IN THE SUPREME COURT OF SEYCHELLES

Miss Connie Wanda Omath

of Cote D'or, Praslin

Plaintiff

vs

Vivien Charles of
Baie Ste Anne, Praslin

Defendant

Civil Side No: 22 of 2003

==========

==========Mr. A. Derjacques for the plaintiff

Mr. F. Bonte for the defendant

D. Karunakaran, J

JUDGMENT

This is a delictual action brought under Article 1382 of the Civil Code of Seychelles. In this action, the plaintiff, a young woman claims the sum of Rs62, 399/- from the defendant towards loss and damage, which she suffered due to 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 are residents of Praslin. The plaintiff is working as tourism representative for a company known as Masons Travels, whereas the defendant a taxi operator in Praslin. The case of the plaintiff is that on 9th December 2002 in the premises of Pizzeria Complex at Cote D'or, Praslin, the defendant unlawfully assaulted the plaintiff causing severe bodily injuries by giving slaps, punches and kicks all over her body. Besides, the plaintiff avers in her plaint that during such assault by the defendant, she also lost her mobile phone and a gold chain, which was on her at the material time. As a result of the said unlawful acts of the defendant, the plaintiff now claims that she suffered loss and damage as particularised below:

Pain and suffering

Rs 30,000. 00

Moral damages for distress,
Humiliation and anguish *Rs 30,000.*
00
Special damages
(1 gold chain and 1 mobile phone) *Rs 2, 399.*
00

Total

Rs. 62, 399. 00

The facts of the case as transpire from the evidence on record are these:

On Monday the 9th December 2002 at around 7 p. m, the plaintiff was in the company of her boy friend Neddy Confait - PW4 -and her sister Moira Samantha - PW3. They were all outing that evening travelling in a pick-up. Reaching Cote D'or, Praslin, they wanted to buy some pizza from a nearby "Pizzeria". They parked their pick-up in the roadside opposite the "Pizzeria". A number of cars had already been parked around. Having disembarked from the pick-up the plaintiff's boyfriend Neddy walked into the Pizzeria, whereas the plaintiff and her sister were waiting outside. After a while, the plaintiff also went in. The defendant, who was standing nearby, passed some derogatory remarks directing the plaintiff. However, the plaintiff did not pay any attention to it and returned to the pick-up, where her sister Moira was waiting. As Moira was carrying a child in her hand, she had placed her two mobile phones on a car parked close to the pick-up. The plaintiff's boyfriend collected the pizzas, came out and was approaching the pick-up. At the same time, the defendant also came out and started to swear at the plaintiff and her sister alleging that they had dirtied his car by putting their mobile phones on it. The plaintiff's sister immediately removed the phones from his car and moved away. However, the defendant continued to swear at the plaintiff and her sister. The plaintiff's boyfriend Neddy having heard the commotion around asked the defendant what had happened. The defendant suddenly got angry and ran towards Neddy to assault him. The defendant while thus running slipped and fell down. Again, he got up and rushed towards the plaintiff and slapped on her face. The plaintiff felt dizzy and fell down. The plaintiff's sister Moira tried to calm the defendant. However, the defendant became more aggressive and hit her as well on her face. Two bystanders (Roy and Jude) intervened and restrained the defendant from continuing the assault. After their intervention, the defendant got into his car and was trying to move away from the scene. However, the plaintiff in anger ran behind the car

and admittedly, picked up some macadam from the ground and threw them at the defendant's car. The defendant after driving a distance of about 50 to 60 feet stopped his car and came back to the plaintiff and again started to assault the plaintiff. The testimony of the plaintiff in this regards reads thus:

> "He (the defendant) came towards me to hit me and I grabbed him by his collar. He threatened me. He shook me and pushed me to the ground. He started to kick me in my chest…It was not only once but several times. I had fallen on my left side and I was protecting my breast with my left hand. That is when my sister came running towards me where I was, saying 'stop hitting her, you will kill her'. That is when he stopped and ran towards my sister and I had the opportunity to get up. We all embarked on the pickup. He (the defendant) went towards Villa Peche which is close by. There were lot of debris around because it had burned down. He picked something up which looked like a piece of wood. He threw it at us but the driver of the pickup swerved and it missed us. We went to the police station. I went to make a report concerning what had happened"

After thus reporting the matter to the police at Baie St. Anne Police Station, the plaintiff went to the Health Centre and received medical treatment for the bodily injuries she sustained from the assault by the defendant. According to the plaintiff, her chest was red and there were scratches on her face. The next day the injuries on the face turned blue. Moreover, the plaintiff testified that during the said incident her beige blouse was damaged; a gold necklace and a white pearl, which she was wearing, had also been lost. However, the defendant subsequently, returned these two items to the plaintiff. The plaintiff on cross examination, though admitted that her sister had placed the mobile phones on the defendant's car, she did not cause any provocation to trigger the defendant who resorted to such violent reaction. WPC Daniella Denousse - PW2 - testified that on the alleged night at around 7 to 8 p. m, while she was on duty at the Baie St Anne Police Station she received a complaint from the plaintiff concerning

the alleged assault by the defendant. According to this officer, when the plaintiff came to the police station she was crying. She was seen in a very distressed state and had some marks on her face. The officer recorded the report in the occurrence book and also gave plaintiff a police memo for medical examination. The plaintiff's sister Moira Samantha (PW3) and the plaintiff's boyfriend Neddy (PW4) also testified in substance, corroborating the evidence of the plaintiff on all material particulars pertaining to the incident of assault by the defendant. In the circumstances, the plaintiff claims that she suffered loss and damage in the total sum of Rs. 62, 399. 00 as particularised hereinbefore and therefore, prays this Court to enter judgment accordingly, in her favour.

On the other side, the defendant denied all the allegations made by the plaintiff in this matter. In defence, the defendant testified that he did not assault the plaintiff at the material time. However, it was the plaintiff who dirtied his new car by placing two boxes of pizza, beer and glasses on it. The defendant being provoked by the acts of the plaintiff, asked her to remove those things from his car. The plaintiff removed them having made some sarcastic remarks against the defendant. In response, the defendant told the plaintiff that if she repeats such acts, he would throw all the drinks down. Having said that the defendant got into his car and tried to drive away from the scene. The evidence of the defendant in this respect runs thus:

> "I got in my car and I was about to go when I heard Ms. Omath (the plaintiff) saying "who do you think you are? She took macadam and threw it at my car at the back. I was inside my car reversing. She came from nowhere and threw macadam on my car. I stopped and came out of my car. I asked her not to do this again. She was about to throw macadam again but I held her hand and told her not to do that again. She was struggling in my hand and I let go of her and she fell down. Her boyfriend came and was holding her hand and I let go of her and she fell down"

In the circumstances, it is the contention of the defendant that he did not commit any unlawful act at the material time. Whatever he did, was only to protect his property 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 elected not to make any submission in this matter. I meticulously analysed the evidence adduced by both parties on facts relevant to the case. Most of the facts, which the plaintiff testified, are not disputed by the defence. Indeed, the defendant in his testimony did not deny any of the material facts and the sequence of events that led to the alleged untoward incident. However, the defendant denied he committed any physical act of assault to cause bodily injury to the plaintiff. According to the defendant, he simply held the plaintiff's hand at the material time, in order to physically prevent her from causing damage to his car, as she was attempting to throw macadam on it. In other words, he acted so in order to protect his property (the new car) from being damaged by the act of the plaintiff. As a result and in the process of his preventive measure, the plaintiff fell down and sustained those injuries. Besides, it is also the defence version that the plaintiff through her act of provocation triggered the said sequence of event, which eventually resulted in injuries to the plaintiff. In view of the lines of defence taken by the defendant in this matter, the following questions arise for determination namely,

(i) *Is the defence of "self-defence" in protection of one's property, 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. Indeed, “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 meet 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 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 - *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 << … … *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 under 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 normally we 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** to liability in 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" normally we 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 answers to the above questions as follows:

(i) *The defence of "self-defence" in protection of one's property 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 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 constitute a defence of ***contributory negligence*** and reduce the quantum of damages.

Having thus set the principle of law on the issues above, I will now move on to examine the evidence on record. First, on the issue of self-defence to protect one's property, it is so obvious from the evidence of the defendant in this matter, that he had time, opportunity and circumstances to retreat from the scene and avoid the plaintiff's threat of

causing damage to his car. Indeed, the defendant had the choice to drive away from the scene as he had already driven about 50 to 60 feet away from scene. However, he did not choose that course of action rather he stopped his car and came back to the scene to retaliate. He then admittedly, caught hold of the plaintiff's hand and engaged in a brawl with her. Even if one accepts the version of the defendant to be true, still his act of brawl with the plaintiff was the cause for her fall to the ground and to the resultant injuries. In my view, the circumstances were not too grave or compelling in order to warrant the defendant to take such a course of action and apply such a degree of force and measure as he did. As I see it, the defendant did deliberately choose that course of action to retaliate, which eventually resulted in injuries to the plaintiff and so I find. In any event, I accept the evidence of the plaintiff and her witnesses in that the defendant did physically assault the plaintiff by giving slaps, punches and kicks all over her body and continued the assault despite her fall to the ground. Besides, I find on evidence that during such assault by the defendant, the plaintiff also lost her mobile phone and a gold chain, which was on her at the material time. Having said that, I note, the nature and location of injuries as observed by WPC Daniella Denousse - PW2 - soon after the alleged incident particularly, the marks found on the face of the plaintiff could have been caused by slaps rather than fall to the ground. Hence, the plaintiff's version as to cause of injuries, appears to be more probable, consistent and more logical than the defendant's version.

In the circumstances, I find that the defendant did not act in self-defence in the entire episode. He physically assaulted the plaintiff by giving slaps, punches and kicks all over her body and continued the

assault despite her fall to the ground 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*** as formulated *supra, which* should proportionately reduce the quantum of compensation payable to the plaintiff for delict.

As regards the element of provocation, having regard to the entire circumstances of the case, I find on evidence that the plaintiff has also acted in provocation, which triggered the defendant to overreact the way and manner he did in that situation. *However, the said provocation by the plaintiff cannot constitute a complete defence and exonerate the defendant from total liability since the dominant purpose of his act* in the entire episode *was to cause harm to the plaintiff. Therefore, I find that the plaintiff's provocation in this matter would only constitutes a defence of* ***contributory negligence*** and would 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 she suffered. Besides, to my mind, the plaintiff suffered those injuries not solely due to the fault of the defendant, but also due to her own contributory negligence in depriving the defendant of his power of discernment for which I would apportion the blame to 50%. As regards the plaintiff's claim for material loss of the gold chain and white pearl, admittedly, the defendant has returned those items to the plaintiff after the commencement of this suit.

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

Pain and suffering

Rs 10,000. 00

Moral damages for distress, Humiliation and anguish *Rs 10,000. 00*

Loss of mobile phone *Rs 1,000. 00*

Total Rs 21, 000. 00

Accordingly, I enter judgment for the plaintiff and against the defendant in the sum of Rs21, 000/- with interest at 4% per annum - the legal rate- on the said sum as from the date of the plaint and with costs.

.....

D. Karunakaran

Judge

Dated this 24th Day of September 2008