide as a matter of policy whether the period of limitation in section 3 of the said Act should be extended or be repealed altogether.
>
> In conclusion, it was determined that section 3 of the Act is not inconsistent with article 27(1) of the Constitution and that therefore it continues to be valid law .

In the present case it is clear that the action was filed out of time and cannot therefore be entertained pursuant to section 3 of the Act. But the plaintiff is not without a remedy. Article 2278 of the Civil Code is instructive. It states -

> Prescription as established by this Title shall run against minors as well as adults under guardianship; but such persons shall have a remedy against their guardians .

it is therefore open to the plaintiff, who was a minor at the time when the cause of action arose, to seek a remedy, if she so wishes, from the guardian who ought to have lodged the claim within the prescribed period.

In a nutshell, the plea in limine litis raised by the defendant's counsel is hereby upheld but for the reasons outlined. The plaint is dismissed.

**Record: Civil Side No 47 of 2005**

**Joanneau v Government of Seychelles**

*Civil Code – Delict – Common law spouses – Loss of expectation of life – Leirs' capacity to sue*

Robin Henriette was shot by police. He lived for at least an hour but was dead when admitted to hospital. The plaintiffs sought damages as relatives of the deceased.

**HELD:**

(i) Heirs can sue on behalf of the deceased for prejudice caused to the deceased before death. They cannot sue on behalf of the deceased if the prejudicial act and the death were concomitant;

(ii) Heirs can also sue in their own capacity;

(iii) Common Law spouses and cohabitants are entitled to moral damages;

(iv) In awarding damages, the Court should bear in mind that claims should not be made "an occasion … of turning family bereavement into pecuniary advantage"; and

(v) There is no cause of action for loss of expectation of life.

**Judgment:** For the plaintiffs. R50,000 awarded to estate of the deceased for pain, suffering, shock, and anxiety over impending death; R10,000 awarded to the mother; R2,000 awarded to siblings; R5,000 awarded to Common Law wife**.** Total sum R77,000 together with interest and costs.

**Legislation cited**
Civil Code of Seychelles, art 1382
Constitution of Seychelles, art 32
Courts Act, s 5
Social Security Act
Tenants' Rights Act

**Foreign legislation noted**
Administration of Justice Act 1982 (UK)
Code Napoleon, art 1382

**Cases referred to**
*De Sylva & Ors v D'Offay* (1970) SLR 99
*Elizabeth v Morel* (1979) SLR 25
*Hallock v D'Offay* 3 SCA (vol 1) 295
*Martha Albert v Kevan Hoareau* (unreported) CS 78/1992

**Foreign cases noted**
*Choonia v Pitot* 1914 MR 53
*Gopal v Mooneeram* 1936 MR 36
*Naikoo v Societe Heritiers Bhogun* 1972 MR 66
*Rohimun v K Gopal* 1937 MR 100

Antony DERJACQUES for the plaintiffs
Ronny GOVINDEN for the defendants

**Judgment delivered on 19 January 2007 by:**

**PERERA J:** This is a delictual action wherein the plaintiffs are claiming damages from the defendants in their own capacities, as well as heirs, legal representatives and *ayant droits* of the deceased person. The defendants have conceded liability for the death of one Robin Jourdan Henriette which occurred on 12 January 2005 at Morne Blanc, Port Glaud consequent to police officers, in the course of their duties shooting with firearms.

The second plaintiff is the mother of the said *de cujus* while third and fourth plaintiffs are his minor children. The fifth and sixth plaintiffs are brothers of the deceased, the seventh plaintiff is a half-brother, while eight, ninth, tenth and eleventh plaintiffs are his sisters. The twelfth plaintiff is the common law wife of the deceased person.

**Damages**

Liability being admitted, the assessment of damages in a case of this nature is dependant on whether the *de cujus* died instantly or sometime after the fatal injury. In this respect, Sauzier J in the case of *Elizabeth v Morel* (1979) SLR 25, cited *Le Tourneau, Le Responsabilite Civil* (2nd ed), para 171, 172, 173 and 174 -

> In law, the heirs of a deceased are entitled to claim in that capacity, damages for prejudice, material and moral, suffered by the deceased before and until his death and resulting from a tortious act whether he had, or had not commenced an action for damages in respect of the tortious act before his death, provided he had not renounced it. When death is concomitant with the injuries resulting from the tortious act, the heirs cannot claim in that capacity and may only claim in their own capacity as in such a case, the cause of action of the deceased would not have arisen before he died.

In the instant case, the medical report (P2) certifies that the deceased when admitted to the Casualty Unit of the Victoria Hospital at 10.35 am on 2 January 2005, was already dead. He had a lacerated wound in the right side of the chest (4 x 1 cms) and a lacerated wound in the left anterior axillary area (3 x 2 cms) in the left rib. Dr Patrick Commettant, who produced the said report of Dr KJ Joseph testified that the post mortem examination had revealed internal thoracic bleeding. He

stated that in such case, it would take some time for bleeding to accumulate and cause eventual death. He was however not prepared to speculate as to how long the deceased person would have lived subsequent to the injuries.

Nelson Henriette (PW4), a brother of the deceased person testified that the shooting took place around 8.30 am that day, but he was unable to go near his brother as he was being guarded by a policeman. After about one hour, three more policeman came to the scene, but did nothing to assist the injured man. Thereafter a doctor arrived with a nurse, half an hour later. He helped them to put his brother on a stretcher, and at that time he recognised him and told him to place a pillow under his head. Hence there is uncontradicted evidence that the deceased person lived for at least one hour after receiving the gun shot injuries. Consequently the heirs of the deceased person would be entitled to claim for material and moral prejudice caused to the deceased person before he died.

**The Awards**

The first plaintiff claims in her capacity as mother of the deceased person, and the administrator of his estate. The deceased was a self-employed farmer. There is no evidence regarding his income. However, he was 25 years old at the time of his death. He had a Common Law wife and two children to support. As regards loss of expectation of life, although Sauzier J in the case of *De Sylva v D'offay* (1970) SLR 99 made an award, the Supreme Court of Mauritius sitting in appeal over that case set it aside on the ground that there was no juridical foundation.

The quantum of damages payable would therefore be limited to the prejudice caused to the deceased by way of pain and suffering, anxiety arising from his impending death, and shock. In this respect, a sum of R50,000 is claimed. I consider this to be a reasonable amount in all the circumstances of the

case. Accordingly a sum of R50,000 is awarded. From this amount, the third and fourth plaintiffs the two minor children as heirs, will be entitled to R25,000 each, the amounts to be deposited in minors' accounts.

The mother of the deceased also claims in her own capacity as the second plaintiff in respect of distress, anxiety and shock, a sum of R40,000. She is 58 years old. She did not see the shooting, but saw her son in hospital.

She testified that when she heard that her son had died, she suffered shock. This would undoubtedly be the natural feeling of a mother. In the circumstances I consider a sum of R10,000 to be a suitable award.

As regards the other plaintiffs, the fifth and sixth plaintiffs and eighth to eleventh plaintiffs are full brothers and sisters of the deceased person. They testified that they suffered mental pain and grief consequent on the sudden death of their brother. They claim R30,000 each. These brothers and sisters are all above 30 years, and are living independently. However the prejudice they suffered could not be as much as that suffered by the mother. As was held in *Choonia v Pitot* 1914 MR 53, the Court in making awards in these circumstances should bear in mind that the claims should not be made "an occasion of coining profit out of affliction and turning family bereavement into pecuniary advantage'. Taking all factors into consideration, I award nominal damages in a sum of R2,000 each to the fifth, sixth, and eighth to eleventh, plaintiffs. The seventh plaintiff Rerens Hortere is a half-brother of the deceased. He did not appear in Court on the hearing day to testify. Hence no award is made.

As regards the twelfth plaintiff, the Common Law wife of the deceased, the Courts in Mauritius adopted a strict approach in the case of *Naikoo v Societe Heritiers Bhogun* 1972 MR 66, the Court held thus –

> It seems clear that a concubine is not entitled to moral damages as such. As for material damages, the question is not free from difficulty, but the better opinion seems to be that the concubine cannot recover such damages, not because concubinage is illegal or immoral, but because it is not a relation protected by law. In other words, the action of the concubine fails not because it is a moral fault, but because it is a legal fault; the parties by their own choice have placed themselves outside the protection which the law offered to them within the marriage bond.

Sauzier JA, in the case of *Hallock v. D'offay* 3 SCAR (vol 1) 295 explained the reluctance of the Courts in Seychelles to extend the scope of legal and juridical rights of married persons to cohabitees. He stated –

> In Seychelles, the Courts have tended to follow the jurisprudence of the French Courts and have not forged any solutions along new paths. If no remedy exists in French jurisprudence, then no remedy could be had by the co-habitee who applied to the Court for redress. This reluctance may be due to the moral and sociological issues raised by cohabitation and the fear that a status might be given to it which would undermine the institution of marriage. However the policy of turning a blind eye to the legal problems thrown up by cohabitation have certainly not helped to discourage it, for after 175 and more years that the Civil Code of the French has been in force in Seychelles, there are less married couples than couples cohabiting.

The learned Justice of Appeal, in his dissenting judgment exercised equitable powers under section 5 of the Courts Act,

as the law in Seychelles was silent as regards the problems thrown up by cohabitation. He stated that it would be a denial of justice to decline to use such powers on the ground that there was on remedy in law, and the solution to them should be left to the legislator.

This Court had an opportunity in the case of *Marthe Albert v. Kevan Hoareau* (unreported) CS 78/1992 to consider the liberal view of Sauzier JA in the *Hallock* case (supra) which was based on division of property, to a delictual claim filed by the Common Law wife of a deceased person. The attention of Abban CJ was drawn to the Administration of Justice Act 1982 (UK) which amended the Fatal Accidents Act 1882 - 1976, and made provision for a co-habitee to be treated as a dependent who could claim compensation from a tortfeasor.

Section 3 of that Act, defined a "dependent" as any person living with the deceased in the same household at the time of the death of the deceased. It was also submitted by counsel for the plaintiff that in Seychelles, the Social Security Act and the Tenant's Rights Act recognised the rights of cohabitees. The Chief Justice stated-

> I must confess that I almost gave in to the request of learned counsel for the plaintiff, but after giving further thought to the matter, I had to decline the invitation. I strongly felt that such radical departure from the law, as it stands now in Seychelles, ought to be made by the legislature and not by Judge made law.

Accordingly, the claim of a cohabitee, who had lived in a Common Law relationship with the deceased for a period of 12 years, and who had been totally dependent on him, was dismissed.
However could this reluctance to deviate from the rigid application of French principles in claims for moral damages

in delictual cases be perpetuated in view of article 32 of the Constitution which provides for protection of families. The prescribed derogations are marriages between persons of the same sex, and persons within certain family degrees. Under that fundamental right, the state undertakes to promote the legal, economic and social protection of the family. No distinction is drawn between families composed of married persons and persons in a common law relationship.

The State has already provided legal protection to a co-habitee as a dependent for benefits under the Social Security Act, and under the Tenants' Rights Act (now abolished, save for limited purposes). There may be a justification to insist on legislation in respect of property rights accruing to a cohabitee as provisions of the Civil Code would need amendment.

However, when moral damages are claimed in a delictual action in respect of grief and sorrow, mental agony, anxiety, and shock, there is no legal or moral jurisdiction to draw a distinction between a surviving married spouse, and an unmarried spouse. It is of interest that the word *"dommage'* in Article 1382 of Code Napoleon (the word *"damage"* in the same Article in the Civil Code of Seychelles) was considered in the case of *Gopal v Mooneeram* 1936 MR 36 Le Conte J stated thus -

> The law speaks of a *"dommage",* i.e of some prejudice. To say that the word *"dommage"* refers solely to material prejudice, or that although it includes moral suffering, such suffering cannot constitute a right of action unless it has engendered pecuniary loss, is not, in my judgment, interpreting the law, but unduly restricting its meaning. Moral suffering is a very serious *"dommage'* indeed, so much so that it often brings about disease, inability to work, and, as a consequence, pecuniary loss; but even when

> it does not, the mental agony, the heartache, the loneliness and wretchedness one feels after the loss of a dear relative who has prematurely met with his death through the wickedness, or simply the carelessness or recklessness of others, that is a great and real *"dommage".* Its pecuniary equivalent, is not easy to assess, because there is no instrument yet enabling us to gauge the human heart with anything like accuracy, and also because no monetary relief can make up for the loss of those to whom we were fondly attached.

This view that moral prejudice does by itself give rise to damages, independently of material damage, and moral damages should be assessed by the judge rather arbitrarily if need be, but without allowing family bereavement to be made an occasion for coining profit, was followed with approval in the case of *Rohimun v K Gopal* 1937 MR 100**.**

Hence I am fortified in the view that a concubine should be entitled to moral damages even where material damage has not been established. Accordingly I award the twelfth Plaintiff, a sum of R5,000 as moral damages for distress, anxiety and shock.

Judgment is accordingly entered in favour of the plaintiffs, save the seventh plaintiff, in a total sum of R77,000, together with interest and costs.

**Record: Civil Side No 12 of 2005**

**Prea v Seychelles People Progressive Front**

*Defamation – Public figure – Quantum of damages – Offer of amends*

The plaintiff is a public figure. He accepted a donation of ducks to be sold as a church fundraiser. The first defendant's newspapers published an article suggesting that the Plaintiff had not sold the ducks, but had instead taken the ducks for himself. The defendants accept that their statements were defamatory. They issued an offer of amends as their written statement of defence.

**HELD:**

(i) The English law of defamation applies in Seychelles under art 1383 of the Civil Code of Seychelles. The substantive and procedural English law of defamation is taken as it stands today;

(ii) An offer of amends will preclude a defamation suit if –

a. An offer is made as soon as practicable to correct the statement, apologise, and (if appropriate) notify those to whom the defamatory statement was made;

b. The defamation was unintentional, and

c. The offer is accompanied by an affidavit detailing the party's innocence.

(iii) If an offer of amends is made too late, there is no defence. The offer may be a

mitigating factor in the assessment of damages;

(iv) Damages for defamation are calculated on the basis of all the circumstances of the case including the conduct of the plaintiff, his position and standing, the nature of the defamation, the mode and extent of the publication, the absence or refusal of any retraction or apology, and the whole conduct of the defendant. The higher the plaintiff's position, the higher the damages; and

(v) The damages awarded to public figures are to be assessed conservatively. It is expected that public figures are subject to scrutiny, attack and criticism, by virtue of their position.

**Judgment:** For the plaintiff. Damages awarded R70,000 with costs.

**Legislation cited**
Civil Code of Seychelles, arts 4, 1383

**Foreign legislation noted**
Defamation Act 1952 (UK)
French Civil Code
Lord Campbell's Libel Act 1843, s 2

**Cases referred to**
*Confait v Ally* (1990) SLR 287
*Derjacques v Louise* (1982) SLR 175
*Patrick Pillay v Regar* (unreported) SCA 3/1997
*Regar Publications (Pty) Ltd v Maurice Lousteau-Lalanne* (unreported) SCA 25/2006

*Seychelles Broadcasting Corporation v Bernadette Barrado* (unreported) SCA 9/1994
*Seychelles Broadcasting Corporation v Bernadette Barrado* (unreported) SCA 10/1994

**Foreign cases noted**
*Bray v Ford* [1896] 1 AC 50
*Dingle v Associated Newpaper Ltd* [1961] 2 QB 161
*Lingens v Austria (*1986) 8 EHRR 407
*Ross v Hopkinson* (The Times, October 17, 1956)

France BONTE for the first defendant
John RENAUD for the second defendant

**Judgment delivered on 28 September 2007 by:**

**KARUNAKARAN J:** The plaintiff in this action claims the sum of R500,000 from both defendants jointly and severally for damages, which the plaintiff allegedly suffered as a result of the defamatory publications made by the defendants in two newspapers. In fact, the plaintiff is a politician and a sitting Member of the National Assembly (MNA).

The first defendant is a political party, which is the publisher and distributor of newspapers by the name of Lespwar, which is distributed free of charge to the residents of the Electoral District of English River, and Zabitan, another newspaper, which is also distributed free of charge to the residents of the Electoral District of Bel Ombre. The second defendant is admittedly the printer of both newspapers.

The undisputed facts of the case are these:
At all material times, the plaintiff was and is the elected Member of the National Assembly for Bel Ombre Electoral District. He is 41. He has a family with four children. He has been the Member of the National Assembly since December 2002. He started his career as a Telecommunication

Technician. Later, he moved to managerial positions, worked in different companies and then jumped into the ocean of politics presumably, taking the risks of being a public figure who is always bound to be within the focus of public scrutiny, attack and criticism.

Indeed, he is a religious person, a born Roman Catholic, baptised at the Bel Ombre Church. He was an altar boy and from his childhood he has been very much associated with Bel Ombre Roman Catholic Church and its Parish. He is an active member of the congregation every weekend and engaged in religious activities for the church and charity besides, his social work as a politician in the district.

In his own words, the plaintiff is a good fundraiser for the Church. Whenever the Parish needed funds for the maintenance or renovation of the Church, they organised fundraising activities and collected contributions of whatever nature either cash or in kind from the parishioners. The plaintiff as a good Christian and a member of the Parish Council used to help the Parish. Whenever, they organised fundraising activities, the Parish priest and the Council always approached the plaintiff for assistance.

In the middle of 2003, the plaintiff was an elected member of the National Assembly representing the people of the Bel Ombre Electoral District. At that time, the Bel Ombre Church required some renovation work. The Parish priest and the Council were engaged in different activities to raise funds for the renovation. As usual, they approached the plaintiff for assistance. In fact, the Bel Ombre Parish Priest requested the plaintiff to collect some ducks from one of the parishioners, who had promised to contribute them as his share in kind for renovation fund. The plaintiff, as requested by the priest, approached that parishioner, collected 30 ducks from him and delivered them all to the church to be sold at the Parish fair.

According to the plaintiff, the good community service, which he rendered in this respect, was twisted with falsity and bad publicity by the alleged defamatory acts of the defendants that injured his credit, character and reputation in the estimate of the right-thinking people of the society. Hence, the plaintiff has come before this Court by a plaint dated 15 December 2003 claiming damages from the defendants for defamation.

The plaintiff has averred in his plaint that in an article entitled “Oli sa bann kannar" in the edition Lespwar of September 2003, the defendants falsely and maliciously wrote, printed and published of, and concerning, the laintiff, whose picture was printed in the article, the following:

"Granmounm i toultan dir ki tande ek trouve i de. Sa zistwar enkwayab sorti Belombre I montre nou ki kailte dimoun I annan dan SNP. Per Parwas ti apros en tre bon kretyen dan distrik pou fer en kontribisyon dan fon renovasyon legliz St. Roch. Sa msye tre relizye ti dir ki, vi ki I sonny bokou kannnar, I a kapab donn Legliz plis ki en santenn pou zot vann dan fennsifer son dimans swivan. Per ti dakor e i ti promet ki i ava anvoy en dimoun pou vin pran sa bann kannnar. Lekel ki ti pase son lannmen? Sete pa lot ki msye Nichola Prea. MNA distrik, ki osi en manm lo komite parwasyal distrik.

> Msye ti vin dan son pti loto rouz avek de bwat kartron pou pran sa 100 kannar. Me dezorme ti napa ase plas e i ti pran selman trant. Parmi ti annan bann kannar manniy, kannar patouyar, kannar lokal e kannar peken. Sa myse ti met tousala dan son loto e I ti ale an vites. Son Dimans apre, dan fennsifer, travayer sa msye ki tin donn kannar ti al vey zaksyon konbyen kannar pe van, me gran sirpriz kot "stall' Msye Prea ti napa okenn kannar. Ler sa madanm ti demann li oli kannar, i ti senpleman reponn ki li

> pa pou zanmen les tonbe. Kestyon ki zabitan Belombre pe demande se oli sa bann kannar. Ki reprezantan SNP in fer avek zot? Eski sa lensidan i annan okenn keksoz pou fer ek sa ta plim kannar kin ganny vwar pros ek en lakaz Lanmiser? Msye Prea, rann kont lepep. Fer tande 'kwak kwak' sa bann kannnar.

This is translated to mean:

> Our old people always say that hearing and seeing are two different things. This incredible story from Belombre shows us what kind of people there are in the SNP. The parish priest approached a good Christian in the district for a contribution to the St. Roch (sic) Church Renovation Fund. This very religious man said that since he rears many ducks he could give the church over a hundred for sale in the fancy fair the following Sunday. The priest agreed and promised him he would send a person to collect the ducks. Who came the next day? It was none other than Mr. Nichola (sic) Prea, district MNA, who is also a member of the parish council. The gentleman came in his little red car with two cardboard boxes to collect the hundred ducks. But there was not enough room and he took only 30. Amongst them were "manni", "patouyar", local and perking ducks. This gentleman put all of them in his car and he left in a hurry.
>
> The following Sunday, in the fancy fair, an employee of the person who had given the ducks went to see how much the ducks were being sold for but she was surprised to see that at the stall of Mr Prea there were no ducks. When the lady asked him where the ducks were he

> answered that he would never give up. The question being asked by Bel Ombre residents is where the ducks are. What has the SNP representative done with them? Does this incident have anything to do with this large pile of duck feathers found near a house at La Misere? Mr. Prea, give an account to the people. Let them hear the quack quack of those ducks.

It is also the case of the plaintiff that in a further article entitled "Kwak! Kwak! Ki'n arrive avek kannar?" in its edition of Zabitan of October 2003, the defendants falsely and maliciously wrote, printed and published of, and concerning, the plaintiff, the following:

> Zafer kannar pe vin pli enteresan de-zour-an-zour. Menm dimoun anvil pe koz lo la. Parey nou konnen nou legliz Bel Ombre i bezwen fer renovasyon lo la e laparwas i akey kontribisyon sorti kot parwasyen et lezot dimoun. Koman son kontribisyon en parwasyen ti pare pour donn en santenn kannar pour vann dan fennsifer. Lekel ki ou a krwar ti vin rod kannar? Pa lot ki Onorab Nicholas Prea, nou MNA Belombre e en manm Komite Parwasyal Belombre. Wi dan son pti loto rouz. Ti annan plas zis pour en trantenn kannar. Me kannar pa ti zanmen ariv dan fennsifer. I paret ki ler en dimoun ti demande si pa ti sipoze annan kannar pour vann, larepons ki i ti gannyen sete "Nou pa you les tonbe"
>
> Me alor kote kannar in ale? Oswa kote kannar i ete? Sakenn pe donn son versyon. I annan ki dir kannar in touye. I annan ki dir ki kannar pe sonnyen. I annan ki dir ki zot in vwar plim. Belombre i byen koni pour lasas trezor. La i paret ki i annan ki oule fer lasas kannar.

> Responsiblilte kannar I kapab enn lour, sirtou akoz ti en kontribisyon pour ganny larzan pour Legliz. Osi akoz tit ek pozisyon sa ki ti al rod kannar kot son met. Solisyon pour sa zafer kannar I tre senp. Avan demann Servis Veteriner oswa Sosyete ki konsernen avek zannimo oswa Lapolis pour mele, Onorab i kapab dir nou ki'n arive avek sa bann kannar. Koumsa tou keksoz i a kler.

This is translated to mean:

> The issue of the ducks is becoming more interesting from day to day. Even people in town are speaking about it. As we know Belombre Church needs to be repaired and the parish welcomes contributions from parishioners and others. As his contribution a parishioner was prepared to give about 100 ducks to sell in the fancy fair. Who do you think came to fetch the ducks? No other than Honourable Nicholas Prea, our Belombre MNA and a member of the parish committee of Belombre. Yes in his little red car. There was room for only about 30 ducks. But the ducks never arrived at the fancy fair, It appears that when somebody asked if there were not meant to be ducks for sale the answer the person got was "We will never give up".
>
> So, where have the ducks gone? Each person gives a different answer. Some say the ducks have been killed. Others say they are being reared. Some say they have seen feathers. Belombre is well-known for treasure hunts. Now it appears that some want to hunt for ducks. The responsibility for the ducks can be heavy especially since it was a contribution to get

> money for the Church. Also because of the title and the position of the person who went to fetch the ducks from their owner. The solution for this affair is very simple. Before asking the veterinary service or the association concerned with animals or the police to get involved the Honourable can tell us what has happened to those ducks. That way everything will be clear.

The said newspapers containing the above articles were distributed in the districts of English River and Bel Ombre respectively and nationally to the public. According to the plaintiff the statements contained in the said articles complained of in their natural and ordinary meaning, or by innuendo, refer and are understood to refer to the plaintiff and are understood to mean that the plaintiff, on behalf of the parish church of St Roch, Bel Ombre, collected thirty ducks donated to the said parish for sale the following Sunday in an activity to raise funds for the renovation of the said parish church and, instead of bringing them to sell, appropriated them to his own use. It is the case of the plaintiff that the said statements are false and malicious and constitute a grave libel on the plaintiff.

Further, the plaintiff on 19 September 2006 testified that his then current term of office as MNA of Bel Ombre was going to end in November 2007 and he had the intention to run again as a candidate of the Seychelles National Party in the next Assembly Election. He further testified that since the alleged defamatory articles published in those newspapers brought a negative public opinion about his character, it adversely affected the chances of winning the next election in his constituency.

Moreover, he testified that although he was doing a good work in his capacity as a sitting MNA in his electoral district of Bel Ombre, the said defamatory remarks and the innuendo

affected his work as and when he met people in the district. In his role as a member of the International Affairs Committee and also the Friendship Committee with India and China, he was called upon to meet foreign diplomats regularly and report back to the Speaker of the National Assembly. This work was also affected by the defamatory publications. As regards its impact on his family life he stated thus:

> Ever since the publication came out, the relationship in the family has not been the same. I live with a woman, who believes that if I am going to do some good work for my constituency and my name is dragged in the mud like this, it is no use. My daughter is 15 years old, she goes to Mont Fleuri School, she has been teased for the last three years by somebody in her class with regard to this article, "Voler Kannar" and she has come home every now and then crying because of this. I am still being called "Vole Kannar" wherever I drive by.

The Plaintiff also produced in evidence copies of the said newspapers the Lespwar and the Zabitan, which carried the articles in question. By reason of the writing, printing, publication and distribution of the said statements in the said articles, the plaintiff has been severely injured in his credit, character and reputation and has been brought into odium, ridicule and contempt in the estimate of the right-thinking members of the society. In view of all the above, the plaintiff claimed that he suffered prejudice in his capacity as an MNA, as a family man, as a member of the Bel Ombre Roman Catholic Parish and as a private person. The plaintiff in this respect estimated the damage to his character and reputation at R500,000. Therefore, he prays this Court to be pleased to give judgment jointly and severally against both defendants and in his favour in the sum of R500,000, with interest and costs.

The defendants on the other hand, did not deny liability but only disputed the quantum of damages claimed by the plaintiff in this matter. Hence, the defendants did not file any statement of defence.

No evidence was adduced by the defendants in mitigation of damages either. However, they requested the Court to treat the notice of the offer of amends dated 17 May 2005, which they issued on the plaintiff as their written statement of defence in this matter. The said Notice of Offer of Amends reads thus:

**NOTICE OF OFFER OF AMENDS**

In the MATTER of Section 4 of the Defamation Act 1952

AND

in the MATTER of a Complaint by Nicholas PREA, of Bel Ombre, Mahe,

against:

(i) Seychelles People Progressive Front of Maison du Peuple, Victoria
(ii) Printec Press Holding of Mont Fleuri, Mahe.

TAKE NOTICE that the Defendants hereby make an offer of amends under and for the purposes of Section 4 of the Defamation Act 1952 in respect of the allegations which the defendants made against the plaintiff and which are the subject of the above mentioned suit.

The facts relied upon by the defendants are that the veracity of the statements published in

September 2003 in the "LESPWAR" Magazine under the title of "Oli sa bann Kannar?" and "ZABITAN" Magazine of October 2003 under the title "Kwak! Kwak! Kin arive avek Kannar?" were not intended to mean that the plaintiff collected thirty ducks donated to the St. Roch Parish for sale and appropriated them.

This offer of amends shall be understood to mean that the defendants, severally and in solido, offer to make suitable apology to the plaintiff in respect thereof before the Supreme Court and in the following manner:

The defendants unreservedly apologise to the plaintiff for any injury to his reputation which the said statement may have caused him, and agree

(i) not to repeat any further libel or publish any slander against the plaintiff in any circumstances; and

(ii) to publish a suitable apology, as approved by the plaintiff, in the next issue of the "LESPWAR" and "ZABITAN" Magazines.

The above Notice of Offer made by the first and the second defendant are respectively dated 17 May and 21 July 2005.

The plaintiff did not accept the above offer. In the circumstances, both parties invited the Court to determine the quantum of damages, which the plaintiff is entitled to obtain from the defendants having regard to the entire circumstances of the case including the offer of an apology made by the defendants after the commencement of the suit.

I meticulously went through the pleadings and the evidence on record including the copies of the publications in question. I gave diligent thought to the submissions made by counsel on both sides. I perused the relevant provisions of law applicable to the case in hand. Firstly, I should begin by saying although it is trite, that by virtue of article 1383 of the Civil Code, the law applicable in the Seychelles today is the English law of defamation. When I say "English law", one has to inevitably qualify this term with reference to a timeframe - a cut-off date - in view of article 1383(3) of the Civil Code that came into force on 1 January 1976. This article reads thus:

> The provisions of this article and of article 1382 of this Code shall not apply to the civil law of defamation, which shall be governed by English law.

Obviously, English law of defamation is not stagnant. It has grown and is still growing, like any other branch of law and has been in a constant growth ever since the enactment of Lord Campbell's Libel Act in 1843 by the British Parliament and of our Civil Code in 1976 by the Queen's Most Excellent Majesty by the advice and consent of the then House of Assembly of Seychelles. From time to time, the source namely, the English law of defamation has been amended, modified and changed by several pieces of legislation and case law in the country of its origin to meet the changing needs of time and society. Now, therefore, the question arises: Should we then apply the stagnant old English law of defamation as it stood on 1 January 1976, the date our Civil Code came into force? Or should we import and apply mutatis mutandis the growing modern English law of defamation with all its developmental changes as it has evolved and stands today in England and Wales?

Before answering this fundamental question, one should firstly find out what was the intention of the makers of the Civil Code in incorporating the provision under article 1383(3) for the importation of English law of defamation? To my mind, their

intention should have been to make it a temporary or transitional measure in order to govern our law of defamation, until we enact our own legislation to replace it. Undoubtedly, they must have intended to do so, in the hope that one day in future we would replace the foreign law with our indigenous one and make it a permanent source or feature in the body of our civil law jurisprudence. The said intention of the makers of the Civil Code is evident from article 4 thereof, which reads thus:

> The source of the civil law shall be the Civil Code of Seychelles and other laws from time to time enacted (underline mine).

The cut-off date thus set by the commencement the Civil Code has obviously, stagnated our law on defamation and the old English law as it stood on 1 January 1976 continues to rule us from the archives.

Have we done anything so far, about it? It seems to me that the time has not yet come for us to enact a Defamation Act of our own to replace the said temporary or transitional governance structured in article 1383(3). Consistency of decisions, speed of resolution and advancement of law with the rest of the world should be the cornerstone of any civil system of justice. Our civil law of defamation is not an exception to it. Our law of defamation, as presently constituted, fails on those counts leading to uncertainty in the area of defamation law and practice and inconsistency of judicial thoughts, approaches and decisions in ascertaining the liability and in the assessment of quantum of damages.

Having said that, I note, the last legislative reform on law of defamation was over thirty-two years ago in 1975, when the Civil Code of the French was repealed and replaced by the present Civil Code of Seychelles. This Code was, in fact, tailored to suit the indigenous conditions that prevailed then in

Seychelles before Independence. This was an age before the advent of internet, television, mobile phones, constitutionalism and free speech. The law of defamation must meet the challenge of the multi-media knowledge-based global society and the changing needs of time and jurisprudence. It does not do so at the moment. For instance, the approach taken by the Court of appeal in the recent case of *Regar Publications (Pty) Ltd v Maurice Lousteau-Lalanne* (unreported) SCA 25/2006 is innovative.

In the said case, the appellate Court in paragraph 16 at page 18 of its judgment in essence, held that if there had been an element of public interest involved in the subject-matter, then it singly constitutes on its own a valid defence in law to an alleged act of defamation. However, the English law of defamation in s 7(3) of the Defamation Act 1952 which is the law applicable in Seychelles by virtue of article 1383(3) requires two elements: (i) the subject-matter must be of public interest and (ii) the publication must be for the public benefit.

Both elements in combination constitute the defence of privilege under the old English law. Now, one may ask where the law of defamation stands now. Which law is applicable? "the stagnant old English law of defamation" as it stood in the colonial era or the growing modern law of defamation as it stands today? In passing, I should mention here that as law reform appears to be long overdue this Court hopes that Honorable Attorney-General would be pleased to consider what he deems necessary in the circumstances for revising and enacting our law of defamation to advance with the rest of the world so as to improve the certainty of law, uniformity of judicial thinking and consistency of judicial decisions in matters of defamation suits.

This exercise is important since there is a fundamental tension in defamation law between preserving press freedom and protecting reputation of individuals and institutions. Because rights and freedoms are not absolute, courts must

strike the proper balance between them. There cannot be rights without corresponding duties or freedoms without reasonable restrictions. They are both sides of the same coin. Having said that, with due respect to the views of His Lordship I K Abban, the Chief Justice expressed in *Confait v Ally* (1990) SLR 287, and to those who subscribe to the same school of thought, it seems to me that, to a "strict constructionist", shortsighted by stagnancy, the term "English law" used in article 1383(3) appears to mean and include the "English law of defamation as it stood on 1 January 1976"; but, to an "intention seeker" foresighted by growth, the same term appears to mean and include the "English law of defamation with all its developmental changes as it stands today".

Obviously, "growth" in any system for that matter, is a sign of life; whereas "stagnancy" is a sign of doubt or morbidity. I prefer the former to the latter as it embraces modernity and accords with nature, reasoning and justice. Hence, in my, considered view, we should import and apply the growing modern English law of defamation, substantive as well as procedural, mutatis mutandis, with all its developmental changes as it has evolved and stands today in England, not the stagnant old English law of defamation as it stood on 1 January 1976, the date our Civil Code came into force.

For these reasons, I venture to apply in the instant case the modern English law of defamation as it stands today. If one intends to steer the existing law of defamation towards the administration justice, this approach I believe, should continue until we revise, reform and modernise our law of defamation. Be that as it may.

Before I proceed to assess the quantum of damages, since the parties have joined issue as to the legal effect of the "Offer of Amends" quoted supra, it is necessary for the Court to give its finding on this issue. Indeed, the alleged defamatory publication was undisputedly made in October

2003, whereas the "Offer of Amends" was made by the defendants to the plaintiff in the middle of 2005 after the commencement of the present suit. But the plaintiff refused to accept the offer of apologies stating that it was not made as soon as practicable and too late to be accepted.

Indeed, as per English law the offer of amends required in cases of unintentional defamation must be made as soon as practicable, be expressed to be made for the purposes of section 5.4 of the Defamation Act 1952, and be accompanied by an affidavit specifying the facts relied on by the person making it to show that the words in question were published by him innocently in relation to the party aggrieved. The offer should contain an offer to publish a suitable correction of the words complained of and a sufficient apology, and, where appropriate, to take such steps as are reasonably practicable for notifying persons to whom copies of a document or record containing the said words have been distributed, that the words are alleged to be defamatory of the party aggrieved.

Once the offer is accepted, the parties should seek to agree on the steps to be taken in fulfilment of the offer. Once such agreement is concluded and the terms have been duly performed, then no proceedings for libel or slander shall be taken or continued by the party aggrieved against the person making the offer in respect of the publication in question.

In *Ross n Hopkinson* - The Times, 17 October 1956 - an offer made after seven weeks, was held not to have been made as soon as practicable. In the instant case, after two years the defendants have made an offer of apology that is not accepted by the plaintiff.

Moreover, the defendants have also not published so far any apology in the same newspapers, which carried the defamatory statements. After the commencement of the suit, despite some attempts, no settlement or any agreement has

been reached by the parties. Therefore, it is evident that the offer of apology made by the defendant in this matter cannot constitute a defence to the liability for the defamatory publication.

Although an unaccepted apology is no defence to an action for libel, it shall be lawful for the defendant to raise it in mitigation of damages. The apology could have been made or offered to the plaintiff for such defamation either before the commencement of the action or as soon afterwards as he had an opportunity of doing so in case the action had been commenced. Moreover, quite apart from this position under English law of defamation, a defendant may show in mitigation of damages that he has published or made a retraction of, or apology for the defamation complained of, or, has offered to make such a retraction or apology, even though he did not publish, make, or offer to make, such retraction or apology until after the commencement of the action. Where in an action for libel contained in a newspaper the defendant relies on the defence under section 2 of Lord Campbell's Libel Act 1843, but fails to prove that the libel was inserted without malice or without gross negligence, the Court is entitled to take the apology into consideration in mitigation of damages: vide Gatley on Libel and Slander (8th ed) 1441.

In the circumstances, although the offer of apology made by the defendants after the commencement of the present action, does not constitute a defence in law, although it does not prove that the libel was inserted without malice or without gross negligence, and even though it was not published, still it is an effective mitigating factor in law that should be considered by the Court in the assessment of quantum of damages in this matter and so I find.
I will now proceed to examine the evidence only for the purpose of assessing the quantum of damages payable to the plaintiff in the light of the law applicable in this action. Obviously, there is no dispute that the said newspapers

carried the articles containing those defamatory statements in question. It is also not in dispute that the said newspapers were printed and published by the defendants.

As regards damages in matters of this nature, it is hackneyed to say that in all cases of libel- actionable per se - the law assumes that the plaintiff has suffered damage and no special damage need be alleged or proved. Damages depended on all the circumstances of the case including the conduct of the plaintiff, his position and standing, the nature of the defamation, the mode and extent of the publication, the absence or refusal of any retraction or apology and the whole conduct of the defendant: see *Derjacques v Louise* (1982) SLR 175.

As a result of the said defamatory statements, I find that the plaintiff has been severely injured in his credit, character and reputation and has been brought into ridicule, hatred and contempt generally by the public, his friends and the residents of the electoral districts of Bel Ombre and English River. Evidently, the plaintiff has suffered prejudice in his capacity as an elected Member of the National Assembly, as a member of the Roman Catholic Parish, as a private person and as father of his school-going children and so I find. Above all, the plaintiff who had been serving the Church for a good cause has been portrayed by the publication as a dishonest person in the estimate of the right-thinking members of the society.

In an action of libel "the assessment of damages does not depend on any legal rule" per Lord Watson in *Bray v. Ford* [1896] 1 AC 50. In dealing with the quantum of damages, I consider the basic principles that underpin the assessment of damages and the relevant authorities including *Seychelles Broadcasting Corporation v Bernadette Barrado* (unreported) CA 9 and 10/1994; *Patrick Pillay v Regar* (unreported) S*CA 3/1997; Dingle v Associated Newspaper Ltd* [1961] 2 QB 162.

In the case of *Pillay* the plaintiff was the Minister for Education and Culture, the Court of Appeal reduced the award from R450,000 to R175,000. In *Barrado*, the plaintiff was the personal assistant of the President of the Republic, the Court of Appeal reduced the award from R550,000 to R100, 000. In this regard the Court of Appeal made the following observation (per Ayoola JA) at 16 and 17:

> The learned judge could not have discussed the circumstances of the libel without adverting to the office held by the respondent and the motive of the scurrilous attack on her. Also, it was perfectly legitimate for the judge to have taken into consideration the status of the plaintiff in the assessment of damages. The higher the plaintiff's position, heavier the damages (see, for instance, *Yusouff v Metro-Goldwyn-Meyers Pictures Ltd* [1934] 50 TLR 581; *Dingle v Associated Newspaper Ltd*, supra; *Lewis v. Daily Telegraph I* [1962] 3 WLR 50.

The plaintiff in the instant case has been holding a relatively higher position in the State hierarchy as an elected Member of the National Assembly, the State legislature representing one of the electoral districts. It is truism that in the assessment as to quantum of damages, the principle, namely, "the higher the plaintiff's position the heavier the damages" generally applies to all, who fall under different categories of position at different levels of the social ladder whether he or she is educated or uneducated, professional or non-professional, rich or poor, celebrity or a commoner, politician or a non-politician. However, this principle should not be indiscriminately applied, especially when the person is a public figure (vide *Barrado* supra and *Regar Publications (Pty) Ltd v Maurice Lousteau-Lalanne* (unreported) SCA 25/2006.

In fact, when a person takes up a career, profession, job or occupation of his/her choice, which involves an element of

public interest or public concern or public duty then that person by virtue of the very public nature of the position he or she holds, is bound to be within the focus of public scrutiny, attack and criticism by all concerned including the fourth rstate. In actual fact, damages in the case of such public figures are assessed at a conservative rate on account of law's preoccupation to render them accountable in the exercise of their public duties: see *Lousteau-Lalanne* supra, *Affair Lingens c Autriche,* Arret du 8 juillet 1986 serie A no. 103, p 404; Vincent Berger Jurisprudence de la Cour Europeenne des Droit de l'Homme (5eme ed).

Coming back to the present case, although the defamatory publication conveys an imputation by innuendo that there are reasonable grounds for suspicion of dishonest dealing implicating the plaintiff, it does not convey any imputation of being guilty of a crime involving dishonesty such as theft or misappropriation of church funds.

It would therefore, be wrong to equate an allegation of suspicion to an allegation of guilt. In any event, the plaintiff has been holding the office of the Honorable Member of the Legislature at the time of the libelous attack on him. The honour attached to that office cannot and should not be downplayed in the assessment of quantum. Although the plaintiff did not suffer any special damage or pecuniary loss, he is still entitled to general damages for the injury to his reputation.

At the same time, I remind myself of the measure of caution the Court of Appeal has indicated in the case of *Pillay* (supra) that great care should always be exercised in an effort to arrive at a fair assessment of damages.

Having taken all the relevant factors into account, which are peculiar to the case on hand, I award the plaintiff damages in the sum of R70,000 which amount in my assessment is

appropriate, reasonable and proportionate to the degree of gravity of the libel and the resultant injury. I therefore, enter judgment for the plaintiff and against the defendants jointly and severally in the sum of R70, 000 with costs.

**Record: Civil Side No 7 of 2004**

**Payet v Pierre**

*Assault – Trespass to the person – Self-defence – Provocation – Contributory negligence – Civil Code interpreation*

The plaintiff and defendants are neighbours. They had a dispute over land which escalated into a fight. The plaintiff claims that the defendant hit him with an iron bar. The defendant claims self-defence and provocation, and that the plaintiff injured himself on an iron sheet.

**HELD:**

(i) Under the French Code, self-defence and provocation are total defences to civil assault;

(ii) The Civil Code of Seychelles is an original text and not a translation. Therefore, the Code should be interpreted in the context of Seychellois jurisprudence. French law should only be referred to if the provision is ambiguous;

(iii) Self-defence will only result in total exoneration if self-defence was the defendant's dominant purpose;

(iv) Provocation will only result in total exoneration if the dominant purpose of the act was not to cause harm to the plaintiff; and

(v) If a defendant fails the dominant purpose test for self-defence or provocation, then the self-defence or provocation may

provide partial defence of contributory negligence.

**Judgment:** For the plaintiff. Damages R20,000 awarded with interest and costs.

**Legislation cited**
Civil Code of Seychelles, art 1382

**Foreign legislation noted**
French Civil Code

**Cases referred to**
*Fanchette v Attorney-General* (1968) SLR 111
*Sedgwick v Government of Seychelles* (1990) SLR 220

**Foreign cases noted**
Tribunal Civil, Strasbourg, 10 MARS 1953

France BONTE for the plaintiff
Defendant in person

**Judgment delivered on 26 September 2007 by:**

**KARUNAKARAN J:** The plaintiff in this action asks the Court for a judgment ordering the defendant to pay the plaintiff the sum of R85,000 towards loss and damages, which the plaintiff allegedly suffered as a result of a "fault" committed by the defendant. The fault alleged is that the defendant on 7 February 2005 at Pascal Village unlawfully assaulted the plaintiff causing him injuries in the right hand and the plaintiff is still undergoing physiotherapy following those injuries.

The plaintiff has averred in the plaint that consequent upon an unlawful assault by the defendant, the plaintiff suffered the following bodily injuries:

(i) Laceration in right hand with injury to extensor tendon 2nd and 3rd finger

(ii) Laceration on the right wrist.

Because of the said injuries, the plaintiff suffered loss and damages as particularised below:

| | | |
|---|---|---|
| (a) For injuries to the right arm | | R35,000 |
| (b) For pain and suffering | | R15,000 |
| (c) For trespass to person | | R35,000 |
| | Total | **R85,000** |

Therefore, the plaintiff claims that the defendant is liable to compensate him for the said loss and damages estimated in the sum of R85,000 with interest and costs of this action. On the other hand, the defendant denies liability putting the plaintiff to the strict proof of all the allegations made against him.

The facts of the case are briefly these.

It is not in dispute that the plaintiff and the defendant are residents of Pascal Village, Mahe. They are neighbours and were once friends. According to the plaintiff, he sold a piece of land to the defendant for R30,000. The defendant paid only R25,000 and was refusing to settle the balance of the purchase price R5,000. Consequently, their friendship got strained and they were not in good terms. The plaintiff testified that the defendant on 7 February 2005 made telephone calls and insulted him using bad languages, inter alia, called him a homosexual.

In the afternoon, the plaintiff went out with a machete (big knife) in order to cut some banana leaves, which were overhanging and blocking the traffic on the main road, close to the defendant's residence. While the plaintiff was standing in

the main road, with that knife in his hand, the defendant came out of his house with a piece of iron bar in his hand and hit the plaintiff and caused injuries on his right hand fingers. The plaintiff lost consciousness and fell down. The defendant dragged the plaintiff on the road and hit him with bottles and stones resulting injuries all over his body with visible marks particularly, over his legs.

During the assault, the defendant was shouting that he was only waiting for the day to kill the plaintiff. Following the injuries the plaintiff was immediately, taken by an ambulance to the Victoria Hospital for medical treatment. The defendant had 17 stitches on his right wrist where, the tendon had been cut. He was admitted to hospital for two days. In support of his testimony as to injuries and treatment, the plaintiff also produced a medical report dated 16 May 2005 in exhibit Pl, the contents of which reads thus:

> Patient's name: Olaf Louis Payet
> Address: Pascal Village
> DOB: 16-10-34
>
> The above named patient was seen at Casualty Unit on 07-02-05. He was assaulted by somebody with machete, and sustained laceration in right hand and was complaining of pain in right hand.
>
> **On Physical Examination:**
> There were bleedings, tenderness, and laceration in the base of the 2nd and 3rd posterior aspect and laceration on right wrist with restriction of movement of 2nd and 3rd fingers.
>
> **Investigation:**
> X-Ray was done and no fracture showed.
>
> **Diagnosis:**

1) Laceration on right hand with injury of extensor tendon of 2nd and 3rd finger.
2) Laceration on the right wrist.

**Plan:**
Suturing of tendon was done under Local Aesthesia in Casualty Unit with toilette (Betadine, Peroxide and normal saline). Plaster of Paris (P.O.P) was applied and he was admitted in D'Offay Ward for observation and put on antibiotics and was discharged on 09-02-05. He was followed up in the Surgical Out-Patient Department and he is doing Physiotherapy.

(Sd) Dr Salomon Gomero ORTHOPEADIC SURGEON

Moreover, the plaintiff produced in evidence eight photographs - collectively marked as Exhibit P2 - showing the injuries on his right arm with sutures and scars. As a result of these injuries, according to the plaintiff, he is still unable to fold and stretch the 2nd and 3rd fingers in his right hand. In the circumstances, the plaintiff claims that he suffered loss and damages in the total sum of R85,000 as particularised and the defendant is liable to make good for the same. Hence, he seeks a judgment against the defendant accordingly.

On the other side, the defendant testified in defence denying liability in this matter. In fact, the defendant gave a different version as to the cause of hostility between the parties and as to the sequence of events that led to the unpleasant occurrence, which resulted in injuries to both parties. According to the defendant, once the plaintiff was his close friend. A couple of months prior to the alleged incident, he sold a set of sofa and a mattress to the plaintiff, who agreed to pay the price by monthly installments. Then the parties had some argument regarding banana trees. Thereafter, on the

Sunday before the incident the plaintiff while returning from church, saw the defendant on his way and started swearing at him using bad languages.

The next day, the defendant on his return from work, he saw the mattress he sold to the plaintiff had been placed outside his house. So, the defendant telephoned the plaintiff and asked about the mattress left outside. The plaintiff got angry and slammed the phone down and in no time came out of his house with a long knife in his hand and went to defendant's place and fought with him. Seeing the long knife in the plaintiff's hand, the defendant moved backward and in the process fell down. The plaintiff came closer on defendant's property and attempted to cut him with the knife. The defendant's daughter having witnessed the scary scene screamed that the plaintiff was going to kill her father. The evidence of the defendant in this crucial aspect of his defence runs (verbatim) thus:

> When he [the plaintiff] hit the first time with a knife, he hit the washing ropes [sic]. Luckily, when he hit that, I got up and grabbed two empty bottles from the shelf there and I hit him with it. I hit him once and then I gave another hit and I took [removed] his panga [an African knife with a long broad heavy blade, often used for cutting down sugar cane]. Then my daughter called the police. The police came and took the knife and my T-shirt and pants with all the blood on it.... He threw a hit at me and hit ropes and then he got cut with the iron sheets standing there. He injured himself. I phoned the police. The police came and took him to Beau Vallon and took him to hospital and then they put me in jail. I spent a night in jail without even going for a dressing or anything,. The police came and looked [at the scene] and saw the blood and everything. They

were about 10 of them. How can he say it was in the public road?

In view of all the above, the defendant claims no fault on his part and raises "self-defence" and "provocation" in justification of his acts and consequently denies liability to pay any damages to the plaintiff. Having agreed to leave the appreciation of evidence to the Court, counsel for the plaintiff moved the Court for a judgment against the defendant as prayed for in the plaint. I meticulously, perused the pleadings and the evidence on record. Although the defendant raised self-defence and provocation as defence in his evidence, he did not specifically plead them in his statement of defence. The defendant was unrepresented and conducted his own defence without any assistance from counsel to advise him on procedural technicalities. Hence, I believe, the Court should not exclude these two aspects of his defences from its consideration in this matter. These issues indeed, are based on points of law and as such pose the following questions for determination namely

*(i)* Is the defence of self-defence available to a defendant in a delictual action, in our jurisdiction?

*(ii)* If so, does it constitute a complete defence so as to exonerate the defendant from total liability? Or does it only constitute a defence of contributory negligence?

***(iii)*** Is the defence of provocation available to a defendant in a delictual action, in our jurisdiction?

***(iv)*** If so, does it constitute a complete defence so as to exonerate the defendant from total liability? Or does it only constitute a

defence of contributory negligence?

Before finding answers to these questions, it is important to examine the position of law in our jurisprudence with respect to self-defence and provocation especially, in delictual actions. In fact, delictual liability in Seychelles is basically governed by article 1382 of the Civil Code of Seychelles. This is the most famous of all the articles of the Civil Code as it embodies the codified law of delict, which has a more limited and rational character than its un-codified counterpart namely, tort under the English legal system. Paragraph 1 of this article, lays down the general rule for all torts, which is that liability rests on the general concept of fault. This paragraph is obviously - word by word - a replica of the corresponding article in the French Civil Code, which was in force prior to the present Civil Code. In fact, “fault" is defined in paragraph 2 of this article as being 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 also stresses that the fault may be the result of a positive act or omission. Paragraph 3 of the said article completes the definition and states as follows:

> Fault may also consist of an act or 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.

Paragraph 4 thereof, reads thus:

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

Paragraph 5 thereof provides that liability may not be excluded by agreement except for the voluntary assumption of

risk. Be that as it may.

Our Civil Code came into force on 1 January 1976. Although the Code is based on and is largely a translation of the French Civil Code, the latter was repealed by Act 13 of 1975, which stated that the former shall be deemed for all purposes to be an original text and shall not be construed or interpreted as a translated text. However, it is pertinent to note here that the original article 1382 found in the French Civil Code is preserved under paragraph 1 in our Civil Code, whereas four other paragraphs 2-5 (inclusive) in our Code, have been added to it. Undoubtedly, these additional paragraphs have been tailored and incorporated in our Civil Code in order to meet the changing needs of our time and Seychellois society. Therefore, in my considered view, although all these additional paragraphs including paragraphs 3 and 4 quoted supra have their origin in French jurisprudence, they should be interpreted independently formulating legal principles on their own, in the context of our unique Seychellois jurisprudence without mechanically resorting to the French Code and jurisprudence, unless an inherent ambiguity in our provision necessitates that we do otherwise.

In the light of the above provisions of law, I now approach the issue on hand. Under the French jurisprudence, obviously it is trite and settled law that self-defence is a valid and total defence to a delict - *responsabilite delictuelle.* Hence, if such a defence is proved in a delictual action, it would constitute a complete defence in France and exonerate a defendant from total liability, as it applies in criminal cases (see nos 633 & 637 of Alex Weill & Francois Terre Droit Civil, Les Obligations (Precis Dalloz). Indeed, it is settled French case law

> ...legitime defence constitue un fait justificatif excluant toute faute et ne peut donner lieu a une action en dommage interets en faveur des ayants cause de celui l'a rendue necessaire par

> son action... (Tribunal Civil Strasbourg, 10 mars 1953).

However, it is evident from paragraph 3 of article 1382 of our Civil Code - quoted supra - that even if it appears that a defendant had acted in the exercise of his legitimate interest so to say, to protect his life, body or property in self-defence, still his act would constitute a "fault" if the dominant purpose of his act was to cause harm to the plaintiff. Hence, as I see it, our law does not recognise an act of self-defence as a total defence to delict unlike its French counterpart, simply because it satisfies the usual tests required in criminal law such as, the necessity of the situation, reasonableness, degree and proportionality of the force used, contemporaniety etc. Therefore, the primary test required to be applied here in Seychelles to render an act of self-defence a total defence to delictual liability, is the test of dominant purpose. The Court has to be satisfied that the dominant purpose of the act in question was not to cause harm to the plaintiff, even if it appears that the defendant had acted in self-defence. Hence, I hold that the defence of self-defence we normally encounter in criminal cases cannot as such constitute a total defence to delictual liability unless the act in question passes the primary test propounded supra. If it does, then it would constitute a total defence consonant with the position of law in the French jurisprudence.

On the other hand, a situation may arise wherein the act in question may pass the usual tests required in criminal law but may fail the primary test hereinbefore mentioned. In such cases, it would still constitute a defence, but only to the extent of contributory negligence by virtue of paragraph 4 quoted supra. That is, the defendant shall only be responsible for fault to the extent that he was capable of discernment as such ability is impaired in proportion to the gravity of the situation created by the act of the plaintiff.

On the question of provocation too, for identical reasons stated supra, I hold that the defence of provocation we normally encounter in criminal cases cannot constitute a total defence to delictual liability unless the act in question passes the primary test propounded supra. However, it would still constitute a defence, but only to the extent of contributory negligence by virtue of paragraph 4 quoted supra.

That is, the defendant shall only be responsible for fault to the extent that he was capable of discernment as such ability is impaired in proportion to the gravity of the situation created by the act of the plaintiff.

In view of all the above, I find the answers to the above questions as follows:

(i) The defence of "self-defence" is available to a defendant in a delictual action, in our jurisdiction.

(ii) It would constitute a complete defence and exonerate the defendant from total liability, provided the dominant purpose of his act was not to cause harm to the dlaintiff or else it would only constitute a defence of contributory negligence and reduce the quantum of damages.

(iii) Likewise, the defence of provocation is also available to a defendant in a delictual action, in our jurisdiction.

(iv) It would also constitute a complete defence and exonerate the defendant from total liability, provided the dominant purpose of his act was not to cause harm to the plaintiff or else it would only constitutes a defence

of contributory negligence and reduce the quantum of damages accordingly.

Having thus set the position of law on the issues, I will now move on to examine the evidence on record. On the issue of self-defence, it is so obvious from the evidence of the defendant that he had time, opportunity and circumstances to avoid the alleged threat of the plaintiff and move away from the scene. However, he elected to remain at the scene and moreover allegedly, picked up an iron rod from somewhere (admittedly, bottles and stones), approached the plaintiff and admittedly hit him, although the circumstances did not warrant such a course of action, such a high degree of force and necessity. Besides, it is evident from the medical evidence that the injuries the plaintiff had sustained were lacerations and not cut injuries. This corroborates the version of the plaintiff that it was the defendant who hit him with an iron bar.

The nature of injuries is in fact inconsistent with the version of the defendant in that he claimed that the plaintiff got cut with the iron sheet standing there, which is a sharp-edged object that evidently cannot cause laceration but only cut injuries.

In the circumstances, I find that the defendant did not act in self-defence in the entire episode. He hit the plaintiff with an iron rod and the dominant purpose of his act was to cause bodily harm to the plaintiff. Hence, the alleged act of self-defence put up by the defendant in this action does not constitute a complete defence to exonerate him from total delictual liability. However, having regard to all the circumstances of the case, the defendant, who failed in his duty to retreat, appears to have acted in the exercise of his legitimate interest to protect against possible threat issued out by the plaintiff. Therefore, I find it would only constitute a defence of contributory negligence and would proportionately reduce the quantum of compensation payable to the plaintiff for delict.

As regards the issue of provocation, I find that the plaintiff did provoke the defendant by insulting him with bad language, calling him a *pillon,* and leaving the mattress at the residence of the defendant without his knowledge and above all by throwing the machete in front of the defendant. As I discussed supra, provocation would constitute a complete defence and exonerate the defendant from total liability if and only if the dominant purpose of the defendant's act had not been to cause harm to the plaintiff. However, on evidence I am satisfied that the defendant's dominant purpose herein was to cause harm to the plaintiff. Therefore, I find that the provocation in the circumstances of the present case, would only constitutes a defence of contributory negligence and reduce the quantum of damages accordingly.

In the final analysis, I hold that the defendant is liable in delict to compensate the plaintiff for the consequential loss and damages. However, the amount claimed by the plaintiff under each head of loss and damage appears to be unreasonable, exorbitant and disproportionate to the actual injuries he suffered.

Besides, to my mind, the plaintiff suffered those injuries not solely due to the fault of the defendant, but also due to his own contributory negligence in depriving the defendant of his power of discernment for which I would apportion the blame to 50%.

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 laintiff 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: see *Fanchette v*

*Attorney-General* (1968) SLR 111.

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 220. The injuries in the present case are obviously, not so severe in degree and nature although there appears to be some restriction of movement on 2nd and 3rd finger in the right arm.

In view of all the above, I award the plaintiff the following sums:

| | |
|---|---|
| (a) For injuries to the right arm | R12,000 |
| (b) For pain and suffering | R 5,000 |
| (c) For trespass to person | R 3,000 |
| | **R20,000** |

Accordingly, I enter judgment for the plaintiff and against the defendant in the sum of R20,000 with interest at 4% per annum - the legal rate - on the said sum as from the date of the plaint and with costs, which shall be taxed in the Magistrate's Court Scale.

**Record: Civil Side No 213 of 2005**

**Batcha v Belle**

*Companies Act – Directors – Shares*

The plaintiff was a director of a company. He held shares on trust for the second defendant. He was managing the company poorly. At the Annual General Meeting, the plaintiff was removed from managerial duties by ordinary resolution, and the third defendant appointed a director. Some of the plaintiff's shares were transferred to the third defendant.

The plaintiff claims that the Annual General Meeting and subsequent meetings were null and void, that he was unlawfully removed as director, and that the third defendant was improperly appointed. The defendants sought an order that the plaintiff hand over all the records, books and other property of the company.

By interim injunction, the defendants were restrained from implementing or giving effect to resolutions passed at the Annual General Meeting, and subsequent resolutions to remove the plaintiff as a director. An application for an interim injunction for the plaintiff to hand over the books of accounts for the company was denied.

**HELD:**

(i) Failure to issue a share certificate does not affect the validity of a share transfer;

(ii) It is not mandatory to have a shareholders' meeting before the Annual General Meeting. Therefore, the resolutions at the Annual General Meeting and subsequent meetings were valid; and

(iii) Under section 119 of the Companies Act, the plaintiff can apply to the Registrar of Companies to hold an Annual General Geeting.

**Judgment:** For the plaintiff in regard to director's fees; Judgment for the defendants in all other respects, with costs. Interim injunction discharged. Board meeting to be called with due notice to the plaintiff. Order that the plaintiff hand over books.

**Legislation cited**
Companies Act, ss 2, 85(1), 85(2), 87, 89, 163, 128, 136, 139, 174(2), 119, 124
Civil Code of Seychelles, arts 1341, 1347

**Cases referred to**
*Shakara (Pty) Ltd v Gracia Bastienne* (1979) SLR 31
*GIC v D Bonte* (unreported) SCA 6/1994

**Foreign cases noted**
*Gluckstein v Burns* [1900] AC 240
*Re Lundy Granite Co ex p Heavan* (1871) LR 6 Ch App 462

Somasundaram RAJASUNDARAM for the plaintiff
Francis CHANG SAM for the defendants

**Judgment delivered on 28 May 2007 by:**

**PERERA J:** The plaintiff, a naturalised Seychellois and a Chartered Accountant, avers that the second defendant, a foreign national, approached him to have a joint venture in a printing business. He claims that he acted as promoter of that business and in that capacity submitted a business plan for a small scale print and packaging industry to the Cabinet of Ministers through the Ministry of Industries and International Business, and obtained approval. He further avers that due to

his "experience and well established public and business relationship", the fourth defendant company, Colour Print and Packaging (Pty) Ltd, experienced a rapid growth in business. The plaintiff further avers that the second defendant, who in addition to being a director of that company, was also the supplier of machinery and raw materials, started to indulge in various activities against him, and exerted undue pressure, and abused and insulted him by phone and fax with a view to ousting him, claiming that he (the second defendant) was the major shareholder of the company.

The plaintiff avers that he holds 500 shares, while the second defendant holds 450 shares and the first defendant 50 shares.

As regards those averments, the defendants deny that the plaintiff was the promoter of the fourth defendant company. They aver that it was the second defendant who conceived the idea of commencing the business now being carried on as the fourth defendant company, and that at that time the plaintiff was only an employee of Printec Press Holdings (Pty) Ltd. The plaintiff claimed that he left Printec Holdings in December 2002, having gone on leave from November 2002.

The defendants aver that the fourth defendant company which was established in the year 2000 bore the name "Pre-Press Systems (Pty) Ltd" at that time, and it was changed to its present name "Colour Print and Packaging (Pty) Ltd" by special resolution on 16 December 2002. The defendants also deny that the plaintiff was appointed as "Managing Director" of the company as claimed, and as a matter of law pleads that "Managing Directors" are not appointed in proprietary companies.

The defendants further aver that it was the second defendant who furnished the entire venture capital for the business, and had he not done so, there would not have been any project to be presented to the Cabinet of Ministers for approval. It is

further averred that the plaintiff failed to keep proper accounts and records, failed to perform statutory duties in respect of business taxes and social security payments and exposed the fourth defendant to penalties and other liabilities thus jeopardising the entire business.

In answer to the claim of the plaintiff to 500 shares, the defendants aver that the whole shareholding consisting of 500 shares of one of the promoters, namely Christopher Gopal, was transferred to the plaintiff on the agreement that he would hold 400 of the 500 shares as a nominee for the second defendant, and on that basis, an agreement dated 24 August 2001 was entered, and a blank share transfer was also signed by him the same day. Those 400 shares were later transferred to the third defendant.

The defendants therefore pray for an order of this Court ordering the plaintiff to hand over all the records and books and other property of the fourth defendant company, confirm that the share transfer in favour of the third defendant on the basis that the agreement was valid in law, and for an order to the Registrar General to properly stamp the said share transfer and allow the notice of particulars of directors notifying the appointment of the third defendant as director to be registered.

On the other hand, the plaintiff prays for an order declaring that the Annual General Meeting held on 25 May 2005 and subsequent meetings are null and void, declaring that the removal of the plaintiff from the post of Managing Director is invalid, declaring that the appointment of third defendant as director is invalid, ordering a new Annual General Meeting, directing the first defendant to convene a proper board meeting and for an order that the defendants pay "appropriate compensation" for his loss of office as director of the Company.

Before the merits of the case are considered, it is necessary to state that upon considering an application for an ex parte interim injunction filed by the plaintiff, Renaud J has by order dated 8 July 2005 restrained the defendants from implementing or giving effect to resolutions passed at the Annual General Meeting of 25 May 2005, and subsequently on 1 June 2005 and 8 June 2005, "removing the Applicant from the management and control of the said company". They were also restrained from holding any meeting to remove the plaintiff from the management.

The first, second and fourth defendants thereupon filed a motion on 12 December 2005 for the interim injunction to compel the plaintiff to deliver to the fourth defendant company and its auditor "all books of records and accounts and related information which are in his custody, control or custody" and restraining the plaintiff from operating the bank accounts of the company, in particular the accounts at Nouvo Banq and at Barclays Bank. That application was resisted by the plaintiff. Renaud J, by order dated 13 July 2006 held inter alia that on the basis of the affidavits and counter-affidavits filed, it had not been established with certainty who was having the control and custody of the books of accounts and related documents. He also noted that the ex parte interim injunction restraining the defendants from taking action to remove the plaintiff from "the management and control of the company" had not been complied with and hence, as the plaintiff had been denied access to the office and the factory, he could not have custody and control of any of the documents sought. He further refused to make any order authorising the second defendant to operate the accounts of the fourth defendant company, as the ex parte injunction issued on 8 July 2005 was to maintain the status quo of the company until final determination of this case.

However, the second defendant testified that the business of the fourth defendant is being carried out through his other

company "Trade Supplies (Pty) Ltd". He stated that the latter company supplies the goods, and work is done by the fourth defendant company. The revenue which should in fact go to the fourth defendant company now goes to the account of Trade Supplies (Pty) Ltd, as the account is frozen. He further stated that had he not done so, the fourth defendant company had to be closed down. He stated that no resolution was passed by the board of the fourth defendant company to trade in that manner.

The pivotal issue in this case is the removal of the managerial functions of the plaintiff, while he still remains a shareholder and director. Another vital issue is the validity of the transfer of 400 shares out of the 500 shares held by him to the third defendant. It was consequent to that transfer that the third defendant became a director and shareholder, and participated in the meetings of the company at which resolutions were passed against the plaintiff. Hence if that transfer was invalid, any resolutions passed at these meetings would be null and void.

I shall first consider some of the relevant provisions of the Companies Act relied on by counsel for the plaintiff as those violated by the defendants. It was submitted that although section 87 requires the company to issue share certificates to shareholders no such certificates were issued either at the time shares were transferred from Christopher Gopal to the plaintiff or at the time when the alleged share transfer was effected between the plaintiff and the third defendant.

Section 89(i) provides that "a certificate issued by a company and signed on its behalf stating that any shares or debentures of the company held by any person shall be prima facie evidence of the title of that person to the shares or debentures". Although failure to issue such a certificate has penal consequences, the validity of the shareholding remains unaffected. One of the resolutions passed at the company

meeting of 25 May 2005, was the issuance of share certificates. But the injunctions issued on the application of the plaintiff have stayed the implementation of that resolution.

The original directors of Pre-Press Systems (Pty) Ltd were Christopher Gopal, with a holding of 500 shares, Anup Vidyarthi (second defendant) with 450 shares while Daniel Belle was a shareholder of 50 shares (D6). The second defendant claimed that Mr Gopal held those shares nominally in trust for him, and that when those shares were transferred to the plaintiff on 24 August 2001 (P5), no consideration was paid by the plaintiff, as stated therein. That transfer was duly stamped and registered on 28 September 2001.

Although article 1341 of the Civil Code provides that no oral evidence shall be admissible beyond the contents of a document, the defendants relied on a "declaration of trust" signed before the first defendant in his capacity as notary public on the same day as the transfer of shares to him by Mr Gopal, as writing providing initial proof which is an exception under Article 1347.

That declaration is as follows-

> Know all men by these presents that I, the undersigned Sathasivan Batcha Palani of Mont Fleuri, Mahe, Seychelles, (Trustee), do hereby acknowledge my nominal ownership of four hundred shares (400) of Pre-Press Systems (Proprietary) Limited of Victoria, Mahe, Seychelles (the company), and further acknowledge that the same are held in trust for the sole use benefit and advantage of Anup K. Vidyathi of 81, Arlington Road, Henden, London, UK, his heirs, successors and assigns (owner).

The covenants of that declaration are numbered 8 to 14.

However, a similar declaration of trust made by the plaintiff the same day in favour of Mr Vidyathi acknowledging nominal ownership of 250 shares of Trade Supplies (Pty) Ltd (which is the subject matter in case CS 240/05 which is pending), was produced in this case as exhibit D20, and the covenants in that document are numbered 1-7. The covenants in both documents are identically worded through differently numbered.

The covenants in the "declaration of trust" in respect of the shares in Pre-Press Systems (Pty) Ltd are as follows -

> The Trustee hereby irrevocably agrees, covenants, warrants and represents as follows:
>
> 1. That the Company is duly registered and that said shares represent 40% of the company's outstanding stock.
>
> 2. That Trustee shall at all times not disclose during or after the term of this declaration of Trust (a) the existence thereof or, (b) the content thereof or, (c) any communications relating thereto or, (d) any instructions received there under or any act undertaken pursuant thereto to any third party.
>
> 3. That the Trustee shall at all times act in accordance with such instructions of the Owner or his authorized representatives and agents as maybe issued from time to time and that if by default absent such instructions the Trustee shall act in his discretion in the best interest of the Owner.

4. That at Owner's request Trustee shall without delay assign the stock in full or in part to the Owner or such other assignee as Owner may direct.

5. That Trustee shall not without prior written approval by Owner (a) create any interest in or related to the corporation, its stock or its assets or, (b) enter into any contract binding the corporation and/or affecting its assets or shareholders or, (c) make any declaration in the name of or on behalf of the Corporation, its shareholders and/or Owner.

   That Trustee shall endorse a share transfer of the said Shares in blank and shall deposit said Share Transfer without delay at such place as may be designated by Owner in accordance with Owner's instructions.

6. That this declaration of Trust is binding upon the Trustee, his heirs, administrators, executors, custodians, successors."

The defendants have also produced a blank share transfer of 400 of the 500 shares by the plaintiff the same day as the transfer of shares to him by Mr Gopal, and the "declaration of Trust". Those three documents were relied on as counterparts to establish the equitable nature of the transaction.

The defendants also rely on the unchallenged evidence of the first [d]efendant who acted as notary to that document, the

blank document of transfer (D2), which the plaintiff admitted signing but maintained that it was in respect of 400 shares of Pre-Press Systems (Pty) Ltd and not of the fourth defendant company. In that respect, the defendants rely on the resolution passed by the board of directors of Pre-Press Systems (Pty) Ltd on 26 November 2002 (D7) whereby the second defendant and the plaintiff as directors resolved that the name of the company be changed to Colour Print and Packaging (Pty) Ltd and to register the name Print Pack as the business name.

The Registrar of Companies registered the change of name on 16 December 2002 (P7). Under article 1347, a writing providing initial proof is a writing (a) which emanates from the person against whom the claim is made or from a person whom he represents, and (b) which renders the facts alleged likely.

The transfer of five hundred shares by Christopher Gopal to the plaintiff on 24 August 2001 (P5) was unconditional. Sections 85(1) and (2) of the Companies Act prohibits restrictions on the right of a person to transfer a debenture or share held by him. However subsection (5) thereof provides that such restrictions do not apply to a proprietary company. By the simulation contained in the "declaration of Trust' (D19), the plaintiff agreed to act in accordance with the instructions issued by the owner of the beneficial interest in 400 shares and for that purpose to endorse a share transfer in blank. The plaintiff, on being cross-examined, stated -

> Q. Mr Palani, do you agree that the 400 shares did not belong to you, they belong to Mr Vidyarthi.
>
> A. Still now, I fully agree that it did not belong to me when it was Pre Press Systems Ltd, which company is different, from 2000 the

> company is in existence. There is no annual return file, there are no accounts done, you tell me now.

However when questioned further whether he is now claiming ownership of all the 500 shares as the company name had changed, he stated that the second defendant gave him 50% shares as there was no one to promote the business.

Counsel for the plaintiff also raised the issue of pre-emption under section 27, which provides that "the continuing members of a proprietary company shall be entitled to purchase shares of an outgoing member". When the shares of Christopher Gopal in Pre-Press Systems (Pty) Ltd were transferred to the plaintiff on 24 August 2001, he (the plaintiff) himself was not a "continuing member" of that company but an outsider.

As Palmer states -

> A private company is normally what the Americans call a "close corporation; This means that its members are connected by bonds of Kinship, friendship or similar close ties and that the intrusion of a stranger as shareholder would be felt to be undesirable unless his admission is accepted by those for the time being interested in the company.

The plaintiff was admitted as a shareholder due to the friendship the Second Defendant developed with him when he was employed at Printec Press Holdings Ltd. It was on the basis of that same friendship and trust that the second defendant entrusted 400 shares to be held on trust from him. It was provided in paragraph 11 of the declaration of Trust that upon the request of the second defendant, the plaintiff would assign the "stock in full or in any part to him or any

other assignee directed by him."

Consequently, he was asked by the second defendant to meet the first defendant to formalise the documentation to effect the transfer to the third defendant who admittedly is his niece. As the plaintiff failed to meet the first defendant as requested, the blank transfer form was filled up with necessary particulars and presented to the Registrar of Companies for stamping. The plaintiff vehemently denied his signature on that document before the Registrar, but eventually it was stamped on 16 March 2005.

Hence although the share certificate has not been issued, the third defendant holds good title to 400 shares of the company.

To maintain his claim for loss of office as director of the company, the plaintiff, has averred that he was a promoter of Pre-Press Systems Ltd, as the second defendant was a non-resident director of that company and that the entire responsibility of forming the company was entrusted by the second defendant to him. The Memorandum of Association of that company was registered with the Registrar of Companies on 6 July 2000 (D6). At that time, the plaintiff was employed at Printec Press Holdings Ltd. The term "promoter" is defined in section 2 of the Companies Act as –

> Any person engaged in the formation of a company, or in raising money to enable a company, to be formed, or to acquire any assets or an existing business, or in negotiating the acquisition of any assets or an existing business by or fora company, and includes any person engaged in doing any of those acts for the benefit of an overseas company, but does not include a person who acts only in a professional capacity on behalf of a promoter.

Palmer on Company Law para 20-06 states that a person becomes a promoter from the moment he takes part in forming it or setting it going. In *Gluckstein v Burns* [1900] AC 240, members of a syndicate who agreed to combine to purchase a property with a view to selling it later to a company they intended to form, were held to have become promoters from the moment they took the first step to carry out that object. In the present matter, the company Pre-Press System (Pty) Ltd had been formed since 6 July 2000 by Mr Gopal, M. Vidyarthi and Mr Belle. The plaintiff became a director in September 2001. The project plan was submitted to the Cabinet of Ministers through the Ministry of Industries and International Business only on 10 March 2003, and it was approved by letter dated 22 July 2003 (P9).

The plaintiff had discussions with the Government for the lease of Parcel V 11232 in the year 2004, and also negotiated a loan from the Development Bank of Seychelles in November 2003. However, the plaintiff testified that the business was inaugurated on 30 October 2003, in a different place. The approved loan amount was subsequently reduced by the DRS, as installments were not paid for over one year. In these circumstances, the laintiff could not have been considered as a promoter in the legal sense of the term.

As the resident director, he undoubtedly had to pursue matters connected with the business. The second defendant stated that 100 shares were given in contemplation of his services as the resident director. He stated that he was paid a monthly salary of R12,000, and was provided with a company vehicle, and a rent allowance.

The plaintiff was neither a promoter nor the Managing Director in the legal sense contemplated in the Companies Act, although he performed some of the functions of both positions for remuneration. The plaintiff claims that the second defendant acted with an ulterior motive in getting him to sign a

blank transfer of shares (D2), in that he had intended to remove him after he had established the business. Such an assertion is not logical, as even then, he remained a shareholder of 100 shares. The defendants have categorically admitted in Court that the plaintiff still remains both as a shareholder and director of the fourth defendant company. The defendants only sought to remove only his "managerial functions" in the interests of the company, and in his own interest as a shareholder. It was disclosed in evidence that the plaintiff, who was controlling the operation of finance of the company, had failed to present the annual accounts for the years 2002, 2003, and 2004, and had also failed to prepare a director's report.

Copies of correspondence produced by the second defendant (D9) show that he had asked the plaintiff to prepare the accounts of the company since May 2004.

The second defendant, finding that the plaintiff was not responding to his fax messages, sent a letter dated 5 April 2005 to Mr Rajasudaram, counsel for the plaintiff stating -

> As was agreed under your guidance and in your presence, Mr Palani has failed to deliver the records for the accounts both for Trade Supplies (Pty) Ltd, and Colour Print and Packaging Company [to the] Secretary or me.
>
> This clearly shows not only a lack of total responsibility as the resident director of the company, but also that he is trying to hide something more sinister.
>
> His actions have left me with no other option but to give him the final ultimatum, which I have done. I would like to assure you that I will proceed with the complaints to the relevant

> authorities, even though I know this may adversely affect me, the other directors and shareholders of both companies.

The plaintiff himself produced copies of several fax messages received by him from the second defendant, where the central theme was the maintenance of company accounts, his rude behaviour towards the staff and his general lack of diligence in the discharge of his duties. These complaints came with a dose of medical, and spiritual advice as Mr Palani was attributing his lapses to his health conditions. The second defendant stated that he sent them out of frustration.

On a consideration of the correspondence, the Court is unable to agree with the plaintiff that the second defendant used intimidation tactics to remove him from the company. Apart from that being a legal impossibility, such correspondence shows that the second defendant, who was providing the plant and machinery, supplying materials and the finances, was justifiably concerned with the future of his investment, as business tax returns had not been furnished and Social Security payments not made (D10), thereby exposing the company to penalties and legal action.

The plaintiff's explanation for the delays was that there was no accountant in the company, and since he had to carry out various duties relating to marketing and business development, he did not have sufficient time to maintain accounts and prepare business tax returns. The second defendant in his testimony stated that the plaintiff was permitted by him to set up a business called "Sairam Traders" which was registered on 22 November 2002 (D16).

However he later found that he was using the fourth defendant company to execute printing orders undertaken by Sairam Traders and appropriating the proceeds. It was therefore claimed that he was devoting his time more to his

own business than that of the fourth defendant company.

In a fax message dated 28 May 2004, (D9) the second defendant informed the plaintiff that if he was unable to maintain the accounts documents, he should employ a qualified bookkeeper. At the adjourned Annual General Meeting of 1 June 2005 (P19) the plaintiff informed the board that he had appointed one Mary Lise Esparon, a licensed bookkeeper, to prepare the director's reports for 2002, 2003 and 2004. He promised to give a progress report at the next meeting on 8 June 2005. But on that day he failed to attend that meeting (P20). At the meeting of 25 May 2005 (P17), AJ Shah and Associates were appointed as Company Auditor.

The plaintiff stated in his testimony that he contacted Mr AJ Shah and that he told him that he could not undertake the work as he was too busy. He then decided to contact Nair & Company Auditors, but Mr Nair told him that his appointment should be approved at an Annual General Meeting. Hence no auditing was done. Therefore there were sufficient reasons for the defendants to remove the managerial duties of the plaintiff while he still remained a shareholder with 100 shares, and as director of the company.

However the plaintiff avers that the resolutions to remove his managerial duties and the consequent removal of his mandate to sign company cheques relating to the bank accounts at Nouvobanq and Barclays were contrary to the provisions of the Companies Act. Originally, it was resolved at a board meeting of 6 October 2003 (P28) that both Mr Palani and Mr Vidyarthi would operate the Nouvobanq account on an "either or" basis and negotiate bills, loans, overdrafts and other facilities at the bank.

After the plaintiff and the second defendant had disputes regarding the management of the company both of them, by a document dated 17 January 2005 (D15) confirmed the

appointment of Ms Karishma Moolraj (third defendant) as Acting General Manager of the fourth defendant company. A list of 20 duties to be performed by her, were set out in that document. She was however to be responsible to the plaintiff, and was to carry out any instructions given by the second defendant. Among these duties were -

1. To maintain proper stock records for all goods currently in stock any other new consignments received.

2. Proper NRM records to be maintained at all times

3. Weekly and monthly reports to respective heads and directors

4. To maintain proper filing records, and proper filing of documents.

5. Keys to the factory should always be maintained by her, and should not be given to any staff member, either to close or to open.

6. To sign all payments vouchers.

7. To hold regular staff and management meetings and file meeting reports with both directors.

This sharing of duties ought to have given the plaintiff adequate time to perform the main duties connected with accounts and business.

With the transfer of 400 shares to Miss Moolraj under the Trust agreement of 24 August 2001, implemented on 15 October 2004 through the transfer document signed by the plaintiff as "Trustee" of those shares, she became a shareholder and director of the fourth defendant company.

She presided as Chairman at the AGM of 25 May 2005 when the plaintiff absented himself after sending a medical certificate by fax at 13.40 hrs on that day (D21). The meeting fixed for 2 pm commenced at 3.17 pm.

That medical certificate had been issued on 23 May 2005. It was noted in the minutes of that meeting, that notice of the meeting and the agenda were sent to the plaintiff on 3 May 2005 at 3.30 pm. Hence he could well have sent it at least a day before the meeting to the secretary. The plaintiff was however present at the adjourned AGM of 1 June 2005 (P19) where Ms Moolraj again presided as Chairman. He however registered his protest and wanted a board meeting of directors to be held first.

At the meeting of 8 June 2005, the plaintiff was absent without excuse. A notice of an extraordinary meeting of shareholders "to be held on 11 July 2005" at 3 pm was sent to the plaintiff, signed by Miss Moolraj in her own behalf and for Mr Vidyarthi by Power of Attorney, and Mr D Belle, on 17 June 2005 (P21). The main resolution to be tabled was "to remove Mr Sathasivan Palani as Director of the Company". The plaintiff filed the present suit on 6 July 2005, and obtained an interim injunction on 8 July 2005 restraining the defendants from holding the meeting on 11 July 2005. Hence the plaintiff has not been removed from his position as director.

Admittedly, the plaintiff ceased managerial duties. The plaintiff stated that despite obstructions, he tried to run the company, but could not do so due to mental stress. After obtaining the injunction, he went to the factory on 15 July 2005 with two orders for printing. But the staff refused to accept them. Then Ms Moolraj came and asked him to go out of the factory and threatened to call the police. The plaintiff stated that he felt humiliated in front of the staff and did not go to the factory thereafter. This situation was created by the plaintiff himself, who by his own negligence, exposed the company to legal

penalties and other liabilities.

As regards the Annual General Meeting fixed for 25 May 2005 at 2 pm, Miss Moolraj stated that the medical report came only 20 minutes before the commencement.

By ordinary resolutions tabled and approved unanimously, it was resolved that (1) AJ Shah & Associates be appointed as auditors; (2) the shareholding qualification for a director to be 15%; and (3) Miss Moolraj be appointed as director. Those resolutions were consistent with the provisions of section 122 of the Companies Act. It was also accepted that the Plaintiff be suspended from being a signatory to the bank account of the company until he resolved the position of the accounts and the actions threatened to be taken by government authorities for failure to perform statutory duties.

Ms Moolraj in her testimony stated that consequent to the plaintiff obtaining the injunction from the Court, that decision was not implemented and that although mandated, she herself cannot operate the accounts without the plaintiff's signature.

In his plaint, the plaintiff has not challenged the third defendant's rights as a shareholder of 400 shares, but only sought a declaration that her appointment as director is invalid. She was appointed at the Annual General Meeting of 25 May 2005 (P17). At that meeting, the third defendant was present as the shareholder of 400 shares, and also in her capacity of proxy to the second defendant director. Mr Belle was also present as the shareholder of 50 shares. Hence with the absence of the plaintiff on medical grounds, the appointment of the third Defendant as director by the company was approved by one director and two shareholders.

As the fourth defendant company is a proprietary company, that appointment did not contravene section 163 of the

Companies Act. Moreover it was submitted by the plaintiff that the second defendant was present in Seychelles when the meetings were held on 25 May, 1 June and 8 June 2005, but purposely avoided attending those meetings, and got Miss Moolraj to appear as proxy. Section 128 of the Companies Act provides that —

> Any person entitled to attend and vote at a general meeting of a company, or a meeting of a class of shareholders or debenture holders, shall be entitled to appoint another person (whether a member, shareholder or debenture holder of the class in question or not) as his proxy to attend and vote on his behalf instead of him….

Hence the fact that the second defendant was present in Seychelles during the relevant period does not contravene the provision of section 128. As a matter of law, the defendants have submitted that the plaintiff is under section 136, out of time to challenge the resolutions passed on 25 May 2005, as the period of one month provided had passed when the present plaint was filed on 6 July 2005. The plaintiff has submitted that he became aware of those resolutions only when he received a letter from Barclays Bank on 12 June 2005 regarding the resolution giving Miss Moolraj power of attorney on the company account (P24). He therefore calculates the one month period from that day. However, the plaintiff was present at the meeting of 1 June 2005, and protested against the chairmanship of Miss Moolraj.

Ms Moolraj in her testimony stated that the meeting of 25 May 2005 was adjourned to 1 June 2005, to deal with matters that concerned the plaintiff, namely the presentation of accounts and the submission of director's reports. However, when he attended that meeting he was hostile and abusive. He wanted a copy of the previous minutes, and was told that they were posted to him. He did not state that he did not have books of

accounts, but stated that he had appointed a person to prepare the accounts. If so, the plaintiff would have had the books of accounts at that time.

At the further adjourned meeting of 8 June 2005 (P20), the plaintiff was once again absent without excuse. The same members who presided at the meeting of 25 May 2005, resolved to remove the plaintiff as signatory to the bank accounts of the company.

That resolution though validly passed was not implemented due to the injunction issued by Court.

As regards the validity of those meetings, it was submitted that the Annual General peetings were not preceded by a shareholders meeting. As was held in the case of *Shakara (Pty) Ltd v Gracia Bastienne* (1979) SLR 31 where the position of the voting power of the shareholders is clear, it will not be necessary to pass a resolution at a general meeting, as the result of the meeting would be a foregone conclusion. Hence at the AGM, the resolutions were passed by majority shareholders. Hence prayers (a), (b) and (c) of the plaint seeking declarations that the resolutions passed at those meetings are invalid cannot be sustained. In any event those declarations are prescribed under section 136.

Another important point of contest between the parties was where the books of accounts in the company are at present. Section 139 provides that every company shall cause to be kept books of account with respect to —

(a) All sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;

(b) The assets and liabilities of the company.

Subsection (3) provides that such books of account shall be kept at the Registered Office of the company or such other place the directors think fit, and shall at all times be open to inspection by the directors. The third defendant stated that after she was confirmed as General Manager on 17 January 2005, all the documents constituting the books of account from June 2005 are being kept in a room at the factory at Providence. Where then are the previous books of account?

The plaintiff stated that the office at Low's building, Revolution Avenue was purely for administrative purposes, and that the books of account were kept at the factory. However, Cortney Sinon (DW1), the Works Manager of the company stated that there was no office at the factory, and no books of accounts were kept there at that time. The plaintiff came there for only about 15 minutes, three times a week, with a photocopy of an order. That copy would only contain the details of the job, but not the pricing. The originals of those orders, invoices etc were at Low's building. Even when the printing was done, the finished product was delivered to the plaintiff at Low's building. Even the staff records were kept there.

Alfred Charles (DW2), the Production Manager of the company corroborated the evidence of Cortney Sinon as regards the books of accounts and other documents. He also stated that the original order forms were never received at the factory. He however stated that purchase orders are attached to the job cards and kept in the factory.

Michel Ange Valentin (DW3), the driver of the company stated that he delivered the work orders to the factory and performed other dispatch duties. He also drove the plaintiff to various places. He too stated that all administrative and business matters were dealt with at Low's building. He stated that the plaintiff would pick quarrels with all workers and one day he invited him to fight. He left thereafter, and later joined

the "new management", as a part-time worker.

Ms Moolraj (DW4) also stated that she too drove the plaintiff to the factory to deliver purchase orders. After she was confirmed as Acting General Manager on 17 January 2005 (D15) she moved to the factory at Providence. Her duties there were mainly administrative in nature. The original purchase orders were at Low's building, and when copies were sent to the factory, she processed them and sent the finished product to the office at Low's building. When she assumed duties there was no office, but later a store room was converted into an office.

There were no books of accounts when she came there. All these documents were at Low's building, and only the plaintiff had the keys to that office. After the transfer of shares in her name in October 2004, the plaintiff became hostile towards her. It was then that she moved to the factory in January 2005, with the joint approval of the plaintiff and the second defendant.

At the adjourned AGM of 1 June 2005 the plaintiff, who was present, was asked to present his director's report for the years 2002, 2003 and 2004. According to the minutes (P19), he stated that he needed more time as he had on 31 May 2005 appointed one Mary Lise Esparon (a licensed Book keeper) "to do the books" for those years. Hence undoubtedly, those books were in his custody in June 2005. He had the keys of Low's building, where the books were. There is no evidence that any of the defendants or any other person removed them without his knowledge. Accordingly, on a balance of probabilities the books of account for the years 2002, 2003, 2004 and up to June 2005 should be with the plaintiff. The plaintiff shall therefore hand over all the records, books and other property belonging to the fourth defendant company to the first defendant in his capacity as Company Secretary.

The plaintiff has, in prayer (g) of the plaint, sought an order on the defendants "to pay appropriate compensation to (him) for loss of office of director of the company". The plaintiff did not cease to be a director of the company. Only his managerial duties were withdrawn as he was "not running the business properly". Admittedly he was paid R12,000 per month and also given the use of a company vehicle for his services as the resident director who was entrusted with the administration of the business and was also paid a rent allowance. However those payments ceased at the end of December 2004. He has been given 100 shares for his initial organisation of the work. Thereafter the second defendant supplied the venture capital including plant and machinery.

In these circumstances, the plaintiff cannot maintain a claim for loss of office. However at the AGM of 25 May 2005, a resolution was tabled to set the "remuneration and expenses of directors of the company". Since the plaintiff was absent, that resolution was taken up at the adjourned meeting of 1 June 2005. At that meeting, the plaintiff agreed to state the amount he would claim as director's remuneration, but he deferred it to the next meeting, which he did not attend. Section 174(2) provides that no payment shall be made by a company as director's remuneration, "unless the payment has been authorised or approved by an ordinary resolution passed at a general meeting of the company". Hence the plaintiff should be entitled to only such director's remuneration which will be determined at a directors and shareholders meeting.

The defendants have admitted that the plaintiff is still a director and was also asked as to what he claimed as fees at the meeting of 25 May 2005. As was held in the case of *GIC v D Bonte* (unreported) SCA 6/1994, payment of a director's fee would continue to be due until removal. His right accrued from time to time until that time. Further, as was held in the case of *Re Lundy Granite Co* (1872) 26 LT 673, such fees are payable "whether profits are earned or not by the company".

In the circumstances of the present case, the Court holds that the plaintiff will be entitled to director's fees from 1 January 2005.

In view of these findings, the interim injunction issued on 8 July 2005 is discharged as the plaintiff was never the Managing Director nor the promoter of the company. He still continues as a shareholder of 100 shares, and as director. At the meeting of 25 May 2005, it was resolved only to suspend the plaintiff from being a signatory to the bank accounts of the company, until the lapses on his part towards the company were resolved. He was not "removed from the management and control of the company" as averred in the motion, and as stated in the order of injunction.

As the share transfer of 400 shares by the plaintiff to the third defendant has been held to be valid, and such transfer has now been duly stamped on 16 March 2005, the Registrar General is directed to register the notice of particulars of directors notifying the appointment of the third defendant as director.

The plaintiff has, in prayer (d) of the plaint, prayed for an order on the defendant to hold a proper Annual General Meeting. Section 119 of the Act empowers the Registrar of Companies to call such a meeting on the application of a shareholder. Hence the plaintiff, in his capacity as shareholder, could make an application to the Registrar, if so advised.

In prayer (e) the plaintiff seeks an order on the first defendant to convene a board meeting to discuss and transact all business in the interest of the company. As the plaintiff is still a director, the Court is empowered under section 124 of the Act to order such a meeting. In view of the findings in the case, the plaintiff should hand over the books of accounts to the first defendant. Further there are issues such as the fixing of director's remuneration to be resolved, the issuing of share

certificates, the presentation of annual accounts for the years 2002, 2003 and 2004 and such other important matters relating to the business of the company to be resolved.

Hence it would be imperative that a meeting envisaged in section 124 be called. The Court orders that a board meeting be called with due notice to the plaintiff. If he fails to attend, the Court directs under the provisions of that section that one shareholder of the company present in person or by proxy shall be deemed to constitute a meeting.

Subject to the limited relief granted to the plaintiff by way of director's fees, his action is otherwise dismissed with costs.

**Record: Civil Side No 230 of 2005**

**Republic v Anna**

*Jury practice – Summing-up – Murder – Burden of proof – Standard of proof – Corroboration*

Wilette, the deceased, was stabbed in the side of her chest with a sharp-edged object, resulting in her death. This is the summing up of the law to the jury before they retired to reach their conclusion on whether the accused committed the murder or not.

**HELD:**

(i) A person commits murder if they cause the death of another person, by committing an unlawful act with malice aforethought;

(ii) Malice aforethought means either:

a. An intention to cause death of grievous harm to a person, whether or not that person is the person actually killed. Grievous harm is the same as serious bodily harm.

b. Knowledge that the act causing death will probably cause a person death or grievous harm, whether that person is actually killed or not.

(iii) In criminal cases, the burden of proof is on the prosecution to prove guilt beyond reasonable doubt;

(iv) "Proof beyond reasonable doubt" does not mean proof beyond a shadow of a doubt. The standard will be met if evidence is so

strong against a person as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable";

(v) Motive need not be proved;

(vi) Premeditation need not be proved;

(vii) A voluntary confession made in a tribunal of law is sufficient to warrant a conviction without any corroborative evidence; and

(viii) A retracted confession made outside a court should only be relied on if there is independent evidence that corroborates the confession. The independent evidence must implicate the accused in some material particulars and tend to show that the confession was probably true.

**Judgment:** Direction to the jury.

**Legislation cited**

**Cases cited**
*R v M* (1966) SLR 218
*R v Marie* (1973) SLR 237

**Foreign cases noted**
*Director of Public Prosecutions v Smith* [1961] AC 290
*Miller v Minister of Pensions* [1947] 2 All ER 372
*R v Base* (1953) 37 Crim App R 51
*R v Hyam* [1975] AC 55

Ronny GOVINDEN for the Republic
Basil HOAREAU for the defendant

[Appeal against the verdict of the jury by the appellant dismissed on 14 December 2007 in SCA 6/2007]

**Summing-up to the jury delivered on 3 July 2007 by:**

**KARUNAKARAN J**

[Part 1]

Ladies and gentlemen of the jury, throughout your deliberations you will have access to all of the exhibits admitted in evidence. If you want to see the photographs, the clothes, or the statement of the accused to the police, medical and postmortem reports or depositions etc at any time, the orderly in charge of you will assist you. Amongst those exhibits there are some important documents like the postmortem report, medical report, retracted-confessional statement of the accused and the like. You may for reasons that are obvious, need them for your examination and perusal. You may do so at any time if you wish. At the same time, I will also rehearse the facts of the case in order to refresh your memory in the second part of my summing up. You may also refer to the notes that you were taking during the proceedings.

First, I hope to offer you a clear guidance on the law and then I will proceed to summarise the evidence. I will give my opinion on the facts in issue, which you and only you should determine.

You are not bound either by my views or that of counsel on both sides on any of those factual issues. You are the sole judges of those facts and you should determine those issues accordingly. However, as regards the questions of law, you must take my directions against the background of counsels' addresses and arguments - of course - in the light of the evidence on record. Obviously, the case is important to the

man in the dock, namely the accused. He should not be convicted if the evidence is found to be unsafe, unsatisfactory, or insufficient. The case is also equally important for you. Because you should truthfully discharge the duty, which you owe to the community as jurors. If the evidential proof is there according to my directions in law, and you have no reasonable doubt about it then, however unpleasant the duty may be, your duty would be to say that the case is proved. You should therefore, discharge your duty accordingly and honorably, without fear or favour, affection or ill-will for the proper administration of criminal justice in the country.

The charge herein, is one of murder and the particulars alleged are that on 12 August 2006 at Anse Aux Pins, Mahe the accused - Michael Johnny Anna - murdered Ms Wilette Figaro. What has to be determined here, in essence, is whether it has been proved beyond reasonable doubt that it was the accused who murdered Wilette Figaro.

It will probably be a useful practical advice for you to follow that as you start considering the evidence, it is always better to start from what the undisputed facts are. From there, if practicable, you would assemble for your consideration the facts that you might accept with confidence. Then, you should move on to other matters which are in dispute. At the outset, considering the entire case of the prosecution and the defence, three fundamental questions arise for your determination. They are:

(1) Was Wilette (the deceased) murdered by someone?

(2) If so, is that someone the accused, who committed the murder?

(3) If yes, has this been proved beyond reasonable doubt?

**What is "murder" in the eye of the law?**

Murder, as a matter of law, is simple enough. A man commits murder if he -

(i) causes the death of another person,

(ii) by committing an unlawful act, and at the same time does so,

(iii) with malice aforethought, which shall be deemed to be established by evidence proving any one or more of the following circumstances -

(a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

Therefore, the three elements namely, death, unlawful act and malice aforethought, are, as rightly submitted by both counsel, necessary to constitute and complete the offence of murder. You may recall the defence counsel, Mr B Hoareau, in his final address, explained to you that if a man commits an act with the knowledge that such an act will cause the death of or grievous harm to some person, that knowledge would also be sufficient to constitute malice aforethought. In his explanation, however, he omitted the crucial word "probably" which is very important when one interprets the term "knowledge" in this

context. In fact, there is a fine distinction in the meaning between the clauses "the act will cause the death" and "the act will probably cause death". I am sure that you will be able to differentiate the meaning between "certainty" and "probability".

With this background in mind, now ask yourselves: Can you have any doubt that Wilette was murdered by someone? If so, was that someone the accused, who committed the murder? Are you sure of it? Obviously, there has been no suggestion of any lawful excuse on the part of anyone for it. Any murder for that matter has to be unlawful. None of the other things that sometimes arise in a murder case has been raised in the instant case, such as self-defence or provocation, or even insanity, diminished responsibility - things of that kind. At any rate, none has been debated but, of course, you still have to be satisfied beyond reasonable doubt that not only Wilette was murdered but also more importantly; it was the accused, who committed it. Theoretically, you can bring in, if you wish, a verdict of manslaughter, provided there is some basis for that. I say "theoretically" because, of course, there has to be some evidential basis for that. However, in the instant case, neither counsel has suggested the slightest basis for manslaughter as opposed to murder.

At any rate, there is no evidence at all to suggest self-defence or provocation or even insanity and the like. No one is therefore, allowed to conclude on mere guesswork that it was an accidental death or killing, in the absence of any evidence to substantiate that theory. The whole of the context in this case has been "who is responsible?" Therefore, for all practical purposes the verdicts open to you are simply, either the accused is "not guilty" or "guilty" of the offence charged, namely, murder. As I see it, that is all and nothing more and nothing less would suffice.

**The burden of proof**

Now I turn to something which you are all well aware of. That is, the onus or burden of proof. In all criminal cases, it is a fundamental rule of law that the prosecution bears the entire burden of proving the guilt of the accused. In almost all cases, this means that the burden of proving all essential elements of the offence charged always lies on the prosecution. The accused does not have to prove his innocence; his guilt must be proved by the Republic. What the Republic has put before you in this case is the submission that the accused committed the crime of murder.

To put the matter bluntly, according to the prosecution, it was the accused who stabbed Wilette with a sharp-edged weapon, with the necessary intent to either kill or cause grievous harm, and thus caused her death. At the least, the accused had the knowledge that the act he committed would probably cause the death or grievous harm to Wilette.

The thrust of the prosecution case has thus really been to place before you a submission that the accused with malice aforethought actually stabbed Wilette in her chest piercing her heart using a sharp-edged weapon and caused her death.

**The standard of proof**

Members of the jury, since the defence of the accused as submitted by the defence counsel is mainly grounded on the requirement as to the standard of proof, I think it is most important for you to clearly understand the concept of "proof beyond reasonable doubt". The contention of the defence is that the prosecution has failed to prove the case to the required standard, that is, proof beyond reasonable doubt. Indeed, the standard of proof defines the degree of persuasiveness, which a case must attain before a Court may convict an accused. Especially, in criminal cases, the law imposes a higher standard on the prosecution with respect to the issue of guilt. Here, the invariable rule is that the

prosecution must prove the guilt of the accused beyond reasonable doubt or to put the same concept in another way, so that the Court is sure of guilt. You should remember these formulations are merely expressions of the higher standard required, which was defined by Lord Denning J in *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373 as follows -

> It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt... If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice"

The law, therefore, precludes a conviction based on suspicion or guesswork or mere satisfaction or even a feeling of being 'fairly sure' Hence, the standard of proof, bearing in mind that the Republic must prove the charge, is, of course, proof beyond reasonable doubt. If you have a doubt as to proof of guilt that fairly arises out of the evidence and that, to your minds, exercising your consciences as jurors, appears to you to be a reasonable doubt, and if it relates to one of the essential elements of the charge or as to the identity of the accused or the proof of murder, then the verdict "not guilty" must follow. Is it reasonably possible that the accused is not guilty? Is there a reasonable explanation or theory consistent with innocence? And if any one of those things occurs to you as the result of your deliberations, and if you find answers to these questions in the affirmative, then they all mean the same thing, that there is a reasonable doubt. The accused should be acquitted. On the other hand, if you decide otherwise, I have to caution you that you must be satisfied before deciding upon such conviction, that the inculpatory

facts either revealed from direct evidence or inferred from circumstantial evidence are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis other than guilt.

**The question of motive**

It is necessary that I should also say a word about the question of motive. Because of your exposure to the ideas of modern storywriters, playwrights, novelists, film makers of Hollywood and Bollywood, you may very easily get wrong ideas about motive in matters of murder. Indeed, motive is different from malice aforethought. In considering whether a murder was committed at all by someone, which is your first enquiry, obviously, the motive for the crime, subject to your better judgment, would appear ultimately to be immaterial. Whoever committed the crime, assuming you find it was murder, that person did it for some motive and some adequate motive - whether it was a concealed motive, or whether it is now undiscovered and is undiscoverable, or whether it was at some time apparent.

All these are immaterial. In connection with this enquiry, it is not legally necessary for you to fasten on a motive.

It is not necessary, in your minds or in your discussions, that you should reproduce or recreate the precise scene which culminated in Wilette's death; for, whatever the motive was, can you have any doubt that she was in fact murdered by someone?

**The question of premeditation**

Again, premeditation is to be distinguished from malice aforethought. As a matter of law, no premeditation need be proved under our law. There are some countries in the world where they have two kinds of murder, a clearly premeditated one, and one that is not premeditated. As far as we are concerned, from the point of view of our law, no premeditation

need be proved. Whether the killing was the climax of some deep laid plan, or whether the resolution to kill and the act itself arose suddenly, from a quarrel or from some other promptings of the moment, or whether it was something in between, is legally nothing to the point, if you are satisfied (i) that Wilette was stabbed by someone other than herself, (ii) that it was not an accidental stabbing, and (iii) that the person who stabbed her did so unlawfully with the intention of either of killing her or causing her serious bodily harm that resulted in her death. If you are satisfied of those things then murder was done by someone.

Well, you have got the entire picture from the evidence. I will say no more about that. Both counsel have rightly explained to you at length the three elements required to constitute the offence of murder. I believe, I need not repeat them again to you. I have to add that the legal situation is that neither motive nor premeditation need be proved.

**Intention**
Members of the jury, when I spoke of "malice aforethought" at the outset, I mentioned the circumstances that establish inter alia, an intention to cause the death of or to do grievous harm to some person.

As far as the instant case is concerned, I would advise the members of the jury to concentrate on the intent to do serious bodily harm rather than the intent to kill. You, members of the jury, in the case on hand, if you are satisfied on evidence that the assailant had stabbed Wilette having known that it was highly probable that such a stab injury in the left side of her chest would cause death or serious bodily harm to her, then the prosecution had proved the necessary intent. It does not matter if the defendant's motive had been simply to frighten Wilette and to rob the mobile phone from her at the material time.

This aspect of the intent, you may consider, later when you revert to the evidence as I discuss in the second part of my summing up. Assuming for a moment that the assailant even without intending to endanger the life of Wilette, had simply stabbed her knowing that it was probable that grievous, in the sense of serious, bodily harm would result to Wilette, then he would be guilty of murder since death has resulted.

The following case that was decided by the House of Lords in the UK would I believe, assist the members of the jury to understand the point in this respect as to Intent:- In a case that went on appeal from *R v Hyam* [1975] AC 55, the House of Lords held - in dismissing the appeal against conviction of murder - that a person who, without intending to endanger life, did an act knowing that it was probable that grievous, in the sense of serious, bodily harm would result was guilty of murder if death resulted. See also *Director of Public Prosecutions v Smith* [1961] AC 290. For the benefit of the members of the jury, I would like to state briefly the facts of that case, which runs thus -

The appellant (A) had had a relationship with a man who became engaged to be married to B. In the early hours of July 15 1972, she (A) went to B's house and poured petrol through the letter box, stuffed newspaper through and lit it.

She gave B no warning but went home leaving the house burning. B escaped from the house but her two daughters were suffocated by the fumes of the fire and died.

The appellant was charged with murder. Her defence was that she had set fire to the house only in order to frighten B so that she would leave the neighborhood. Ackner J (the trial judge) directed the jury that the prosecution had to prove beyond reasonable doubt that the appellant had intended to kill or do serious bodily harm to B, that if they were satisfied that when she had set fire to the house she had known that it was highly

probable that the fire would cause death or serious bodily harm, then the prosecution had proved the necessary intent and that it mattered not if her motive had been to frighten B. He advised the jury to concentrate on the intent to do serious bodily harm rather than the intent to kill. The appellant was convicted of murder. Her appeal against conviction was dismissed by the Court of Appeal confirming the direction was proper.

This is what I too advise you in the instant case. Undoubtedly, the prosecution must prove beyond reasonable doubt that the accused had intended to kill or do serious bodily harm to Wilette. On the evidence, if you are satisfied that when the accused stabbed Wilette, he had known that it was highly probable that such an act of stabbing would cause death or serious bodily harm, then the prosecution had proved the necessary intent. It does not matter, even if his motive had been to frighten Wilette so as to take away the mobile phone from her.

**Witnesses and their testimonies**

Very many witnesses have been called. In fact, 30 witnesses have testified and many hundreds of pages of their evidence have been recorded. In the nature of things, I must refer to much of that evidence, and to many of the witnesses.

In performing your function of determining the facts, you are, of course, also judges of the witnesses. You should assess each one carefully. You will remember that both counsel made submissions to you about witnesses and about what reliance you should place upon them. And, naturally, included in the persons that you are to assess is also the accused, as he has given his unsworn evidence from the dock. Now you may reject everything a witness says; you may accept everything a witness says; you may accept part of what a witness says, and reject the rest but for valid reasons. That is all within your function and responsibility. You may either

believe or disbelieve a witness; you might have also observed the demeanor and deportment of the witnesses whilst in the witness box. Therefore, you can make your own assessment on the veracity of his or her testimony.

Having said that, it is pertinent to note that human memory is not infallible. We all tend to forget things as time progresses. Individuals differ in their ability to observe events and remember. Who is the more credible - the witness who recalls in tremendous detail every bit of what went on when he was involved in or observed some incident, or the one who says honestly that he cannot exactly remember every minute details? I am not here referring to a dishonest witness, who so often seems to suffer from selective amnesia. Obviously, it is a task for you to try and distinguish the honestly forgetful witnesses from the ones who choose not to remember. You should separate the wheat from the chaff. Hence, please remember forgetful witnesses need not necessarily be dishonest in all cases.

As a practical matter, it is important to bear in mind what parts of the witness' testimony have been challenged, and what have not. For example, on one hand, the defence did not challenge, to any noticeable extent, the evidence of the Pathologist Dr Maria Zladkovitch (PW24) on the cause of death, nor did they challenge to any noticeable extent the actual terms of the telephonic conversation between the accused and his girlfriend Ms Lucy Quatre (PW7), which took place at around 11 pm on 12 August 2006, soon after the alleged incident of stabbing, nor did they challenge to any noticeable extent the actual terms of the direct conversation, which took place between the accused and his sister Ms,. Cindy Arrisol (PW28) at Corgate Estate in the morning following the fateful night, pertaining to an attempted sale of a mobile phone, which displayed the name "Wilette".

The defence did not challenge the substance of the

statement, the "dying declaration", which Wilette made at the English River Clinic in front of a nurse, Ms Lydia Mondon (PW18), who testified categorically that she accurately and clearly heard that statement from the mouth of Wilette and repeated the contents in Court. It is for you to decide on her credibility. Now the accused, for example, gave the explanation - in the form of an unsworn and untested statement which is before you. In it, he narrated his alleged role as an innocent by-passer and gave a version that another man could have attacked Wilette at the relevant time, place and circumstances. He also narrated his own version as to the sequence of events surrounding the attack, the description of the possible assailant, his attempt to help Wilette as Good Samaritan and how he came to be in possession of Wilette's mobile phone etc.

Members of the jury, you are the judges of facts. You may decide on the credibility and the weight you can attach to the evidence of any witness for that matter, including the accused. I would like to remind you that evidence will succeed in persuading a Court only if that evidence appears as truthful, reliable, cogent, consistent, and where it does not contradict the rest of the proven facts and circumstances. I want you to understand, and to remember throughout this summing-up, that when I refer to a fact, or to what a witness has said, my reference is always subject to your assessment.

It is as if every time I speak of an act or an event or a circumstance or an opinion, described or expressed by a witness, I am also saying - "If you the jury, accept that evidence", or, "To the extent that you accept this or that witness", or, "If you accept this or that opinion or judgment". I do not propose to say that every time, because it would be an insult to your intelligence and secondly it would become intolerably wearisome to you. You know quite well you have the responsibility for judging the facts and the witnesses and that responsibility never departs from you.

I may express, or you may think I am expressing, some view about the evidence although, as I say, very largely I usually contain in my summing up a series of questions - but if I do express a view or if you think I am expressing one, that is simply and solely for your consideration, because I am not the judge of the facts, but you are.

I now refer to what I might term slips, errors or omissions - the sort of human mistakes that men and women may make while giving evidence in Court either as percipient witnesses or otherwise. And as to the men and women - and I use that general description intentionally and including the accused - who have figured in this trial, let me say a word of general application. This Court, the criminal Court, is, above all else, a human Court dealing with human beings and working to make judgments on men and matters. Obviously some things - for example, work by accountants, or doctors, or scientists - must be done with accuracy and precision, and any assessment or criticism of it is entitled to be put on that basis; but no-one would suggest that, in this Court, allowance cannot or would not or should not be made for slips or errors or omissions that are the sort of thing that could be made or committed by anybody. We obviously, in short, acknowledge human infallibility. But, ladies and gentlemen, the distinction is both wide and clear between mistakes of that kind namely, forgivable human error and omissions and falsehoods that are produced deliberately with intent to deceive. An important part of your duties is to detect the difference, whenever "errors", or "omissions", or "slips" have occurred, and to act resolutely.

Defence counsel, in his address, mentioned about some correction made by a police officer as to 3 to 4, when he was giving testimony in Court. You decide, whether such mistake is a forgivable human error or a deliberate falsehood.

**Retracted Confession and Corroboration**

You all know that a confession is the name given to an adverse admission made by the accused in a criminal case which suggests or confirms his guilt of the offence charged. A voluntary confession is sufficient to warrant a conviction without any corroborative evidence. In the instant case, having held a trial within a trial, this Court ruled on law that the statement, which the accused gave to the police on the 17 August 2006 in exhibit Pl, was admissible in evidence. Obviously, it is a confessional statement. However, in Court the accused retracted that statement alleging that it was not made voluntarily. According to the defence, the police obtained this confession by oppression, force, promise and other inducement and in breach of the Judges' Rules.

Members of the jury, it may be taken as a rule of universal jurisprudence that an unequivocal confession of guilt made by an accused person freely and voluntarily to a judicial tribunal is sufficient to base a conviction.. However, in the case of an extrajudicial confession, though made freely and voluntarily by the accused, though admitted in evidence, subsequently if retracted by him, as a rule of law, the Court can rely and act upon that statement/confession and safely base a conviction if, and only if, there is some independent evidence corroborating that confession in material particulars. To corroborate a retracted confession all that is required is some independent evidence which implicates the accused in some material particulars and which tends to show that what is said in the confession is probably true: see, *R v M* (1966) SLR 218.

You should also note here that in the case of *R v Marie* (1973) SLR 237, the Court held that, although it found a voluntary statement given by an accused person to the police admissible in evidence, the Court is not bound to accept or reject its contents in toto. Although the whole of the confession is received in evidence, the trial Court is entitled to form an opinion as to the credit to be given to the different

parts of the statement and to believe only such parts found to be true.

Also it should be noted that as a rule, evidence which itself requires corroboration cannot provide corroboration for other evidence which also requires corroboration.

It is also pertinent to mention that once the evidence is admitted the only question for members of the jury, is to consider its probative value and effect. However, in the case of a confession, which in your view, was not made freely and voluntarily by the accused, then you should disregard it. In any event, admissibility of any statement is not an absolute test of the truth of its contents. *See, R vs. Base (1953) 37 Cr. App. R 51, 57.* Members of the Jury, bearing these principles in mind, you should approach the confession with caution. I should warn of the danger in convicting a person, solely relying on a retracted confession. I caution you, if you decide to rely and act upon the confessional statement in this matter, you must look for independent evidence to corroborate the confession on material particulars. I believe that the matters so far I have summed up on points law, would suffice to meet your requirement in this case.

[Part 2]

Members of the jury, at the start of this summing-up I told you that I would direct you as to the law and then remind you of the evidence. I dealt with the law in the first hour or so. I noticed that you were paying very close attention, as you did throughout the entirety of this trial. I do not intend therefore, at this stage, to repeat my earlier directions as to the law. These, you must apply to the facts as you find those facts to be on the evidence, which you have heard in this trial. I will now endeavor to summarise for you the evidence in the second part of this summing up.

If I say something about the facts with which you do not agree with, you should ignore entirely what I say and act upon your own views of the matter. The facts and the way the facts are to be interpreted are your responsibility and no-one else's, neither the judge nor counsel can exercise that responsibility for you.

The facts of this case as transpire from the evidence on record are as follows:

It is not in dispute that the deceased Ms Wilette Figaro, 43 years of age, hereinafter called "Wilette", was at all material times, a resident of Gaza Estate, Montagne Posee, Anse Aux Pins, South Mahe. During 2005, she was working in Italy. She returned to Seychelles in early 2006 and started working for Plantation Club. In August 2006, she was living with her son Mr Audrey Valentin (PWIO) and his girlfriend Rita in the same household at Gaza Estate.

Wilette was a very happy, jovial, and at the same time, hard-working and outgoing person. She had a large circle of friends and one among them was Ms Myra Solin (PW7) of Anse La Mouche. Wilette liked cooking, singing and dancing. During weekends, she used to visit her friends and relatives living in her neighbourhood. At nights, sometimes, she and her friends used to go to "Katiolo", a discotheque situated at Anse Royale for entertainment. Whenever her friends had transport, they used to go to Wilette's house first, pick her up and then take her to Katiolo. Wilette had a personal mobile phone, make "Nokia", black in colour, subscribed to telephone no 586919 with Cable and Wireless (Sey) Ltd. She used to make calls using this particular phone and her friends also used call this number to talk to her.

Wilette's friend Ms Myra Solin (PW7) testified that even on Saturday 12 August 2006, in the night at 8.27 pm, as well as at 10.03 pm, she received telephone calls twice from Wilette.

According to Myra, in the last call of 10.03 pm, Wilette asked her to come early and pick her up from her house to go to "Katiolo". Since Myra had no transport that night, she told Wilette to go to Katiolo on her own and then she would join her there. In passing, I should mention that these telephone calls remain recorded in the computer printouts, exhibit P15, produced by Mr Georges Doffay (PW25), showing the automated data entries retrieved from the telecommunication computers maintained by the Cable and Wireless (Sey) Ltd.

According to these records, Wilette used a mobile phone (telephone no 586919) with IMSI (International Mobile Subscriber Identity) no 633010100121009 - a unique 15 digit code used to identify an individual user on a GSM network. and with an IMEI (International Mobile Equipment Identity) number, which is also a unique 15 digit code used to identify an individual mobile station (equipment) to a GSM network. This is a built-in manufacture number unique to the equipment. Be that as it may.

Wilette's son Mr Audrey Valentine (PW10) testified that on 12 August 2006 at around 11 pm, Wilette was at home with him and asked him if he could accompany her to go to Katiolo that night. As he was tired he declined and did not go with her but gave her R100 and then he went to bed. It was then that Wilette left home and walked along the Anse Aux Pins main road on her way to Katiolo. When she was passing Reef Hotel, at Anse Aux Pins, admittedly the accused saw her. Then what happened? The accused himself gives a clear picture as to what really happened in his statement to the police exhibit P1. The said statement inter alia, reads thus:

> When I was going home, upon arriving near Reef Hotel, I saw someone coming to my direction. When we were coming closer to each other with the light of the transport, I recognised that that person was Wilette but I do not know her

surname. When I came close to her, I recognised that she had a phone in her hand. I tried to take that phone from her, which was in her left hand. Then she struggled for me not to take her phone. At the same time, she told me that she would stab me. I did not see any weapon in her hand. At that time, I have a nail file with me. It measured around 17cm and all that time I had it in my possession whenever I went to work. I threatened, her with it, for her to let go of the phone. While I was threatening her, the nail file stabbed her in her stomach. The nail file was in my right hand but I did not remember which side Wilette had been stabbed, but I know it was in her stomach region. While I was in struggle with Wilette, the nail file I felt was stuck in Wilette's body. The moment she was stabbed, Wilette told me "tou fason Jason mon konn ou, ou frer Josette Pauline". When I ran, I went to the Golf Club direction. I hid myself to see what she was going to do. I was there for about I minute, I saw a pick-up 1 1/2 ton but I do not remember the colour.

It came from the direction of Anse Royale and was going to the direction of town. I saw her stopping the pick-up. At that time Wilette was still standing. When the pick-up stopped near Wilette I continued running towards Green Estate. Then, I reached the main road to go home. When I arrived vis avis Jumaeau lane, I broke a sugar cane for me to eat. At that time, the telephone was with me. I called a woman at Les Cannelles whose name is Lucie. I do not know her surname. That was on number 371458. I called her few times. I told her, I was at Aux Cap and asked her what she was doing. I made a small

conversation with her but I do not remember all that I told her. After I had broken that sugar cane, I broke a piece of it, I removed my shirt and wrapped it in it. I went to the staircase at Claire Robesrt; I sat for me to eat the piece of sugar cane. There Alex Moses who is Claire's child saw me sitting on the staircase and asked me what I am doing here. I asked him what he thought I was doing. I was just sitting there. We started to exchange words with each other. At a certain point Alex told me that he was going to get his weapon at his house. So I left. When I arrived near the house, I saw the police searching everywhere so I held my position until they left. After that, I went inside.

When I entered the house, Gilbert told me that the police were looking for me. I took a shower and changed my clothes. I was wearing black trousers and a white t-shirt and left. Since then, I did not go to the house again. The next day Sunday Wilette's child came running after me with a machete. The phone that was in my pocket fell but I continued running. When I attacked Wilette, there was no bag with her.

The next day Sunday 13 August 2006, around 1.30pm when I was at the shop at Mont Fleuri one of my sisters, on my father's side named Cindy Anna told me that Wilette had passed away and I told Cindy what had happened between me and Wilette. I called Gilbert to ask her if that was true. She told me that it was in message. I want to state that I did not expect that thing could happen that way. I want to state also that I do not know what had happened with that nail file that I have left with Wilette. My

> intension to do that with Wilette was just to take the phone from her. I am ready to show the police where the incident happened. I regretted that an action like this had happened; but it had already happened.
>
> Today Thursday 17 August 2006, around 12.30 to 1pm I decided with my mother and my wife to handover my body to the police at Central Police Station.

Before, I proceed further it should be noted here that the term "stomach" , which appears in the above statement carries a special meaning in Creole, when used by a Seychellois as his or her idiomatic usage and context. To an ordinary Seychellois, this particular term refers to and means "heart" or "chest" that is, the thorax region, whereas for others in the rest of the English speaking world, it means "abdomen" or "belly", that is, the alimentary region of the body between thorax and pelvis. This statement almost amounts to a confession by the accused to the police stating that he was the one involved in the entire episode.

Coming back to the evidence, Ms Lydia Mondon (PW18), a nurse from English River Clinic, testified that on the alleged night at around 11.30 pm, Wilette was brought in a pick-up to the Clinic as a case of emergency, with a cut injury on her left breast with fresh bleeding.

She saw Wilette at the back of the pick-up, who was screaming and shouting "Sister, save, my life! Save my life!" The nurse with the assistance of the other staff and security guard (PW15) put Wilette in a couch and immediately shifted her to the emergency room. As she observed, Wilette was found to be struggling for life and she was almost dying. There was no blood pressure. Her pulse rate was very low. In that critical condition Wilette gave her name and address to

the nurse and said the following words, "He fought with me, stabbed me and took away my mobile. He is the brother of Josette Pauline."

After a couple of minutes, according to Dr Vivekanandan (PW16), the duty medical officer at English River Clinic, Wilette was immediately ambulanced to the Victoria Hospital. However, she died there, despite all emergency medical treatment and measures including artificial respiration. This doctor also clinically examined Wilette when she was first rushed to English River Clinic.

That time, he also found that she had a cut injury about 1 cm long near the left nipple area, with blood oozing out.

Following the death of Wilette, the pathologist, Dr Maria Zladkovitch (PW24), conducted the postmortem examination on the body of the deceased. The pathologist testified that the cause of death was "internal bleeding", due to a "stab injury", which had "pierced through the heart". She also produced the postmortem report, exhibit P13 in evidence.

It is not in dispute that the accused has four brothers namely (i) Tony Mathew Pauline (PW12), (ii) Jimmy Pauline (PW14), (iii) Roy Andre Pauline (PW13), and (iv) Dean Pauline (PW31) and has two sisters namely, (i) Josette Pauline and (ii) Marie Clair Pauline. All the siblings had the same surname "Pauline" except the accused as he had a different father, but all were born of same mother. All the four brothers of "Josette Pauline" except the accused testified that they all were sleeping at their respective homes on the relevant night and at the time in question.

By the way, you would have noted their demeanour and deportment, when they all testified in Court. All of them or some of them or none of them might have appeared to be very truthful and reliable witnesses to you. It is for you to place

and ascertain the degree of accuracy, credibility and reliability to their evidence.

Admittedly, the accused soon after the occurrence of the alleged incident used Wilette's mobile phone to call his girlfriend Ms Lucy Quatre (PW27), a resident of Les Cannelles. He made calls twice to her telephone number 371458. These two calls were made at 11.24pm and 11.32pm respectively, on the night in question, as evidenced by the documents in exhibit P15. The following questions of commonsense may arise in your mind, as you examine the evidence:

> Do you think any reasonable "Good Samaritan" like the accused, who claimed to be one, having witnessed the crime being committed by another person, would simply take the mobile from the scene of occurrence and attempt to sell it the following morning?
>
> Do you think that Wilette could have misidentified the assailant as the brother of Josette Pauline in the circumstances of having known each other, having observed, having had the exchange of greetings, having conversed, fought and struggled with him to secure her mobile phone in a close encounter at the material time? Or do you think that Wilette could have lied and falsely incriminated the accused for some reason?

As men of the world, you may estimate the duration as to how long the entire episode would have taken place. The accused himself stated in his unsworn statement as well as in his confession to the police that Wilette immediately after the alleged attack, at the scene of occurrence said "tou fason mon konn ou, ou frer Josette Pauline". (In any case, I know you;

you are the brother of Josette Pauline). Again, she repeated the same accusation against the accused in front of the driver of the white pickup, which transported her to the English River Clinic. On both occasions Wilette made this accusation in the presence and hearing of the accused at the scene. Again, she confirmed and repeated the substance of this accusation in front of the nurse Mrs Mondon at the English River Clinic. Remember, the light from the pick-up should have been sufficient to recognise the face of a person, since the accused himself admittedly identified Wilette at the scene. He could even notice a mobile phone in her hand. He could also admittedly, see a broken bag on the ground. Now ask yourself whether Wilette had sufficient time, light, opportunity and circumstances to identify the assailant or could this be a case of mistaken identity or Wilette falsely accusing him of the crime.

Kindly, bear in mind that Wilette and the accused were not strangers to each other. Certainly, it was not a fleeting glance between two strangers. At the least, admittedly, the accused could recognise her as Wilette, whom he had known before. You are the judges of fact and you may decide accordingly. If you are satisfied on evidence that Wilette did properly and correctly recognise her assailant as the accused, then you may safely rely and act upon the dying declaration of the deceased and base a conviction, provided you safely rule out the probability of the other brothers of the accused committing the crime.

The accused claimed in his unsworn statement that he helped Wilette after the attack as a by-passer at the scene of crime. Could this story of "Good Samaritan" put up by the accused be true? If so, could he foresee all possible pieces of evidence, imagine and build-up an inculpatory story, when he gave his statement to the police (exhibit PI), making it so cogent and consistent with the rest of the evidence that subsequently came to light during police investigation?

Do you think the accused had the foresight of a prophet and built up an imaginary story in his statement to the police? Or, do you think, he narrated in that statement what really happened? I am sure you will find answers to these questions, along with other questions that may arise in your mind, while you examine the evidence with diligence in its entirety.

**Corroboration**

Now, let us move on to the evidence if any, to corroborate the retracted confession of the accused. If you look for evidence to corroborate the confession in question, first of all, you should ask yourselves, ladies and gentlemen, the following question -

> Is there any independent evidence, other than the retracted confession of the accused to implicate him in some material particulars and tend to show that what is said in the confession is probably true?

In this respect, you may consider the following:

The dying declaration made by Wilette at English River Clinic a few minutes before her death, in the presence and hearing of the nurse Ms Lydia Mondon (PW18), reveals that it was the brother of Josette Pauline, who fought with her, stabbed her and took away the mobile phone. All other four brothers of the said Josette Pauline, except the accused, testified that they were all at their respective homes sleeping or at their place of work at the material time on that particular night and were not in or around that area, where the incident occurred. If you do not believe all four or any one or more of them, you may reject their evidence accordingly. On the other hand, if you believe that all four brothers of the accused were credible witnesses and were telling the truth under oath, then the only inference you can draw is that the assailant described by Wilette could only be the accused, no one else.

Are you satisfied that all other four brothers spoke the truth to the Court? Does this come from independent evidence? Does it implicate the accused in some material particulars? Does it tend to show that what is said in the confession is probably true? You should find answers to these questions.

- The accused was in possession of Wilette's mobile phone immediately after the alleged incident and admittedly made telephone calls to his girlfriend Ms Lucy Quatre at Les Cannelles, which fact is evident from the testimony of the said Lucy Quatre (PW27).

- The documentary evidence exhibit P15 emanating from Cable and Wireless also corroborates the material fact that the accused made a few calls to telephone no 371458 soon after the alleged incident.

- After giving the confessional statement to the police, the accused has freely and voluntarily, shown a number of positions in the scene of occurrence to be photographed by SP Reginald Elizabeth (PW3), who testified that he took photographs of those points in exhibit P3, as indicated and described by the accused.

- The accused in his unsworn statement indicated the involvement of another person in the commission of the crime. Could this be true? Had this story been true, you may ask yourself, what could have prevented him from disclosing this fact during the police interview and when he gave the statement to the police? What could have prevented the accused from indicating those points to SP

> Elizabeth (PW3) to be photographed at the scene of occurrence? Is the accused telling a lie in his unsworn statement? Or telling the truth of the matter to the Court? Is the explanation, which the accused gave as to how he came in possession of the deceased's mobile phone immediately after the occurrence of the crime reliable? Could it be true? Members of the jury, you may make your own assessment on the credibility of the accused and on the veracity of his unsworn statement and the weight you may attach to his evidence.

Members of the jury, (i) do you think that the facts and circumstances discussed above, originate from independent sources of evidence, other than the retracted confession? If so, (ii) do they implicate the accused in some material particulars, which tend to show that what is said in the confession is probably true?

If you find the answer to both or either of these two questions to be in the negative, then you cannot use them for corroborative purposes. On the other hand, if you find answers to these two questions in the affirmative, then you can safely rely and act upon them being independent evidence to corroborate the retracted confessional statement of the accused. Ladies and gentlemen, find the answers from the facts and circumstances revealed by evidence, which you have heard, seen, read and examined in this matter and decide accordingly.

After giving a careful thought to all that I have said so far, now you may go back to find answers to the fundamental questions, which I have formulated for you in the first part of my submission. They are:-

(i) Was Wilette (the deceased) murdered by someone?

(ii) If yes, was that someone the accused, who committed that murder?

(iii) Again, if yes, has this been proved beyond reasonable doubt?

Before I conclude I would like to remind you that as far as the first question is concerned, no one has ever disputed the fact that Wilette was indeed murdered by someone. Therefore, you may not find any serious facts in issue for your determination in this respect. However, your task and concentration should be more on questions (ii) and (iii), which require a careful determination. On the other hand, if you answer in the negative to any one or more of the said three questions, then you have to give the verdict of not guilty.

In the circumstances, the verdicts now open to you are simply-

Either the accused is "not guilty" or "guilty" of the offence charged namely, murder.

As I have said earlier, it is clear to me that you have paid very careful attention throughout the whole of this case and throughout the whole of my summing up. I know, you have your own careful and detailed notes. However, it is very important that you should not feel that your deliberations will involve you in some sort of exacting memory test. Let me make it very clear to you that if you wish to hear any of my directions on the law repeated or if you have any query as to the evidence which you have heard, you need only send a little note through your jury bailiff and ask and I will give you appropriate further assistance.

Unless you have already done so, the first thing you should do once you have retired to consider your verdict is to elect from amongst your member a lady or a gentleman to act as your foreman, if you have not already selected one. He or she should organise and chair your deliberations and, in the fullness of time, deliver your verdict on this indictment.

Your verdict must be unanimous, that background outside this Court room. You must reach your verdict in this case upon the evidence which you have heard, seen and read in this Court room.

Now the time is 7.05 pm. I believe I have completed my charge, ladies and gentlemen of the jury, you may if you all so desire, retire to consider your verdict. Thank you very much for your kind indulgence.

**Record: Criminal Side No 41 of 2006**

**Republic v Pierre**

*Penal Code – Sexual assault – Misrepresentation to obtain consent – Corroboration – Lies as corroboration*

The accused was charged with two counts of sexual assault. The accused visited the complainants on the premise that he had been sent by a medical doctor to conduct a medical examination. He then sexually assaulted the first complainant with a candle and sexual organ, and indecently assaulted the second complainant.

In a statement made to police after his arrest, the accused stated that he had not had sexual intercourse with the first complainant. At trial, he admitted he had lied about having had sexual intercourse with the first complainant, but that he had obtained consent. He stated that he lied because he was embarrassed, had panicked, and had not had a chance to get legal advice.

**HELD:**

(i) Sexual assault under s 130(2)(d) of the Penal Code includes penetration by an object other than sexual organ;

(ii) There was no consent. Even if there had been consent, it was not valid because the accused misrepresented his purpose by stating that he was sent to conduct a medical examination; and

(iii) In sexual assault cases, the Court should look for corroboration of evidence. False statements made by the defendant to the police before commencement of

proceedings may amount to corroboration if–

a. The lie is deliberate

b. The lie relates to a material issue

c. The motive for the lie is realisation of guilt and fear of the truth; and

d. The statement is clearly shown to be a lie by evidence from an independent source.

**Judgment:** Defendant convicted.

**Legislation cited**
Penal Code, ss 130(2), 130(3)(a)
Criminal Procedure Code, s 184(1)

**Cases referred to**
*R v Rose* (1972) SLR 43
*Victor v Ally* (1990) SLR 121

**Foreign cases noted**
*R v Lucas* [1981] 1 QB 720
*R v R* Cr L R 736

Ronny GOVINDEN for the Republic
Wilby LUCAS for the defendant

**Judgment delivered on 8 October 2007 by:**

**KARUNAKARAN J:** The defendant above named stands charged before this Court with the offence of sexual assault on two counts contrary to section 130 (2) (d) and 130 (2) (a) and punishable under Section 130 of the Penal Code under

Count 1 and 2 respectively. Section 130 reads thus:

> (1) Any person who sexually assaults another person is guilty of an offence and liable to imprisonment for 20 years.
>
> (2) For the purposes of this section "sexual assault" includes -
>
> (a) an indecent assault;
>
> (b) the non-accidental touching of the sexual organ of another;
>
> (c) the non-accidental touching of another with one's sexual organ, or
>
> (d) the penetration of a body orifice of another for a sexual purpose.
>
> (3) A person does not consent to an act which if done without consent constitutes an assault under this section if -
>
> (a) the person's consent was obtained by misrepresentation as to the character of the act or the identity of the person doing the act,
>
> (b) the person is below the age of fifteen years; or
>
> (c) the person's understanding and knowledge are such that the person was incapable of giving consent.
>
> (4) In determining the sentence of a person convicted of an offence under this section the Court shall take into account, among other things –

(a) whether the person used or threatened to use violence in the course of or for the purpose of committing the offence;
(b) whether there has been any penetration in terms of subsection (2)(d); or
(c) any other aggravating circumstances.

The particulars of the charge under Count 1 allege that the defendant on 20 March 2003, at Mont Buxton, Mahe, without consent, penetrated the body orifice of A for a sexual purpose.

The particulars of the amended charge under Count 2 allege that the defendant on 20 March 2003, at Mont Buxton, Mahe without consent, indecently assaulted B by holding and examining inside the buttock of B.

The defendant denied the charges. The case proceeded for trial. The defendant was represented and duly defended by counsel Mr W Lucas. The prosecution adduced evidence by calling ten witnesses to prove the case against the defendant. After the close of the case for the prosecution, the Court ruled that the defendant had a case to answer in defence for the offence charged. Accordingly, he was called upon to present his defence, if any. He was put on his election in terms of section 184 (1) of the Criminal Procedure Code. The defendant elected to give evidence on oath and called no witnesses for the defence.

The facts of the case as transpire from evidence are these:

C (PW6), aged 62, a pensioner, is a resident of Mont Buxton, Mahe. He is a religious man. He used to do his regular prayers. He always kept a candle on a table in his bedroom for that holy purpose. The first complainant in this matter Ms A (PW3), aged 35, is his daughter. She is a housewife living on

social security benefits. The second complainant, B (PW4), aged 22 is the nephew of the first complainant. B is a person of weak intellect. He is mentally retarded and has been under medical treatment since his childhood. They all live together in the same household at Mont Buxton as a joint family.

The defendant Mr Frederic Pierre was, at all material times, a police officer with the rank of Lance Corporal. He joined the Seychelles Police Force in 1995. He had been serving the Force until he was suspended from service because of the instant criminal case registered against him. In late 1990s he was working as police officer on La Digue having been attached to La Digue Police Station. Later he was transferred to Mahe. He started working at the Mont Fleuri Police Station as a Process Server under the supervision of the Police Inspector Ericson Charles (PW9).

Since the defendant held the rank of Lance Corporal, a non-commissioned rank in Police Force - that is above private and below corporal - he was not assigned any criminal investigations. Investigations that involve sexual offences were and are assigned to a special investigation branch called "Family Support Squad" that falls under the Criminal Investigation Department. Be that as it may, the defendant is also a resident of Mont Buxton, living in the same area where the complainants are living. In fact, the defendant's house is situated within a kilometre above the complainants' residence on the mountain. Since they all live in the same neighbourhood C (PW6) and both complainants (PW3 and PW4) had known the defendant very well as a police officer having seen him many times in the uniform. At times, the defendant while passing by used to visit them on his way and talked to them.

The first complainant A (PW3), aged 35, testified in essence that the second complainant B (PW4) was her nephew being the son of her sister. On 20 March 2003, in the morning at

around 11am, whilst A was at home with her father and the nephew, the defendant, who was in a red pair of shorts and T-shirt came to her house and told her that the doctor had sent him to do a medical test on her. That time her father was taking a bath outside. The defendant having thus entered the house took A into her father's bedroom, bolted the door from inside, made her remove her knickers and put her in the bed. He then took the holy candle from her father's table and inserted the bottom part of it into her vagina and pulled out. Then, he inserted it into her anus. It was very painful. After doing these acts of penetration, the defendant took his penis, inserted it into her vagina and had sexual intercourse with her. She tried to resist but the defendant told her to shut up and not to make any noise. She noticed that her nephew, the mentally retarded B was also watching this incident from outside through some opening in the door. After ejaculation, the defendant released her, opened the door and came out of the bedroom. He saw B, the mentally retarded man, sitting outside in the living room. Soon the defendant took B into the same bedroom and did something to him. B (PW4), the second complainant, who appeared to be a person of average intelligence and capable of understanding the nature of the oath testified in this respect, in essence thus:

> On 20th March 2003, at around 11 am, the Defendant, whom he (B) knew as a police officer came to the house at Mont Buxton, where the latter lived with his grandfather C (PW6), grandmother D and aunty A (PW3). That time the defendant was wearing a red pair of shorts. After entering the house, the defendant sat in the living room, spoke to his aunty A for some time and then took her into his grandfather's bedroom and closed the door. B out of anxiety wanted to know what the police officer was doing to his aunty in the bedroom. Hence, he peeped through the hole from a corner of the bedroom-door.

> Inside, he saw the defendant with a candle stick in his hand and inserted it into his aunty's anus and then took it out. After that he inserted his penis and had sexual intercourse with her. At one stage, he also heard his aunty screaming out of pain saying that the act of the defendant was hurting her. After the defendant finished those acts on A, he came out and told B that the doctor had asked him to do a test on B too. Therefore, the defendant asked B to go into the same bedroom. As B went in, the defendant asked him to remove his trousers and made him lie down on the bed. B did. Then the defendant opened B's buttocks and looked in his anus and then released him.

C (PW6), the father of A, testified that on the alleged date in the morning he did not notice the defendant when he entered the house as he was working in the garden that time. After finishing the work, he wanted to take a bath. His soap box was in his bedroom. So, he came into the house to take the soap box; but his bedroom had been locked from inside. He asked the person whoever was inside to open the door. After three shouts there was no response. Finally, C shouted that if the door is not opened he was going to break the door. He heard a man's voice inside. The door opened. But C did not know who opened it from inside. As the door opened, he did not go inside but he stretched his hand from outside and took out the soap box and noticed his prayer candle was missing from the table. The man, whom he saw inside, was in red shorts. He did not look at his face nor did he talk to him. And, then he went outside, had his bath and came back. The bedroom door was open. He went inside and continued his search for the candle. He could not find it. However, C admitted in cross-examination, that he saw the defendant in his bedroom and the defendant asked him to get a pencil and

paper to make some accounts on it. Also he denied that the defendant used to come to his house prior to the alleged incident.

Further he stated in cross-examination that the defendant on that day told him not to watch what he was doing in his house by using some obscene languages.

Ms Janette Thelermont (PW7), a woman Police Constable testified that following a complaint made by A on the same day of the alleged incident, the police immediately arrested the defendant and brought him to the Central Police Station. He was informed of the complaint of sexual assault and of his constitutional rights. He voluntarily gave a statement to the police at 17.30 hrs on the same day of the alleged incident. This statement was produced in evidence and marked as exhibit P5, which reads thus:

> Today the 20th day of March 2003 at around 12.45hrs I came from the shop at Mont Buxton and went to the house of C who is one of my friends. The reason of going to his residence is to talk regarding an incident that been occurred to his step son B as he was sexually abused by one Daniel JULIE. From the time I arrived at the residence of C I saw his daughter namely A sitting next to the house gate and we were talking regarding the sexual abuse to B from Daniel JULIE. So A invited me inside the house for us to talk, while I agree that she brought me in the house corridor and told me to sit on the table for us to talk, the same moment C came and told me to get inside the bedroom if I wanted to talk to A; frankly me and A we got inside the bedroom of C where we sat on the bedroom and talked to each other regarding what had happened with B.

> The bedroom door was well pushed but was unlocked, fifteen minutes of talk, later after the talk I went away. From the moment I was in the bedroom with A nothing happen between her and myself. I never touched her, even used candle inside her vagina nor ass, and I had never done sexual intercourse with her. But what I remember is when I was busy talking to A in the bedroom she made me aware that I have large penis and asked me about when I will give it to her, that was the indecent words that she was talking with me when we were inside the bedroom together. It was the moment that I informed A that I would never make any action of love with her as my girlfriend E is her godmother. That was when I leave the place.
>
> If there is allegation that I threaten A that I will burn the hair on her vagina if she don't have any sexual intercourse with me is totally wrong. If there is also allegation that I said that the doctor who has sent me to make a test with A is again totally wrong.

Police Constable Mariano Orphee (PW1) testified that on 20 March 2003, while he had been to Mont Buxton on a duty related matter, at around 2pm, he received a complaint from A stating that a police officer by the name of Pierre had been involved in an incident with her. Following some investigation, he received a candle from C. He brought that candle to the Central Police Station and kept it in his safe to be produced as an exhibit in this case. Accordingly, the said candle was produced in evidence.

Mr Wilson Denis (PW2), a Police Officer, testified that on 20 March 2003, while he was on duty at the Central Police Station he received a complaint of sexual assault against the

accused. As a result he went to Mont Buxton to apprehend the defendant at his residence, where he found a pair of red shorts left on the cloth line for drying. He arrested the defendant and seized the red shorts and the same was produced in evidence.

Inspector Neige Raoul (PW8) of the "Family Support Squad" unit testified that on 19 March 2003, she received a phone call from the defendant who informed her that one B of Mont Buxton had been sexually abused by one Daniel Julie and so he sought her advice on this matter. Mrs. Raoul advised the defendant to tell B to go to the police station and make his complaint. Then the complainant would be sent for medical examination and the suspect would be arrested. Moreover, she testified that she never instructed or authorised the defendant to investigate any case involving sexual assault on B. Further she stated that medical examination on the victim of sexual assault cases should be done only by the doctors at the Victoria Hospital, not by any police officer for that matter.

Police Inspector Ericson Charles (PW9), testified that the defendant was working under his supervision during the period of the alleged incident and he never instructed or authorised the Defendant to carry out any investigation in any sexual assault case involving B or A. The defendant was at that time working under his supervision at the Mont Fleuri Police Station only as a Process Server. Since the defendant held the rank of Lance Corporal, a non-commissioned rank in the Police Force, he was not assigned any criminal investigation at any point in time.

Dr Daniella Malulu (PW10), a psychiatrist, testified that B had been a known patient of psychiatric department of the Victoria Hospital, ever since he was 7 years of age. He has been on treatment and medication on and off for aggressiveness due to mental retardation. The doctor Malulu also produced a medical report on B in this respect.

After the close of the case for the prosecution, the Court ruled that the defendant had a case to answer in defence. The defendant elected to give evidence on oath. He testified in essence, that it was true that he had sexual intercourse with the first complainant A, on the date, time and place as alleged by the prosecution. However, according to the defendant, he had that sexual intercourse with the consent of A. He further stated that it was not the first time he had it, but he used to have such sexual intercourse with her in the past, at least ten times, at different venues before the alleged one. However, as far as the venue was concerned, it was the first time he had such sexual intercourse at her house in her father's bedroom.

He further testified that on the alleged date in the morning while he was in his uniform, A met him in a shop at Mont Buxton and asked him to come and see her in a few minutes at her home. So, the defendant went to his house, changed his uniform, put on a red pair of trousers and then went to A's home as usual, since he was in the habit of going to her place often to play dominos. In A's house he first met her father C, who told him to go inside the house and talk to A.

When he went in, he saw A, who took him into her father's bedroom stating that she had to tell him, something about her nephew, B, who was allegedly sodomised by one Daniel Julie. So, he asked her to give him a piece of paper to note down what she was going to say about the incident of B. However, A told him that the real purpose of her invitation to her house was to have sex with him. Then, she closed the bedroom door and pulled him down and got him sit by her side and, told that they were going to have quick sex. The crucial part of his evidence in this respect runs thus:

> She told me Pierre, we have to do it, let us hurry up. I did not touch her. She pulled up her skirt

> very quickly... and she removed her underpants on the left leg. The right side was still on her. She was on the bed and she leaned against the wall and put her legs up. I looked at her private part. She told me 'Pierre look at it, let us have sex quickly'. At this point I had an erection. I was tempted, and the way she was encouraging me to do it... I did not use force on her. I did not harass her. I did not have the intention to come there and have sex. As a police officer, I had come there to help them about the incident of B. She then opened the door and went out.

Besides, the defendant stated that he never inserted any candle into her anus or vagina. As regards his statement (supra) given under caution to the police, the defendant testified that he lied in his statement stating that he did not have sexual intercourse with A because of the following reasons:

(i) He felt embarrassed to tell the truth since he was working as a personal body guard to the Speaker of the National Assembly at that time.

(ii) He panicked to tell the truth.

(iii) Things did not make any sense at that time

(iv) He did not get a chance to take any legal advice when he gave the Statement to the police.

(v) Inspector Denis pressurised him, so he could not tell the truth.

(vi) Investigating Officer Cecil Valmont threatened him saying that he was going to put him in a cell and that is what made him give a statement containing lies.

As regards the allegation of sexual assault on B, the defendant testified that on 'Clean up the World Day' - which in fact, fell from 19 to 21 September 2003 - he went to C's house looking for B as the defendant wanted to get help from him to dispose of some rubbish from his house. When he went to C's house, he noticed that B was rubbing his abdomen. The defendant asked him what was wrong with him. In response, B told him that he had been sodomised by one Daniel Julie of Hangard Street. Having thus replied, according to the Defendant, B voluntarily lifted his T-shirt and showed him his waist, where the said Daniel Julie had been holding him around while having anal intercourse with him. The defendant noticed that there was a blue mark and scratch on him. Furthermore, the defendant testified that he did that in his capacity as a police officer vested with power to investigate any complaint made to him. Having thus testified in the chief-examination, the defendant admitted in cross-examination that the incident happened on the morning of 19 March 2003.

Further, the defendant testified that the police officers Land Corporal Julie, Sergeant Bell, WPC Janette Thelermont and WPC Marie Souffe have all fabricated the story and framed him falsely in this case. Hence, the defendant claimed that he was innocent, he has never committed any indecent act either on B or A.

I shall now proceed to examine the evidence pertaining to the charge in question in the light of the submissions made by counsel on both sides. Before doing so, I should state that all the witnesses called by the prosecution in this matter appeared to be very credible. I believe them all in every aspect of their testimony.

The entire evidence adduced by the prosecution is reliable, consistent, cogent, and more so corroborative in all material particulars.

As regards the charge under count 1, I believe A (PW3) in her testimony that the defendant did insert the candle into her anus, vagina and then had sexual intercourse with her using his male organ. Indeed, the defendant does not dispute the fact that he did commit the act of sexual intercourse on her, presumably using his penis, on the date and place as alleged by the prosecution. However, according to the defendant, A did give her consent to the sexual intercourse. Therefore, the defence contends that the defendant's act cannot, in law, amount to a "sexual assault" which is the essential ingredient of the offence alleged. Now, the only issue before the Court for determination is whether A had consented to the alleged acts committed by the defendant on her body.

Firstly, on the question of credibility, I believe the complainant A in her testimony in that she did not give her consent for the defendant to commit the act of sexual intercourse that is, using his male organ on her, on the alleged date and place. I do not believe the defendant's version to the contrary. Hence, on the strength of the first complainant's evidence alone, I find the defendant did commit an act of sexual intercourse on her without her consent.

In any event, even if one assumes for a moment that she had given her consent implicitly for the defendant to commit the said act of sexual intercourse on her using his male organ, still I find that she never gave consent to the acts of the candle being inserted by him into her anus and vagina. These acts of sexual perversion of the defendant namely, by inserting an external object into her anus and vagina for a sexual purpose in my view, on their own - dehors the defendant's act of sexual intercourse using his male organ - constitute a "sexual assault" in law, by virtue of section 130(2) (d) of the Penal Code, which reads thus:

> (2) "For the purposes of this section "sexual

assault" includes –

> the penetration of a body orifice of another for a sexual purpose.

Therefore, in law sexual assault means not only the penetration of another's body orifice by using one's sexual organ but also it includes any such penetration made by using any other part of one's body or by using any other external object or material whether solid, liquid or gas, which entity may even include radiations such as laser beams etc. What is important here is the act of penetration using any tangible entity and the purpose for which such penetration is made. If it is made for a sexual purpose, then it completes and constitutes the act of sexual assault as defined in section 130 (2)(d) of the Penal Code. It does not matter, what is being used for the penetration or which orifice in the body is penetrated. Obviously, the defendant in this case has committed and completed the act of sexual assault in the eyes of law on A by the simple fact that he inserted a candle into her anus and vagina, without her consent for a sexual purpose, and so I find.

**Misrepresentation**

On the other hand, even if one assumes for a moment that A had given her consent for the defendant to carry out any of those acts on her whether of sexual nature or not, the fact remains that she consented to those acts being performed on her because of the misrepresentation made by the defendant whom she knew as a police officer, who told her that he had been asked by a medical doctor to carry out those tests presumably of a medical character. In fact, any consent so obtained by such misrepresentation as to the character of the act is not a valid consent in law, in terms of section 130 (3) (a) of the Penal Code (vide supra) which reads thus:

> (3) A person does not consent to an act which if

> done without consent constitutes an assault under this section if –
>
> (a) the person's consent was obtained by misrepresentation as to the character of the act or the identity of the person doing the act…

Hence, even if the defendant had obtained consent as he claims, from A to commit those acts on her, it was evidently obtained by misrepresentation. Hence, a conclusive legal presumption is activated against him by operation of section 130 (3)(a) of the Penal Code. That is, the complainant did not consent to any such act, and the defendant is presumed to have committed that act without consent in law. Therefore, I find the defence of consent raised by the defendant in this respect is not maintainable in law.

**Corroboration**

I note that corroboration of the evidence of the complainant is looked for as a matter of practice and the Court should warn itself of the danger of acting without it, in all cases of sexual offence, irrespective of the sex of the complainant or the party involved.

**Corroborative evidence aliunde**

Although this Court can completely rely and act upon the truth of the evidence of the complainant in the present case, and after warning may proceed to convict the defendant without looking for any corroboration (see *R v Rose* (1972) SLR 43, still I find that there is strong and overwhelming evidence of the eye-witness B (PW4), which aptly corroborates the evidence of the complainant in all crucial facts relating to the act of sexual assault and the involvement of the defendant in the commission of the act on the complainant. This witness categorically testified that inside the bedroom, he saw the defendant with a candle stick in his hand and inserted it into

his aunty's anus and then took it out. After that he again inserted his penis and had sexual intercourse with her. At one stage, he also heard his aunty screaming out of pain saying that the act of the defendant was hurting her.

**Lies as corroboration**

As rightly submitted by Principal State Counsel Mr. Govinden, it is trite law that a false statement made by the defendant to the Police before the commencement of proceedings may amount to corroboration. In *R v Lucas* (1981) 1 QB 720 it was held and subsequently followed in *R v R* Cr LR 736*,* that a defendant's lies during a police interview can be treated as corroboration, provided the following criteria are considered before a lie can be said to amount to corroboration:

(i) The lie must have been deliberate

(ii) It must relate to the material issue

(iii) The motive for the lie must be a realisation of guilt and a fear of the truth

(iv) The statement must be clearly shown to be a lie by evidence other than that of the person who has to be corroborated, that is to say, by admission or by evidence from an independent source (see Archbold (1993 ed) 1229, mid paragraph, and *Victor v Ally* (1990) SLR 121)

Admittedly, the defendant lied to the police when he gave the voluntary statement under caution. This is also clearly shown to be a lie by the officer Ms Janette Thelermont (PW7), who recorded the statement, and by the evidence of A (PW3) and B (PW4). In fact, both complainants testified that the

defendant unlawfully had sexual intercourse with A. The defendant's evidence under oath also confirms this revelation of the lie as it directly contradicts his statement to the police under caution. The motive of this lie as to the sexual intercourse was clearly a realisation of guilt. It was made to set a defence of total denial of a charge in the first instance to the police. However, the defendant in Court, having observed the strength of the evidence of the prosecution in respect the act of sexual intercourse, obviously changed his story and the lie, again this time in an attempt to prove consent.

The lie, evidently, relates to the material issue that is the act of sexual assault. Finally, I find that the lie was deliberate. There was nothing accidental about the falsehood of the defendant's statement under caution. It was a deliberate lie which he told the police during the course of an interview. Obviously, none of the reasons he gave in Court for lying to the police to my mind, appears to be plausible and convincing. Hence, I find the lies told by the defendant in his statement to the police under caution can also safely be used on its own for the purpose of corroboration in this matter, although there is overwhelming independent evidence available and used from other sources for this purpose, as discussed supra.

As regards the second count, I believe B (PW4) in every aspect of his testimony. I find on evidence that the defendant, whilst he was representing himself to be an investigating officer, did tell B that he had been asked by the doctor to conduct a medical examination on him. Having thus misrepresented the facts, the defendant asked B to remove his trousers, opened his buttocks and then looked in B's private parts. On the question of his police authority to investigate the alleged cases of sexual offence, I believe the Inspector Mrs Neige Raoul (PW8) in her evidence that she advised the defendant that any complaint of sexual assault should be reported by the complainant at the police station and the complainant would be sent to Victoria Hospital for

medical examination. Besides, I believe the Inspector Eric Charles (PW9) in his evidence when he testified that in his capacity as the superior officer he never instructed the defendant to carry out criminal investigations in respect of any case, since the defendant was only a non-commissioned officer serving the police force as a process server. I do not believe the defendant's version to the contrary stating that he had authority to investigate and B removed his shorts on his own and voluntarily showed the defendant his waist for examination.

In the circumstances, I find that the unauthorised examination of the defendant on the private parts of B amounts to an indecent act, which obviously falls well within the definition of "sexual assault" in terms of section 130 (2)(a) of the Penal code.

On the question of consent, I believe B in his testimony that he did not give consent in law, since I find that such consent was obtained by misrepresentation. This finding is based on similar reasons discussed supra in the case of A. In any event, the medical evidence shows that B is a mentally retarded person of weak intellect, whose understanding and knowledge in my view are such that he could not have given valid consent as contemplated under section 130 (3)( c) of the Penal Code, which reads thus:

> A person does not consent to an act which if done without consent constitutes an assault under this section if –
>
> (b) the person's understanding and knowledge are such that the person was incapable of giving consent.

On the question of corroboration, I find there is no need for it in the case B, as I completely rely upon the truth of the

evidence, which he has given before this Court (see *R v Rose* (1972) SLR 43).

As regards corroboration, although there is no need for it as I completely rely upon the truth of the evidence of the complainant - see *R v Rose* - still I find there is strong and overwhelming evidence of the defendant's confession to corroborate the evidence of the complainant on the question of sexual assault by the defendant.

In my final analysis, I have considered the whole of the evidence. I believe both complainants to be truthful and satisfactory witnesses. I accept their evidence in total. I find that neither the complainants nor the police officers have concocted this story to incriminate the defendant falsely in this matter. In the circumstances, I find that the prosecution has proved beyond reasonable doubt that not only the offences of sexual assault have been committed against the complainants under counts 1 and 2 respectively, but also the defendant who committed those offences during the month of March 2003, particularly on 20 and/or 19 March, at Mont Buxton, Mahe.

I therefore, find the defendant guilty of the offence of sexual assault on two counts contrary to section 130 (2)(d) and 130 (2)(a) of the Penal Code under Count 1 and 2 respectively of the Penal Code and convict him of the offences accordingly

**Record: Criminal Side No 71 of 2003**

## Umbricht v Lesperance

*Civil Code - Right of way – Enclosed land – Constitution*

The plaintiff's land was enclosed on all sides. He rented it to tenants. He accessed the land using a road over the defendant's land. The defendant blocked the access way.

**HELD:**

(i) Rights of way are discontinuous easements. They can only be created by a document of title, subject to certain statutory exceptions;

(ii) The owner of land enclosed on all sides is entitled to a right of way under article 682 of the Civil Code of Seychelles;

(iii) The position and form of a right of way can be determined by 20 years' continuous use; and

(iv) In right of way cases, the constitutional right of the land owner needs to be balanced with the statutory right of the neighbour.

**Judgment:** For the plaintiff. R3000 awarded as moral damages.

**Legislation cited**
Civil Code of Seychelles, arts 682, 683, 685, 688, 691
Constitution of Seychelles, art 26 (2) (a) – (i)

**Foreign legislation referred to**
French Civil code, art 685

**Cases referred to**
*Alf Barbier v Government of Seychelles* (unreported) CC 1/2003
*Azemia v Ciseau* (1965) SLR 199
*Delorie v Alcondor* (1978-1982) SCAR 28
*Georges Sinon v Maxim Dine* (unreported) CS 177/1999
*Pat Pascal v J J Leveile* (unreported) CS 177/2000
*Payet v Labrosse* (1978) SLR 122

Philippe BOULLE for the plaintiff
Karen DOMINGUE for the defendant

**Judgment delivered on 6 August 2007 by:**

**KARUNAKARAN J:** The plaintiff in this action prays this Court for a judgment against the defendant in essence, seeking the following remedies -

(i) An order directing the defendant to unblock the access road, and remove all constructions and the gate he has put up blocking the plaintiff's right of way on the defendant's land Parcel PR661, in order to have access from the public road to the plaintiff's land Parcel PR624.

(ii) A declaration that the plaintiff has a right of way over the defendant's land Parcel PR661 along the existing access road; and

(iii) An award of R20,000 - for the plaintiff against the defendant towards moral damages the plaintiff suffered

Beginning from the main road the access way passes over several parcels of land situated between the main road and the plaintiff's property. They are namely,(1) PR1287, (2) PR829, (3) PR1344, and (4) PR 1988 (belonging to the

plaintiff herself), (5) an unsurveyed parcel of land belonging to one Mrs. Western Fred, (6) PR661 belonging to the defendant, and (7) PR625 belonging to one Ms Wilhem Figaro and then it ends up on the plaintiff's property. After the purchase, the plaintiff lived in that house for about six years. Thereafter, she had been renting it out to several tenants. Undisputedly, the first tenant was one Mr Louis D'offay - PW2 - who had been occupying the house from 1991 to 1994. The second tenant was a company "Casino Des Iles", represented by its General Manager Mr Philip Saunders - PW3 - who had been renting the house from 1995 to 1998. The third tenant was also a company, Masons Travel (Pty) Ltd, represented by one Mr Paul Allisop - PW5 - who had been occupying the house from 1999 to August 2001. Be that as it may.

The defendant's parcel PR661 is situated not only adjacent to that of the plaintiff but also it is the penultimate parcel of land, through which passes the said access road. The defendant purchased his land in 1989 from his aunty Davinia Lesperance - vide exhibit P3 - and then built his house thereon. Incidentally, the defendant's parcel PR661 is now subdivided into two parcels namely, PR3878 and PR3875.

The plaintiff testified that as far as she knew the said access road had been in existence for the past 35 years serving different houses in that area, wherein the families of her father and other siblings had been living. The plaintiff further stated that her father was the one first started building the said access road beginning from the main road for the benefit of his children. A stretch of the said access road, which now passes through the defendant's land, hereinafter called the "access in dispute" according to the plaintiff, has been in use as a motorable access to reach her parcel PR624 ever since she purchased the property. The plaintiff testified that in 1988 she carried out some repair works and resurfaced the access in dispute with concrete strips to enhance its utility.

The plaintiff categorically testified that the access in dispute is the only shortest route possible, convenient, and available from the public road to the plaintiff's property as well as to the adjacent property PR625. Further, the plaintiff testified that her property is an enclave and no other access is available apart from the access in dispute. The plaintiff also produced a detailed plan - exhibit P6 - in respect of the said access in dispute that passes through the defendant's land leading to parcel PR624 via PR625. This plan drawn by G & Surveys Pty Ltd in 2000 clearly indicates that there had been an existing access road beginning from the public road to the plaintiff's property stretching across the defendant's land. She also produced an Aerial Photographic Map - exhibit P7 - in respect of her land and its surroundings. This map indeed, shows the continuation of the said access road over PR625, PR661 and PR1988 and then shows it leading to the adjoining properties situated down towards the seaside. In addition, the plaintiff produced a number of photographs - exhibits P11 to P25 - from which one can easily observe the existence of a motorable access road with old concrete strips starting from the public road, passing over different properties, crossing the defendant's land and then leading to the plaintiff's property. Furthermore, the plaintiff testified that Ms Wilhem Figaro, the owner of PR625, had already granted her permission - vide exhibit P8 - in 1990 for the construction of a motorable access road leading to her property. Moreover, she produced in evidence copies of the "title deeds" in respect of PR 1988 and PR 1288, exhibit P9 and P1O respectively, showing that she is the owner of these two parcels of land over which passes the said access road. The plaintiff further testified that she also built a retaining wall along the stretch of the access in dispute on the defendant's property at her own expense and that too with the defendant's consent in order to protect the said access in dispute from being damaged by landslides. Moreover, the plaintiff testified that the defendant had also been using the said access road since he purchased the property and even transported all the building materials for

the' construction of his house using the same the access road in dispute.

In November 1999, the plaintiff was away from the country for some time. The third tenant Mr Paul Allisop - PW5 - of Masons Travel Pty Ltd was occupying the house at that time. Upon her return in December 1999, the plaintiff noticed that the defendant had put up a gate - made of galvanised pipes -- across the access in dispute and had completely blocked the motorable access to plaintiff's house. The tenant also complained about it to the plaintiff. When the plaintiff asked the defendant why he had done so, the defendant stated that the said access road was on his property and he had the right to block it. Moreover, the defendant told the plaintiff to advise her tenant to move out of the house. The plaintiff sought police assistance to get the obstructions removed but to no avail. Then she sent a personal letter to the defendant dated 1 December 1999 - exhibit P26 - which reads thus:

> Dear David,
>
> On my return from my holidays I was surprised to see you have erected a gate across my road leading to the house I rent to Masons Travel.
>
> Obviously, this is not acceptable to me because you are prohibiting access by car or any vehicle to the house. Access to the property has been available for some twenty years, long before you lived near the land. I funded the construction of the road personally at great expense. No objections were raised by the previous owners of the land. Only now after all these years you have decided to block the road without consultation with me.
>
> ....David please, contact me... so we sort this

matter out.

Yours sincerely,
(Sd) Plaintiff

The defendant made no response to this letter. In the meantime, because of non-access, the tenant "Masons Travel" vacated the house before the expiry of the contracted tenure. As a result of the defendant's unlawful act, according to the plaintiff, she suffered mental stress, which affected her health condition and she had to undergo four surgical operations. She estimated the moral damage, which she suffered in this respect at R20,000 for which she claimed that the defendant is liable to make good.

The first tenant Mr Louis D'offay - PW2 - testified that he was living in the plaintiffs house as a tenant from 1991 to 1994. During that period he had a car. He used to drive on the said access in dispute to reach the entrance of the veranda of the house and park his car there. According to him, the plaintiff in the early 1990s resurfaced the access in dispute with concrete. The second tenant, Mr Philip Sanders - PW3 - who was then the General Manager of Casino Des Iles also testified that his company had been renting the house from the plaintiff from 1995 to 1998. During that period the said motorable access road was in existence with a concrete surface and was in use by the tenant. The third tenant Masons Travel (Pty) Ltd, represented by one Mr Paul Allisop - PW5 - who had been occupying the house from 1999 to August 2001 testified that the tenant had to terminate the tenancy prematurely and vacate the house since the defendant had put up an obstruction across the access road.

The land surveyor Mr Michel Leong - PW4 - testified in essence that in July 2000 upon the plaintiff's request, he surveyed her property. On the defendant's property, he noticed a gate made of galvanised pipe erected across the

access in dispute. This gate was completely blocking the motorable access to the plaintiffs house. Although the gate was mostly located on defendant's property, part of it had encroached onto PR624. Further, in cross-examination he stated that he did not see any other footpath on any other property, which could lead to the plaintiff's house.

In view of all the above, the plaintiff has now come before this Court seeking the remedies first-above mentioned.

On the other hand, the defendant denied all the allegations and the claims made by the plaintiff in this matter. According to the defendant, the plaintiff has no right of way over his property, as it has not been demarcated in the registered title deed burdening PR661. Therefore, the defendant seems to justify that he has the right to block the access road in dispute. The previous co-owner, Mr Laporte - DW2 - who sold the property to the plaintiff testified that when he sold it to the plaintiff in 1988, there was only a footpath along the access in dispute. According to him, the plaintiff built the motorable access along the access in dispute only in 1990 or 1991. It is the contention of the defendant that the plaintiff's property is not enclosed. The plaintiff has other alternative access without having to go through the access in dispute. Moreover, it is the case of the defendant that the Government has built a road on the western side at a distance of 7 minutes walk from the plaintiff's property. There was a proposal by the Government for the extension of that road. This project can easily provide an alternative access to the plaintiff’s property through adjacent parcels lying on the western side of the plaintiff's land. In support of this contention as to the alternative access the defendant called DW3, Mr Brian Felix - a private land surveyor - to testify as to the possibility of getting an alternative access road to the plaintiff's property. According to this witness there is already a footpath - vide blue broken line in exhibit P3 - from parcel PR625 leading to parcel PR3854, which has been earmarked by the Government for the

construction of a sub road. This proposed road would pass over adjacent parcels of land on the western side of the defendant's property. According to Mr Felix, the plaintiff can have a right of way over PR625 to reach the said footpath and then reach the road yet to be built by the Government. He also testified that the existing access road reduces the area of the defendant's property, which has already been subdivided into two parcels and its area of utility is minimised. According to the defendant, the right of way proposed by him is more convenient than the existing one. In the circumstances, the defendant seeks dismissal of the suit.

I meticulously perused the entire evidence including the documents adduced by the parties. I gave diligent thought to the arguments advanced by both counsel in their written submissions. Obviously, the plaintiff in this matter claims right of way over the defendant's land relying on two grounds.

Ground (i): Since the plaintiff's land is enclosed on all sides, in law she is entitled in terms article 682 and 683 of the Civil Code to obtain a right of way over the defendant's property. These two articles read thus:

> Article 682
> 1. The owner whose property is enclosed on all sides, and has no access or inadequate access on to the public highway, either for the private or for the business use of his property, shall be entitled to claim from his neighbours a sufficient right of way to ensure the full use of such property, subject to his paying adequate compensation for any damage that he may cause.
>
> 2. However, where the owner has been deprived of access to a public road, street or path in pursuance of an order converting a public

> road into private property, the person who has been granted such property shall be required to provide a right of way to the owner without demanding any compensation.
>
> Article 683
> A passage shall generally be obtained from the side of the property from which the access to the public highway is nearest. However, account shall also be taken of the need to reduce any damage to the neighbouring property as far as possible.

Ground (ii): L'assiette de passage over the access in dispute has been used for a period in excess of 20 years and the plaintiff has prescribed the said assiette de passage, which is the shortest route to the main road.

For the sake of convenience, let us first take ground (ii) above for examination. It is trite law that a right of way is a discontinuous easement in terms of article 688 of the Civil Code of Seychelles. This right cannot be created except by a document of title. Even possession, use and enjoyment from time immemorial is not sufficient for its creation in terms of article 691 of the Civil Code of Seychelles (see *Payet v Labrosse* (1978) SLR 122 and *Delorie v Alcindor* (1978-1982) SCAR 28). Hence, as I see it, the right of way cannot be created by acquisitive prescription, even if the claimant had been in use and enjoyment for 20 years or more or even from time immemorial. However, it is interesting to note here that in cases of non-access (enclave) “assiette de passage et mode de servitude de passage" is subject to prescription by twenty years of continuous use in terms of article 685 of our Civil Code, which reads thus:

> 1. The position and the form of the right of way on the ground of non-access are determined by twenty years' continuous use. If at any time

> before that period the dominant tenement obtains access in some other way, the owner of the servient tenement shall be entitled to reclaim the right of way on condition that he is prepared to return such a proportion of any compensation received under paragraph 1 of article 682 as is reasonable in the circumstances.
>
> 2. The action for compensation as provided in paragraph 1 of article 682 may be batted by prescription; but the right of way shall continue in spite of the loss of such action.

Indeed, article 685 of our Civil Code (supra) is simply the replica of article 685 of the French Civil Code, except for the number of years pertaining to the continuous use. Article 685 of the French Civil Code, which was in force until 1975, reads thus:

> L'assiette et le mode de servitude de passage pour cause d'enclave sont determines par trente ans d'usage continu.
>
> L'action en indemnité, dans le cas prévu par l'article 682, est prescriptible et le passage peut-être continue, quoique l'action d'indemnité ne soit plus recevable

Therefore, it is evident that article 685 of our Civil Code simply specifies that only the position and the form of the right of way are to be determined by twenty years' continuous use. This obviously, does not refer to the right itself or create any right of way (the abstract entity); but rather determines only the position and form of the access (the physical attributes) and thus protects their continuance and longevity by prescription of 20 years. To my understanding of the case law, the right of way is a distinct discontinuous easement attached to an

immovable property. It is a real right as opposed to personal. It is perpetually attached to the property, not to the owner/s of the property. Therefore, it requires a document of title or a declaration of the Court for its creation. In this respect, I would like to restate herein the *Sinon* Principle, which I first formulated and applied in the case of *Georges Sinon v Maxim Dine* (unreported) CS 177/1999 and later fine-tuned it in the case of *Pat Pascal v J J Leveille* (unreported) CS 177/2000. This principle states that in the absence of any document of title or a declaration by a competent court of law, no owner of land is entitled to have any right of way over another's land. This is the general rule of principle, which I applied in *Sinon* (supra). When the occasion arose in a subsequent case of *Pat Pascal* (supra) I had to rethink and fine-tune the said principle and appended two exceptions to the rule. Thus, in *Pat Pascal* I held that although the creation of the said right of way is governed by that principle, there are two exceptions to it by virtue of articles 693 and 694 respectively of the Civil Code of Seychelles, which I termed as "statutory exceptions". Obviously, these two articles relate to the category of contiguous plots of land, which were once owned by the same owner but subsequently subdivided and transferred to different owners. If the non-access had arisen from exchange or a division of land or from other contract, the passage may only be demanded from such land as has been the subject of such transaction. In such cases, requirement as to the existence of any document of title or a declaration by Court under article 682 becomes irrelevant and thus constitute an exception to the *Sinon* principle quoted supra. However, the case on hand does not fall under this category of statutory exceptions to the *Sinon* principle. Hence, the plaintiff, who admittedly, having no "document' of title" or a "declaration by Court" for the right of way, has now come before this Court seeking a declaration that she has a right of way over defendant's land parcel PR661 along the existing access road, invoking article 682 of the Civil Code.

Coming back to the facts of the case, the plaintiff purchased the property only in 1988. Obviously, she could not have been in continuous use in excess of 20 years whether it relates to the right of way as such or the position and form of the right of way as she was admittedly interrupted of her use by the defendant in November/December 1999. In any event, the previous owner, Mr Laporte - DW2 - unequivocally testified that when he sold the property to the plaintiff, the access was only in the form or mode of a footpath along the access in dispute, not in the form of any motorable road. Therefore, the plaintiff cannot invoke article 685 of the Civil Code to establish l' assiette et le mode de servitude de passage namely, the position and the form of the right of way, as the condition as to number years required under article 685 of the Code is not satisfied.

I will now move on to examine the merits of ground (i) supra, pertaining to the issue of enclave. From my observations of all the relevant documents admitted in evidence, namely the detailed plan (exhibit P6), Aerial Photographic Maps (exhibits P7 and D4) and photographs (exhibit P11 to P25) I find more than on a balance of probabilities that the plaintiff's property is enclosed on all sides in the present condition and nature of the surrounding terrain. The plaintiff has no other convenient and practicable access on to the public highway for the private use of her property apart from the access in dispute. The alternative access proposed by the surveyor Mr. Felix (DW3) in this respect is not only speculative but also being a footpath, it cannot provide a sufficient right of way to ensure the full use of her property. Besides, the proposed alternative (see, blue broken line in exhibit P3) is not obviously the nearest to the public highway compared to the access in dispute. Therefore, the plaintiff is entitled to claim from her neighbor, namely the defendant, the existing right of way - the access in dispute - to ensure the full use of her property in terms of article 682 of the Civil Code. A passage shall generally be obtained from the side of the property from which

the access to the public highway is nearest: vide article 683 (supra). Undoubtedly, the existing access road over the defendant's property is not only the shortest route to the public highway but also more practicable and more convenient in the circumstances. Hence, I find the existing right of way along the access in dispute on the defendant's property is the plaintiff's entitlement in law by virtue of article 683 of the Civil Code and so I find.

In passing, I would like to observe that by granting a landowner "right of way" on another's property, the Court in effect, interferes with the former's constitutional "right to property and peaceful enjoyment", which is one of the fundamental rights, a sacrosanct right guaranteed by the Constitution. In so doing the Court indeed sets limitations to the constitutional right of that person in order to accommodate a statutory right granted in favour of his enclosed neighbour under article 682 of the Civil Code. At this juncture, I should mention that the list of such limitations which may be prescribed by law as contemplated under article 26 (2)(a) to (i) of the Constitution does not include or provide for the contingency of non-access due to enclosed lands, which is a common phenomenon in the Seychelles given the nature and form of its terrain and topography. The constitutional reflection in this respect indeed, originates from the noble thought of Mr PJR Boulle, counsel for the plaintiff, expressed in his address before the Constitutional Court in the case of *Alf Barbier v Government of Seychelles* (unreported) CC 1/2003. Be that as it may. When an enclosed neighbour requires access over another's property, the Court should determine such requirement with utmost judicious mind and diligence striking a balance between the constitutional right of the landowner and the statutory right of his neighbour. In this process, the Court obviously ought to take into account all the relevant circumstances of the case. These circumstances in my view should include the fact as to how the non-access arose, the balance of convenience and hardship, the availability,

practicability and cost of construction of the alternative access road on neighbouring properties, the peaceful enjoyment of one's property with least interference from others and the need to reduce as far as possible any damage to neighbouring properties and the like.

In fact, the plaintiff in this matter has now come before this Court seeking a declaration, injunction and damages against the defendant. On the other hand, the defendant suggests that his neighbour, the plaintiff, may build an alternative access road over the neighbouring properties belonging to others like Freddy and Ginette and that too based on a speculation that the government will be extending an existing road situated several parcels away from that of the plaintiff. With due respect to the defence suggestion as to the alternative access, I would state that the extended application of the religious principle - the Golden Rule - "Do unto others what you expect from others to do for you" - see Matthew 7:12 and Luke 6:31 - embodied in article 682 of the Civil Code should not be restricted only to Freddy and Ginette. The defendant himself should first observe this rule by extending his generosity and kindness to his neighbour before he suggests it to be enforced by law on others. Having said that, it is pertinent to note what the Court held in *Azemia v Ciseau* (1965) SLR 199, which runs thus -

> (i) The land owner whose property is enclave and who has no access whatever to the public road can claim a right of way over the property of his neighbour for the exploitation of his property, conditioned on giving an indemnity proportionate to the damage he may cause.
>
> (ii) A property may be deemed to be "enclave" not only from the fact that it has no access to the public road but also in the case

where such road is impracticable.

(iii) If the accessibility is the result of the property having been divided by sale, exchange, partition or any other contract, a right of way can only be asked for over the properties affected by such contract.

Bearing the above principles in mind, on the strength of the evidence and pleadings on record, I hold that the plaintiff is entitled to claim/maintain/possess the right of way over the defendant's property. In the circumstances, I conclude that the plaintiff's claim for a right of way over the defendant's land based on enclave is maintainable in law and on facts.

As I see it, the defendant's suggestion for the alternative access is based more on speculation than on facts. In any event, the alternative access canvassed by the defendant in my judgment is impracticable, inconvenient and above all such an access road will have to pass over more than two parcels of land in the adjacent area, causing more inconvenience and damage to the neighbouring properties. In the final analysis, I conclude that the plaintiff is entitled to the remedies first above mentioned. Upon evidence, I find that the defendant did put up a gate or obstruction on the existing motorable access road taking the law into his own hands and thereby prevented the plaintiff from using the access road over which she had a legitimate expectation of having a right of way. As a result, the plaintiff should have obviously suffered a certain degree of hardship and inconvenience. However, the amount claimed by the Plaintiff for moral damages in the sum of R20,000 appears to be highly exaggerated and unreasonable in the given circumstances and nature of the case. Furthermore, I find that the defendant's unlawful act in this respect, could not have been the sole or proximate cause for the four surgical operations the plaintiff claimed to have undergone, which all appear to be of gynaecological origin.

Considering all the relevant circumstances, I award a global sum R3,000 in favour of the plaintiff for moral damages, which sum, in my view would be reasonable, appropriate and meet the ends of justice in this matter.

In view of all the above, I enter judgment for the plaintiff as follows:

(i) I hereby declare that the plaintiff has a right of way in favour of her enclosed property parcel PR624, over the defendant's land parcel PR661 along the existing motorable access road leading to the public main road at Baie St Anne, Praslin;

(ii) Consequently, I order the defendant to remove permanently the obstructions, namely the galvanised gate or any other object or structure or construction, which he has put up blocking the plaintiffs right of way over his land parcel PR661, in order for the plaintiff or her assignees or successors in title or agents to have access from the public road to the plaintiff's land parcel PR624;

(iii) Further, I award a sum of R 3,000 for the plaintiff against the defendant towards moral damages the plaintiff suffered because of the obstruction the defendant had put up blocking her right of way; and

(iv) I award the plaintiff the costs of this action.

**Record: Civil Side No 127 of 2000**

## Seychelles Marketing Board v Languilla

*Civil Code - Limitation*

The plaintiff supplied goods to the defendant on credit. The credit period ended on 21 January 1995. The defendant failed to pay invoices. A statement of account was sent to the defendant on 19 October 2000. The plaintiff sued for payment.

**HELD:**

The credit contract was a continuing contract. Prescription runs from the statement of account, not from the date that the agreed period of credit stopped.

**Judgment:** For the plaintiff.

**Legislation cited**
Civil Code of Seychelles, arts 1315, 2271, 2274

**Cases referred to**
*Hughes and Polkinghorn v North Island Company Ltd* (1984) SLR 154
*Teemooljee Ltd v Thomas* (1965) SLR 169
*Victor v Azemia* (1977) SLR 195

France BONTE for the plaintiff
Francis CHANG SAM for the defendant

**Judgment delivered on 11 June 2007 by:**

**PERERA J:** The plaintiff claims a sum of R77,061.76 from the defendant for goods sold and delivered. Juddoo J ruling on a plea in limine litis raised by the defendant that the plaint is time barred by prescription, held that –

> Where the plaintiff alleges that the purchases made by the defendant were "on credit" the period of prescription will only start to run once the agreed period of credit have expired. There is no averment in the pleadings to enable the Court to assess and determine the period or periods of credit pertaining to the alleged transactions between the plaintiff and the defendant.

He therefore held that the plea could only be considered with the merits of the case. The case for the plaintiff is that, building materials were supplied to the defendant on credit from 1992 to 1994 for a total sum of R77,061.76. It is averred that that sum has not been paid despite repeated requests. Mr Raymond Simeon, the Investigation Officer of the SMB, produced a copy of the “debtor’s statement” relating to the defendant from 31 March 1992 to 21 December 1994 which shows that a sum of R77,061.76 was outstanding on 30 September 1998.

He stated that as Investigation Officer he checked the receipts but found no payment to correspond with the invoices in the statement. He also stated that the credit period for payment was 30 days from the date of the invoice. Shown a receipt for R24,012, Mr Simeon admitted that it was a payment to SMB, but stated that it was not recorded against the payments for the invoiced amounts in the statement. He also stated that those payments would have been cleared, and only those outstanding were in the final "debtors statement”.

Mr Simeon stated that the last invoice was dated 24 December 1994. Hence on the basis of a 30 day credit arrangement, credit was stopped. Following the ruling of Juddoo J that the period of prescription commenced from the date the agreed period of credit stopped, Mr Chang Sam,

counsel for the defendant, submitted that the claim was time barred under article 2271 from January 1995, as the plaint was filed only on 1 August 2002. Juddoo J's ruling was obiter, as he stated that the pleadings did not disclose the agreed credit period.

At the end of the plaintiff's case, Mr Chang Sam made a submission of no case to answer, on the ground that the plaint was prescribed under article 2271, as prescription commenced from the date the payments became due, namely January 1995. Relying on the case of *Teemooljee Ltd v Thomas* (1965) SLR 169, he submitted that a letter of demand was insufficient to interrupt prescription. In any event, he submitted that no letter of demand was sent to the defendant. However, there is on file a letter dated 22 September 2000 (marked exhibit Pi*)* before Juddoo J at the time the plea of prescription was taken up. That letter, addressed to Mr Bonte by Mr Chang Sam is as follows -

> Dear Sir,
>
> Mr. Jacques Languilla - SMB
>
> I refer to your letter of 12th September 2000 to Mr. Jacques Languilla of Grand Anse Praslin in respect of a demand by SMB for the payment of the sum of R77,061.76.
>
> I act for Mr Languilla. Mr Languilla denies owing SMB the above or any other sum and any legal proceedings instituted by SMB for the purpose of recovering any sum whatsoever will be resisted.
>
> I would be grateful if you would refer all return correspondence regarding the above to our Chambers.
>
> Thank you

Yours faithfully

Sgd. Francis Chang Sam
Attorney at Law"

There is therefore an admission that a letter of demand was sent to the defendant on 12 September 2000. However the statement of accounts was sent to him only on 19 October 2000 (P2). No further correspondence has been produced with regards to this matter.

Article 2274 of the Civil Code provides that in a continuing contract, prescription runs from the statement of account. In the case of *Hughes and Polkinghorn v North Island Company Ltd* (1984) SLR 154 it was held inter alia that-

> It is clear from the jurisprudence that the period of prescription for the rights or action under article 2271 and 2274 starts running from the time that the account started is submitted.

In this case, the statement of account as at 30 September 1998 was submitted to the defendant on 19 October 2000. Demand for payment had been made on 12 September 2000. The credit sales continued from 31 March 1992 to 21 December 1994. On the basis of the evidence, although the credit period ended on 21 January 1995 in terms of article 2274, the period of prescription in a continuing contract commenced on 19 October 2000. Therefore the present plaint which was filed on 1 August 2002 is not time barred under the provisions of article 2271 of the Civil Code.

As was held in the case of *Bouchereau v Rassool* (1975) SLR 238 at 242 -

> It is a settled rule of practice and procedure that on a submission by the defendant of no case to

> answer in a civil case, the defendant must win or fall on his submission so that if he chooses to make a submission of no case and the ruling goes against him, he is not entitled to call evidence in answer.

In the case, apart from the issue of prescription, evidence was adduced by the plaintiff to substantiate the averments in the plaint. The defendant failed to rebut the evidence of the plaintiff's witnesses in cross-examination by adducing proof of payment of the amounts in the statement of account (P1), which was his burden under article 1315 of the Civil Code. In the case of *Victor v Azemia* (1977) SLR 195 at 196, the English rule relating to "no case" was followed, and the Court stated –

> In future however counsel should bear in mind that if they wish to make a submission of no case to answer at the close of the plaintiff's case, they must elect to call no evidence and are bound by such election, and judgment will be given for plaintiff or the defendant on the submission.

In this case, counsel for the defendant elected not to call evidence, and to abide by the ruling on the issue of prescription. Accordingly, as the submission of the defendant has failed, judgment is entered in favour of the plaintiff in a sum of R77,061.76, together with interest and costs.

**Record: Civil Side No 210 of 2002**

## Ventigadoo v Government of Seychelles

*Civil Code - Medical negligence – Damages for loss of limb – Loss of earnings*

The plaintiff cut his arm. He got gangrene and his arm was amputated above the elbow. The respondents were liable. The Supreme Court had to decide the quantum of damages.

**HELD**

(i) Pain and suffering can be physical or mental. In cases for loss of limb, the substantial award should be for the loss. In cases of full recovery, such as fractured bones, the substantial award should be for pain and suffering;

(ii) Assessment of damages for the loss of a limb should be considered separately from assessment of loss of earning capacity. The award should be fair and reasonable, having regard to all the circumstances of the case; and

(iii) The multiplier method of calculating loss of future earnings is not suitable in cases of permanent partial disability.

**Judgment:** For the plaintiff. R275,000 awarded for loss of future earnings, R150,000 awarded as damages for loss of arm, R75,000 for pain and suffering.

**Legislation cited**
Social Security Act 1987, s 5(d)

**Cases referred to**
*Antoine Esparon v UCPS* (unreported) CS 118/1983
*Fanchette v Attorney-General* (1968) SLR 111
*Francois Savy v Willy Sangouin* (unreported) CS 229/1983
*Georges Sidney Larame v Coco D'Or (Pty) Ltd* (unreported) CS 172/1998
*Harry Hoareau v Josep Mein* (unreported) CS 16/1988
*Jude Bristol v Sodepec Indistries Ltd* (unreported) CS 126/2002
*Mark Albert v UCPS* (unreported) CS 157/1993
*Rene De Commarmond v Government of Seychelles* (unreported) SCA 10/1996
*Sedgwick v Government of Seychelles* (1990) SLR 220

**Foreign cases noted**
*Foster v Tyne and Wear Country Council* [1984] 1 All ER 567

Antony DERJACQUES for the plaintiff
Ronny GOVINDEN for the defendant

**Judgment delivered on 5 October 2007 by:**
**KARUNAKARAN J:** The plaintiff in this action sued the defendant, the Government of Seychelles, for damages allegedly arising from medical negligence of the employees of the defendant, namely surgeons, doctors, and staff, who work at the Victoria Hospital. These employees allegedly committed a number of negligent acts or omissions in the course of the medical treatment given to the plaintiff for an accidental cut injury to his right arm. The plaintiff claimed damages against the defendant based on vicarious liability as the said employees were professionally negligent in the course of their employment with the defendant.

The plaintiff claimed that the alleged medical negligence resulted in amputation of his right forearm above the elbow and so he suffered extensive loss and damage in all walks of his life.

Hence, he claimed a total sum of R918,000 for loss and damage as detailed below -

| | |
|---|---|
| (i) Estimated damage for pain and suffering by the plaintiff | R150,000 |
| (ii) Estimated damages for plaintiff's loss of arm | R200,000 |
| (iii) Permanent cosmetic disability | R100,000 |
| (iv) Loss of job at R2,600 per month, for life | R468,000 |
| ***Total*** | ***R918,000*** |

The defendant denied liability. The Supreme Court heard the case on the merits and in its judgment dated 28 October 2002 refused the claim of the plaintiff and dismissed the suit. The plaintiff being dissatisfied with the said judgment appealed against it to the Seychelles Court of Appeal. Having heard the appeal, the Court of Appeal in its judgment dated 26 April 2007 allowed the appeal and held that the defendant, the Government of Seychelles, was liable in damages for the medical negligence of the hospital staff. Having thus reversed the judgment of the Supreme Court on liability, the Court of Appeal remitted the record to the Supreme Court with direction to assess the quantum of damages and costs to be awarded to the plaintiff, Charles Ventigadoo. Hence, this Court now proceeds to assess them accordingly, in the light of the evidence on record and the submissions made by counsel on both sides.

It is not in dispute that on 2 June 1998 the plaintiff was only 19 when he sustained the accidental cut injury. On the same day, he underwent a medical operation at the Victoria Central Hospital for the treatment of the injury. On 5 June, that is, on the 3rd post-operative day, the plaintiff suffered severe pain in his right forearm, where the wound had been operated. The same day he was examined by the surgeon in charge and

found to have developed gangrene following the injury.

He suffered acute pain. The pain was not only localised but was spread all around the area of wound. He could not walk. He could not sleep. His arm suffered inflammation and putrefaction. He had a high rise in his body temperature. On 6 June, the plaintiff had to undergo an amputation above the elbow of his forearm obviously, under anesthesia.

**1. Non-pecuniary damages**

**(i) Pain and suffering:** Under this head the plaintiff claims R150,000. The defendant contends that although the plaintiff is entitled to damages for actual and prospective pain and suffering caused by the injury, the quantum claimed is excessive and manifestly exaggerated. Frankly speaking, it is impossible to use an exact mathematical standard to measure the amount that an injured person is entitled to recover for physical and mental pain and suffering and loss of normal state of mind.

Legally speaking, "pain and suffering" are not two separate concepts. Instead, it is one compound idea. Awards for "pain and suffering" are not apportioned into separate amounts; one for pain and one for suffering. Pain and suffering is a phrase that is always used as a single unit in legal terminology. While there may be real differences between "pain" and "suffering", it is legally impossible to separate the two when trying to award damages. In most injuries, there will be physical and mental pain and suffering. Physical pain and suffering includes bodily suffering or discomfort. Mental pain and suffering may include mental anguish or loss of enjoyment of life, in other words amenities of life.

Following an injury, the injured is entitled to damages for both physical and mental pain and suffering for the past,

present and future. Undoubtedly, the plaintiff in this matter would have suffered excruciating pain during the period he had developed gangrene and soon after the amputation and healing period of the wound. He had stayed in hospital for three months because of the injury.

**Mental Anguish**

Due to amputation, the plaintiff will no longer be able to enjoy the things in life that he used to enjoy like swimming, driving etc and he should be obviously wracked by worry. Hence, he must be awarded monetary compensation for his mental anguish that forms part of the pain and suffering. This includes psychological injury, emotional trauma, and even embarrassment that are a result of the injury. These are relevant considerations in the assessment of damages for pain and suffering in the instant case. Having said that, as rightly pointed out by Perera ACJ in *Georges Sidney Larame vs. Coco D'Or (Pty) Ltd* (unreported) CS 172/1998 on a review of cases in respect of personal injuries, the tendency of the courts appears to be that when the claim is for a loss of an organ or a limb, the substantial award should be made for such loss. On the other hand, in claims for fractured legs or arms from which a claimant recovers completely, the substantial award should be made for "pain and suffering", the main in damages. Obviously, in the case on hand, the plaintiff has made a separate claim for loss of the arm that will be considered later in this judgment. Having regard to all the circumstances of the case and considering the precedents cited by counsel, for pain and suffering - since pleaded as a separate head - I would award R 75,000 which sum in my considered view, is fair and reasonable.

**(ii) Loss of arm:** Under this head, the plaintiff claims R200,000 towards damages. The defendant contends that this figure is unreasonable and exaggerated. Indeed, the disfigurement caused by the loss of right arm is the

significant permanent physical disability attributable to the injury which the plaintiff suffered. Here restoring the plaintiff to pre-amputation status is clearly impossible. His employability in the world of work and prospects of getting a normal job are, I would say, almost nil or to say the least, not as bright as that of any other able man with two good arms.

The dearth of authority pertaining to damages in respect of this particular limb loss makes assessment by comparison with other domestic awards impossible.

In relation to quantum in this respect, it seems to me that even the decisions of English courts are inapplicable and inappropriate, as those decisions are made in an entirely different socio-economic climate and living standard and index. Be that as it may. Often times an amputation of a limb can affect the way that someone leads his or her life and looks. When this happens, the injured is entitled to disfigurement damages, which are intended to compensate that person for the embarrassment that he feels due to how he or she looks after the injury. Sometimes this will be lumped in with mental anguish, but this may also often receive more quantum when it is considered as a separate element of the damages award as the plaintiff has opted in this matter. However, in the instance case, not only might this include the loss of a limb or scarring, but also the very change that has taken place in the Plaintiff's life-style and day-to-day activities, consequent upon loss of his right arm. This physical change would certainly alter the way the plaintiff interacts with others in the family and in the community. His anatomical impairment following the amputation as I see it has resulted in more than 50% disability and loss of use of his upper limbs especially, for a right-handed person like the plaintiff. For avoidance of doubt, this loss of use of a limb should be considered on its own in this context, without regard to loss of earning

capacity, for which the laintiff is claiming damages under a separate head called "Loss of Job". In any event, it is very difficult to compartmentalise some of the facts and circumstances, which fall in more than one category of damages. Therefore, the ultimate guiding principle is said to be that the award should be fair and reasonable, having regard to all the circumstances of the case.

In the case of *George Larame v Coco D'Or (Pty) Ltd* (unreported) CS 172/1998, the plaintiff sued the defendant company in delict for personal injuries suffered in the course of his employment. The plaintiff's forearm was severed completely by an electric saw. The arm was amputated below the right elbow.

In that case the Court, in considering the damages for pain and suffering and loss of arm, referred to the previous cases of *Antoine Esparon v UCPS* (unreported) CS 118/1983, *Mark Albert v UCPS* (unreported) CS 157/1993 and *Rene De Commarmond v Government of Seychelles* (unreported) SCA 10/1996, and came to the conclusion that the quantum of damages for the loss of an organ or limb has increased from R50,000 in 1983 to R65,0000 in 1986 and R105,000 in 1993.

In *Larame* the Court went on to hold that in the *Mark Albert* case the Court of Appeal had taken consideration of the inflationary tendencies over a period of 8 years between the *De Commarmond* case and that case, but reduced it to R40,000 from the award of R145,000 made by the Supreme Court. The Court concluded that on a consideration of the disability of the plaintiff in that case and the comparative awards made by the Court it would make award in the sum of R125,000.

Accordingly, the Court awarded in *Larame* a total sum of R125,000 to the plaintiff, whose arm was amputated below

the right elbow. It was awarded for the total non-pecuniary loss caused by the injury itself, being the loss of the arm, which is consequent upon any disability attributable to the injury.

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* (unreported) CS 16/1998 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 16 years back.

(2) *Francois Savy v Willy Sangouin,* (unreported) CS 229/1983 where a 60 year old plaintiff was awarded R50,000 for loss of a leg. That was awarded about 20 years back.

(3) *Antoine Esparon v UPSC,* (unreported) CS 118/1983 where R50,000 was awarded for a hand injury resulting in 50% disability and the plaintiff was restricted to light work only. Again this sum was awarded about 22 years back.

(4) *Jude Bristol v Sodepec Industries Limited* (unreported) 126/2002 where R160,000 was awarded for an injury that resulted in amputation of distal part of the right forearm, that involved no loss of earning as the plaintiff continued to work doing light duties with his employer.

As regards the 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: see *Fanchette v Attorney-General* (1968) SLR 111. Moreover, it is pertinent to note that the fall in the value of money leads to a continuing re-assessment of the awards set by precedents of our case law: see, *Sedgwick v Government of Seychelles* (1990) SLR220.

Thus, having given diligent consideration to all the facts and circumstances to the instant case, I award R150,000 to the plaintiff as damages for loss of his right forearm above the elbow.

**(iii) Permanent cosmetic disability:** under this head the plaintiff claims damages in the sum of R100,000. This claim is pleaded in the plaint as "permanent cosmetic disability due to loss of forearm" With due respect to the views of the plaintiff's counsel, disability could be either mental disability of physical disability.

Mental disability means and includes any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities that all limit a major life activity whereas physical disability means and includes any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects one or more of the body systems, neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hematic (blood-related) and lymphatic, skin, and endocrine limits that all limit a major life activity.

Hence, when we considered the damages for the loss of the arm supra, we in fact considered all consequential damages due to physical disability, which included "cosmetic disfigurement or cosmetic loss or cosmetic defect" that arose from loss of the arm.

Hence, I completely reject the plaintiff'd claim under this head, as he cannot be allowed to make profit by splitting the same claim into two different heads using different terminologies.

**2. Pecuniary Loss**

**Loss of job:** Under this head the plaintiff claims in effect loss of future earnings in the total sum of R468,000 calculated at the rate of R2,025 per month being his last earned salary, for a period of 20 years, using the multiplier method prescribed in the 'Table of Authentic Awards in the Common Law' as found in The Quantum of Damages - Kemp & Kemp, 1987. Since the plaintiff was only 19 years old at the time of the injury, his expectation of life being the maximum, the multiplier of 20 has been used by the plaintiff in the calculation. According to the plaintiff's counsel, Mr Derjacques, the plaintiff should be treated as a totally unemployable person incapacitated for any work for the rest of his life and so he is entitled to full compensation for the total loss of future earnings.

On the contrary, Mr Govindan submitted that the multiplier method used to calculate the prospective loss of earning as suggested by the plaintiff's counsel may not be applicable here as this formula is based on total loss of earning capacity. Mr Govinden further submitted that according to Michael Jones on Medical Negligence at page 474, on loss of earning capacity as compared to loss of earnings,

> In practice, award for loss of earning capacity are more impressionistic and less susceptible to the multiplier method of calculation ( the multiplier) – the solution is

> to award only moderate sum in this situation, although there is no tariff or conventional award for loss of earning capacity and each case is to be based on its own facts: vide *Forster v Tyne and Wear Country Council* [1986] All ER 567.

Therefore, Mr Govinden submitted that the sum of R468, 000 calculated using the multiplier method is unreasonable and excessive. Since the plaintiff has only suffered a reduction in earning capacity, the Court should award a sum based on this reduced capacity. While it is true that the loss of one arm makes it very unlikely for the plaintiff to obtain any of the several normal jobs in the competitive labor market which are within his skill, experience and qualification, the fact remains that out of his two arms - which in combination contributed to 100% of his upper-limb functional ability - only one arm has been lost. Therefore, the functional ability of his upper limbs has been reduced to 50%. Therefore, he has in fact suffered permanent partial disability of his upper limbs not permanent total disability, since his left arm is still in use and functioning. The plaintiff may - through training and practice - develop skills and he will obviously, be able to perform almost all the chores which he was performing before, using his right arm. A person is said to be permanently totally disabled, only if his injury-caused impairments are of such severity and nature that he would never be able to perform any substantial gainful work at all which exists in the competitive labor market within his skills, qualification and experience.

As I see it, this is not the case with the plaintiff in this matter. The answer given by the plaintiff to a question put to him in cross-examination is relevant to the point in this respect. At page 23 of the records, it reads thus:

> Q: Are you aware that there are some possible jobs that you still can (sic) be able to do apart (sic) that you have lost

one of your limb?

A: There is, but that is not the job I wanted, my job was a boatman.

Therefore, it goes without saying that despite, this injury the plaintiff still has some residual capacity to work and earn. However, we do not have the necessary sophisticated evidence for an in-depth analysis to determine the percentage of the residual capacity of the plaintiff to work and earn. Having said that, the Court cannot go beyond a simple logical assumption that reduced earnings of partially disabled men or women in Seychelles are subject to their limited access to the labor market.

Besides, it is important to note that section 5 (d) of the Social Security Act, 1987 provides for invalidity benefit to people like plaintiff, as it reads as follows:

> Invalidity benefit which consists of periodic payments to a person covered who is partially or totally incapable of work.

Taking all these factors into account and adjusting for the differences, I am of the view that an award of R275,000 is the appropriate, fair and reasonable award for the prospective loss of earning of the plaintiff in this matter.

For these reasons, I enter judgment for the plaintiff and against the defendant in the total sum of R500,000 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 407 of 1998**

## Timonina v Government of Seychelles

*Judicial review – Immigration – Illegality – Unreasonableness – Constitution*

The plaintiff is a Russian national. Her gainful occupation permit expired on 25 July 2007. On 8 June 2008, she was declared a prohibited immigrant and ordered to leave Seychelles by the Immigration Officer. The Immigration Officer cited public interest but did not give reasons for the decision. The plaintiff sought an order quashing the decision and a declaration that the decision was illegal, unreasonable and null and void. She also sought an order preventing her from being deported.

**HELD:**

(i) There is a presumption if consistency attached to statutes, by virtue of the transitional provision in the Constitution;

(ii) A decision is irrational or unreasonable if no sensible person could have arrived at the decision; and

(iii) In immigration matters involving national security or national interest, failure to give particulars of the reason does not render the decision irrational or unreasonable.

**Judgment:** Petition dismissed.

**Legislation cited**
Immigration Act, ss 17(9), 17(4), 19(1), 21(1), 21(3),
Constitution of Seychelles, arts 5, 25(3), 25(5), sch 7 parad 2(1), 66(1)

**Foreign Legislation noted**
Foreign Courts Act (UK)

**Cases referred to**
*Ex parte Michael Scheele* (unreported) CS 73/1992

**Foreign cases noted**
*Berthelsen v Director General of Immigration for Malaysia* [1988] LRC 621
*Chief Constable of North Wales Police v Evans* [1987] 1 WLR 1155
*R v Secretary of State for Home Affairs ex parte Hosenball* [1977] 3 All ER 452
*Salvat v Attorney General* (1998) 2 CHRLD 45
*Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374
*The Zamora* [1916] 2 AC 77

Frank ELIZABETH for the petitioner
Ronny GOVINDEN, Deputy Attorney-General

**Order delivered on 30 July 2007 by:**

**PERERA J:** Upon an application for habeas corpus being filed under section 352 of the Criminal Procedure Code for the production of the body of Yulia Timonina, who had been declared a Prohibited Immigrant, from the custody of the police and immigration officers, this Court, by order dated 27 July 2007 issued order to produce her today (30 July 2007) at 9.00 a.m, when the Court would proceed to make a further order. This order was complied with, and the said Yulia Timonina was produced in Court.

Mr Elizabeth, counsel representing her, filed a motion and affidavit averring that the detention of Yulia Timonina was illegal or improper, and hence she should be forthwith set at liberty.

However, after instructions, Mr Elizabeth called upon the Court to make a release order as a sequel to the application for habeas corpus filed on 27 July 2007 upon which the order for production of the corpus was made. In these circumstances he withdrew the second application which was based on section 352(1) (b) of the Criminal Procedure Code.

Section 352(2) provides that the Chief Justice may from time to time frame rules to regulate the procedure in cases under this section. However, as no such rules have been made, this Court should follow the practice and procedure of the High Court of Justice in England, as provided in section 4 of the Courts Act .

Ian A Macdonald, on Immigration Law and Practice (2nd ed), examining the procedure of the High Court of England states at page 402 thus -

> Where a challenge is being made, whether by way of habeas corpus or judicial review, to the legality of the detention, as in the illegal entrant cases, the High Court has always regarded itself as having an inherent jurisdiction to grant bail pending the full hearing of the Application. (*R v Spilsbury* [1898] 2 QB 615, *Re Amand* [1941] 2 KB 239).

Mr Govinden, Deputy Attorney-General, resisted the release of Yulia Timonina on bail and submitted that she is being detained legally under the provisions of section 24(1) of the Immigration Decree.

With respect, the legality of the detention is not in issue now, as Mr Elizabeth has withdrawn his motion filed on 30 July 2007.

Yulia Timonina has filed a petition before the Constitutional Court (case no 5/2007) alleging a contravention of her rights under article 25(1) of the Constitution. The judgment is due to be delivered in that case tomorrow (31 July 2007 at 2 pm). In the judicial review case filed by her (case no 173/07) a single Judge of the Court of Appeal has, on an application for stay of execution of an order refusing leave to proceed, granted a stay order, which reads, inter alia that,

> Accordingly, I suspend the execution of the "order of removal" until the determination of her application by the Supreme Court……..

The judicial review application is therefore due to be heard on the merits on 2 August 2007 at 9.00am.

In these circumstances, acting pursuant to the practice and procedure of the High Court of Justice in England, Yulia Timonina is released on bail until this Court determines the judicial review application, on the following conditions —

1. As already ordered by Hodoul JA in his order dated 22 June 2007, she must refrain from doing any act, overt or covert, alone or with others, which is "inimical to the public interest".

2. She shall report to the Anse Etoile Police Station every day at 9 am until the judgment in the judicial review case is delivered.

3. If she breaches any of these conditions she will be liable to be further detained in custody.

**Record: Civil Side No 173 of 2007**

## Timonina v Government of Seychelles

*Habeas corpus – Procedure*

This is an application for habeas corpus. The Chief Justice had statutory authority to make procedural rules for habeas corpus. No such rules had yet been made.

**HELD:**

(i) In the absence of a Seychellois procedure for habeas corpus, the Court should follow the practice and procedure of the High Court of Justice in England; and

(ii) Under English practice and procedure, bail is available until the Court determines to judicial review application.

**Judgment**: Bail granted.

**Legislation cited**
Criminal Procedure Code, s 352(1)(b), 352(2)
Immigration Decree, s 24(1)
Constitution, art 25(1)

**Foreign Legislation noted**
Courts Act (UK), s 4

**Cases referred to**
*Ex parte Michael Scheele* (unreported) CS 73/1992

**Foreign cases noted**
*Berthelsen v Director General of Immigration* (1988) LRC 621
*CCSU v Minister of Civil Service* [1985] 1 AC 374
*Chief Constable of North Wales Police v Evans* [1987] 1 WLR 1155

*R v Secretary of State for Home Affairs* [1977] 3 All ER 452
*Salvat v Attorney-General* (1998) 2 CHRLD 45

Frank ELIZABETH for the petitioner
Ronny GOVINDEN for the respondent

[Appeal by the appellant allowed on 14 August 2008 in CA 38/ 2007]

**Judgment delivered on 12 December 2007 by:**

**PERERA J:** The petitioner, a Russian national, was employed by "Creole Holidays" on a gainful occupation permit (GOP) which expired on 25 July 2007. Admittedly, before the GOP expired, she was served with a notice by the Immigration Officer on 8 June 2007 upon a declaration made by the Minister for Internal Affairs declaring her a "prohibited immigrant" and ordering her to leave Seychelles by 14 June 2007, as her presence was "inimical to the public interest."

The instant application for judicial review was filed on 11 June 2007. The petitioner seeks -

(1) An order of certiorari quashing the decision of the Immigration Officer dated 8 June 2007, and declaring that it was illegal, unreasonable and null and void.

(2) An order of prohibition on the respondents from deporting or otherwise requesting her to leave Seychelles until further order of the Court.

This Court, by order dated. 11 June refused to grant leave to proceed. Upon an appeal filed against that order, the Court of Appeal by order dated 22 June 2007, granted a stay of the removal order until this Court determines the present

application on merit. Hence the second order sought in the prayer to the petition does not arise for consideration now.

Mr Elizabeth, counsel for the petitioner, submitted that the ground on which the Minister had relied on to declare the petitioner a prohibited immigrant was based on section 19(1)(i) of the Immigration Decree, namely "any person whose presence in Seychelles is declared in writing by the Minister to be inimical to the public interest,"

He referred the Court to article 25(5) of the Constitution which provides that:-

> (5) A law providing for the lawful removal from Seychelles of persons lawfully present in Seychelles shall provide for the submission, prior to removal, of the reasons for the removal and for review by a competent authority.

He submitted that the statutory reason given in the declaration was alone inadequate for purposes of article 25(5) of the Constitution. This matter was canvassed by the petitioner before the Constitutional Court in case no 5/2007. In that case, the petitioner sought: -

1. An order declaring the decision of 8 June 2007 amounts to a contravention of her constitutional rights under article 25(1).

2. A declaration that the failure, refusal, or omission to appoint a "competent authority" to review the said decision contravened her constitutional rights.

That Court decided that prayer (1) should be left to be decided by this Court exercising supervisory jurisdiction. As regards prayers (2) the Court held that "no specific law as envisaged

in Article 25(5) has established a “competent authority" to review an order of removal" in the same manner as the "Immigration Appeals Tribunal" of the United Kingdom. That Court also relied on section 21 of the Immigration Decree which provides for representations to be made to the Minister, and the availability of the supervisory jurisdiction of this Court. That Court also relied on paragraph 2(1) of Schedule 7 of the Constitution which provides that "except where it is otherwise inconsistent with this Constitution” an existing law shall continue in force on or after the date of coming into force of this Constitution, and held.

> Hence until such time in the future when the creation of a specific "competent authority” in the same manner as in the United Kingdom becomes necessary, and the legislature so decides, the existing review procedure is not inconsistent with the provisions of article 25(5).

Mr Elizabeth, challenging the decision of the Minister on the ground of illegality, submitted that the Court should take into consideration that the Immigration Decree was enacted in 1981, and that provisions which are inconsistent with the present Constitution should be considered as void. That is a matter to be decided by the Constitutional Court, upon a specific application being brought before that Court under article 5 of the Constitution. Until then, the declarations of prohibited immigrants and their consequent removal from the country should be considered within the framework of the Immigration Decree. All existing laws which could be considered as being inconsistent with the Constitution did not become null and void on the day the Constitution came into force.

Hence until the Immigration Decree is amended or there is a specific finding of the Constitutional Court as to any inconsistency with article 25(5), there is a presumption of

constitutionality attaching to the Immigration Decree, by virtue of the transitional provision in the Constitution. Therefore the ground of illegality fails.

The petitioner also relied on the ground of irrationality, which is the same as unreasonableness. Lord Diplock, considering the concepts of illegality, irrationality and procedural irregularity in the case of *CCSU v Minister of Civil Service* [1985] 1 AC 374 at 410 (commonly referred to as the "GCHQ case") stated that by illegality is meant that the decision-maker must understand correctly the law that regulates the decision making power and must give effect to it.

By "irrationality" or "unreasonableness" he meant, where a decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question could have arrived at it.

In the present case, the file maintained by the Department of Internal Affairs (Immigration Division) in respect of the petitioner, which was forwarded to this Court pursuant to Rule 10 of the Supervisory Jurisdiction Rules, discloses that the GOP of the petitioner was valid from 26 July 2006 to 25 July 2007. However, the Immigration Officer issued a notice dated 8 June 2007, in form IMM/9 prescribed in the first schedule to the Immigration Regulations 1981, on the petitioner declaring her a prohibited immigrant under section 19(1)(i) by reason of her presence (being) "inimical to the public interest".

The copy of that notice on file shows that she refused to sign as recipient. A footnote on that notice draws the attention of the recipient to section 21(1) which provides that within 48 hours of receiving the notice she could make written representations to the Immigration Officer or the Minister against such notice.

The petitioner failed to comply with section 21(1) and to make

written representations within 48 hours, However, there is on file a letter dated 14 June 2007 sent by Mr Frank Elizabeth, her counsel, addressed to the President, who was also the Minister for Internal Affairs at that time, appealing against the decision of the Immigration Officer declaring her a prohibited immigrant. That was the day after she was required by the notice to leave Seychelles. In that letter, it was stated that the petitioner -

(1) Is Group and Incentive Executive at Creole Holidays pursuant to a valid GOP issued by the Government of Seychelles.

(2) Has not done anything wrong whilst in the Seychelles.

(3) No reason has been given why she has been declared a prohibited immigrant despite several requests.

There is nothing on file to show that any written requests were made of the Immigration Officer as to the reasons for the declaration or for particulars of allegations against her. In the petition and affidavit filed in this case the petitioner does not aver that any requests were made for particulars of the reason stated, nor has she sought a writ of mandamus to compel the Minister to disclose particulars of that reason.

The petitioner's counsel was informed by letter dated 21 June 2007 that the appeal had been given due consideration but had not been successful. Under section 21(3) that decision of the Minister was final and could not be challenged in any Court. However, it is settled law that the supervisory powers of Courts supersede ouster clauses, as was held in the case of *Chief Constable of North Wales Police v Evans* [1987] 1 WLR 1155 at 1173 where it says "judicial review is concerned not with the decision, but with the decision-making process."

In the present case, the Minister has given the reason, which is one of the reasons provided in section 19(1) of the Immigration Decree upon which a foreign national can be declared a prohibited immigrant. The reason specified in paragraph (i) of section 19(1) is the only instance which requires a written declaration by the Minister; the others can be made by the Director of Immigration. The reason obviously is due to the fact that a decision that a person's presence in the country is inimical to the public interest can be taken as a matter of state policy exercisable only by the executive powers of a Minister.

Such power, which is primarily vested in the President of the Republic under article 66(1) of the Constitution, is exercisable through the Ministers. In the present case, the declaration was made by the President in his capacity as the Minister responsible for Internal Affairs.

Article 25(3) provides that one of the restrictions to the freedom of movement can be prescribed in law necessary in a democratic society "(a) in the interest of defence, public safety, public order, public morality or public health". They are distinct concepts, though not always unrelated. The term "public interest" in section 19(1)(1) of the Immigration Decree generally encompasses all these concepts which are in essence matters of national security although of varying degrees of gravity.

The pivotal issue is whether there is a duty on the part of the Minister to give particulars of the reason under section 19(1)(i) which is based on national security in the broad sense of the term. In the case of *Ex Parte Michael Scheele* (unreported) CS 73/1992, which was decided prior to the promulgation *of* the present Constitution, it was held that the statutory reason that a person's presence in Seychelles was inimical to the public interest, without furthermore, satisfied the duty to give reasons.

However, as was held in *The Zamora* [1916] 2 AC 77 at 107 -

> Those who are responsible for national security must be the sole judges of what national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law otherwise discussed in public.

In the case of *R v Secretary of State for Home Affairs, ex parte Hosenball* [1977] 3 All ER 452, a United States citizen working as a journalist in London was informed by a letter from the Home Office that the Secretary of State had decided in the interests of national security to make a deportation order against him under the Immigration Act, and that if he wished, he could make representations to an Independent Advisory Panel.

The journalist (Mr Hosenball) through his solicitors, requested particulars of what was alleged against him, but was refused. The Court of Appeal held that it was well settled that the Courts must accept the evidence of the Crown and its officers on matters of national security. The Court however held that the ordinary principles of natural justice were modified for the protection of the realm and that public policy required the preservation of confidentially for security information, and that accordingly, the Secretary of State, who had given the matters his personal consideration, need not disclose the information he had to the applicant. Lord Denning MR however observed that the Court would have interfered if the applicant had not been given an opportunity to make representations. The Court of Appeal therefore upheld only the refusal to provide the particulars.

In the present case the petitioner was given an opportunity to exercise her right to make representations, despite being out of time.

In the case *Salvat v Attorney-General* (1998) 2 CHRLD 45, the applicant, a French citizen settled in Grenada in 1991, had been granted a work permit. That permit was renewed annually until 1996, when it was refused. That decision was taken without first informing the applicant of the intended grounds of refusal or affording the applicant the opportunity to be heard in relation to the matter. The Immigration Authorities ordered him to leave the country. He challenged that decision on the ground that it violated his constitutional right to a fair hearing and also exposed him to the threat of a denial of the right to freedom from expulsion from Grenada. The respondents contended that the decision was taken as he constituted "a threat to national security", and that hence judicial review was precluded.

The Supreme Court of Grenada held inter alia that -

1, Even in cases involving considerations of national security, the rule of fairness applies and must, whenever possible, be implemented albeit in modified form depending on the circumstances of each case.

2. The Court does not have the power to intervene in matters involving national security or to review the substantive decisions taken by the Minister, within the limits of his authority, in the exercise of the prerogative discretionary power in such matters. The Court can only ensure that procedural requirements are complied with and that rules of fairness are followed in the process of decision making.

In that case however, it was held that the respondents had failed to establish that the interest of national security required the Minister to avoid the obligation to act fairly in relation to the applicant before making his decision.

In the present case, the Minister gave the statutory reason albeit without particulars. The petitioner's appeal was considered by the Minister. In these circumstances, does the failure to give particulars of the reason impugn the decision-making process in a matter involving national interest?

In *Ex Parte Hosenball* (supra) Lane LJ, dealing with the necessity for reasons in cases involving national security or national interest stated -

> There are occasions, though they are rare, when what are more generally the rights of an individual, must be subordinated to the protection of the realm. When an alien visitor to this country is believed to have used the hospitality extended to him so as to present a danger to security, the secretary of State has the right and, in many cases, has the duty of ensuring that the alien no longer remains here to threaten our security. It may be that the alien has been in the country for many years. It may be that he has built a career here in this country, and that consequently a deportation order made against him may result in great hardship to him.
>
> It may be that he protests that he cannot understand why any action of this sort is being taken against him. In ordinary circumstances, you can call it natural justice if you wish, would demand that he be given the names of who are prepared to testify against him and, indeed probably the nature of the evidence which those witnesses are prepared to give should also be delivered to him. But there are counter-balancing factors.
>
> Detection, whether in the realms of ordinary

> crime or in the realms of national security, is seldom carried out by cold analysis or brilliant deduction. Much more frequently it is done by means of information received....
>
> The reasons for this protection are plain. Once a source of information is disclosed, it will cease thereafter to be a source of information. Once a potential informer thinks that his identity is going to be disclosed if he provides information, he will cease to be an informant.

In *Berthelsen v Director General of Immigration* (1988) LRC 621, a US citizen who had been granted an employment pass in Malaysia, was served with a notice of cancellation of that pass before its validity period has expired, informing him that his "presence was or would be prejudicial to the security of the country." His application for judicial review filed in the High Court was refused on the ground that it was futile as the Court could not go behind the decision of the executive in a matter of national security.

The applicant filed an appeal to the Supreme Court, but left the country. It was held, on the facts of that case that no

> …dire consequences of catastrophic magnitude would or possibly could have ensued if the appellant had been accorded a right to make representations prior to the contemplated exercise of the power to cancel his employment pass…

and that all I that was needed to be given was an opportunity to make representations, and that the question of security would only arise in the event he sought particulars of the allegations that his presence in the country was or would be prejudicial to the security of the country.

In the present case, the petitioner was given ample opportunity to make representations despite the fact that she had acted in defiance by refusing to receive the notice and also despite the appeal to the Minister being filed out of time. It has not been averred that she had a legitimate expectation that her GOP would have been extended beyond 25 July 2007. In fact, the Director General of Immigration has averred in paragraph 7 of his affidavit that he is "instructed by the Minister responsible for Internal Affairs that the gainful occupation permit of the petitioner which will expire on 27th July 2007 would not be renewed..." Section 17(9) of the Immigration Decree specifically empowers the Minister to "revoke a gainful occupation permit if there has been a breach of any condition attached thereto or he considers it in the public interest so to do." Upon such revocation, a person becomes a prohibited immigrant under Section 19(1)(d), and becomes liable to be deported.

Even when an application for a GOP is made initially, section 17(4) provides that -

> The Minister may, in any case, either refuse or grant the application subject to any condition or limitation, without assigning any reason for that decision."

Hence the obtaining of a GOP is not a right but a privilege. It can therefore be revoked in the public interest. If an initial application can be refused under section 17(4) without assigning reasons therefore, it can also be revoked under section 17(9) in a similar manner without reasons. A fortiori. where the Minister declares that the presence of a person who had been granted such GOP has become inimical to the public interest, he or she can be declared a prohibited immigrant under section 19(1)(i) of the Immigration Decree with the concomitant result that that person's GOP becomes revoked. In these circumstances, the decision of the Minister is neither

illegal nor irrational.

As the petitioner has failed to establish both grounds of illegality and irrationality pleaded in the petition, the petition is dismissed with costs.

The petitioner therefore continues to be a prohibited immigrant since 25 July 2007 when her GOP expired. She has also no residential status, as the validity of her National Identity Card lapsed on the same day. Hodoul JA in his order dated 22 June 2007 stated -

> As regards her application for a temporary suspension of the "order of removal", I am of the opinion that under article 25(5) of our Constitution, she has a right not to be removed from Seychelles until the "order of removal" is reviewed by the "Competent Authority". But that right must be exercised in conformity with the public interest. Accordingly, I suspend the execution of the "order of removal" until the determination of her application by the Supreme Court, upon which the matter will be submitted to this Court for further consideration.

With respect, this Court is functus officio to make any further order after making the present order dismissing the petition.

**Record: Civil Side No 173 of 2007**