

**IN THE COURT OF APPEAL OF SEYCHELLES**

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**Reportable**

[2020] SCCA ...  
SCA7/2018

In the matter between

**1. LUCILLE ALBERT**

**2. RENNIC MATHIOT**  
*(rep. by Clifford Andre)*

**Appellants**

and

**SALLY VIELLE**  
*(rep. by Frank Elizabeth)*

**Respondent**

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**Neutral Citation:** *Albert & anor v Vielle* (SCA7/2018) [2020] SCCA 21 August 2020  
**Before:** Fernando PCA, Twomey JA, Robinson JA  
**Summary:** nuisance- noise- troubles du voisinage- assessment  
**Heard:** 7 August 2020  
**Delivered:** 21 August 2020

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**ORDER**

The appeal is therefore dismissed in its entirety with costs to the Respondents.

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**JUDGMENT**

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**TWOMEY JA**

[1] The Plaintiff (now the Respondent) and the Defendants (now the Appellants) were neighbours in a housing estate at Perseverance. During the presidential election campaign at the end of 2015, the Respondent complained that the Appellants were repeatedly playing loud music usually with political overtones causing serious disturbance to the neighbourhood.

- [2] It was the Respondent's case that whenever complaints were made to the police, the volume of the music would be turned down as soon as the Appellants would be aware that the police had arrived but as soon as they left it would be turned up again.
- [3] The Respondent claimed that she was living in a state of constant fear because apart from the loud music, the Second Appellant had attempted to assault a neighbour whom she suspected had reported her to the police about the noise. After she obtained interim relief by a court order in April 2016 and the subsequent related contempt order, the situation improved. The Respondent therefore prayed for the interim injunction to be made permanent and for damages to be awarded for the inconvenience, anguish and trauma she had been subjected to.
- [4] In his decision in the court a quo, the learned trial judge agreed with the principles adopted in relation to the issue of nuisance in the cases of *Hallock v Green* (1979) SLR 72, *Bouchereau v Francois* (1980) SLR 80, *De Silva v UCPS* (1996) SLR 74, *Laporte v Berjaya* (2002-2003) SCAR 135, namely, that the tort of nuisance is proved if the acts complained of exceed the ordinary standards of the neighbourhood; the character of the neighbourhood determines the acceptable duties of each neighbour and is relevant in this assessment. There is no absolute standard for nuisance by noise or smell and it is a question of degree whether the interference with comfort or inconvenience is sufficiently serious to constitute a nuisance.
- [5] In considering the above authorities, the learned trial judge added that noise can become a nuisance if it becomes an unlawful interference with a person's use or enjoyment of land or of some right over, or in connection with it. He added that the process of determining what level of noise constitutes a nuisance can be quite subjective. Ultimately, he found that the Respondent and her witnesses had been truthful and consistent in their testimony and that the Second Appellant, the sole witness for the Appellant's case was evasive, lacking in consistency in his answers and altogether not at all convincing. He concluded that the Respondent had succeeded in proving her case that the Appellants had played loud music causing a nuisance during the period in question and were therefore liable. He awarded the sum of SR 65,000 in total for damages suffered

and ordered a permanent injunction against the Appellants prohibiting them from playing loud amplified music unless authorised by the Court or the Commissioner of Police for a special occasion.

[6] From this decision the Appellants have appealed on the following grounds:

*1. The learned judge erred when he made a finding that the Respondent had proved her case against the Appellants despite the lack of expert evidence establishing whether the interference with comfort or inconvenience was sufficiently serious to constitute a nuisance.*

*2. No expert having been called to measure the level of noise complained of by the Respondent, the judge erred in holding the Appellants liable for the tort of nuisance without proof that “damage exceeded the measure of the ordinary obligations of the neighbourhood”.*

*3. The learned judge erred in finding the Appellants liable for the tort of nuisance without first satisfying himself that it is a question of degree whether the interference with comfort or convenience is sufficiently serious to constitute a nuisance in the absence of expert evidence.*

*4. The learned judge failed to objectively consider and evaluate the testimony of the Plaintiff for inconsistencies and also failed to evaluate and consider the testimony of Mrs. Brioche and that of Officer Aimable and also failed to objectively evaluate and consider the entire evidence in the case.*

[7] The grounds of appeal are all considered together as they are inextricably linked. They are to the effect that in cases of nuisance occasioned by noise, it is necessary that an expert be called as to the level of noise emanating for the tortfeasor and that the learned trial judge did not objectively evaluate the test for nuisance with the evidence adduced.

[8] Counsel for the Appellants has not produced any authority for his submissions on the necessity for an expert witness in cases of nuisance. However, the court notes and there was a discussion on this issue during the hearing of the appeal, that pursuant to section 29 of the Environment Protection Act, a person emitting noise in excess of the noise emission standards established under the Act without authorisation is guilty of an offence and liable on conviction, to imprisonment for one year and a fine of R50,000 and, if the offence is continued after conviction, is liable to a further fine of R5000 for each day

during which the offence is so continued. There are noise emission standards provided under the Environment Protection (Noise Emission Standards) Regulations.

[9] It is clear that these laws and regulations are only applicable to criminal convictions for public nuisance. However, it does not extend to cases in private law, which applicable law is found in the Civil Code and the *jurisprudence constante*.

[10] The law relating to delict generally, and private nuisance specifically, is found in Article 1382 of the Civil Code which provides:

“1. Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.

2. Fault is 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 an omission.

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

[11] As confirmed by Sauzier J in the landmark case of *Desaubin v United Concrete Products (Seychelles) Limited* (1977) SLR 164, these provisions codified French jurisprudence on certain elements of fault including those relating to nuisance. Specifically, the *troubles de voisinage* (neighbourhood disturbances) was invented by the Court de Cassation of France in the nineteenth century (see the authority of Cass. civ., 27 nov. 1844.) with the principle that: *nul ne doit causer à autrui un trouble anormal de voisinage* (no one may cause an abnormal neighbourhood disturbance to another)". The Court de Cassation of France fudged the application of both Articles 1382 and 544 of the Code civil in this respect and did so in a number of subsequent cases finding that even the legitimate exercise of one's right to property could generate a disturbance for the neighbourhood when it exceeded the measure of the ordinary obligations of neighbourhood (See req., 3 janv. 1887, 2e civ. 24 mars 1966, n°64-10737, 3e civ. 3 janv. 1969). The principle of *troubles de voisinage* independent of both Articles 1382 and 544 were firmly established

in a number of subsequent cases, namely the arrêt of Cass. 2e civ. 19 nov. 1986, n°84-16379.

- [12] Sauzier J in *Desaubin* (supra) expresses the principle developed by French jurisprudence, although basing it in tort, finding that the tortfeasor is liable for behaviour which goes over and beyond what would be expected for ordinary neighbourly relations, at 166-167:

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

- [13] In distinguishing between the law applicable under the old provisions of the Code civil and the new Civil Code of Seychelles Sauzier J finds that the former recognised the principle that there is *faute* if the damage suffered exceeds the measure of the ordinary obligations of the neighbourhood. After examining the provisions of Article 1382 of our Civil Code, he concludes that although an attempt had been made to restrict the definition of *faute* the opposite effect had been achieved, that of expanding the definition of fault in Seychelles.

- [14] The Court of Appeal in *Green v Hallock* (1979) SCAR approved *Desaubin* (supra) finding that:

*“it is common ground that the relevant provisions of the Civil Code correspond with those of the French Code civil, which applied previously and that French decisions are relevant and persuasive”* (at p.145).

- [15] It appears, therefore, that the French principles of *troubles de voisinage* have been conflated under our provisions of Article 1382.

[16] With regard to delictual liability generally, the provisions of Article 1382 clearly establish that three elements are necessary to establish an action: fault, damage and causality. Additionally, French jurisprudence has established four cumulative conditions to establish liability for neighbourhood disturbances:

*Il doit exister une relation de voisinage entre l'auteur de ce trouble et sa victime c'est-à-dire que celle-ci doit se trouver dans le voisinage de l'auteur, à une distance raisonnable;*

*La victime doit faire état d'un préjudice, préjudice de jouissance ou préjudice de santé par exemple du fait du trouble;*

*Troisième condition il doit exister un lien de causalité entre le trouble et le préjudice ;*

*Enfin le trouble doit véritablement être anormal c'est-à-dire être bien supérieur aux inconvénients dits normaux que tout un chacun doit pouvoir supporter dans une société vis-à-vis du voisinage (See Christophe Sanson <https://www.christophe-sanson-avocat.fr/publications/video-n0-6-quappelle-t-on-un-trouble-anormal-de-voisinage>, <https://youtu.be/4hysioPSngQ>)*

[17] In other words, first, there must be neighbourly relations between the perpetrator of the disturbance and the victim, in other words the latter should be in proximity to the former, at a reasonable distance. Secondly, the victim must establish the prejudice – for example, prejudice of their right of enjoyment of a noise-free environment or prejudice to their health as a result of the disturbance. Thirdly, there should be a link of causality between the disturbance and the prejudice. Fourthly the disturbance must, without doubt, be of an abnormal nature – in other words, it must be over and beyond the inconveniences considered as normal, which everyone should be able to tolerate in a community insofar as neighbourhood relations are concerned.

[18] Cadiet Loïc in his “Theorie des inconvenients anormaux de voisinage et droit commun de la responsabilité (Revue Judiciaire 1983-1 pp 33-51) sums up the test for nuisance as follows:

*“La responsabilité du voisin qui crée les nuisances naît précisément de la violation du devoir de ne causer à autrui aucun trouble dépassant les inconvenients ordinaires nés du voisinage. Elle se déduit, objectivement,*

*indépendamment, de la démonstration d’une malveillance ou d’une négligence, de l’observation d’une nuisance anormale.”*

[19] The test, therefore, for the abnormal nature of the disturbance is not by way of an expert establishing what number of decibels of noise was registered and whether it created a disturbance for which damages are liable. Rather, the test is one of appreciation by the trial judge of the abnormality of the disturbance in each case in its own circumstances. Hence the repeatedness of the disturbance, for example playing the same CD over and over may be as disturbing as playing loud music. In *Bouchereau v Francois* (1980) SLR 80, the court stated that nuisance by noise is something for which no absolute standard can be applied and that it is a question of degree whether the interference with comfort and convenience is sufficiently serious to constitute a nuisance.

[20] It is apparent in this case that the learned trial judge accepted the evidence of the Respondent and her witnesses including that of the Sub Inspector of Police who investigated the disturbance and interviewed five neighbours who confirmed the Respondent’s narrative. Based on this evidence and in view of the test of degree of comfort and convenience as stated in *Bouchereau* (supra), I cannot find fault with his appraisal of the evidence as a whole including finding the Respondent and her neighbours more credible than the Second Appellant who was the only person to testify for the Appellants. I therefore see no reason to interfere with his findings.

[21] Counsel for the Appellants tried to raise a ground on the quantum of damages at the appeal. He relied on Rule 31(4) of the Seychelles court of Appeal Rules. I stated at the hearing that he could not be permitted to do so as the issue was not canvassed in the appeal grounds. I emphasize that the rule he has referred to is one granting discretionary power to the Court of Appeal to hear further evidence in certain cases. It certainly is not meant to result in a breach to party’s right to a fair hearing. When a ground has not been canvassed in a notice of appeal, the other party is ambushed. In any case a decided issue which has not been appealed against is taken to be *res judicata* (l’*autorité de la chose jugée*). I am supported in this view by jurisprudence and doctrine. In the Mauritian case of *Gilbride v Desvaux de Marigny* [1972] MR 224, which citing French authorities stated:

*"un jugement si grave ... n'en a pas moins l'autorité de la chose jugée, aussi longtemps qu'il n'a pas été attaqué par une voie de recours".*

[22] *Gilbride* (supra), cited note 2185 from Ripert et Boulanger, II —

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No3. — *Identité d'objet.*

*L'appel, en effet, peut ne point porter sur tous les chefs de la décision rendue par les premiers juges. Dans ce cas les points sur lesquels il n'a pas été appelé acquièrent définitivement l'autorité de la chose jugée, et ne peuvent plus être réformés en appel. [...]. Dans le même ordre d'idées, il faut remarquer que les juges du second degré ne peuvent pas reformer la décision des premiers juges, dans l'intérêt de l'intimité, quand celui-ci n'a pas relevé appel incident..."*

[23] The authorities and French doctrine on the subject state that *l'autorité de la chose jugée* apply to the matters on which parties do not appeal against.

[24] The ground of appeal is therefore dismissed and the relief granted by the learned trial judge therefore stands.

[25] In the circumstances, the appeal is dismissed in its entirety with costs to the Respondents.



Signed, dated and delivered at Ile du Port on 21 August 2020

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Twomey JA

I concur \_\_\_\_\_  
Fernando PCA

I concur \_\_\_\_\_  
Robinson JA