

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS135/2012

[2016] SCSC 10

John Denis

Plaintiff

versus

Ronniel Ryland

Defendants

Commissioner of Police

The Attorney General

Heard: 7th November 2014, 10th February 2015, 19th May 2015, 12th November 2015.

Counsel: Frank Elizabeth for plaintiff

Vipin Benjamin for defendant

Delivered: 15th January 2016.

JUDGMENT

M. TWOMEY, CJ

[1] The Plaintiff, John Denis, is a businessman and the 1st Defendant a security officer and/or driver of Minister Joel Morgan and also a police officer. The 2nd Defendant is the Commissioner of Police and the 3rd Defendant the Attorney General appearing in his statutory capacity as the representative of the government.

- [2] The Plaintiff claimed in his plaint that on 17th April 2012 he was unlawfully arrested in Orion Mall at Palm Street, Victoria, was assaulted and detained at the Central Police Station for 24 hours by the 1st Defendant and another police officer. He gave details of the assault as being violently manhandled, hand cuffed, tear gassed and having his t-shirt pulled and torn.
- [3] He stated that the 1st Defendant had used more force than was reasonable and that this amounted to a faute in law for which the 1st Defendant is directly liable and the 2nd and 3rd Defendants jointly, severally and vicariously liable. He claimed damages for injuries, pain and suffering, humiliation, distress, mental anguish and trauma, inconvenience, embarrassment and anxiety and loss of liberty for 24 hours under the general rubric of moral damages in the total sum of SR400, 000.
- [4] The Defendants filed a joint defence in which they denied that the Plaintiff was unlawfully arrested, assaulted or illegally detained. They claimed that the Plaintiff had interfered with the 1st Defendant in the course of his employment and that the Plaintiff had been abusive and aggressive towards him. They also denied causing any prejudice, loss or damage to the Plaintiff.
- [5] The Plaintiff called Doctor Viveganandan who was attached to the Accident and Emergency Service at Victoria Hospital at the material time. He testified that he saw the Plaintiff on 17th April at 9.15 pm and confirmed that the Plaintiff had a mild contusion to his back, neck and left side of his abdomen. He also confirmed that the Plaintiff had itchy eyes and mild concussion. The doctor was unable to confirm if it was pepper spray or tear gas that had been applied to the Plaintiff's eyes but stated that the effects of either would have lasted between two to eight hours, if not longer, unless washed out.
- [6] A senior physiotherapist, Mrs. Daphne Govinden also testified that the Plaintiff was referred to her by Dr. Kumar and that she had seen him on 14th May 2012. She testified that the Plaintiff had bruises and scars over the palm aspect of his left wrist and that the movement of that wrist and the left thumb was restricted and accompanied with pain on palpitation. She testified that the Plaintiff had impaired sensation in his thumb and index finger, that he had weakness in the movement of his fingers and had difficulty gripping

objects. She stated that she administered physiotherapy sessions from the 17th May 2012 until 12 July 2012 with the Plaintiff amounting to between ten to fifteen sessions. She testified that the Plaintiff made a good recovery but that there was some residual numbness and mild pain when lifting heavy objects. She testified that the treatment administered was free of charge.

- [7] The Plaintiff also testified. He deponed that he had gone to the Orion Mall on the date in question to buy an iron and that he had tried to get parking. He stated that he had gone round the mall three or four times until he spotted someone reversing from a space and waited. However, a green jeep sped in and took the parking space before he could. He spoke to the driver of the vehicle, the 1st Defendant, telling him that he had been waiting for the space. He stated that the 1st Defendant was extremely aggressive and abused him. After asking the 1st Defendant why he was abusing him, the latter pulled out his police badge and displayed a tear gas canister in his belt. The Plaintiff stated that he challenged the 1st Defendant in terms of his threatening behaviour and had asked him for his name which he refused to give but continued to abuse him in foul language.
- [8] The Plaintiff then proceeded to buy the iron he had come in search of and as he was going back to his car he was approached by the 1st Defendant together with another police officer. The 1st Defendant after asking him to swear again then told him he was going to show him his place. After further argument, he assaulted the Plaintiff and sprayed the gas from the canister straight into his eyes. He then restrained the Plaintiff by putting two handcuffs on his wrists and pulling him along for about 20 to 25 metres causing injury to his two wrists. The scars from these injuries were visible to the trial judge at the hearing who noted that they were mild and linear.
- [9] The Plaintiff deponed that he had then been taken to the Central Police Station and had remained there bleeding from his injuries and with his eyes burning from the spray. It was not till 9 pm that evening that he was taken to the hospital for treatment. He stated that he was released at around 10 am or 11 am the next day. He produced a letter of complaint he wrote to the Commissioner of Police. He stated that he had not been charged with any criminal offences following the incident.

- [10] In cross examination the Plaintiff admitted to having signed a document which stated that he had been charged with the offence of using obscene language in a public space and resisting arrest but stated that no case had ever been brought against him.
- [11] The 1st Defendant also gave evidence. He stated that he was a police officer providing security to Minister Joel Morgan. He explained that he had been sent out to purchase a charger and had gone to the Orion Mall, had spotted a car reversing and had pulled into the parking space when it was free. He stated that he was accosted by the Plaintiff who abused him. He then went on his errand but had tried to phone the Central Police Station to report that he was being threatened. He came across another police officer, Police Constable Cedras and asked for assistance, specifically to borrow his handcuffs in case he was further threatened by the Plaintiff.
- [12] On reaching his car he was again abused by the Plaintiff. He stated that he cautioned the Plaintiff and arrested him. He stated that the Plaintiff was aggressive and resisted arrest and that when he tried to handcuff him, he pulled his arm away and screamed to the passing public that he was being beaten up by the police. In cross-examination he stated that the Plaintiff continued to wave one arm around as the handcuff was broken and that is when he administered pepper spray to him. He denied assaulting or tearing the Plaintiff's t-shirt. He stated that he tried to administer first aid to the Plaintiff who suffered from the effects of the pepper spray.
- [13] The trial judge hearing the case became indisposed and left the jurisdiction shortly after the evidence of the 1st Defendant was given. Parties to this case were in agreement to have the trial continue with a new judge adopting the evidence that had already been produced. Police Constable Cedras then gave evidence supporting in the main the evidence of the 1st Defendant. He could not say which part of the Orion Mall the Plaintiff emerged from. He confirmed in cross examination that he saw blood on the Plaintiff but attributed the injury to the fact that the Plaintiff was resisting arrest and got cut by the handcuffs. He was unable to state what offence the Plaintiff had committed for him to be arrested and handcuffed. He was also unable to state whether the Plaintiff had been cautioned.

- [14] The issues that arise from this case are the following: first, have the Defendants in their acts committed a delict, second, if they did, did their “faute” cause harm to the Plaintiff, third, if it caused harm are damages payable to the Plaintiff and if so what is the quantum of such damage.

Issue 1: Have the defendant committed a delict (a *faute*)?

- [15] Counsel for the Defendants has referred this Court in his written submission to *Servina v Indian Ocean Tuna Limited* [2012] SCCA25 without any explanation of how the case applied to the present one. *Servina* relates to a termination of employment matter in which the Appellant claimed that since his employer, the Respondent had not acted in compliance with the Seychelles International Business Authority to pay him compensation a *faute* had been committed. It has no relevance to the present case.

- [16] Article 1382 (2) of the Civil Code describes 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...”

Article 1382 (3) provides that:

“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.”

- [17] Having examined the evidence adduced by both parties and placing particular attention on the cross examination of all the witness, which I believe is sometimes the best way to ascertain the credibility of witnesses, I come to the following conclusions: there was an altercation between the parties as to a parking space taken by the 1st Defendant. I am of the view that both parties engaged in verbal abuse. Tempers were frayed as parking spaces were limited. I am further of the view that the altercation had been diffused by both parties walking away to continue their respective errands. It appears to me that the 1st Defendant seemed to have wanted to assert the fact that he was a policeman. This is revealed by the fact that he did two things- he tried to phone the police station to state

that he had been threatened and to seek assistance and secondly by enlisting the help of P.C. Cedras who was also in the mall.

[18] His evidence is telling of his heavy-handedness of the situation. He deponed as follows at page 78 of the transcript of proceedings of Tuesday 19th May 2015:

“Q. My question is the behaviour of the plaintiff at the time you told him of his arrest and you cautioned him. What was his demeanour at that particular time.

A. He was looking at me.

Q. He was just looking at you?

A. Yes.

Q. Saying nothing, doing nothing just looking at you?

A. Yes because he thought I was coming for an argument and he was waiting for what I have to say to him.

Q. You used more force than was reasonably necessary in all the circumstances of the case...

A. I find my decision that I made (sic) I find it to be a good decision. If the incident were to happen again today I would have done the same thing.”

[19] I also conclude that the arrest and detention of the Plaintiff was certainly unwarranted in this case given the triviality of the offence with which he was later charged but not prosecuted, that is using obscene language in a public space. A warning could have been given to the Plaintiff or an investigation into the matter initiated by a statement from the 1st Defendant. It appears that the best course of action would have been for the 1st Defendant to diffuse the situation. Instead, he chose to escalate it and used excessive force in his attempt to arrest the plaintiff. There was also absolutely no need to spray the Plaintiff at close range with pepper spray when two police officers were at hand to subdue the Plaintiff and when two handcuffs had already been placed on his wrists, albeit that one pair of handcuffs was broken.

[20] I find that this is a clearly a case falling under the provisions of Article 1382 (3) (supra). Therefore, as to the first issue of whether the 1st Defendant committed a *faute*, the answer is in the affirmative. As the 1st Defendant was acting in the course of his employment on the date in question and certainly not on a frolic of his own, the 2nd Defendant is vicariously liable for the *faute* of the 1st Defendant (see Article 1384 (3). The 3rd Defendant is the Attorney General. This is clearly an error. The Attorney General is not vicariously liable for anyone. Although it is explained in the plaint that he is sued as representative of the Government of Seychelles, the Government of Seychelles has not been sued. The claim against the Attorney General cannot stand and is hereby dismissed.

Issue 2: Did their *faute* cause harm to the Plaintiff?

[21] In *Simon Emmanuel & Attorney General v Edison Joubert* SCA 49/1996, it was held that a claim arises under Article 1382 of the Civil Code when the act and the injury co-exist and there is a causal link between the act and the injury. Insofar as the injury to the eyes of the Plaintiff and injury to his back, neck and abdomen is concerned there is certainly a causal link as this was confirmed by the doctor who saw the Plaintiff on the same day. No other explanation has been made available to explain how the injuries were caused other than by the direct acts of the 1st Defendant. Although the Plaintiff may have been struggling his injuries were not self-inflicted.

[22] Counsel for the Defendants has in his submission stated that there was too much of a time lapse between the incident and the reported injury to the left wrist and thumb of the Plaintiff for one to conclude that the injuries treated by the physiotherapist arose from a different incident. I am of the view that the blood stained t-shirt and the fact that the scars still existed on the wrist of the Plaintiff at the time of the trial bolsters his evidence that the wrist injuries arose out of handcuffs being incorrectly applied.

[23] As to the second question of whether the *faute* of the 1st and 2nd Defendants caused harm to the Plaintiff, the answer is in the affirmative.

Issue 3: Are damages payable to the Plaintiff and what is the quantum of damages to be awarded?

[24] The Plaintiff has claimed moral damages in the sum of SR100,000 for pain and suffering, moral damages in the sum of SR100,000 for humiliation, distress, mental anguish and trauma; moral damages of SR100,000 for inconvenience, embarrassment and anxiety and SR100,000 for loss of liberty for 24 hours. It must be noted on the outset that damages in delictual cases are compensatory and not punitive (See *Jacques v Property Management Corporation* (2011) SLR 7). The Court has received neither submissions nor authorities from Counsel in terms of the quantum of damages.

[25] The Plaintiff has not claimed any damages for physical injury which would have been payable for the injury to his eyes, wrists and the rest of his body including a continuing medical condition such as the weakness he claims to still be experiencing in his wrist. This Court can only make an award for damages claimed. I find that the Plaintiff did suffer moral damages. Article 1149(2) states:

“Damages shall also be recoverable for any injury to or loss of rights or personality. These include rights which cannot be measured in money such as pain and suffering and aesthetic loss and the loss of any amenities of life.”

[26] Moral damages is a term used to cover damage that is neither material nor corporeal. It is something intangible as in the case of suffering. In the case of *Michel & Ors v Talma & Anor* (2012) SLR 95 the Court of Appeal stated:

“The Court of Appeal in *Cable and Wireless v Michel* (SLR 1966 253) referring to Planiol and Ripert make the case that where a right has been violated, compensation can be awarded for moral damages even in the absence of a claim for material damages. These rights can be patrimonial or extra patrimonial as in this case. We agree that it is difficult to assess moral damages but the exercise must still be carried out and the plaintiff is entitled to them. There has however never been a method established in Seychelles to assess moral damages. No method of assessment is set out either in the Constitution or in the Civil Procedure Code.”

[27] I am left with the same dilemma of assessing moral damages without any statutory yardstick. A survey of recent cases (*Low Toy v Manikon and anor* CS 03/2014, *Fanchette v Dream*

Yacht Charter (Seychelles) Ltd CS 158/2008, Nourrice v Delorie C.S. 209/2011 and Estico v Fanchette and ors C.S. 36/2012), all cases decided in 2014 and 2015 show a wide divergence in moral damages awarded. It appears that each case is judged on its own merits. In the absence of any guidance or evidence from the Plaintiff, the award this Court makes in the present case can only be arbitrary.

[28] In terms of moral damages for pain and suffering I award SR30,000, for humiliation, distress and mental anguish, SR 20,000; for inconvenience, embarrassment and anxiety, SR15,000 and for loss of liberty for 24 hours SR30,000. The total sum awarded is SR95,000 jointly and severally against the first two defendants.

[29] Costs are also granted to the Plaintiff.

Signed, dated and delivered at Ile du Port on 15th January 2016.

M. TWOMEY
Chief Justice