IN THE SUPREME COURT OF SEYCHELLES

Mr. Edison Rideau of
Copolia, Mahé **Plaintiff**

Vs

Mr. Richard Mend of
Copolia, Mahé **Defendant**

Civil Side No: 144 of 1992

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==========Mr. M. Vidot for the plaintiff

Mr. F. Ally for the defendant

D. Karunakaran, J

JUDGMENT

This is a delictual action brought under Article 1382 of the Civil Code of Seychelles. The plaintiff in this action claims the sum of Rs300, 200/- from the defendant towards loss and damage, which the plaintiff claims to have suffered, as a result of a "fault" allegedly committed by the defendant. The defendant denies the entire claim of the plaintiff and seeks dismissal of the action.

It is not in dispute that the plaintiff and the defendant were at all material times, and are still residents of Copolia, Mahé. They are neighbours too. The plaintiff was working at Public Utilities Corporation as a Shift Supervisor, whereas the defendant is a mason by profession. According to the plaintiff, on 9th of September 1997, the defendant having entered the premises of the plaintiff, attacked him using a metal pipe and a knife, and thereby inflicted severe bodily injuries to the plaintiff particularly, to his left forearm and neck. Following those injuries, the plaintiff had to undergo a

number of surgical operations and a prolonged medical treatment. He had been hospitalized for more than 15 days. Despite all medical treatments, the plaintiff is still suffering from partial disability of his neck and forearm. Consequently, he had to change the nature of the job he was doing. Besides, the plaintiff claims that he also sustained cosmetic loss due to disfigurement, resulting from those injuries.

Subsequently, criminal law was set in motion against the defendant for his alleged unlawful act against the plaintiff. The defendant was charged with the offence of causing grievous harm to the plaintiff before the Magistrate's Court, in Criminal Case No. 255 of 1998 vide exhibit D1. The defendant pleaded guilty to the charge. The Court, accordingly convicted him of the offence charged, and sentenced him to pay a fine of Rs 7,000/- Out of the said fine admittedly, a sum of Rs 5,000/- was paid to the plaintiff as compensation for the injuries he suffered.

As regards the incident, the plaintiff - PW1- testified that on the alleged date, at around 6. 30 p. m he was cutting a banana tree in his garden using a machete, a long knife. That time the defendant came out of his yard and accused the plaintiff of having an affair with defendant's wife. As the plaintiff was about to respond to the accusation, the defendant suddenly grabbed an iron rod and ran towards the plaintiff in order to attack him with the rod in his hand. With the intention of avoiding the attack, the plaintiff attempted to move backwards from his position. In the process the plaintiff fell down with the knife in his hand. The knife slipped off, flew out of his hand and landed on the ground near the defendant. According to the plaintiff, the defendant suddenly picked up that knife, ran towards the plaintiff and cut him on his neck and left forearm. There was profuse bleeding from the wounds. The plaintiff was immediately taken to Victoria Central Hospital. Reaching the hospital, he was given first aid treatment at the casualty. Later, he was transferred to the operation theatre for emergent surgery, as the cut injury

was very deep to nerves and bones. Dr. Ken Barrand, the consultant surgeon did the operation. After the operation the plaintiff had been admitted in hospital for 15 days. A couple of weeks later, the plaintiff again went to the hospital for further surgical intervention.

The following are the relevant excerpts from the medical report dated 2nd February 1998 - exhibit P1- prepared by Dr. Ken Barrand, the consultant surgeon, who treated the plaintiff for those injuries:-

On 9th of September 1997, the plaintiff was admitted in hospital with serious cut injuries to his right neck and left forearm. The same day, he was resuscitated and then his wounds were treated under general anaesthesia. He had a near amputation wound of his left forearm. Immediate treatment consisted of debridgement of the wound and stabilization of his fractured forearm with intramedullary nails. This wound was only partiality sutured. He was subsequently, on the 16th of September 1997 returned to theatre for skin closure. His neck wound was cleaned and closed primarily. He was discharged on 24th September 1997 with a small wound defect. This healed up over the next month. ***Since most of the important structures had been divided due his original cut injury, his left-hand function is very poor. Indeed, he would always have a serious disability of his left arm.*** *On 18th November 1997, Surgeon Barrand performed another operation to suture his left ulnar nerve.* ***So far there is no return of ulnar function but it is too early to know if function would return later.*** *On 22nd December the plaintiff returned to work but could perform only light duties. His residual problems are:*

(1) *Permanent scar on right neck*
(2) *Numbness of the left hand medial 1½ fingers*
(3) *Weakness of Left hand*
(4) *Weakness of left Wrist.*

However, according to Surgeon Barrand's opinion ***the plaintiff does have a pinch grip but his left hand is still useful for work.***

Furthermore, the plaintiff testified that as a result of the said injuries he is still not able to close his left hand. Two of his fingers have become stiff. As regards the neck injury, the plaintiff testified that although it is now completely healed, it has left a scar about 3 inches long. When the plaintiff was testifying from the witness box, the Court also observed a scar of about 3 inches long on his neck and a linear scar of about 10 inches long on the posterior aspect of his left arm. The plaintiff further stated that consequent upon those injuries, he could not continue in his job as a Shift Supervisor. He had to change his job to suit his impaired physiological condition.

In cross-examination, the plaintiff testified that the defendant in attacking and causing those injuries never acted in self-defence. There was no need for any. The plaintiff never caused any provocation or invited the defendant for a fight or brandished his knife to attack the defendant. According to the plaintiff, the knife was in his possession for the genuine purpose of cutting the banana trees in his garden. The plaintiff further stated that it was an offensive attack by the defendant and so did with the intention of causing grievous harm to the plaintiff. Thus, the defendant acted without any necessity for self-defence. Further, the plaintiff denied that he ever had any problem with the children of one Mrs. Arrisol family living in the neighbourhood.

PW2, Mr. Jemmy Bell, a neighbour of the plaintiff, who witnessed the scene immediately after the occurrence, also testified for the plaintiff. This witness knew both, the plaintiff and the defendant since they all lived in the same neighbourhood. PW2 stated that at the material time of the alleged incident he was at the house of one Mr. Damien Francois, situated at a distance of about 50 feet from the spot of the incident. At around 6.30 P. M on the said

date, he heard the defendant shouting for help. He rushed to the spot. In the scene, he saw the defendant who appeared to be very was aggressive with a machete in his hand. The defendant's wife was holding him around his waist, arresting his movements. And around 20-25 feet away from them, he saw the plaintiff with bleeding from wounds. PW2 immediately, ran to the defendant and asked him to return the machete. But he refused saying that it was the plaintiff, who came to attack him with the machete. At the same time, the defendant was also trying to get out of his wife's hold. According to this witness, the defendant had no bodily injuries on him at the material time. Eventually, this witness could manage to take away the knife from the defendant. In no time, he called for an ambulance and sent the injured plaintiff to hospital for urgent medical attention.

In the circumstances, the plaintiff testified that as a result of the said unlawful attack by the defendant, he sustained severe bodily injuries, pain, suffering, partial disability of his neck and forearm. Consequently, he had to change the nature of his job. Besides, he suffered cosmetic loss due to scar and disfigurement. Moreover, the plaintiff testified that following the injuries he has now lost certain amenities in life like gardening etc. as he is not able to hold objects firmly in his left hand. In view of all the above, the plaintiff claims a total sum of Rs300, 200-00 from the defendant towards loss and damage as particularized below:

a) *Pain and suffering for injuries to neck and forearm SR 200,000-00*
b) *Disfigurements and loss of amenities to life SR 60,000-00*
c) *Moral damage SR 40,000-00*
d) *Medical Report SR 200-00*

Total ***SR 300,200-00***

On the other side, the defendant in his statement of defence has averred that the plaintiff was the one, who attacked the defendant with a machete at defendant's premises at Copolia. And during that attack, the defendant acted in self-defence and hit the plaintiff with a piece of pipe, which resulted in injuries to the plaintiff. In the process of self-defence, the defendant also sustained injuries on him allegedly inflicted by the plaintiff. The defendant also testified that at the material time the plaintiff had some argument with another neighbour one Norcy Arrisol and was aggressive and swearing at him. After that incident, the aggressive plaintiff came out of his house with a machete and started to cut the banana trees in the garden. The defendant was at his house that time watching the plaintiff. The plaintiff entered the compound of the defendant and attempted to attack the defendant with that knife. The testimony of the defendant in this crucial aspect of the defence runs thus:

> *"Edison (plaintiff) came in my compound and came towards me with that machete. From where I was sitting there was an iron bar, that is, a galvanized pipe- 3 inches in diameter. He threw the knife towards me, which missed. He threw it again and it missed me again. I thought I was going to either die or run. My wife told that he threw the knife two or three times. I went down and took the iron pipe and went towards him. He went back and came forward with power. I took the iron pipe and threw it at him. He had his machete with him. If I had not thrown the pipe at him, I would be dead buy now. The machete hurt me on my right ear and I received four stitches (sic)"*

Besides, the defendant called two other witnesses namely, Mr. Arrisol Bell - DW2 - and Mr. Steve Mend - DW3 – to testify in support of the defence. However, these two witnesses admittedly, were not at the scene at the material time and did not see the actual fight when it took place between the plaintiff and the defendant. In the circumstances, it is the contention of the defendant that he only acted in self-defence at the material time, to protect

his life from plaintiff's attack, which resulted in injury to the plaintiff. Thus, according to the defendant, he was not at fault nor was he negligent in causing those injuries to the plaintiff. Hence, the defendant denied liability.

Having agreed to leave the appreciation of evidence to the Court, counsel for the parties, in their submissions, joined a number of issues pertaining to the line of defence taken by the defendant 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 the 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 coming into operation of our 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 January 1, 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 cater for the changing needs of our time and Seychellois society. Therefore, in my considered view, although all these additional paragraphs including paragraph 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 us to do otherwise.

In the light of the above provisions of law, I now analyse the issues 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 - *responsabilité délictuelle.* 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 - précis Dalloz. Indeed, it is settled French case law that :

> << … … *légitime defence constitue un fait justificatif excluant toute faute et ne peut donner lieu a une action en dommage intérêts en faveur des ayants cause de celui l’ a rendue nécessaire par son action*… >>
> (Tribunal Civil Strasbourg 10 mars 1953).

However, it is evident from paragraph 3, 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 render an act of self-defence a total defence to delict unlike its French counterpart, simply because the act satisfies the usual tests required in criminal law, such that of the gravity and necessity of the situation, reasonableness, degree and proportionality of the force used, contemporaniety etc. Therefore, in delictual actions, the primary test required to be applied here in Seychelles to render an act of self-defence a

total defence, is the test of ***dominant purpose***. In order for an alleged act of self-defence to constitute a total defence, 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 vide paragraph 3 supra. Hence, I hold that the defence of "self-defence" normally we encounter in criminal cases, cannot constitute a total defence as such, to delictual liability, unless the act in question passes the primary test propounded above. If it does, then that act would evidently constitute a total defence to delict, 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 to constitute a valid "self-defence" but it may fail the primary test required in terms of paragraph 3 of article 1382. 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 his power of discernment is impaired commensurately with the gravity of the situation created by the act of the plaintiff.

On the question of "provocation" too, for identical reasons stated above, I hold that the defence of "provocation" that normally we encounter in criminal cases, cannot constitute a total defence to delictual liability, unless the act in question passes the primary test propounded above. However, it may 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 plaintiff or else it would only constitute a defence of* ***contributory negligence*** and would proportionately 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 would proportionately reduce the quantum of damages.

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 to move away from the scene. However, he elected to remain in the scene and moreover, picked up an iron rod from somewhere, approached the plaintiff and admittedly hit him, although the circumstances did not warrant such a course of action and such a higher degree of force. In any event, there arose no necessity for him to use such unreasonable force, which he did. Besides, it is evident from the medical evidence that the injuries plaintiff had sustained were cut injuries. This fact indeed, corroborates the version of the plaintiff

that it was the defendant who cut the former with the machete. The nature of injuries is in fact, inconsistent with the version of the defendant in that, he claimed that he used only a rod, a blunt-edged object, which evidently, cannot cause cut injuries deep to bone.

In the circumstances, I find that the defendant did not act in self-defence in the entire episode. He cut the plaintiff with the long knife 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 the 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, although the defence counsel has raised it in his closing submission and the Court has also entertained the legal aspect of the issue in this judgment, nowhere in the defence it has been pleaded nor has any evidence been adduced in this respect. In the absence of any pleading and evidence, this Court cannot and should not consider the defence of the alleged provocation in this matter. Obviously, the Court cannot formulate a case for the defendant from mere statements made by counsel in his submission.

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 exaggerated, unreasonable, exorbitant and disproportionate to the actual injuries he suffered. Besides, I find on evidence that the plaintiff

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

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

(a) Pain and suffering for injuries to neck and forearm	*SR*	*50,000-00*
(b) Disfigurements and loss of amenities to life	*SR*	*10,000-00*
(c) Moral damage	*SR*	*10,000-00*
(d) Medical Report	*SR*	*200-00*
Total		***SR 70,200-00***

Since the defendant has already been partly compensated in the sum of Rs5, 000/- by the Magistrate's Court out of the fine paid by the defendant in Criminal Case No. 255 of 1998, this sum ought to be discounted from the amount warded in the present action.

Accordingly, I enter judgment for the plaintiff and against the defendant in the sum of Rs65, 200/- with interest at 4% per annum - the legal rate on the said sum as from the date of the plaint and with costs.

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D. Karunakaran

Judge

Dated this 31st of October 2005