

**Canaya v The Government of Seychelles
(2000) SLR 143**

Franky Simeon for the plaintiff
Lucy Pool for the Attorney-General

Judgment delivered on 3 July 2000 by:

PERERA J: This is a delictual action for damages for alleged acts of assault and torture inflicted on the plaintiff after being arrested and detained in a joint operation by police and army officers.

The case for the plaintiff is that on 10 November 1998 around 5.30 p.m, about eight to ten army officers came to his residence and took him to the Anse Aux Pins Police Station. He was locked up in a cell for about ten minutes and then taken away in a police car to the "Grand Police Army Camp". Inside the car, was another person called Francis Pillay, who too had been arrested. When they reached the Army Camp around 7 p.m, Pillay was asked to go inside, while he was taken to an area outside the gate. He stated that he was handcuffed with his arms around a disused electric post.

The plaintiff further testified that the officers questioned him about a pistol, which they stated, was in his possession, but he denied. Then they started to beat the soles of his feet with a polythene pipe. The beatings went on for about 25 minutes, and he kept on screaming. Then one Alan Rath put a plastic bag over his head, and he started to choke, Vincent Luther, who was in charge of the camp asked Rath to remove the bag, fearing that he would die. They took him to the office, where he sat on the steps. Once again he was questioned about a pistol, but he denied that he had any in his possession. Thereafter he was locked up in a cell. Among the others who were locked up that day was one Robert Dugasse. The plaintiff was released around 11a.m on 12 November 1998, 2 days after his arrest. In the meantime, an application for a writ of Habeas Corpus was filed by his common law wife in this court on 11 November 1998 (exhibit P1). In the supporting affidavit she avers that the plaintiff was arrested on 10 November 1998 by officers of the Seychelles Police and of the Defence Forces.

After being released he consulted Dr. Kirkpatrick around 3 p.m the same day (12 November 1998), at the Anse Aux Pins Clinic. Dr. Kirkpatrick testified that she examined the plaintiff that day, and produced a medical report she had sent to the counsel for the plaintiff (exhibit P2). This report reads as follows:

Gerard Canaya, 41, of Anse Aux Pins consulted me here at my clinic at 3 p.m on 12.11.98. He said he had been released from custody at 11 a.m that morning.

The following were his visible injuries:

- 8 cms red mark on the skin round the left wrist
- 1 cm red mark at the base of the left thumb
- 3 cms red mark over the base of the right thumb

All the above ecchymoses were under intact skin.

The soles of both feet were blue, especially the medial borders, with swelling of the forefeet, greater on the left than the right. The dorsum of the left foot was markedly swollen and blue over the metatarsal heads. He could however walk despite the bruises.

The doctor testified that the injuries to the feet could have been caused by a direct assault with a blunt instrument, and that the injuries to the wrists by some form of tying around. She further stated that the injuries could not be considered as mild, and that they would have taken at least three weeks to heal.

Robert Dugasse, testifying on behalf of the plaintiff stated that he was arrested by army officers on 10 November 1998 and taken to the Grand Police Army Camp around 9p.m that day and locked up in a cell. He was questioned that night and released the next day. Subsequently he was re-arrested the following week and once again brought to the Grand Police Army Camp around midnight. He was unable to recall the exact date. However, he too testified that he was tied to a post and beaten with a hose under his feet, and also that a plastic bag was put over his head. He further stated that while he was in his cell, he saw the plaintiff being taken into another cell.

According to the evidence of this witness after being arrested on 10 November 1998 around 9p.m for the first time, he was released the next day. Although he could not recall the exact date of his second arrest, he stated that he was arrested the following week and taken back to the Grand Police Army Camp. But on being cross-examined he stated that he was arrested and that he saw the plaintiff on the second day. He stated that he also saw the plaintiff being beaten, but later changed his testimony and categorically stated that he did not see him being beaten, but only saw him passing by his cell. This witness was without doubt, not speaking the truth. The plaintiff was admittedly arrested on 10 November 1998 and taken to the Grand Police Army Camp around 7p.m. Dugasse stated that he saw him after being arrested for the second time, the following week. Hence he was not speaking the truth when he stated that he was arrested before the plaintiff. I therefore totally reject his evidence.

Francis Pillay, corroborated the evidence of the plaintiff and stated that he was also arrested on 10 November 1998 around 6p.m, by Army Officers. He was questioned about the possession of a pistol. He was brought to the Anse Aux Pins Police Station and then taken to the Grand Police Army Camp in a Police car. The plaintiff was also taken in the same car. Neither he nor the plaintiff were handcuffed. On reaching the gate of the camp, the plaintiff was removed from the car and handcuffed, and taken

away towards the bushes. He was however driven inside the camp and locked up in a cell. He was released the next day (11 November 1998) around 6p.m.

Pillay further stated that after about 10 - 15 minutes of being locked up he was given his dinner. When he was eating the food, he was called to the office which was in the 1st floor of the building. While he was being questioned there, he "heard someone shouting, like he was beaten". He was questioned, there was shouting. It seemed the voice was his, it seemed to be the same voice. He was shouting "stop beating me, or, so whatever, he was crying and then, a few minutes, there was no noise". The witness further stated that after being questioned, when he was walking down the stairs, he saw the plaintiff sitting on the steps. He stated that he had known the plaintiff for several years. The next day, he spoke to the plaintiff who told him that he was beaten up in the night. He showed his swollen legs.

On being cross-examined he stated that he thought the person screaming was the plaintiff as he had been taken to the bushes from the car. Later he saw him seated on the steps of the stair case.

The relevant part of the evidence of Francis Pillay is his assertion that he heard a voice of someone shouting and that he identified that voice as that of the plaintiff. When he saw the plaintiff seated on the steps when coming downstairs, he assumed that it was the plaintiff who had shouted when being beaten. He claimed that the next day he met the plaintiff in the corridor and that he showed him his swollen legs. Although arrested and detained he was released before the expiry of 24 hours stipulated in section 100 of the Criminal Procedure Code and article 13(5) of the Constitution. He has so far not filed any action regarding his arrest and detention. It was obvious from his demeanor that he was very resentful about his alleged experience and was therefore testifying regarding matters about which he had no personal knowledge. Further, his evidence was clearly tailored to suit the evidence of the plaintiff. It is difficult to believe that he was taken to the office while he was taking his meals, which he claimed was given about 15 minutes after being locked up, and that he heard any shouting while he was being questioned. As both he and the plaintiff were brought in the same car and the plaintiff testified that he was assaulted, and tortured for about 25 minutes, Pillay was obviously attempting to fit in events within a period of 1/2 an hour after he was locked up in a cell. I found him to be an utterly unreliable witness and hence I place no reliance on his evidence.

The defence called Sub-Inspector Sonny Leggaie of the Criminal Investigation Unit of the Central Police Station. He testified that in April 1998, a "joint operation" between the army and police force was set up under him in April 1998 to deal with the law and order situation in the country at that time. That operation ended sometime in November 1998. That "operation" involved the police officers working with the assistance of army officers. They were based at the Grand Police Army Camp.

At this stage, I shall consider the evidence of Mrs Ivy Orr, Director General, Administration Planning and Finance in the Ministry of Social Affairs and Manpower

Development, who was called to testify by the plaintiff. She testified that the prisoners in the Grand Police Army Camp were transferred to the civilian prison in Long Island on 1 January 1993 and that she had no knowledge that there were any civilian prisoners at the Grand Police thereafter.

Capt. Vincent Luther testifying for the defendant stated that he was involved in the joint operations during the relevant period, and that upon information received that the plaintiff was in possession of a pistol, and that he was trafficking in dangerous drugs, his officers assisted the police in the arrest. He was brought to the Grand Police Camp around 6p.m on 10 November 1998. The next day he spoke to the plaintiff, but he did not complain of any assault on him.

Article 18(10) of the Constitution provides that:

A person who has been unlawfully arrested or detained has a right to receive compensation from the person who unlawfully arrested or detained that person, or from any other person or authority, including the state, on whose behalf or in the course of whose employment the unlawful arrest or detention was made or from both of them.

Therefore the plaintiff's action against the Government of Seychelles has been correctly brought, as the police and army officers, who were engaged in a joint operation at the time of the arrest and detention of the plaintiff, were acting in the course of their employment with the government. The plaintiff's claim for damages is based on the following heads:

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|---|------------------------|
| 1. Moral damages for pain and suffering as a result of being assaulted and tortured | R 75,000 |
| 2. Moral damages for depression, emotional stress, humiliation and fear | R 25,000 |
| 3. Unlawful arrest and illegal detention | <u>R50,000</u> |
| | <u>R150,000</u> |

The defendant admits in the defence that the plaintiff was arrested on 10 November 1998 around 5.50p.m. and was released on 12 November 1998 at 10.30a.m. There was clearly a violation of section 100 of the Criminal Procedure Code and indeed of article 18(5) of the Constitution which provide that a person arrested and detained be produced before a court within 24 hours. Hence the detention was unlawful.

As regards the arrest, article 18(2)(b) of the Constitution provides an exception to the right to liberty of a person guaranteed in article 18(1). It reads thus:

The arrest and detention on reasonable suspicion of having committed or of being about to commit an offence for the purpose of investigation or preventing the commission of the offence and of producing, if necessary,

the offender before a Competent Court.

Capt. Vincent Luther testified that the plaintiff was arrested upon information received that he was trafficking in drugs, and was in illegal possession of a pistol. He testified further that a search at his residence was unsuccessful. That alone does not make an arrest, illegal. However, there should be a "reasonable suspicion" that the person to be arrested has committed or is about to commit a specific offence. Hence an arrest on a vague general suspicion, riot knowing the precise crime suspected, but hoping to obtain evidence of the commission of some crime, would be illegal. In the Sri Lankan case of *Namasivayam v Gunawardene* (1989) 1 SRI. L.R. 394, a person was arrested while travelling in a bus. He was not informed of the alleged offence, but was asked by the police officer to accompany him to the police station. He was questioned and released immediately. The police officer in his affidavit averred that he was investigating into a case of theft of a gun from a farm and that he had reason to believe that the petitioner was acquainted with the facts and circumstances relating to the theft. The court held that although the petitioner had not been locked up, he was deprived of his liberty to go where he had intended, and as he did not go to the Police Station voluntarily, he was under "arrest".

In the present case, the Plaintiff testified that:

One person, whom I know as Sgt. Major Matatiken asked me if I was Gerard Canaya, I said yes. He informed me that he would be arresting me because he had reason to believe that I had a pistol. I told him I did not have a pistol. He told me that I would say that to the necessary authorities, let us go.

The plaintiff was therefore informed that he was being arrested on "reasonable suspicion" that he was in illegal possession of a pistol. In the Constitutional case of *Willy Charles v. The Attorney General* (unreported) Constitutional case No.5 of 1998, as the burden is on the State to prove that there has not been a contravention of a provision of the Constitution, I took the view that the State must disclose the grounds of suspicion for the court to consider whether the exception in article 18(2)(b) had been satisfied. However, the present case is a civil action based on delict, and hence the burden is on the plaintiff to prove his case on a balance of probabilities. The plaintiff was not, according to the evidence in the case, arrested without cause, on a speculative impulse. Hence although his detention for over 24 hours without being produced in court was unlawful, his initial arrest was lawful. Therefore he is entitled to damages under the head of illegal detention.

According to the evidence in the case the plaintiff was illegally detained for about 18 hours.

In the Constitutional Court case of *Darrel Green v The S.L.A.* (unreported) Constitutional case 3 of 1997 I took the view that:

This Court (the Constitutional Court) is not the proper forum to consider evidence and grant delictual damages hence an aggrieved person should decide between bringing a delictual action to obtain compensation, or file a constitutional case to establish the contravention of a fundamental right and obtain a solatium where redress is granted.

In the present case, the plaintiff has opted to a delictual remedy in respect of an act or omission of public officers in the execution of their office. In this respect I also observed in the constitutional case of *Willy Charles v The Attorney-General* (supra) that in constitutional cases damages are based on an acknowledgement of regret and a solatium for the hurt caused by the violation of a fundamental right, and not as delictual damages. Hence in a delictual action, damages would be based on article 1149 of the Civil Code, which provides that:

1. The damages which are due to a creditor cover in general the loss that he has sustained and the profit of which he has been deprived, except as provides hereafter.
2. Damages shall also be recoverable for any injury to or loss of rights of personality. These include rights which cannot be measured in money, such as pain and suffering, and aesthetic loss and loss of any of the amenities of life.

The plaintiff would therefore be entitled to moral damages for "loss of rights of personality", that is, his right to liberty, for a period of 18 hours. In this respect, I would consider a sum of R5000 to be adequate to compensate the plaintiff under this head of damages.

As regard the averments of assault and torture, there is only circumstantial evidence. I have already rejected the evidence of Robert Dugasse and Francis Pillay in this respect. However the plaintiffs evidence regarding the various acts of assault and torture, are partially corroborated by the evidence of Dr. Kirkpatrick. In her report she stated that she examined the plaintiff at 3p.m on 12 November 1998. That was about 4-5 hours after his release from custody. She testified that the injuries to the soles of the feet had been caused by a direct assault with a blunt instrument. This corroborates the Plaintiffs evidence that he was beaten with a polythene pipe. The defendant has not produced any evidence as to how such an injury was caused while in custody. There were also injuries on the left wrist and bases of the left thumb and right thumb as a result of tying of hands. Dr. Kirkpatrick has certified that despite the swelling on the foot the plaintiff could walk. The doctor also testified that those injuries could not be described as "mild" as they would have taken about three weeks to heal. However the injuries were not of an aggravated nature. There is no permanent or partial disability as well. Hence I consider a sum of R10,000 to be fair compensation under the head of pain and suffering.

Usually, aspects of depression, emotional stress, humiliation and fear are considered under the general head of moral damages, which includes pain and suffering. However, considering the circumstances under which the plaintiff had been detained in non-civil custody and certain injuries being inflicted on him by the custodians, the court accepts the plaintiffs assertion that he suffered from depression, emotional stress, humiliation and fear. Accordingly I award a sum of R10,000 under that head of damages.

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

Record: Civil Side No 42 of 1999