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Editor

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JUDGES OF THE SUPREME COURT

CHIEF JUSTICE

Hon V Alleear

OTHER JUDGES

Hon AR Perera
Hon D Karunakaran
Hon N Juddoo

CITATION

These reports are cited thus:
(2000) SLR

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LIST OF CASES

DIGEST OF CASES

(2000) SLR

Republic v Bamboche

Sentencing – revision of sentence

In a review of a sentence imposed on the respondent by the Magistrates' Court, the factors relevant to sentencing were considered.

HELD:

(i) Motive for offending may be taken into account in sentencing; and

(ii) An appellate court should not interfere with the sentence passed by a subordinate court, except where:

(a) the sentence is not justified by law, in which case the court will interfere not as a matter of discretion but of law

(b) the sentence has been passed on a wrong factual basis

(c) a matter has been improperly taken into account or there is a new matter to be taken into account

(d) the sentence was wrong in principle, or manifestly excessive.

Judgment: Sentence reduced.

Legislation Cited

Criminal Procedure Code, ss 328, 329
Penal Code, ss 27A, 260, 289
Practice Direction 1 of 1971 (1970-1971) SLR 1

Foreign cases noted
R v Law Current Sentencing Practice Vol - 1 - Section (3-2 B01)
R v Lawrence (1988) 10 Cr App R 463
R v Oaks Current Sentencing Practice Vol - 1 - Section (3-2 C01)

Wilby Lucas for the Republic
Franky Simeon for the respondent

Judgment delivered on 13 June 2000 by:

PERERA J: This is an application for a revision of sentence filed by the Attorney General in terms of section 328 of the Criminal Procedure Code (Cap 54).

Particulars of offence are as follows:
The respondent was charged before the Magistrates' Court with the offence of housebreaking, contrary to section 289 (a) of the Penal Code and stealing, contrary to section 260 of the Penal Code. According to the particulars of the offence, the items stolen from the dwelling house were one video cassette player and three "red snapper" fish, together valued at R3100.

After the learned Magistrate had explained the right of legal representation to the accused, he elected to defend himself and also pleaded guilty to the charges. In sentencing the respondent, the learned Magistrate made the following order:

> I have considered the fact that the accused is a first offender, he has pleaded guilty at the first instance, and the facts contemplated in his plea of mitigation. <u>At present the law prescribes a minimum mandatory sentence of 5 years for count 1</u>.
>
> I therefore sentence him as follows:
>
> Count 1:5 years imprisonment

Count 2: 2 years imprisonment
Both to run concurrently.

The part of the order sought to be revised is the finding of the learned Magistrate that the present law prescribes a minimum mandatory sentence of 5 years for the offence of housebreaking.

The present law as regards sentencing for the offence of housebreaking and burglary under section 289 of the Penal Code is contained in the Penal Code (Amendment) Act 1995, (S.I. 16 of 1995). By section 27A(I)(a) and(e), the previous term of 7 years imprisonment was increased to 10 years. By Section 27A(I)(b), it is provided that where an offence is punishable with imprisonment for more than 8 years, but not more than 10 years, and the person has, within 5 years prior to the date of conviction, been convicted of the same or similar offence, be sentenced for a period of not less than 5 years. Hence the mandatory term of 5 years applies to a second or subsequent offender and not to a first offender, such as the convict in this case.

Therefore, the learned Magistrate had the discretion to impose any custodial sentence up to 10 years by virtue of the amendment in section 27A(I)(a) (e) aforesaid, or to a non-custodial sentence involving a fine or a suspended sentence.

In terms of section 329(I)(b) and (c) of the Criminal Procedure Code, this court, in exercising powers of revision, is empowered to make any order which it could have made in exercising its appellate jurisdiction. In any event, the convict has filed an appeal against the sentence (appeal 4 of 2000), which was taken up together with the revision application filed by the Attorney General. It was agreed by Counsel that the decision in the revision application would dispose of the grounds relied on in the appeal as well.

The prosecutor who appeared before the Magistrates' Court had not stated the facts and circumstances of the offence to the learned Magistrate as is usually done when an accused

pleads guilty. The Practice Direction No. 1 of 1971 dated 20 August 1971 (1970-1971 SLR 1) is as follows:

> To enable:
> (a) the Magistrates' Court to decide upon the proper sentence to be passed, and
>
> (b) the Supreme Court on appeal or revision to decide upon the propriety of a sentence passed by the Magistrates' Court, the following directions are issued by the Chief Justice for the guidance of Magistrates when dealing with a case where the accused person pleads guilty to the charge against him.
>
> 1. Before convicting the accused person as required by section 81(2) of the Criminal Procedure Code, the Magistrate shall invite the prosecution to state the facts and circumstances to the offence, the substance of which shall be noted down briefly on the record, and the accused person shall then be asked whether he admits all or any of them. The substance of what the accused person states in reply shall also be noted down briefly. (This procedure will enable the Magistrate to satisfy himself as to whether the accused person understands the charge laid against him, to which he pleads guilty, and at the same time to ascertain the facts and circumstances which he admits.

However, in the present case, only the following had been recorded as “facts”.

> Magistrate: As per charge. The video cassette

> player was recovered. 1 red snapper was recovered.
>
> Accused: I admit the facts.
>
> Magistrate: On the accused's plea of guilty and admission of facts, I proceed to find the accused guilty on both counts and proceed to convict him on both counts.

As this court in exercising the reversionary powers or appellate powers could not decide on the propriety of the sentence passed, counsel for the respondent was called upon to state the facts admitted and any mitigating factors which the respondent, who was inops concilii before the Magistrates' Court, had failed to submit to that court. The following facts were disclosed by counsel for the respondent with the Counsel for the Republic agreeing.

The convict had worked for Frank Savy, the virtual complainant, on a casual basis. The convict claimed R2000 as his wages but Savy had failed to pay. Consequently there was a dispute regarding the wages. The convict has a wife and children to support. His wife is presently expecting another child. Hence failing to get his wages, he entered the house of Savy by force opening the back door. He removed three "snapper" fish from the refrigerator, and also took the V.C.R from the sitting room. The house was unoccupied at that time. Mr Simeon submitted that although the offence of housebreaking and theft have been committed, those offences had been committed due to anger and the financial necessity to maintain his family.

Thomas on *Principles of Sentencing* (2nd Edition) states at page 207:

> Offences, usually of dishonesty, are frequently attributed to the fact that the offender found himself in a financial crisis to which misappropriation appeared to be the only

> solution. Where the offender's financial embarrassment is the result primarily of events beyond his control rather than extravagance or gambling, these circumstances may have some mitigating effect.

The respondent, in mitigation before the Magistrates' Court stated “I am guilty, I should not have done this”,... "I ask the court to forgive me”. When the present revision application was taken up for hearing, the convict, who was then not legally represented told this court “I did what I did out of anger because I worked for a whole month and I was not paid”.

However, criminal law does not take into account the motive of an offender, but his intention. Hence a good motive will not excuse an otherwise unlawful act. A person who steals a loaf of bread to feed his hungry children is still a thief as his mens rea was to steal, although his motive was good. However, a sentencer would be more lenient to him than to a thief in other circumstances. So also in the present case, the items selected by the convict indicate that his motive was to compensate himself for the wages he had earned, in kind, as the cash was not forthcoming from his employer. There were other legal ways of recovering his wages, and the convict himself had told the Magistrate in mitigation “I should not have done this”. But repentance comes too late.

Under section 329(l)(b) and (c) of the Criminal Procedure Code, this court in exercising the powers or revision, is empowered to make any order which it could make in exercising its appellate jurisdiction. An appellate court does not interfere with the sentence passed by a subordinate court, except in the following circumstances:

(1) Where the sentence is not justified by law, in which case the court will interfere not as a matter of discretion, but of law.
(2) Where the sentence has been passed on wrong factual basis.

(3) Where some matter has been improperly taken into account or there is some fresh matter to be taken into account.

(4) Where the sentence was wrong in principle, or manifestly excessive.

In the present case, it is manifest that the learned Magistrate imposed a sentence of 5 years imprisonment considering himself bound to impose a mandatory sentence. That sentence was therefore wrong in principle, and not justified in law.

There are several mitigating factors to be considered in this case:

1. The accused was a first offender.

2. He was entitled to the benefit of a Social Inquiry Report before sentencing. That was not done.

3. He pleaded guilty at the first instance and saved the time of the court.

4. The items stolen have been voluntarily returned by the convict. Hence he did not benefit from the crime.

5. His family circumstances.

6. The chances of his repeating this offence is minimal.

What then is the suitable punishment in this case?

In the case of *R v Law* (Current Sentencing Practice - Vol 1 - Section (3-2 B01), a sentence of 3 years imprisonment for arson was reduced to 18 months' imprisonment on the ground that the offence was the result of emotional stress. In that case, the accused had set fire to the semi-detached cottage

where he lived on the day he discovered that his wife intended to leave him for another man, taking their children with her. In the case of *R v Oakes* (Current Sentencing Practice - Vol 1 Section (3-2 C01) - a sentence of 2 years' imprisonment was reduced to 15 months' imprisonment and suspended on the ground that the offence was committed as a result of serious financial difficulty, for which the accused was not wholly responsible. On the other hand, the fact that the offence was committed to provide money to support an addiction to drugs was not considered a mitigating factor in the case of *R v Lawrence* (1988) 10 Cr App R (S) 463. In that case, the accused committed several burglaries and stole cash amounting to £6000. He was a heroin addict and all the offences were committed with the purpose of financing his addiction, at a cost of about £90 per day. Simon Brown J stated thus:

> It is no mitigation whatever that a crime is committed to feed an addiction, whether that addiction be drugs, drink, gambling, sex, fast cars or anything else.

In the present case the motive was different, and more rational. Hence to a sentencer who has the discretion to impose a lenient sentence on a first offender, this is a classic case. The respondent has already served four months of his term of imprisonment. On a consideration of all the circumstances, acting in terms of section 329(l)(c) of the Criminal Procedure Code, I alter the sentence of 5 years' imprisonment imposed on count 1 to 8 months' imprisonment, and the term of 2 years' imprisonment imposed on count 2 to 6 months' imprisonment. Both terms to run concurrently.

This judgment would effectively dispose of the appeal in case no. CA. 4 of 2000.

Record: Revision Side 1 of 2000

Republic v Mothe

Penal Code - manslaughter – unlawful act

The accused was charged with manslaughter of a person he had slapped on the face. The person assaulted fell back, hit his head and died.

HELD:

(i) A person engaged in performing an unlawful act, which a sober and reasonable person would recognise as exposing another person to, at least, the risk of some harm as a consequence, and that act results in death, is guilty of manslaughter; and

(ii) There is nothing in the Penal Code which requires the unlawful act of the accused to be a direct cause or a substantial cause or a major cause or any other description of cause, of the death. As long as the unlawful act is a cause and something more than de minimis that is sufficient. The proper way is to consider whether the accused's unlawful act is a cause rather than the cause or a substantial cause of death.

Judgment: accused convicted as charged.

Legislation Cited
Penal Code, ss 10, 192, 199

Cases referred to
DPP v Newbury (1976) 62 Cr App R 291
Republic v Emmanuel Bibi Cr S (1999) SLR 1

Foreign cases noted
Republic v Smith [1959] 2 QB 35

Wilby Lucas for the Republic
France Bonte for the defendant

Judgment delivered on 31 March 2000 by:

KARUNAKARAN J: The accused above-named stands charged with the offence of Manslaughter contrary to section 192 of the Penal Code. According to the charge the accused on 28 December 1998 at Belonie, Mahe caused an unlawful act on Wilfred Cedras alias Sir Wills that resulted in the death of the said Wilfred Cedras. The accused denied the charge. The case proceeded for trial. He was legally represented by an able and eloquent defence counsel Mr Bonte throughout the trial.

The facts of the case as transpired from the evidence are as follows:

At all material times the deceased, Wilfred Cedras, aged 64 years, a retired schoolteacher, was residing at Belonie, Mahe. He had no family. He was living alone. His sister Yvette Micock-PW7- was also a resident of Belonie. But she was living in another house situated close to that of the deceased's. The accused in this matter, namely Mr. Georges Mothe, is a young man. He is also a resident of Belonie. At one time, the deceased was in fact, the teacher of the accused during his schooldays.

It is not in dispute that on the day in question, around 5.30 p. m the accused was returning home after work in town. On his way he saw the deceased in the public road at Belonie opposite to the shop of one Raju Pillay-PW8. The deceased was coming down walking along the road with a bottle of Guinness in his hand. One Mr. Dave Marimba-PW4-who was passing by met the deceased on the road and told him to be careful, as the police might catch him presumably as he was consuming alcohol on the public road. The deceased got angry and started to swear at Mr. Marimba using filthy language. However, Mr. Marimba did not react as he had

already known the deceased and his habit of swearing whilst under the influence of alcohol. The accused who was at that time approaching the deceased witnessed this episode. He went near the deceased and told him not to swear at anyone on the public road. The deceased who was a bit drunk according to PW4, turned against the accused and started to swear at him. The deceased insulted the accused by saying the following words in Creole:

> You don't have to say anything, you cunt of your mother. Your mother involved in witchcraft

Thus, the deceased continued to use filthy language, this time against the accused. Hearing those words, the accused got angry. He hit the deceased. According to the eye witness Mr Marimba-PW4-the accused slapped the face of the deceased. The deceased consequently fell backwards hitting the back of his head on the surface of the road. The bottle of Guinness from his hand also fell down. The accused picked up that bottle and left the scene. One Mrs. Sonia Larame-PW5-a neighbour-come-friend of the deceased witnessed this incident from a distance. She also noticed the fall of the deceased as a result of the assault by the accused at the material time. The deceased did not get up. He was still lying flat with his face up in the middle of the road blocking the vehicular traffic. That time a pickup was coming on the road. It could not pass through that spot. The driver had to stop his pick up. He got out. With the assistance of his handyman he lifted the deceased from the road, carried and placed him off the road near the steps close to the entrance of a shop belonging to Raju Pillay-PW8. The deceased was lying there in a sleeping position. In the late evening Mr Pillay was about to close his shop. Therefore, he requested one Mr Simon Pierre-PW9- a resident of Belonie to pick up the deceased from that place and take him to his house. Mr. Pierre with the help of another person, namely one Donald, carried the deceased to his house. They opened the door, placed him leaning against a wall inside the house, and then left. There was no one in the house at that time. The deceased was lying alone. At around 6.45 p.m a friend of the deceased,

namely Mr Chrisant Morel-PW6, came to know about the incident through Mr Pillay. He rushed to the house of the deceased. Inside the house, he saw the deceased leaning against the wall. He called him. The deceased did not respond. He appeared to be unconscious. Mr. Morel tried to lift him but he could not. He then went to the house of the deceased's sister namely Yvette Micoke-PW7, and informed her of the state of the deceased. She immediately proceeded to the house of the deceased. She testified in this respect as follows:

> It was around 7 p.m. I visited my brother. He could not even speak. I was not able to do anything with him. I spoke to him but he did not answer...The same day and the next day too, I took him to the Clinic at English River. The Doctor said that he had high blood pressure. As he was not speaking he did not complain of any pain or discomfort. Then I bought him back home in the same condition. Two or three times he visited the clinic.

The neighbour-come-friend of the deceased, Mrs. Sonia Larame-PW5, who was indeed, an eye- witness of the above incident used to visit the deceased almost every day at his house. She went to see him on the 29th, 30th, and 31st, of December as well as on the 1st, 2nd, and 3rd, of January 1999. She felt that the knock the deceased received at the back of his head in the incident should have affected his head. Therefore, even on the first day when she saw the deceased in a sleeping state at home, she advised him to go to the doctor. However, she noticed the condition of the deceased gradually worsened. On 4 January 1999, she noticed the deceased was seriously ill. She advised the sister of the deceased to take him to the hospital immediately. The same day the deceased was taken to the emergency/casualty ward at the Central Hospital in Victoria. The duty doctor, Dr Omoloyo-PW2,-examined the deceased. He testified of his observations as follows:

> The patient (deceased) was seriously sick. He was comatose, and was breathing very rapidly. He had fever. His blood pressure was low. His pupils were dilated and were not reacting to light. The condition of the patient was so bad that we could not move him from the casualty to the ward. We had to call the specialist from the ward to come and see him in the casualty unit.

He further testified that the patient possibly had a very severe infection or the patient could have had any injury from which an infection might have developed. It was possible that cerebral, Sudbury hemorrhage, could have caused those conditions. The same day the patient died in the hospital.

The following day, a pathologist, Dr Radha-PW1,-conducted a post-mortem examination on the body of the deceased. Based on the internal examination into the cranial cavity of the deceased, Dr Radha testified that the patient died of cerebral, subdural and subrachnoid haemorrhage due to basal skull fracture in the region of occipital bone. She further stated that any trauma or injury could cause such fracture. She also produced in evidence-ExhPl-the notes of her post-mortem examination in this case.

Following the death of the deceased the police started an investigation. They arrested the accused and interviewed him on the alleged incident. The accused elected to give a free and voluntary statement to the police under caution. In his statement to the police-ExP4-the accused admitted all the material facts as testified by the witnesses above save the fact that he slapped or gave a punch on the face of the deceased at the material time. In fact, the accused in Exh P4 stated as follows:

> I asked him why he is swearing at me like this. Sir Wills could not understand anything but still swearing at me. I approached him and pushed

him with my left hand in a gesture to shut his mouth. He then lost balance and fell down on the concrete public road.

In view of all the above, now the prosecution contends that the accused has committed the offence first above-mentioned. After the close of the case for the prosecution, the defense counsel submitted on no case to answer. However, the court ruled otherwise. The accused gave his unsworn statement from the dock. He stated that he was not the one who caused the death of the deceased because he met the deceased later. He met, sat and talked. According to him the deceased told him that he was all right and there was no problem. The accused moreover, called a witness-DWI-in support of his defense. This witness in essence testified that on 29 December 1998, the next day after the alleged incident, he saw the accused and the deceased on the public road. They were according to him, talking to each other about the incident that happened the previous day. In the circumstances, the accused claims innocence. The defense counsel further contends that the cause of death was due to the failure or negligence of the doctor at the English River Clinic. According to counsel, the doctor therein did not make proper diagnosis of the disease or injury in time when the patient first went to see him. Had he detected the head injury in time, it could have saved the life of the deceased. Moreover, the counsel submits that the deceased might have received the head injury/skull fracture subsequent to the alleged incident as he was staying alone for about four days at his home until he was taken to casualty. In any event the defense submits that the Defendant had no mental element- the mens rea- when he pushed the deceased causing his fall. Hence, he invoked the doctrine of the Latin maxim "actus non facit reum nisi mens sit rea". Finally, the defense contends that on the whole of the case, the guilt against the accused is not proved beyond reasonable doubt.

Therefore, the defense counsel prays this court to dismiss the case and so seeks the acquittal of his client.

I diligently perused the entire evidence adduced by the parties in this matter. I carefully analyzed the submissions made by the counsels in the light of the relevant laws and the authorities cited by them. Firstly, on the question of credibility I believe all the prosecution witnesses to be truthful and reliable in all material aspects of their evidence. I find no reason to disbelieve any of them. Their evidence is cogent, corroborative, reliable and consistent in all necessary details.

In the aspect of law, the prosecution on a charge under section 192 of the Penal Code must prove an unlawful act or omission by the accused and which caused the death of the victim. Section 192 reads as follows:

> Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

Unlawful Act

In fact, the law applicable to cases of this nature is set out in *D.P.P v Newbury* (1976) Vol. 62 Cr. Appeal Reports p291. If a person is engaged in performing an unlawful act which all sober and reasonable people would inevitably recognize,
a would subject another person to, at least, the risk of some harm resulting therefrom and that act results in his death the person doing the act is guilty of manslaughter.

e In the present case, the prosecution set out to prove that the unlawful act was an assault by the accused. That is a slap which caused the deceased to lose balance on his feet or made him so and that as a result he fell backwards on the
i hard surface of the road. Indeed, there is no dispute on the fact that the accused pushed the deceased who lost balance and fell down. However, the defense attempts to establish that the accused did not slap or punch but only pushed and

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that would not constitute an act of assault, as there was no mens rea. As I see it, whatever be the name of the physical act, which caused the fall whether it was a slap or a punch or even a push as the defense calls it, the fact remains that mere change of terminology does not make any difference in the effect, in the eye of law. It only reminds me of William Shakespeare's saying in Romeo and Juliette Act II Scene ii. *"What is in a name? That which we call a rose by any other name would smell as sweet." But* to mutilate Shakespeare a little in this respect, an 'act of assault' by any other name would be just as effective. One may call an 'act of assault' by a name of one's own choice but as long as that act involves the application of force and yields its effect the name does not make any difference. In my view, the act of assault committed by the accused against the deceased in this matter constitutes and completes the element of 'unlawful act' required to be proved by the prosecution under section 192 of the Penal Code

Causing Death

Section 199 of the Penal Code provides that:

> A Person is deemed to have caused the death of another person although his act is not immediate or not the sole cause of the death in any of the following cases:
>
> (a) If he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case, it is immaterial whether the treatment was proper or mistaken if it was employed in good faith and with common knowledge and skill...
>
> (b) If he inflicts bodily injury on another which would not have caused death if the injured person has submitted to proper surgical or

medical treatment or had observed proper precaution as to his mode of living.

(c) ...

(d) If by any act or omission he hastened the death of a person suffering under any decease or injury which apart from such act or omission would have caused death.

(e) If his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.

Upon a careful perusal of the above provision of law, it is obvious that nothing in the Code requires the unlawful act of the accused to be a direct cause or a substantial cause or a major cause or any other description of cause, of the death. As long as the unlawful act is a cause and something more than de minimis that is sufficient and the above provision of law operates. The proper way to direct our mind is to consider whether the accused's unlawful act is a cause and it no longer has to be the cause or a substantial cause of death. The case of *R v Smith* (1959) 2 Q. B 35 as cited by His Lordship Perera, J in his ruling in *Republic v Emmanuel Bibi* (unreported) Cr. Side No 38 of 1999 is relevant to the point. All this Court has to find is whether the accused in the alleged incident committed an unlawful act which caused the death of the deceased. In this respect on evidence, I find the accused did commit an unlawful act, which was in fact, an operating cause of the death of the deceased.

Further, on evidence I find that the accused did assault the deceased at the material time and place causing him to lose his balance. The deceased consequently fell down backwards. Obviously, the skull fracture on the back of his head could have been caused only by this fall. As a result I find the deceased sustained cerebral, subdural and subrachnoid haemorrhage that resulted in his death. This is

the only logical inference any reasonable tribunal could draw from the entire circumstances of the case. In the absence of any other evidence to the contrary it is highly farfetched and unreasonable to infer otherwise. The hypothesis put up by the accused's counsel suggesting the other possible causes for the skull fracture over the duration of four days between the fall and the death of the deceased is simply based on guesswork. This hypothesis cannot by any means be supported.

Medical Negligence or Omission

Be that as it may, the defense contends that if the doctor who first saw the patient immediately after the injury had made proper diagnosis, then it could have saved the life of the deceased, as all modern medical facilities including the scanner are available at the hospital to treat such head injuries. Even for the sake of argument, if one assumes this proposition as to the doctor's negligence or omission to be true, I still find the offence is made out by virtue of the statutory definition of causing death provided under section 199(e) of the Penal Code. In fact, the accused is deemed to have caused death although his act would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons. To my understanding, I believe the term 'other persons' which appears in the said section should by necessary implication, include medical practitioners as well. Therefore, the defense argument in this line does not appeal to me in the least.

Intention to cause death

The intention to cause death is not an ingredient necessary to constitute the offence of manslaughter. The mere culpable negligence or omission or mere unlawful act is sufficient to constitute and complete the offence against the accused under section 199 of the Penal Code provided that act or omission causes the death of another person and so I find. Indeed, the intention to cause death is not expressly declared to be an element necessary to constitute the offence of manslaughter under this particular section. The accused claims that by his act of pushing the deceased at the material

time, the result he intended was only to stop the deceased from swearing at him. Even if one accepts that was the real intention of the accused, still such result intended is immaterial for consideration as far as the offence of manslaughter is concerned. This is clear from section 10 of the Penal Code which provides as follows:

> Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or in part, by an act or omission, the result intended to be caused by an act or omission is immaterial

Therefore, I find that the result intended by the accused in committing the unlawful act namely assault against the deceased at the material time is neither relevant nor does it constitute any defence in law to the charge.

In the final analysis of evidence, I am satisfied that the prosecution has proved beyond reasonable doubt all the elements necessary to constitute and complete the offence of manslaughter against the accused. Therefore, I find the accused guilty of the offence of manslaughter contrary to section 192 of the Penal Code and so convict him of the offence accordingly.

Record: Criminal Side No 7 of 1999

Intour S.R.L. v Emerald Cove

Private international law – proof of foreign law – arbitration clause – stay of proceedings

In a dispute about the occupation of premises, the respondent pleaded a contractual clause which referred disputes to arbitration in Italy under Italian law. The applicant claimed that the contract had been rescinded and that the arbitration clause no longer existed.

HELD:

(i) Generally, the rescission of a contract must be obtained through proceedings in which the court is empowered to intervene and determine whether the contract is to be rescinded or whether it may be confirmed subject to the payment of damages to the extent of the partial failure of performance;

(ii) Generally, the operation of a condition resolutoire rescinds the existing obligations between the parties under the agreement and restores the things to the same state as they would have been if the obligation had never existed;

(iii) The arbitration clause in the present application is one by which the parties bound themselves, at a time when no actual difference had arisen between them, to submit to arbitration disputes that might arise out of the agreement. This is more commonly known as a clause compromissoire and is usually contrasted with what is termed a compromis which arises where the parties agree to refer to arbitration a dispute which has arisen;

(iv) A foreign law is a matter of fact; and

(v) A party who applies for an order of stay of proceedings must, as a matter of procedure, file an affidavit to satisfy the court that both now and before the proceedings commenced, that party is and has always been ready and willing to do all things for the proper conduct of the arbitration.

Judgment: Plea in limine litis dismissed.

Legislation Cited
Civil Code of Seychelles, arts 1183, 1184
Commercial Code of Seychelles, s 110

Cases referred to
Biestma v Dingjan (1974) SLR 292
Pillay v Pillay (1973) SLR 217

Pesi Pardiwalla for the applicant
Nichol Tirant for the respondent

Ruling delivered on 10 February 2000 by:

JUDDOO J: The applicant, Intour S.R.L has moved this court for the issue of a writ habere facias possessionem against the respondent to leave and vacate the premises of Emerald Cove Hotel at Anse La Farine, Praslin.

The respondent has raised a plea in limine litis as follows:

1. The Supreme Court of Seychelles does not have jurisdiction to hear this application on the grounds that such jurisdiction of the court is deliberately ousted by a bilateral agreement between the parties contained in clause 5 of the agreement entitled "ARBITRATION", which clause specifically states that "all disputes or differences whatsoever ...

shall be referred to an arbitral tribunal" to be held in BERGAMO, ITALY and that the agreement shall be governed by Italian Civil Law.

2. The Supreme Court has no jurisdiction to evict the respondent who is legally in occupation of the premises and is considered as a tenant under the Control of Rent and Tenancy Agreements Act and eviction can only be ordered by the Rent Board.

In a prior ruling, delivered on 14 October 1999 it was held that the second ground of objection would have to be determined at the merits stage of the instant application. I shall therefore determine the remaining first ground of objection which relates to the arbitration clause. The arbitration clause in the agreement reads as follows:

> 5. ARBITRATION
> (i) All disputes or differences whatsoever which shall at any time hereafter whether during the continuance in effect of this Agreement or upon or after its discharge or determination arise between the parties hereto touching or concerning this Agreement or its construction or effect as to the rights, duties and liabilities of the parties hereto or either of them under or by virtue of this Agreement or otherwise or as to any other matter in any way connected with or arising out of or in relation to the subject matter of this Agreement shall be referred to an arbitral tribunal composed of 3 members. Arbitration shall be held in Bergamo, Italy and shall be, governed by Italian Civil Law.
>
> (ii) Each party shall appoint one member and the third member (the Chairman) shall be appointed by the two members. In case of disagreement

the Chairman shall be appointed by The President of the Court of Bergamo, Italy.

In reply to this ground of the plea in. limine litis, counsel for the applicant, Mr. Pardiwalla, has submitted that:

1) By virtue of the operation of clause 6 of the agreement, the contract has been rescinded between the parties and, there is no valid, arbitration clause, which can be relied upon,

2) Alternatively, the arbitration clause is a clause compromissoire which in the absence of proof as to its validity under the foreign law is invalid under the law of Seychelles and does not oust the jurisdiction of this court.

3) The respondent has to apply for a stay of the instant proceedings and submit itself to the foreign jurisdiction to be able to rely on the arbitration clause

Clause 6 of the agreement, referred above, reads as follows:

6. MANAGEMENT FEES

The fees to be paid by the Operator to the Lessee shall be:

(a) For the first year 15% of the income of the hotel.

(b) From the second to the sixth year the sum of Italian Liras 650 million.

(c) For the seventh year the sum of Italian Liras 700 million.

(d) For the eighth year the sum Italian Liras 730 million,

(e) For the ninth year the sum of Italian Liras 770 million.

The above amounts shall be paid by equal three monthly installments, by the tenth of the month (expiry date).

Should the three monthly installments be delayed, interest at 1% per month shall start to run after 20 days from expiry date.

Should the three monthly installments be delayed by more than 60 days from the expiry date, the Lessee shall be entitled to treat this Agreement as rescinded by operation of law.

It is agreed between the parties that the document which regulates their contractual relationship is the one made on 18 April 1996, a copy of which has been attached to the application and labeled as Exhibit 1. The applicant, Intour S.R.L., is represented by its director Paulo Chionni of Anse La Farine, Praslin. It is not disclosed in the application or the agreement (Exhibit 1), whether the applicant company is a local or foreign company. However, Exhibits 2 and 6, attached to the application, disclose that the address of the applicant company is "Via Frizonni n.24, 24121 BERGAMO". There is also no indication in the agreement or affidavit filed whether the respondent company, Emerald Cove Ltd, is a foreign or local company. The agreement between the parties is for the management of a hotel situated on the island of Praslin, Seychelles. The payments to be made by the respondent to the applicant under the terms of the contract are in foreign currency (Italian Liras) and there is evidence to show that one such payment was made to a bank account in the United Kingdom (Exhibit 7 attached to the application). More importantly, the parties have contracted, by virtue of clause 5 of the agreement (the Arbitration Clause) that, "all

disputes or differences whatsoever...shall be referred to an arbitral tribunal composed of three members. Arbitration shall be held in Bergamo, Italy and shall be governed by Italian Civil Law."

In Dalloz *Encyclopedie Droit International*, Tome 1, 1968, Verbo Arbitrage, the author commented that:

> Le caractère étranger ou international d'un arbitrage pourrait théoriquement résulter:-
>
> 1° de la nationalité des arbitres;
> 2° de la nationalité ou du domicile des parties:
> 3° du lieu de l' arbitrage;
> 4° de la loi applicable d la procédure d'arbitrage…..

Accordingly, the above foreign elements, comprised in the contract, give rise to a conflict of jurisdiction which is to be determined by reference to principles of private international law.

In *Pillay v Pillay* (1973) SLR 307 on appeal from the Supreme Court of Seychelles, the Court of Civil Appeal in Mauritius laid down the guidelines which are to be followed when an agreement between two parties gives rise to a conflict of jurisdiction. In that case the parties were both citizens of India and they had bound themselves by an arbitration clause to submit any dispute to foreign authorities and to the laws and Court of India. The court (Garrioch and Ramphul JJ) observed that:

> ...The jurisdiction of the Supreme Court of Seychelles when adjudicating upon civil rights and obligations is not dissimilar from that of the Supreme Court of Mauritius. Just as the Seychelles Court, this Court is vested, with the powers, privileges, authority and jurisdiction of the High Court of Justice in England...But it does not follow that when confronted with a conflict of

> laws this Court should and will necessarily turn to its English counterpart for guidance. The standpoint of this Court was thus defined in Austin v Bailey (1962) MR 113 at pages 115, 116-
>
> Since the rules of private international law in any country must necessarily have their foundation in the internal law of that country, those which are applicable must be based substantially on the provisions of our laws regarding civil rights and obligations. These laws are basically and almost entirely French, so that, subject to any exceptions which may arise through certain different statutory" 'enactments and treaty obligation,, we must be guided by the French rules of private international law (See Valery, Manuel de Droit International Prive. p. 6 para, 3; Graveson, The. Conflict of Laws, 4th Ed., pp. 30-32: *D'Arifat & ors. v Lesueur*, 1949 MR; de *Chazal v de Chazal*, 1961 MR 5

The guidelines laid down in *Pillay v Pillay* were delivered before the coming into force of the Commercial Code of Seychelles Act, 1976, which brought about, under Title IX, legislation pertaining to arbitration. However, the basic law pertaining to contractual relationships remain governed by the principles enacted under the Civil Code as recognized under article 8 of Ordinance 5 of 1976 (which provided for the application of the Commercial Code of Seychelles) and which reads:

> ... any inconsistency between the Commercial Code of Seychelles and the Civil Code of Seychelles shall not operate to invalidate the latter which shall continue to apply to all maters dealt with thereunder.

At this stage, it is necessary to examine the argument by counsel for the applicant that by virtue of the operation of

clause 6 of the agreement the contract has been rescinded and there is no valid arbitration clause which can be relied on by the parties.

The law governing the rescission of a contract is found in article 1184 of the Civil Code of Seychelles (Cap 32). The general rule is that rescission must be obtained through proceedings whereby the court is empowered to intervene arid decide whether the contract shall be rescinded or whether it may be confirmed subject to the payment of damages to the extent of the partial failure of performance. The exception to this general rule is provided for under the last sentence of the first paragraph to article 1184 which reads as follows:

> Rescission shall only be effected by operation of law if the parties have inserted a term in the contract providing for recession. It shall operate only in favour of the party willing to perform.

The above two types of rescission within article 1184 are commonly known as "Resolution Judiciaire" and "Resolution de plein droit" respectively.

In Encyclopedic Dalloz, *Repertoire de Droit Civil*. Tome III. 1976, Chapter 'Contrats et Conventions' the author comments that:

> Note 238 - L'article 1134 ... du Code Civil, a prévu la nécessité d'une décision de justice pour prononcer la résolution, c'est la résolution Judiciaire; mais les parties peuvent vouloir éviter les inconvénients d'une procédure; de la ires souvent des clauses conventionnelles prévoyant la résolution de plein droit...
>
> note 257 - Très souvent les parties insèrent dans leur accord une clause résolutoire expresse selon laquelle l' inexécution d'une des parties

> entrainera par elle-même la destruction du contrat.

In *Jurisclasseur Civil*, 1979, Verbo 'Contrat et Obligation - article 1184 notes B 19 & 20 the author comments that:-

> Des Lors que le créancier de l' obligation inexécutée, entend se prévaloir de la résolution de plein droit, il n'a pas besoin d'intenter une action en résolution. Si le tribunal est parfois amené a intervenir son rôle se borne a constater une résolution qui s'est effectue en dehors de lui et a laquelle il ne pourrait faire obstacle ...
>
> Le Juge n'a aucun pouvoir pour empêcher ou retarder la rupture du contrat quand se trouvent réunis les conditions prévus par une clause résolutoire licite dont les lerm.es son clairs et précis; si rigoureux qu'en soit les effets pour le débiteur, il ne peut donc se refuser a déclarer le contrat résolu ...
>
> Cette clause ... a normalement pour conséquence de retirer an Juge le pouvoir de prononcer la résolution, la, destruction du contrat résultant de simple fait de l'inexécution; s'il vient a être saisi, le Juge doit seulement constater que, la résolution a eu lieu sans pouvoir accorder aucun délai, ni, faire revivre un contrat déjà résolu en dehors de lui.

Counsel for the applicant submitted that the fact that the contract was rescinded by operation of law under clause 6 of the agreement brings about a situation where there is no valid contract between the parties and, as a result, the respondent cannot rely on the arbitration clause. As a general rule, the operation of a "condition resolutoire" rescinds the existing obligations between the parties under the agreement and restore the things in the same state as they would have been if the obligation had never existed. This general rule is

confirmed under article 1183 of the Seychelles Civil Code which reads:

> A condition subsequent is the condition which when fulfilled, rescinds the obligation and restores the things in the same state as they would have been if the obligation had never existed.

However, this general rule is subject to some important exceptions which are relevant to the instant determination.

In *Jurisclasseur Civil III*, Art. *1156 à* 1264, 1979, Fasc *49*-1, Verbo Contrats et Obligations, under the heading 'Effet*s* De La Resolution Judiciaire" the author comments as follows:

> note 76 - La résolution prononcée par le juge (résolution judiciaire) produit les mêmes effets que l' accomplissement d'une condition résolutoire expresse (résolution de plein droit). La condition décompile a un effet rétroactif au jour ou l' engagement a été contracte (Art. 1179) la condition résolutoire est celle qui, lorsqu'elle s'accomplit, opère la révocation de l'obligation, et qui remet les choses au même état que si {l'obligation n'avait pas existe (Art. 1183)...
>
> note 77 - Le contrat résolu cesse de produire effet dans l' avenir. Si le créancier n'a pas encore exécute sa propre obligation, il ne peut plus y être contraint. ... La résolution judiciaire fait tomber toutes les dispositions du contrat qui n'étaient intervenues que pour son exécution...
>
> note 78 - Mais, par contre, certaines des clauses du contrat qui avaient prévue éventualité de son inexécution conservent leurs effet âpres la résolution. II eu est ainsi lorsque les parties out insère dans le contrat une clause compromissoire: celle-ci reçoit application

> malgré la résolution (Cass. Com. 12 nov. 1968: Bull. Civ. IV. N. 316). De même une clause attributive de compétence permet de soumettre au tribunal choisi par les parties les difficultés entrainées par l'inexécution du contrat (Cass. Civ. II, 11 janv. 1978: Bull. Civ. II, n. 13).
> On ne peut pas soutenir que, le contrat devenant dépouru d'effets par suite de la resolution, la clause attributive de competence ne doit plus receuoir application (Cass. Com. 23 ort, 1978: Bull Civ IV. N. 233). Ces clauses conservent leur ultilité pour liquider les séquelles d'un echec contractuel; tant qu'elles n'y out pas renonce, les parties out le droit de s'y referer pour faire trancher les litiges issus du contrat, meme ceux survenus apres resolution (Cass. Civ. II, 25 nov, 1966: D.S. 1.967, 359, note J. Robert).

Under the local law, section 110(5) of the Commercial Code Act (Cap 38), statutory recognition is expressly given to the above principle in the context of an international contract. It reads as follows:

> If an agreement containing an arbitration clause is judicially declared to be void, the arbitration clause therein shall also be void. However, an arbitration clause is an international agreement shall not be ipso facto void by reason only of the invalidity of such agreement,

Furthermore, the arbitration clause makes express reference to its application to "*disputes or differences whatsoever ... whether during the continuance of this Agreement or upon or after its discharge or determination arise between the parties*..."

Accordingly, it cannot be said that the arbitration clause is ipso facto void in the agreement, produced as exhibit 1, by virtue of the operation of rescission under clause 6 of the said agreement.

Counsel for the applicant has submitted, in the alternative, that the arbitration alause is a 'clause compromissoire' which in the absence of proof as to its validity under foreign law is invalid under the laws of Seychelles and does not oust the jurisdiction of this court. He quoted, in support, the decision of this court in *Biestma v Dingjam (1974) SLR 292.*

The 'arbitration clause' in the present application is one by which the parties bind themselves, at a time when no actual difference has yet arisen between them, to submit to arbitration disputes that may arise out of the agreement. This is commonly known as a 'clause compromissoire' and is usually contrasted with what is termed a 'compromis' which arises where the parties agree to refer to arbitration a dispute which has arisen. In Encyclopedie Dalloz, *Civil*, Tome III. 1989, Verbo 'Compromis - Clause Compromissoire' the author *com*ments:

> **65.** La clause compromissoire est la convention par iaquelle les parties a un contrat s'engagent avant toute contestation, a l'arbitage les differends qui viendraieni a s'elever entre elles a l'occasion de ce contrat. La clause compromissoire s'applique done a un litige eventuel et indetermine tandis que la compromis est relatif a, un litige ne.

Under article 110(1) of Title IX of the Commercial Code Act (Cap 38),it is enacted that:

> Any dispute which <u>has arisen or may arise</u> out of a specific legal relationship, and in respect of which it is permissible to resort to arbitration, may be subject to an arbitration agreement. Subject to articles 2044 to 2058 of the Civil Code relating to compromise…

The above quoted enactment applies to a dispute between the parties which "has arisen or may arise". This includes both

a 'clause compromissoire' and a 'compromis'.

The Supreme Court decision in *Biestma* v *Dingjam* was expressly made in furtherance of the principles laid down in *Pillay v Pillay* (1973) SLR 307. In the latter case, the Court of Civil Appeal laid down the approach to be followed by the trial court when faced with an arbitration clause which claims that a foreign law is the law of the agreement. It states as follows:

> Having regard to the principles set out...it would, have been incumbent... first to ascertain whether, under the law of India (which, it is agreed, is the proper law of the agreement, and consequently, the law by which the validity of the 'Clause Compromissoire' is to be determined) such clause was valid and if he (the Judge) came to the conclusion that it was, to pronounce himself incompetent...

Furthermore, the Court of Civil Appeal added that the validity of the arbitration clause under the foreign law was a fact in issue, proof of which had to be established before the trial court, It stated:

> The law of India, in particular, being a, foreign law is, as such, a matter of fact, the proof of which must be made before the trial court.

In the end result, the case was referred back to the Supreme Court of Seychelles which heard evidence as to the law of India on arbitration - vide: *Pillay v Pillay* (1978) SLR 217. In the present application before this Court, I find that there has been no evidence led as to the validity of the arbitration clause within the agreement signed by the parties (exhibit 1) under the laws of Italy so as to enable this court to pronounce itself incompetent.

Lastly, counsel for the applicant argued that the respondent has to apply for a stay of instant proceedings and submit itself to foreign jurisdiction to be able to rely on the arbitration

clause. On this issue, I will approve of the observation made in *Biestma v Dingjan* where the court stated that:

> ...as a matter of procedure the party who asks the court for an order of stay of proceedings must file an affidavit so as to satisfy the court not only that he is, but also that he was at the commencement of the proceedings ready and willing to do everything for the proper conduct of the arbitration.

In the end result and for reasons set out above, I find that:

(i) the arbitration clause in the international agreement (exhibit 1) is not void by virtue of the rescission of the contract by operation of law;

(ii) there has been no proof of the validity of the arbitration clause under Italian laws so as to declare this court incompetent; and

(iii) the respondent has failed to satisfy this court that it is ready and willing to do everything for the conduct of arbitration in order to stay the proceedings before this forum.

Accordingly, the plea in limine litis is dismissed.

Record: Civil Side No 220 of 1998

Alcindor v Varnier

Tenancy – Purchase agreement – Specific performance

The plaintiff sued the defendant based on a failure to perform an agreement that the plaintiff had with the defendant's representative in Seychelles to purchase the defendant's house. The plaintiff was a statutory tenant of the premises. The defendant denied the agreement and pleaded no case to answer.

HELD:

> In the process of a statutory tenant purchasing premises under the Tenants' Rights Act, the aspect of "agreement of the price" does not arise as in a civil contract envisaged in article 1341 of the Civil Code. The best that either the statutory tenant or the statutory landlord could do is seek a reassessment of the statutory valuation if there was no agreement on the price.

Judgment for the plaintiff.

Legislation Cited
Civil Code of Seychelles, arts 1153, 1341, 1353, 1589
Tenant's Rights Act 1981, ss 11, 13, 23, 31, 32, 33, 34

Charles Lucas for the plaintiff
Philippe Boulle for the defendant

Appeal by the defendant was dismissed on 19 April 2002 in CA 28 of 2000.

Judgment delivered on 13 November 2000 by:

PERERA AC J: This is an action for specific performance of an alleged agreement to sell. The defendant is the owner of titles H.583 and H.714 at Arise Etoile, Mahe. The plaintiff

commenced occupation of the house thereon as a lessee paying a monthly rental of R300. The plaintiff avers that on 11 December 1986, he was registered as a provisional statutory tenant in respect of those premises and that on 29 November 1993 he was registered as the statutory tenant under the Tenants' Rights Act 1981. It is further averred that in November 1993, the defendant who was residing abroad, ″agreed to sell″ the premises, through her representative in Seychelles, Mrs Jeanne Beaudouin, for a consideration of R.80,000. That sum constituted the valuation made in the proceedings for declaration of the statutory tenancy. The plaintiff further avers that he obtained a loan of R80,000 from the Seychelles Housing Development Corporation *(SHDC)* and made an initial deposit of R20,000 for the purchase of the property, and continued to pay 1200 monthly repayments.
The plaintiff further avers that pending the transfer of the property, and on the basis of the defendant's acceptance, he carried out certain improvements, such as rock-blasting, landscaping, construction of a vehicular access, tile laying, sewerage, toilet and house repairs and maintenance. It is further averred that he continued to pay R800 per month as rent for the premises pending the completion of the procedure under the Tenant's Rights Act, and hence prays that such payments from January 1994 be considered as part payment towards the sale price. The plaintiff also claims R25,000 as moral damages.

The defendant, in her statement of defence avers that "nobody was empowered to bind her into any agreement to sell her property," arid that she had "no personal knowledge of the price proposed for the property and did not authorise anyone to accept on her behalf." It is further averred that at all material times the plaintiff considered himself a tenant and that in Rent Board Case no. 72/94 wherein she applied for the fixing of rent, the plaintiff did not aver that he was the owner of the premises or that there was an agreement to sell it to him for R80,000 in those proceedings.
It must here be stated that, at the end of the plaintiffs case, Mr Boulle, counsel for the defendant made a submission of no case to answer. According to the practice of this court, he was

called upon to elect between standing on his submission or calling evidence. He elected to call no evidence if his submission failed.

The main contention was based on the averment in paragraph 3 of the plaint that the defendant "agreed to sell" the property "for the consideration" of R80,000 which represents its value as per the assessment carried out by expert Quantity Surveyor at the instance of the Tenants' Rights Registrar. He submitted that the plaintiff has pleaded a civil contract of sale and hence although in terms of article 1589 of the Civil Code, a sale is complete when the two parties have mutually agreed on the "thing" and the "price" there was no agreement on the "price," and accordingly the plaintiff cannot seek specific performance as pleaded in the plaint.

Mr Lucas counsel for the plaintiff submitted that the "agreement to sell" pleaded, is the "consent" of the defendant to sell the property to the plaintiff, as evidenced by the letters sent by her, and on the basis of the evidence of Mrs Beaudouin, her representative in Seychelles.

By a letter dated 2 November 1982 (PI) the defendant writing from France, informed the plaintiff

> As we talked about you had decided to buy my house, and so I've been waiting for your decision. As it had never come, I'm informing you that my nephew who will be married soon has asked me for the house and he would like to have it in three month's time to be able to start some installation.

Similar letters were sent by the defendant to the plaintiff on July 1983 and 3 May 1994. There is therefore evidence that there was an agreement between parties regarding the sale of the property to the Plaintiff, and that there was also agreement on the "thing". But what of the price? The plaintiff testified that in 1982, the agreed price was R120,000, but he could not obtain a government loan as there was no access

road to the property. Hence he made an application under the Tenants' Rights Act which came into operation in 1982, to purchase the property as a statutory tenant. The defendant raised no objections which could have been raised in terms of section 13(1) of the Act, read with schedule 2 thereof.

The plaintiff testified that the tenancy was negotiated with Mrs Jeanne Beaudouin, the sister of the defendant, who represented her in Seychelles. The monthly rent of R800 was paid on a standing order on his account at the Barclays Bank *(*exhibit P2*).* The Tenants' Rights Act, gave a lessee who had continuously occupied premises for a period of 5 years or more, security of tenure of those premises, and the right to purchase those premises, including the surrounding land. The plaintiff made the application under section 11 of that Act. In terms of the said Act, the application had to be published in a local newspaper. Schedule 3 of the Act provided the grounds on which an owner could object. However no such objection being raised, \he was registered as a "Provisional Statutory Tenant" on 11 December 1986. Subsequently on 29 November 1993, he was registered as the Statutory Tenant, and a certificate in terms of section 23 of the Act was issued to him *(*exhibit PI*).* This is considered as the "final registration," and by virtue of section 23(3) the date of such registration would be the original date of the provisional registration, that is 11 December 1986, in the present case. In terms of section 31 of the Act, the Statutory Tenant had to apply to the Registrar of Tenants' Rights within 5 years of the date of registration stating that he wished to purchase the premises from the statutory landlord, and that he and the statutory landlord had agreed on the purchase price. But where the Registrar is of opinion that the purchase price agreed is not fair and reasonable or that such price is not acceptable to the SHDC for a tenant's mortgage, the SHDC would appoint a valuer to assess the *"*statutory value" In the present case however, a valuation was done and assessed at R80,000 and the Ministry of Community Development approved a loan of R80,000 for the plaintiff to purchase the house and land Parcel H. 583 (exhibit PI), on 15 December 1993. The plaintiff thereupon paid the SHDC, a deposit *of*

R20,000 “for the purchase of property H.584/H.714 at Ma Constance" *exhibit (*P4*). He* thereafter continued to pay *R1,200* per month, and also R800 per month as rent.

Section 34 of the Act provides that when the "Statutory value" has been finalised, "the Statutory Tenant may purchase the Registered premises from the Statutory landlord by the completion of all the following steps:

(a) The statutory landlord granting a transfer of the registered, premises to the statutory tenant...

(b) The statutory tenant:

(i) granting a tenant's mortgage over the registered premises in favour of the corporation; and
(ii) paying the statutory landlord any amount which the statutory value exceeds the maximum mortgage amount, and

(c) The Seychelles Housing Development Corporation (on behalf of the Government):

(i) paying to the statutory landlord one-twentieth of the statutory value or the maximum mortgage amount, whichever is lessor, and
(ii) delivering to the statutory landlord a bond in terms of section 39 for the remainder of the statutory value or of the maximum mortgage amount, whichever is the lessor, and

(d) if the registered premises are already subject to a mortgage, the steps specified in paragraph 1 of the schedule 8.

The Tenants Rights Act 1981 was repealed by Act no 7 of 1992. However applications received by the Registrar of Tenants' Rights before 13 April 1992 and pending on that

date continues to be dealt with under the Act as if it had not been repealed. In the present, case, the application of the Plaintiff was made before the specified date and was pending on that date.

Section 34(3) of the Act provides that:

> The statutory tenancy and any other lease of or agreement to lease the registered premises, together with any obligation thereunder, terminate on purchase under this Section.

Hence the plaintiff is still a statutory tenant. In paragraph 6 of the plaint, the plaintiff avers that:

> Despite various requests by the plaintiff and the Registrar of Tenants' Rights, the defendant has failed to complete the transfer and has failed to collect the "consideration from the office of SHDC. The plaintiff avers that the defendant's acceptance of the offer was binding in contract and she is obliged in law to perform the contract and execute the transfer

Hence what is being sought to be specifically performed is section 34(1)(a) of the Act, as statutory valuation has been finalized.

The plaintiff produced a letter dated 23 August 1994 (P6) whereby the Registrar of Tenants' Rights requested him to attend the office on 1 September 1994, "to complete the transfer of the registered premises under section 34 of the Tenants' Rights Act." He testified that on that day, the defendant's son, Mr Rassin Sinon, who had been in France during the time the application was being processed before the Registrar, came and objected stating that Mrs Beaudouin did not have any authority to execute the transfer. Hence the transfer did not take place.

The averment of the plaintiff that the defendant agreed to the sale of the property for R80,000, was the "statutory value" assessed by the SHDC valuer.

This alleged agreement on the price is based on the fact that no objections were raised by the defendant nor her representative, and that no application was made to the Minister to appoint an independent arbitrator under paragraph (3) of schedule 6 of the Act. Hence the plaint is based on a breach of a statutory obligation by the defendant to transfer the property.

Mr Jacques Leveille an assistant accountant of the SHDC produced a statement of the plaintiff's loan account (exhibit (15). He stated that the loan of R80,000 was approved by the Ministry and forwarded to the SHDC for payment on the basis of a minute made by the Registrar of Tenants' Rights that both parties had agreed on the statutory valuation of R80,000. He corroborated the plaintiff and stated that the plaintiff paid R20,000 as a deposit for the purchase of the land, and a receipt was issued on 2 February 1994 (exhibit P4). He stated that the Ministry would not have approved the loan unless the statutory valuation had been finalized and the registered premises was ready for sale.

Miss Phillis Pothin, the Registrar of Tenants' Rights corroborated the plaintiff and stated that the defendant, visited her office about three times regarding the application, whenever she came to Seychelles. She stated that after a statutory valuation, both parties were informed of the valuation price. Thereafter, there being no application for a re-valuation from the defendant or her representative, the application was sent to the SHDC for preparing the transfer documents. She further stated that Mrs Beaudouin enquired from her as to when the payment would be made. She also stated that she never received any objections from the defendant or her representative, Mrs Beaudouin, as regards the processing of the application at any stage. Miss Pothin further stated that when the SHDC was preparing the transfer documents. Mrs Beaudoin told her that the defendant did not intend to sell the premises. Hence at present, the transfer has not been effected, and no payments have been made to the defendant.

Mrs Beaudoin testified that the defendant's sister, who was residing in France, had instructed her to represent her in all matters connected with the application of the plaintiff to purchase the property through the Registrar of Tenants' Rights. She went to the Registrar's office with the laintiff and signed the necessary documents on the defendant's behalf. She kept the defendant informed of the progress of the proceedings. When the Registrar informed her that the statutory valuation was R80,000, she informed the defendant. She wrote back and informed her that she agreed with the price, and was awaiting payment. She thereafter informed the Registrar, who made an entry on the record. Mr Leveille, the assistant accountant of the SHDC who brought the file to court, and Miss Pothin corroborated the entry recording the agreement of both parties testified as to the statutory valuation of R80,000.

Mrs Beaudouin further testified that she ceased to represent the defendant when her son Rassin Sinon came to Seychelles and told her that his mother did not want her to sign the transfer deed. The plaintiff also produced a copy of an application dated 10 August 1994 (P96) filed by the defendant before the Rent Board, seeking to evict, him on the ground that the house was reasonably required for the use of the owner. But by that time the plaintiff had obtained security of tenure as a statutory tenant.

Mr Boulle's submission of a no case to answer is based primarily on the contention that there was no agreement on the price, and hence there was no contract of sale for the plaintiff to seek specific performance by transfer of the property. He was therefore considering the plaint as one based on a civil contract. The plaintiff admitted that the original price demanded by the defendant was R120,000. He agreed with that price, but could not obtain a government loan for that amount. Thereafter, the agreement of both parties, the defendant to sell, and the plaintiff to purchase the property, continued with the plaintiff pursuing an application under the Tenants' Rights Act. On the basis of the evidence, the

defendant acquiesced with that procedure. Under that Act, section 32(1) provides that the Statutory Tenant may inform the Registrar in writing that he and the statutory landlord "have agreed on the purchase price of the registered premises". Whether that was done is riot in evidence. However it is in evidence that a valuation was done by the SHDC in terms of section 33 of the Act, and that the statutory value was intimated to both parties. It is not entirely correct that the Statutory Landlord cannot agree or disagree with such valuation, which would in effect be the "sale price" of the property.

Paragraph 3 of schedule 6 provides that within 30 days of being informed of the statutory valuation, either the Statutory Tenant or the Statutory Landlord could request the Minister to appoint an independent arbitrator to re-assess the statutory value. No such application was made by either party, and hence it is on that basis that the plaintiff relies on "agreement on the price." Mr Boulle's submission is that, there is not an "agreement", but a presumption of an "agreement," and that in terms of article 1353 of the Civil Code, the court can admit such a presumption only "in cases in which the law admits oral evidence." It is therefore contended that since oral evidence is prohibited under article 1341, such a presumption of an agreement on the price ought not to be drawn. It is therefore his submission that the plaintiff cannot maintain the action and accordingly the defendant has no case to answer.

According to letter dated 23 August 1994, (P6), the transfer of the property was ready on 1 September 1994. The defendant who had decided not to proceed with the transfer sent a letter dated 27 June 1995 (Dl) through her lawyer, Mr France Bonte, which is as follows:

> I am acting for Mrs Julie Vannier, the owner of the land upon which you are a statutory tenant under the Act.
>
> I am instructed to inform you that my client hereby gives you fifteen days to buy the said land for

> R160,000, failing which my client would have no alternative but to repossess her property in view of the fact that you have delayed the said purchase for 18 years and with the said delay the property value has increased and my client should not like to loose on the 'market price' as a consequence of your delay.
>
> I have been instructed to write to the Registrar of Tenants' Rights for a certificate waiving and removing the sold property from the Tenants Right's Register so that your statutory tenancy will be considered as having lapsed.
>
> I wait your earliest response and hope that you will purchase the said property within the time given.

This letter indicated a continuous intention, and an agreement to sell the property to the plaintiff. Obviously, the defendant, who did not apply for a re-assessment of the statutory valuation within the prescribed time, was seeking to obtain the agreement of the plaintiff to a price of R160,000. Had he agreed, there was still the possibility of proceeding with the transfer of the property under the Tenants' Rights Act, as section 32(1) permits the purchase of properties on the "agreed price." But the plaintiff did not agree with that price, and stated that the market value may have gone up as he had made several improvements to the premises, including providing an access road. The present action was filed on 24 July 1997.

As I stated above, in the process of a Statutory Tenant purchasing premises under the Tenants' Rights Act, the aspect of "agreement of the price" does not arise as in a civil contract envisaged in article 1341. The best that either the statutory tenant or the statutory landlord could do is to seek a re-assessment of the statutory valuation, if there was no agreement on the price. Hence the submission of no case to answer fails.

In the present case, there is overwhelming evidence that the defendant herself, and Mrs Beaudouin on her behalf, pursued the Tenants' Rights application of the plaintiff, up to the time when what remained was only the transfer of the property. In those circumstances, the obtaining of any written proof of the obligation does not arise as he was a party to a statutory process which would make him the owner of the property by virtue of his eligibility under the Tenants' Right Act. The element of "price", if not agreed upon under Section 32(1), and is assessed under section 33, and is determined under the Act.

Accordingly, I hold that there has been an agreement for the sale of the property bearing title nos. H. 583 and H. 714 to the plaintiff, in the statutory sense of a finalization of the procedure towards the transfer of the premises to the Statutory Tenant, and hence the defendant is obliged to execute the transfer thereof for the price of R80,000. In terms of section 34(3) the plaintiff is still a Statutory Tenant. Hence prayer (b) of the plaint to treat the payment of rent as part payment of the consideration is not granted, as he is liable to pay rent until the Statutory Tenancy is terminated by purchase. So also prayer (c) for moral damages is not granted in view of article 1153 of the Civil Code as no special damages caused by bad faith has been established.

Judgment is accordingly entered in favour of the plaintiff, together with costs of action.

The caution entered by the plaintiff under the provisions of the Land Registration Act on 8 October 1997 prohibiting any dealings with the land Titles H. 583 and H. 714 will continue to be in force until the transfer is effected to the plaintiff.

Record: Civil Side No 253 of 1997

Krishnamart & Co (Pty) Ltd v
Harry Savy Insurance Co Ltd

Civil Procedure – Pleadings

The defendant denied liability in his defence, then sought to plead a breach of contract.

HELD:

(i) The justice system does not permit the court to formulate a case for a party after listening to the evidence, and to grant relief not sought in the pleadings.

(ii) Each party is procedurally required to state the whole of its case in the pleadings and must plead the material facts on which it intends to rely.

(iii) Where the pleadings aver a 'faute' and the action for damages is based on the Civil Code, the court cannot go outside the pleadings and award damages under the Civil Code on the ground of 'responsabilite du fait de la chose'.

Judgment for the plaintiff.

Legislation Cited
Civil Code of Seychelles
Seychelles Code of Civil Procedure, s 75

Cases referred to
Bessin v A-G (1936-1955) SLR 219
Charlie v Francois (Unreported) SCAR No 12/94
Tirant v Banane (1977) SLR 219

Foreign cases noted

Ramjan v Kaudeer (1981) MR 411

Antony Derjacques for the plaintiff
Francis Chang Sam for the defendant

Ruling delivered on 14 January 2000 by:

ALLEEAR CJ: In the present action the Supreme Court, in its judgment of 28 March 1999 found the defendant liable to make good the plaintiff's loss which resulted in a fire at the commercial complex owned by the plaintiff.

An appeal was lodged to the Seychelles Court of Appeal against the said judgment of the Supreme Court. At the hearing of the appeal, Hamid Moolan Q.C. conceded that there was a contract to provide an insurance cover by the defendant company to the plaintiff, but sought to canvass an issue not pleaded, namely that the plaintiff was in breach of the "contract of insurance." It would appear that Hamid Moolan Q.C. was unable to prevail upon the Seychelles Court of Appeal to accede to his viewpoint.

It will be recalled that in his statement of defence, paragraph 6, the defendant had stated:

> As regards paragraph 9 of the plaint, defendant has never been requested to issue any Fire or Special Perils Policy and did not therefore do so.

In paragraph 8 of the statement of defence it had further been averred by the defendant that:

> Defendant denies paragraph 11 of the plaint, specifically denies that the alleged peril or loss was covered by defendant or that there was any insurance contract between plaintiff and defendant in respect thereof.

In light of the above, liability was denied by the defendant who prayed for the dismissal of the plaintiff's action with costs. The

defendant did not aver in his statement of defence that, "in the alternative, if there was a contract of insurance between the parties, the plaintiff was in breach of the terms of the said contract."

On the day the plaintiff's witness David Grant, a quantity surveyor, was about to depose, Mr. Chang Sam, who had replaced Mr. Valabhji as defendant's counsel raised a preliminary objection to the effect that since the plaintiff was in breach of the terms of the insurance policy, the court could not hear evidence on the issue of quantum. As David Grant had come from England specifically to depose in the case, the court took his testimony, but reserved the ruling on the preliminary objection of Mr. F. Chang Sam. If the objection of Mr. Chang Sam finds favour with this court, it goes without saying that the question of quantum of damages to be awarded will not arise.

Section 75 of the Seychelles Code of Civil Procedure provides:

> The statement of defence must contain a clear and distinct statement of the material facts on which the defendant relies to meet the claim, A mere general denial of the plaintiff's claim is not sufficient. Material facts alleged in the plaint must be distinctly denied or they will be taken to be admitted**,"** (Emphasis added).

It is a procedural requirement that each party must state the whole of its case in the pleadings. The material facts on which the party intends to rely must be pleaded. If a defence is not raised in the pleadings, it may not be considered. In civil litigation, each party must state its whole case and must plead all facts which he intends to rely upon. Otherwise, he cannot at the trial, give evidence of facts not pleaded. For instance, a defence of an act by a third party in a motor vehicle collision case not having been pleaded, cannot be considered. (Vide case *Tirant v Banana* (1977).

In *Charlie v Francois* 1995 SCAR, it was held that:

> The system of civil justice does not permit the Court to formulate a case for a party after listening to the evidence and to grant relief not sought in the pleadings.

In the Mauritian case of *Ramjan v Kaudeer* 1981 MR 411, Supreme Court judgment 387, it was held:

> Where the pleadings aver a "faute" and the action for damages is thus based on Article 1382 Code Nap, the Court cannot go outside the pleadings and award damages under Article 1384 - Code Nap, on ground of 'responsabilité du fait de la chose'.

In *Bessin v Attorney General*, 1936-1955, it was held:

> The Court hearing such an application must limit itself to the allegations contained in the pleadings and no extraneous evidence was admissible to support the application.

In my considered view based on law and authorities cited above, the denial by the defendant in his statement of defence, paragraph 6, of the existence of the Fire and Special Perils Policy, does not permit him now to raise the issue of breach of the term of the Fire and Special Perils Policy.

In the light of the above, the conclusion that I must necessarily reach one which did find favour with the Seychelles Court of Appeal must be that no party can rely upon an averment not made in the pleadings. The objection of counsel for the defendant is without legal basis and cannot be entertained.

Record: Civil Side No 97 of 1998

Alisop v Payet

Civil procedure - Bill of exchange

The plaintiff claimed money due on an unpaid cheque. The defendant disputed the facts.

HELD:

(i) A cheque issued unconditionally is as good as cash and should be honoured unless there is a good reason not to.

(ii) The Court has accepted as a good reason to not honour a cheque as where:

(a) the bill of exchange itself was induced by fraud or misrepresentation;

(b) the transaction for which the bill was given is illegal;

(c) there is no consideration.

Judgment for the defendant. Case dismissed.

Legislation Cited
Civil Code of Seychelles, art 1315
Seychelles Code of Civil Procedure, s 295

Cases referred to
Berjaya Beau Vallon Bay v Philibert Loizeau (Unreported) Civil Side 268/1996
Rolly Payet v Karly Faure (1996) SLR 188

Foreign cases noted
Brouard v Gopalsing (1871) MR 53
Coo-Marassamy v Moo Magalingum (1871) MR 51
Fielding and Platt Ltd v Salim Najjar (1969) 1 WLR 35
Franky Simeon for the plaintiff

Frank Elizabeth for the defendant

Judgment delivered on 24 May 2000 by:

PERERA J: This is an action under the Summary Procedure on Bills of Exchange, provided in section 295 of the Code of Civil Procedure (Cap 213). The plaintiff claims a sum of R50,000 due to him as holder of a cheque dated 13 March 1998 issued by the defendant on his business account of "active electronics", which had been returned by the bank with the endorsement "PL represent 19.3.98".

The defendant in seeking leave to appear and defend the writ as averred in his affidavit dated 20 November 1998 admitting that he issued the said cheque, but that the balance in his account had dropped between the date of issue and the presenting. He avers however that upon the plaintiff advising him that the cheque was not cleared, he paid R.46,000 to him in cash against the cheque and hence he owes only a balance sum of R4000.

The plaintiff has filed a counter affidavit averring that the cheque for R.50,000 was issued by the defendant as part payment for the sale of a motor vehicle he had purchased from him for R78,000 and that the balance sum of R.28,000 was paid in cash. He denies that the defendant paid R46,000 in cash after the cheque was not cleared by the bank on presentment.

As was held in the case of *Rolly Payet v Karly Faure* (1996) SLR 188**,** upon the granting of leave to defend, the defendant should be given an opportunity to adduce evidence of his ground of defence. In such circumstances it would be required of the plaintiff as holder, to prove consideration. In this repect, Lord Denning, in the case of *Fielding and Platt Ltd v. Salim Najjar* (1996) W.L.R 35 stated:

> We have repeatedly said in this Court that a bill of exchange or a promissory note is to be treated

> as cash. It is honoured unless there is an arguable case based on total failure of consideration

Hence a cheque issued unconditionally is as good as cash and should be honoured unless there is some good reason to the contrary. Some of the "good reasons" accepted by the Courts are where:

1. the bill of exchange itself was induced by fraud or misrepresentation;

2. the transaction for which the bill was given is tainted with illegality; or

3. there has been a total failure of consideration.

Hence unless the defendant can show facts which if proved would impugn the plaintiff's right to consideration on the instrument, the plaintiff would be entitled to judgment.

In this respect the issue arising from the defence for determination would be whether the defendant paid R46,000 in cash after the cheque was not cleared on presentment.

Article 1315 of the Civil Code provides that:

> A person who demands the performance of an obligation shall be bound to prove it. Conversely, a person who claims to have been released shall be bound to prove the payment or the performance which has extinguished his obligation.

The Plaintiff testified that on 13 March 1998 that he sold his pick-up truck to the defendant for R78,000 and received R28,000 in cash and a cheque dated 13 March 1998 for R50,000 (exhibit PI). The defendant told him that the cheque will be cleared in three days. But as he was going to Praslin

that day, he banked the cheque at the Nouvo Banq Branch at the Airport. The seal on the cheque confirms that. After about a month he noticed that the cheque had not been credited to his account at Nouvo Banq. The plaintiff claims that when he contacted the defendant from Praslin, he told him that he was in financial difficulties and that he had utilised the money payable on that cheque. He denied that he was paid R46,000 thereafter.

The plaintiff further testified that as the defendant had not paid the sum of R50,000 even after four or five months later, he went to a lawyer for advice. But no letter of demand was sent to the defendant.

Bernadette Toussaint (PW2), the girlfriend of the plaintiff, testified that she was aware of the transaction between the parties. She stated that the plaintiff who was living on Praslin sent her to collect some money from the defendant three or four times, but did not receive any. She further stated that she was sent *several months after the cheque had bounced.* On being cross examined by counsel for the defendant, she admitted that she was asked to collect R6000 from the defendant, but that amount was not given to her.

The defendant in his testimony stated that on the day of the transaction he gave a cheque for R50,000 and R26,000 in cash to the plaintiff. He requested him to present the cheque for payment only on 19 March 1998 when he expected the proceeds of the sale of his car to be in his account. The plaintiff however maintained that he was told that funds would be available in three days from the date of issue of the cheque, that is on 16 March 1998. He further agreed with the plaintiff to pay the balance sum of R2000 later. He claimed that, that sum was eventually paid. The defendant produced his statement of account at the Seychelles Savings Bank, dated 17 November 1999, (exhibit Dl). The relevant entries are as follows:

Date	Details Value	Reference (Cheque No)	Debit	Credit	Balance
13.3.98	Cheque Deposit	99143	-	50, 000	51,796.98
17.3.98	Service Charge	287310		200.00	
20.4.98	Cash Withdrawal	-	42,000		284.82

The defendant testified that after about one month from the date of issue of the cheque, as also testified by the plaintiff, the plaintiff wanted the sum of R50,000 due on the cheque. He further stated that the plaintiff told him that he did not want to re-present the cheque and that he wanted cash. Hence he went to the bank on 20 April 1998 and withdrew R42,000 in cash, leaving a balance of only R282.82 in his account. He also produced a receipt dated 20 April 1998 from the said bank in proof of receipt of that amount by him (exhibit D2).

The bank statement supports the evidence of the defendant that a cheque bearing no. 991433 post dated 19 March 1998 for R50,000 was deposited in his account on 16 March 1998. The cheque bearing no. 287310 (exhibit PI) which is being sued upon, was presented to the bank on 17 March 1998. The seal of the airport branch of Nouvo Banq shows that the cheque was deposited on 13 March 1998 (a Friday). It was sent for clearing on 17 March 1998, but the cheque for R50,000 already in his account on 16 march 1998 was realisable only on 19 March 1998 as it was post dated. This accounts for the endorsement made by the bank "PL represent 19.3.98" on exhibit PI. However, as testified to by the plaintiff, the cheque had been returned to him to the Air Seychelles Office where he was employed previously and it was only about a month later that he became aware that the sum of R50,000 had not been credited to his account. Had he re-presented the cheque on 19 March 1998 or even up to 30 March 1998 when a sum of over R50,000 was available in the defendant's account, the cheque would have been honoured. Hence there was no "dishonouring" of the cheque. According

to *The Law and Practice of Banking* by J. Milnes Holden, Page 264, *"if a banker has to dishonour a cheque for lack of funds, he will return, it with the answer 'refer to drawer',"* and if he has reason to believe that the customer will provide funds to meet the cheque during the next day or two, he will sometimes add *"please re-present."*

The plaintiff testified that he contacted the defendant from Praslin. The following questions were put to him by counsel for the defendant in cross examination:

Q. When did you contact him, do you remember the date that you telephoned him?

A. No.

Q. But it would have been around 13th to 20th April?

A. Let us say yes.

Q. In that week?

A. A month after.

Q. And you would have come down around that period of time between the 13th of April to around the 21st or 22nd of April?

A. I would say so, yes.

Q. When you came down the following week you saw Mr Payet at his shop?

A. Yes.

Q. He did give you the sum of R42,000 at the shop?

A. No.

In this respect, the entry under date 20 April 1998 (exhibit Dl)

and the receipt (exhibit D2) support the defendant's evidence that a sum of R42,000 was withdrawn. But these documents on their own are self serving and do not constitute proof of payment to the plaintiff. Hence under article 1315 of the Civil Code the burden falls on the defendant to prove that he has discharged his obligation to pay on the cheque sued upon. In these circumstances, where there is a conflict of evidence between the plaintiff's witnesses and the defendant's witnesses, the court should accept the evidence after examining the totality of the facts. The plaintiff's witness, Bernadette Toussaint admitted that she was asked by the plaintiff to collect R6000 from the defendant and not R50,000. This independent evidence corroborates the defendant's averment in the affidavit in defence and in the testimony before court that he still owes the plaintiff R4000. The averment in the affidavit that he owes only R4000 was explained by the defendant on the basis that he paid R42,000 and later R4000 in respect of the dishonoured cheque leaving a balance of only R4000, and that he had forgotten at the time of preparing the affidavit that he still owed the plaintiff R2000, as he paid only R26,000 in cash and not R28,000 as claimed by the plaintiff at the time the cheque for R50,000 was issued, He now admits that he owes R6000 to the plaintiff.

The plaintiff testified that the question of issuing a receipt for R28,000 which he received, did not arise as the transaction was done in a hurry and he had to go back to Praslin that day.

The defendant on the other hand testified that when he gave R42,000 in cash he too did not ask for a receipt. But two weeks later when he gave another R4000 he asked for a receipt and the plaintiff told him that he would give it after all the payments have been made, and that he would retain the cheque as security.

In the case of *Berjaya Beau Vallon Bay v Philibert Loizeau* (Unreported) Civil Side 268/1996the defendant issued cheques for payment in purchasing "chips" for betting at the casino. When sued upon dishonoured cheques, he claimed that they were given as security and not as payments, and

that he had subsequently paid the amount claimed in cash. He further alleged that the cheques were not redeemed after payment as the cashier had locked them away somewhere and he was being sued by the new manager who had discovered them subsequently. This court, upon considering the evidence in the case, applied article 1315 of the Civil Code, and held that the defendant had failed to prove that he made any payments to redeem the cheques which he averred were given as security and not for valuable consideration, and entered judgment in favour of the plaintiff.

The burden on a defendant who claims to have been released from an obligation under article 1315 was illustrated in two Mauritian cases. In the case of *Coo-Marassamy v. Moo Magalingum* 1871 MR 51 the defence case was that a bond sued upon was the reception of a former undertaking arid was not due. The court in the presence of conflicting and ambiguous evidence, gave judgment against the party who relied on his defence to prove his discharge. So also in the case of *Brouard v. Gopalsing* 1871 MR 53, it was held that although a doubt as to the defendant's liability will be interpreted in his favour, yet, if a liberation is relied upon by the defendant as a defence, he will be bound to prove the fact causing his liberation.

The facts of the instant case can be distinguished from those three cases. First, when the cheque dated 13 March 1998 reached the Seychelles Savings Bank for clearing on 17 March 1998, there was in deposit a post dated cheque for R50,000 in the defendant's account on 16 March 1998 but realisable on 19 March 1998. He testified that he had informed the plaintiff to present the cheque in three days as he expected that money to be in his account as sales proceeds from his car. The plaintiff also admitted that the defendant informed him that funds would be available in three days. Hence on 17th March 1998 there were funds in the account as promised but realisable only on 19 March 1998. A sum of R50,000 was available in that account until 30 March 1998, but the cheque could not be re-presented during that time for reasons purely attributable to the [laintiff. Secondly,

the plaintiff's witness, Bernadette Toussaint, categorically stated in her testimony that the plaintiff did not tell her to collect R50,000, but only R6000 from the defendant. This evidence serves as independent corroboration of the defendant's case.

Thirdly, the plaintiff admitted that he informed the defendant about the cheque not being cleared by the bank around the 20 of April 1998. According to the bank statement (exhibit DI), there was a cash withdrawal of R42,000 on 20 April 1998. Although no formal receipt was produced by the defendant for the reasons stated above, yet such evidence, on a balance, makes his case more probable

There are therefore several factors that support the defendant's case on a balance of probabilities that R42,000, against the cheque for R50,000, was paid to the Plaintiff in cash. The defendant has admitted that he still owes R6000 to the plaintiff

The plaintiff's action is therefore dismissed. However the defendant shall pay a sum of R6000 which he admittedly owes the plaintiff together with interest thereon. In view of the circumstances of the case, the defendant will be entitled to costs.

Record: Civil Side No 256 of 1998

Zaksat General Trading Co Ltd v
Yousef Al Shaibani & Ors

Procedure – Notice to produce documents – Evidence – Best evidence rule

The plaintiff served a notice to produce documents on the defendant. The procedure followed was that of the English law. The defendant claimed that the Code of Civil Procedure alone was applicable.

HELD:

(i) The Supreme Court has all the powers, authorities and jurisdiction of the High Court of England as at 22 June 1976.

(ii) The Civil Code has no equivalent of the United Kingdom Order 27, rule 5(4). Hence section 12 of the Evidence Act can be used when necessary to resort to the English law of evidence and Order 27, rule 5(4).

(iii) Secondary evidence of an original document possessed by an adverse party is not admissible unless notice has been served on that party.

(iv) The plaintiff cannot use a notice to produce documents for inspection under section 84 of the Code of Civil Procedure as an alternative to achieving discovery.

Judgment for the plaintiff.

Legislation Cited
Civil Code of Seychelles, art 1334
Courts Act, s 3A
Evidence Act, s 12
Seychelles Code of Civil Procedure, s 84

Foreign legislation noted
Civil Evidence Act 1938 (UK)
Supreme Court Rules Order 27 (UK)

Cases referred to
Casino Des Seychelles Ltd v COSPRO (unreported) SCA 1/1994
Kim Koon & Co Ltd v R (1965-1976) SCAR 60
David Sopha v Robert Melanie & Ors (1994) SLR 151

Foreign cases noted
R v Government of Pentenville Prison Ex parte Osman [1989] 3 All ER 701
R v Wayte (1983) 76 Cr App R 110

Ramniklal Valabhji for the plaintiff
Pesi Pardiwalla, and France Bonte for the defendants

Appeal by the Defendant was set aside on 12 August 2001 in CA 20 of 2000.

Ruling delivered on 6 July 2000 by:

PERERA J: The attorney for the plaintiff has served a "notice to produce" the originals of 24 documents listed therein, on the attorneys for the defendants. In a reply to particulars sought by the defendants, the attorney for the plaintiff has already disclosed 5 of those documents on 15 February 1999 in a list of 12 documents, some of which have already been exhibited in the case. Mr Pardiwalla, counsel for the defendants objected to the procedure of serving such a "notice to produce" under the laws of Seychelles. His objections could be summarised as follows:

(1) The provisions of the Code of Civil Procedure are exhaustive regarding matters of discovery of documents.

(2) The issuing of "notice of produce" - being a procedure under English Law, is not applicable in Seychelles.

(3) That discovery of documents is always a pre-trial procedure and hence the attorney for the plaintiff cannot seek discovery in this case as the plaintiff's case has been closed.

(4) That in any event, the circumstances under which a "notice of produce" is permitted in English Law are where the original in the possession of the adverse party has emanated from the party seeking the production.

(5) That order 27, rule 5 of the Supreme Court Rules of the United Kingdom, provides that a notice to produce a document should be served within 21 days after the cause or matter is set down for trial. But the date of trial in this case had been fixed on 30 March 2000, and the notice was served on 24 June 2000, well out of time.

Mr Valabhji, counsel for the plaintiff submitted that "notice to produce" the originals of documents has been filed under the provisions of English Law, by virtue of section 12 of the Evidence Act (Cap 74) - that section reads as follows:

> Except where it is otherwise provided in this Act or by special laws now in force in Seychelles or hereafter enacted, the English Law of Evidence for the time being shall prevail.

In the case of *Kim Koon & Co Ltd v R* (1965-1976) S.C.A.R. 60 at 64**,** the Court of Appeal interpreting the term "for the time being" stated:

> We have no doubt that it is not competent for the

> Seychelles legislature, to delegate the power to legislate, and so far as section 12 of the Evidence ordinance as amended may purport to apply to Seychelles future amendments of the English Law of Evidence, it is inoperative. In our judgment, the effect of the section is to apply to Seychelles the English Law of Evidence as it stood on 15 October 1962, the date of enactment of the Seychelles Judicature Ordinance 1962.

Hence for purposes of section 12 of the Evidence Act (Cap 74), it is the Civil Evidence Act 1938 (U.K) that applies.

The procedure under the Evidence Act is governed by the Rules of the Supreme Court. As was held in the case of *Casino Des Seychelles Ltd* (unreported) SCA 1/94, by virtue of section 3(a) of the Courts Act, powers, authorities and jurisdiction of the High Court in England given to the Supreme Court in Seychelles are such as the High Court of Justice in England possessed and exercised as at 22 June 1976 and not such as are vested in it by statute after that date.

Hence in terms of the Rules of the Supreme Court of the United Kingdom prevailing at that time, the filing of a *"notice to produce"* is governed by Order 27, rule 5(4), which incidentally is the same under the R.S.C. Rules of 1965. It provides that:

> (4) Except where rule 4(3) applies, a party to a cause or matter may serve on any other party a notice requiring him to produce the documents specified in the notice at the trial of the cause or matter.

Rule 4(3) is where there is mutual discovery of documents by lists served by parties. This is the equivalent of section 84 of the Code of Civil Procedure (Cap 213). Mr Valabhji cited paragraph 36-26 of *Phipson on Evidence* (14th Edition), wherein it is stated that:

> When a document is in the possession of the adverse party or someone bound to give up possession thereof to him (eg. His solicitor, banker etc) any such party refuses to produce it either after notice, or when notice is excused, the other party may, in civil cases, provided that it was duly stamped, give secondary evidence of its contents.

Paragraph 36-27 states that:

> The object of a notice to produce is to enable the adversary to have the document in court, and if he does not, to enable his opponent to give secondary evidence thereof, so as to exclude the argument that the latter has not taken all reasonable means to procure the original.

The procedure of serving a "notice to produce" is based on the "best evidence" Rule, that when a document was put in as evidence, the original had to be produced. In Seychelles, this rule is contained in article 1334 of the Civil Code. However that rule has now lost its rigidity. The modern attitude to the rule is set out by Lloyd LJ in *R v. Government of Pentenville Prison Exp Osman* (1989)3All ER 701 at 728, thus:

> .....The Court would be more than happy to say goodbye to the best evidence Rule. We accept that it served an important purpose in the days of Parchment and Quill Pens. But, since the invention of Carbon Paper and, still more, the photocopier and the telefacsimile machine, that purpose has largely gone. Where there is an allegation of forgery the Court will attach little, if any, weight to anything other than the original; so also if the copy produced in Court is illegible. But to maintain a general exclusionary Rule for those limited purposes is, in our view, hardly justifiable.

In this respect Beldam J in the case of ***R v Wayte*** (1983) 76 Cr. App. R. 11O at 116 stated:

> First, there are no degrees of secondary evidence. The mere fact that it is easy to construct a false document by photocopying techniques does not render the photocopy inadmissible.
>
> The fact that the documents were only copies merely went to weight, not admissibility.

It was on the basis of these principles that copies of documents were admitted so far in examination in chief and cross examination of witnesses in the present case. However the present matter that calls for a ruling, is different.

A "notice of produce" in English Law, is different from the procedure for inspection of documents contained in section 84 of the Code of Civil Procedure. It is a mere notice to the adverse party that he is required to produce the documents specified at the hearing. It does not oblige such party to produce the document, even though he has it. When it is called in court, his counsel may say that he does not produce it, in which case it would be open to the party who served the notice to put in a copy or give oral evidence of its contents. In short, the effect of giving a notice to produce, is to enable a party to give secondary evidence of the contents of any document referred to in the notice if it is not produced at the hearing (see Odgers on pleadings and practice 20th Edition: page 297).

There is no such provision as Order 27, rule 5(4), in the Code of Civil Procedure of Seychelles. Hence where it becomes necessary, the English Law of Evidence, and Order 27, rule 5(4) can be resorted to under the provisions of section 12 of the Evidence Act (Cap 74). Where the original is in the

possession of the adverse party, secondary evidence of a document is not admissible unless notice has been served on him. Barnard and Houghton in *"the New Civil Court in Action*" states at page 229 that the Court will admit secondary evidence, if:

> The original is in the possession of the opposing party and he has been served with notice to produce that original at the trial, but has failed to do so. In the High Court, where there has been discovery by list each party is deemed to have been served with notice requiring him to produce all documents he has listed as being in his possession. In all other High Court cases and in all country court actions each party must serve on the other specific notice to produce any original documents held by the other side which he wishes to put in as part of his case. The practice followed is that when counsel comes to the stage in his case where he wishes to put in the original document, he "calls for its production". If his opponent does not then produce the original. Counsel may at once prove its contents by, for example, producing a copy and calling evidence to show this corresponds with the original.

Hence where the party serving the notice to produce is the plaintiff, generally, it must be done before the close of his case as the object of notice is to adduce secondary evidence to establish his case, if the original in the possession of the defendant is not forthcoming. The notice therefore provides a foundation for reception of secondary evidence.

In the present matter, the plaintiff's case has been closed, and hence it remains for counsel for the plaintiff to cross examine the defendant's witnesses.

The object of cross-examination is two-fold, to weaken,

qualify or destroy the case of the opponent, and to establish the party's own case by means of his opponent's witnesses. Mr Pardiwalla referred to Order 27, rule 5(1) where the notice is required to be given within 21 days after the cause or matter is set down for trial. However, that rule applies to notices to "admit the authenticity of the documents specified in the notice".

Order 27, rule 5(4) which provides for the serving of a notice to produce documents, has obviously no time limit as it applies to both the plaintiff and the defendant and could be served at any stage of the proceedings to establish his own case through his witnesses or by cross-examining the opponent's witnesses. However, the scope of this procedure is limited. The original documents in the possession of the adverse party must have a connection or relation to the copy in the hands of the plaintiff. As Cross on evidence states:

> notice to produce is not served in order to give the opponent notice that the documents mentioned in it will be used by the other party, and thus to enable the opponent to prepare counter-evidence, but so as to exclude the objection that all reasonable steps have not been taken to procure the original document.

In the case of *David Sopha v. Robert Melanie and Ors* (unreported) C.S. 229 of 1992, the plaintiff, who was a prisoner, claimed damages for personal injuries caused by prison officers while in custody. He was consequently hospitalised. His counsel sought to produce in evidence copies of letters sent by the plaintiff himself and by him to the superintendent of the Prisons and Hospital Authorities. The copies were with the counsel for the plaintiff, and the originals with those authorities. Objection was raised by the counsel for the defendants that notice to produce the original had not been served. I, as trial judge, upheld that objection. However where correspondence from those authorities to Counsel for the plaintiff had acknowledged receipt of such letters, and hence there was some internal reference which made it safe

to conclude that the copies of the letters established a link in correspondence, the copies with the plaintiff were admitted.

Similarly, by a notice to produce, the plaintiff cannot achieve the same object as discovery of documents under section 84, for inspection. Neither can it be used to 'fish' for evidence. Hence where the plaintiff is in possession of a copy of a document, and in the ordinary course of correspondence or business the original ought to be with the defendant, then secondary evidence could be adduced as notice to produce has been served, if the defendants refuse to produce the originals. Documents not falling within that category ought to have been applied for inspection under section 84 of the Code of Civil Procedure.

The defendants however are deemed to have received notice of documents numbered 1, 3, 7, 9 and 16 of the notice to produce dated 24 June 2000.

Ruling made accordingly.

Record: Civil Side No 247 of 1998

Kilindo v Morel & Or

Personal injury – Damages

The plaintiff was in a motor accident caused by the defendant. The only issue in this personal injury claim was the quantum of damages.

Judgment for the plaintiff. Damages awarded R162,200.

Legislation Cited
Civil Code of Seychelles, art 1149

Cases referred to
Suzette Hermitte v Philipe Dacambara & Ors (unreported) Civil Side 261/1998
Didas Louis v SPTC (unreported) Civil Side 1996
Simon Maillet v Louis (unreported) Civil Side 117/1999
Leon Malcouzanne v Peter Simeon (unreported) Civil Side 241/1993
Antonio Ruiz v Borremans (unreported) Civil Side 200/1991
Tirant v Banane (1977) SLR 219

John Renaud for the plaintiff
Kieran Shah for the defendant

Appeal by the appellant was partly allowed on 12 April 2001 in CA 12 of 2000

Judgment delivered on 30 June 2000 by:

KARUNAKARAN J: The plaintiff, aged 45 is a working woman. She is working as principal secretary at the Directorate of Civil Aviation. On 10 August 1997, she was involved in a motor traffic accident and suffered personal injuries. She sued the defendants for loss and damages arising out of those injuries. The defendants have admitted liability. The only issue before this court is to determine the quantum of damages payable to the plaintiff. In fact, the plaintiff claims a total sum of R3,115,200 from the defendants

towards the said loss and damages. However, the defendants dispute the quantum contending that the plaintiff's claim is grossly exaggerated and unreasonable. The particulars of the plaintiff's claim are as follows:

Loss

1.	Transport to attend hospital and treatment including air-tickets and accommodation	R15,000.00
2.	Medical Reports	R200.00

Damages

1.	Injuries requiring knee change including period in hospital	R900,000.00
2.	Pain and suffering and continued treatment including for cost of medicine	R2,000.00 R800,000.00
3.	Loss of amenities including loss of earning at Rs5000	R900,000.00
4.	Inconvenience anxiety and distress	R500, 000.00
	Total	**R3,115,200.00**

According to the medical report by the orthopedic surgeon Dr. Horatius Browne - dated 15 December, 1997 - the plaintiff had sustained through that accident the following injuries:

1. Comminuted fracture on the medial side of the left knee and loss of tissue at the site of the injury.

2. Left upper 1st and 2nd incisor tooth slightly mobile.

3. Minor bruises below the angle of mouth on right side.

4. One laceration wound on the dorsal aspect of the lower half of the right arm.

5. One laceration wound on the dorsum aspect of upper half of right forearm.

6. Minor abrasions on the antero-medial aspect of upper half of right leg.

The main and major injury the plaintiff suffered was the comminuted fracture of the left knee and lacerations on the right upper and forearm. The plaintiff was initially treated for all the above injuries at Victoria Hospital in Seychelles. Particularly for the major knee-injury of a compound comminuted fracture to the medial plateau of the left tibia, she was surgically operated at the Victoria Hospital. According to the surgeon Dr. Jerom of Victoria Hospital, the plaintiff recovered fully from the injuries No: 2, 3, 4, 5 and 6 above but was suffering a permanent disability from injury No: 1. On recovery from that injury, she complained of residual stiffness and pain in her left knee. It limited her walking and activities of daily living. She could not squat or climb stairs. She could only walk short distances. Symptomatically, she was suffering from pain and sensation of crackling sound during walking. She was unable to flex fully the left knee joint. This caused her pain and great inconvenience at home and at work. Therefore, she had to go to Singapore for further treatments. As per the medical report dated 4 August 1998 from orthopedic surgeons in Singapore she was diagnosed for "genu varum" and early osteoarthritis changes in the medial joint space following the fracture to the tibial plateau. She also had soft tissue contractures in the left knee resulting in restricted range of motion. Following this diagnosis in Singapore, on 29 July 1996 a soft tissue release, quadricepsplasty, joint debriment and high tibial osteotomy were performed using a plate and screw. After this first treatment in Singapore, she again developed "tibial femoral osteoarthritis" as per medical report dated 8 February 1999. This led to severe osteoarthritis changes in both medial and lateral compartments of the left knee. Hence, a total knee replacement was performed in Singapore. Now she has a surgical scar and suffers a permanent disability of 40% mobility to her left leg. According to the prognosis of the orthopaedic surgeon Dr. George Cosmaus that the plaintiff though has suffered a bad knee injury the pain should subside in due course. She will not suffer osteoarthritis as the knee has now been replaced.

The plaintiff testified that following the first operation to her knee in Seychelles, she had to go to Singapore twice for two more surgical operations involving knee replacement. The Government of Seychelles funded her first trip to Singapore. In fact, the Government paid for both the surgical operations done in Singapore. However, for the second trip she had to spend from her pocket. She had to stay in a hotel in Singapore and incurred incidental expenses.

Further, she testified that she could bend her left knee only to 90°. Whenever she climbs up the stairs, she has to put her feet on the step before she could proceed to the next one. After the accident, she had to sell her car as it had manual gear operation and had to buy an automatic one so that she could avoid clutch operations using her left leg. She bought this car for the sum of R70,000 During her physiotherapy period she had to engage private transport for her trips to the clinic. Before the accident she was working shift duty and was earning an extra allowance in addition to her monthly salary. Now she is unable to work shift hours due to the injuries. Before the accident, she was a very active person. She used to go hiking, to Praslin and La Digue. Since the accident, her movements, physical and social activities are completely restricted. Moreover, the plaintiff testified of her sufferings as follows:

> I cannot stand long because of my knee. I can still feel the pain. I cannot wear high heel shoes as I used to wear. Nowadays I would rather stay at home instead of going out for activities because I am afraid that I may make a false step and affect my knee more. For sexual activities, it has been decreased.

In the circumstances, the plaintiff claims a total sum of R3,115,200 from the defendants towards loss and damages.

Firstly, I should mention here that the plaintiff from her demeanour and deportment appeared to be a credible witness. I believe her in every aspect of her testimony. She

frankly and truthfully spoke about her injuries, pain and suffering. Having considered the nature and extent of the injuries suffered by the plaintiff, this court finds that she would have suffered considerable pain and suffering resulting from the accident and the three surgical operations. Undoubtedly she would have suffered discomfort, inconvenience and distress. Further, this court finds that the plaintiff has a partial permanent disability of 40% mobility of her left leg due to the injury to the knee. However, in my judgment the claim of the plaintiff under the heads of injuries, pain and suffering, loss of amenities, inconvenience and distress are grossly exaggerated. They all appear to be unreasonably exorbitant and disproportionate to the actualities. At this juncture, it is pertinent to note that the quantum of damages awarded by the courts in cases of this nature must only be compensatory and nothing else. The rate of award should also be appropriate to the commission of the delict in question in terms of article 1149 (3) of the Civil Code of Seychelles. In fact, no victim should be allowed to take advantage of the occasion and make a profit out of it by inflating the claim out of proportion. The loss and damage claimed, should not be too remote or too speculative but should reasonably be foreseeable and ascertainable in the ordinary course of events. Besides, the quantum should be assessed on the basis of some realistic index. In law it should be pegged to some recognised index such as cost of living or other index appropriate to the activity of the victim (see article 1149 (4) of the Civil Code of Seychelles). Obviously, the case law resorting to the doctrine of *stare decisis* could be of much assistance in this respect as they are the essence of the application of such indices on case to case basis. This judicial exercise has evolved by broadening down the case laws from precedent to precedent. By getting guidance from previous decisions we have kept the common law on a good course. Hence, I believe it is preferable to look up some of the precedents for guidance.

In the case of *Loen Malcouzanne v Peter Simeon*(unreported) Civil Side No 241/1993 the plaintiff who suffered limited flexion of right knee of 45° with permanent disability of 20%

who used crutches and unable to bend the right leg was awarded R30,000 for pain and suffering and R45,000 for permanent disability.

In *Didas Louis v SPTC* (unreported) Civil Side No 6/1996 the plaintiff - 46 years old - with a fracture of the right patella, and an anthrotomy of right knee had been performed with chronic pain in his knee and permanent disability of 15%, was awarded R55,000 for pain and suffering and loss of amenities of life.

In *Simon Maillet v Louis* (unreported) Civil Side **No** 117/1999 - the plaintiff sustained a fracture of the left tibia and fibula. After treatment by traction and casting, he continued to have pain in his ankle and also had a limp. He was awarded R30,000 for the injuries and pain and suffering and R10,000 for loss of amenities of life.

In the case of *Antonio Ruiz v Borremans*(unreported) Civil Side No 200/1991 the plaintiff suffered a fracture of the 3rd metatarsal bone of the foot and underwent treatment in Belgium as well as in Seychelles. He had a partial permanent disability of 5% of his left foot. A total sum of R80,000 awarded by Bwana, J. was reduced to R40,000 by the Court of Appeal.

In the case of *Suzette Hermitte v Phillipe Dacambara & Ors*(unreported) Civil Side No 261/1998 - the plaintiff suffered a gunshot injury on her left leg leaving a residual permanent disability of 15%. Perera, J. awarded a sum of R60,000 in respect of the injuries and pain and suffering and R 15,000 for loss of amenities of life.

In *Tirant v Banane* 1977 SLR 219 a 53 year old man, with a fracture of the pelvis, compound fracture of right knee, urethra damaged, amputation of right leg and, who was rendered impotent was awarded moral damage of R100,000.

Indeed, the defendants in their written submission have already admitted the following sums:

1.	Transport to attend hospital and treatment including air-tickets and accommodation	R15,000.00
2.	Medical Reports	R 200.00
3.	Cost of medicine	R 2000.00
4.	Loss of earnings	R 5000.00
	Total	**R22,200.00**

In the light of all the above and having taken into account all the relevant circumstances of this case I award the following sums to the plaintiff:

1.	Transport to attend hospital and treatment including air-tickets and accommodation	R15,000-00
2.	Medical Reports	R200-00
3.	Cost of medicine	R2,000-00
4.	Loss of earnings	R5,000-00
5.	Globally for the injuries and for the resultant pain and suffering	R110,000-00
6.	Loss of amenities of life	R20,000-00
7.	Inconvenience, anxiety and distress	R10,000-00
	Total	**R162,200-00**

Therefore, I enter judgment for the plaintiff and against the defendants jointly and severally for the sum of R162, 200-00 with interest on the said sum at 4% per annum as from the date of the plaint and with costs.

Record: Civil Side No 122 of 1999

Vidot v The Minister of Employment & Social Affairs

Administrative law – Judicial review – Employment law – Affidavit evidence

A dismissed employee sought judicial review of the Minister's decision that the dismissal was justified, on the basis that the decision was unreasonable because the Employment Advisory Board had held the dismissal to be unjustified.

HELD:

(i) In exercising supervisory jurisdiction under the Act, this court does not act as an appellate body and hence will not enquire into the merits of the decision of the adjudicating authority. The scope of supervisory jurisdiction is a review of the decision-making process itself. Hence the consideration is whether the petitioner has been treated with justice and fairness.

(ii) A decision can be quashed by a writ of certiorari where a subordinate body acted ultra vires, or failed to follow rules of natural justice, or where there is an error of law on the face of the record.

(iii) A conclusion is unreasonable if no reasonable authority could come to it, or is so absurd that nobody could think that it was within the authority's power to act that way.

(iv) Where all known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker

who has given no reason cannot complain if the court draws the inference.

(v) Affidavits should be sworn before a different attorney at law or any of the persons in section 171 of the Code of Civil Procedure only when such affidavits are used in court as instruments of evidence.

Judgment for the respondent. Petition dismissed.

Legislation Cited
Employment Act 1995, s 65
Seychelles Code of Civil Procedure, s 171
Constitutional Court Rules, r 3
Supreme Court (Supervisory Jurisdiction of Subordinate Courts, Tribunals and Adjudicating Authorities) Rules, r 2

Foreign legislation noted
Tribunal and Inquiries Act 1992 (UK)
Supreme Court Rules Order 41 (UK)

Cases referred to
Amalgamated Tobacco Company v MESA (1966) SCR 1
Rosette v ULC SCA 16/1994
United Opposition v A-G (unreported) constitutional case 7/1995
Mike Valentine v Beau Vallon Properties (unreported) civil side 42/1992

Foreign cases noted
Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223
Padfield v Minister of Agriculture [1968] AC 997
Public Service Board of New South Wales v Osmund (1987) 159 CLR 656
R v Ministry of Defence Ex parte Murray (1997) TLR 1104

Antony Derjacques for the plaintiff

Dora Zatte for the defendant

Judgment delivered on 6 November 2000 by:

PERERA J: The petitioner was employed at the Plantation Club of Seychelles as the "Casino Middle Manager" ("Pit Boss"). Her employment was terminated on 20 September 1997 on the ground of committing a serious disciplinary offence as provided in schedule 2, part II, paragraph (k) of the Employment Act 1995, which is as follows:

> A worker commits a serious disciplinary offence wherever, without a valid reason, the worker causes serious prejudice to the employer or employer's undertaking and more particularly, inter alia where the worker:
>
> (k) Does any act, not necessarily related to the work of the worker, which reflects seriously upon the loyalty or integrity of the worker and causes serious prejudice to the employer's undertaking.

The petitioner hereupon invoked the grievance procedure under the said Act. According to the facts, as disclosed in the competent officer's decision, the applicant was in charge of the gaming floor of the casino under the supervision of the Casino Surveillance Manager and the Casino Manager. On 18 September 1997, she was on night shift and left the hotel at 3.30 a.m. The next day she was questioned by the Human Resources Manager as regards certain foreign currency irregularities in her department. Her duties did not involve handling of foreign currency. However she stated that she knew that foreign currency and IOU cheques were held by the cashier, and that if there was any malpractice in the transactions it was the responsibility of the Night Manager and the Financial Controller to detect them. The respondent's attorney, Mr B. Georges submitted to the competent officer that a fraudulent practice had occurred in her Department and that she had failed to report the matter to the management although she was aware of it. That fraudulent practice was

committed by the Casino Manager, who did not bank each day's foreign currency transactions. It was accordingly submitted that her failure to notify the management on the matter constituted a serious disciplinary offence under the Employment Act 1995, as sub paragraph (k), of schedule 2, part III covered acts not necessarily related to the work of the worker, as well. The applicant sought an order declaring the termination to be unjustified and consequently a reinstatement without any loss of earnings. The competent officer made the following decision.

> *1.* Although the Applicant pleaded ignorance of all knowledge of fraud, at least at one given time, she was aware that foreign exchange was being held for a local client.
>
> 1. This is contrary to the Foreign Exchange Regulation. It is not a defence to plead ignorance of the law. All the same, assuming that she did not know the existence of such law, it was her duty to report this malpractice to the management. I am of the opinion that although there is no proof to suggest that the applicant was directly implicated in this practice, circumstantial evidence shows that the applicant was guilty of intentionally hiding certain malpractices by her very failure to report the same_to_the management. This absolute breach of good faith has been proved to my satisfaction. In the light of the above, termination of the applicant's contract of employment pursuant to section 61(12)(a)(i) of the Employment Act 1995 was justified. Therefore her claim for reinstatement fails."

In an appeal to the Minister, the Employment Advisory Board heard submissions of both parties. Mr. Georges appearing for

the respondent hotel submitted that the applicant had known that the Casino Manager was holding foreign currency, contrary to procedures, and hence she ought to have reported the matter to the Personnel Manager. He however informed the board that "the hotel had no objection to the reinstatement of the appellant in her job." The board held that the applicant's "termination was unjustified and that she should be reinstated to her post without loss of earnings."

The Minister however disregarded the opinion of the Advisory Board, and affirmed the decision of the Competent Officer. This, he was entitled to do as the appellate body is not the Advisory Board, but the Minister.

The present application for a writ of certiorari is based on alleged irrationality or unreasonableness of the decision of the Minister. It is submitted by counsel for the petitioner that although the Competent Officer had decided that the termination of employment was justified and that accordingly the claim for reinstatement must fail, the decision of the Employment Advisory Board that it was unjustified and hence the applicant should be re-instated in her post without loss of earnings was based on the submission of the counsel for the employer that there was no objection to the re-instatement. He therefore contended that the decision of the Minister upholding the decision of the Competent Officer, was in the *Wednesbury* sense, so "unreasonable that no reasonable authority could ever come to it." It has here to be noted that the finding of the Competent Officer, and of the Minister that the petitioner's act fell within the provision of paragraph (k) of schedule 2 of part II of the Act is not being challenged.

The submissions of Mr. Georges before the Employment Advisory Board should be considered in the proper perspective. He supported the Competent Officer's finding that the applicant had knowledge of the irregularities in the foreign currency transactions in her department, but failed to report the matter to the Personnel Manager. In these circumstances, his submission that the hotel had no objection to the re-instatement of the applicant was not an admission of the

termination being unjustified, but clearly that, if the Board held it to be so, on the merits, the employer had no objection to an order under Section 62 (2)(a) (iii) being made as regards for re-instatement. Otherwise he would have settled the case without further ado. The decision of the Board was clearly influenced by the submission of Mr Georges is regards re-instatement. There is nothing to indicate that the Advisory Board considered the merits of the Competent Officer's findings, in coming to the conclusion that the termination was unjustified.

The Minister, in his affidavit dated 28 September 1999 avers that:

> 8. I was satisfied upon consideration of all the material placed before me that the petitioner intentionally withheld from the management the malpractice relating to foreign exchange. I am advised that the said intentional failure to report the said malpractice referred to in above amounted to a serious disciplinary offence under schedule 2 part II (k) of the Employment Act 1995 as it reflected seriously upon the loyalty or integrity of the petitioner as it caused serious prejudice to the employer's undertaking as it amounted to serious misconduct in relation to the work of the petitioner.
>
> I was satisfied in the circumstances that the Competent Officer's decision of 7 October 1997 was correct that the termination of the petitioner was justified in terms of section 61(2)(a) of the Employment Act 1995.
>
> 9. I state further that my decision was in accordance with all the evidence

The Employment Act 1995 does not contain a specific provision as the previous Act of 1990 that the decision of the Minister upon an appeal or review shall be final and that is validity or legality could not be challenged by any person on any ground whatsoever. However, even under the 1990 Act, the court preserved its right to quash unlawful orders in the exercise of its powers under supervisory jurisdiction, *Mike Valentine v Beau Vallon Properties* (unreported) civil side 42 of 1992, *Rosette v U.L.C* (unreported) SCA 16 of 1994) and *Amalgamated Tobacco Company v M.E.S.A* (unreported) civil side 33 of 1995.

In exercising its supervisory jurisdiction, this court does not act as an appellate body and hence will not enquire into the merits of the decision of the adjudicating authority. The scope of supervisory jurisdiction is a review of the decision-making process itself. Hence the consideration is whether the petitioner has been treated with justice and fairness. Unlike in an appeal, this court cannot substitute its own decision for that of the sub-ordinate court, tribunal or adjudicating authority. But such a decision can be quashed by a writ of certiorari where such subordinate court, tribunal or authority had acted ultra vires its powers and jurisdiction, or failed to follow rules of national justice, or where there is an error of law on the face of the record, or, as is being relied in the present case, on the ground of unreasonableness.

In the instant case, the petitioner relies on the principle enunciated by Lord Greene MR in the *Associated Provincial Picture Houses v, Wednesbury Corporation* (1948) 1 KB 223, which in administrative law is commonly known as *Wednesbury* unreasonableness. Lord Greene's definition included misdirection on points of law, irrelevance and bad faith. The learned Judge further stated that a conclusion was unreasonable if no reasonable authority could come to it. He also categorized it as something so absurd that nobody could think that it was within the authority's power to act that way. Section 65(4) of the Employment Act 1995 provides that:

> Upon an appeal or review under this section the Minister may consult with the Employment Advisory Board before giving the ruling on such appeal or review.

Hence, the Minister is not bound by the decision or advice of the Advisory Board. The function of the board is to advise the Minister, but the ultimate decision lies with him. However, that decision should inter alia be reasonable within the *Wednesbury* principles.

The Minister has averred inter alia that the petitioner had "intentionally withheld from the management the malpractice relating to foreign exchange." This was a fact which was not in dispute, as the petitioner herself stated before the Competent Officer that although she knew about the malpractice it was not her duty to report. The finding of the Competent Officer on this aspect was as follows:

> I am of opinion that although there is no proof to suggest that the Applicant was directly implicated in this practice, circumstantial evidence shows that the applicant was guilty of intentionally hiding certain malpractices by her very failure to report the same to the management.

In criminal law, "intention is an operation of the will directing an overt Act." However for purposes of schedule 2, part II, paragraph (k) of the Act, could it be said that the petitioner intended to cause serious prejudice to her employer by failing to report the malpractice? In the field of employment, a term will be implied in every contract of employment that the employee will serve loyally and faithfully. Hence the conduct of the employee has to be determined in contract and not under criminal law.

State counsel submitted that the decision of the Advisory Board appears to have been actuated solely by the offer of

re-instatement made by the counsel for the employer, and that there is no evidence to show that the issue of whether the petitioner had been aware of the malpractice and yet failed to report it to the management, was considered. Hence it was contended that the Minister avoided the offer of re-instatement as it was irrelevant to the main ground on which the petitioner's services were terminated. The *Wednesbury* principle also involved a consideration whether the finding of the decision making body, was flawed by irrelevance. Lord Greene MR stated that this would be the case where the decision-making body "has taken into account matters which it ought not to take into account." If indeed, the employer wanted to re-instate the petitioner in employment, they ought to have settled the case before the Advisory Board. Instead their counsel maintained that "if the petitioner knew that a person was holding foreign exchange, and knew it was wrong, she should have reported it to the Personnel Manager."

In these circumstances the Advisory Board could not have advised the Minister that the termination was unjustified unless they considered the offer of re-instatement as an admission of such termination being unjustified.

The Minister who was not obliged to follow the advice of the Advisory Board, was satisfied upon all material placed before him that the Competent Officer's decision was correct. This court has no jurisdiction to consider the merits of that decision. There is no procedural or legal irregularity in that decision. Nor is there any ‘unreasonableness’ in the *Wednesbury* sense.

Counsel for the petitioner also submitted that the failure of the Minister to give reasons points overwhelmingly in favour of a different decision. He cited the case of *Padfield v. Minister of Agriculture* [1968] AC 997 where it was held that... "if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision maker who has given no reason cannot complain if the court draws the inference." However, in the Australian case of

Public Service Board of New South Wales v Osmund (1987) L.R.C. 681 Gibbs CJ stated that:

> Reasons were normally, but not invariably given for judicial decisions, but the exercise of administrative functions was not necessarily subject to the same rules as the exercise of judicial functions. If the requirement of reasons for administrative decisions was desirable as a policy development, it was a change which required action by legislatures, not by the courts.

The Tribunals and Inquiries Act 1992 (U.K) requires the order making authority to supply reasons on request. There is still no statutory requirement to do so. However, as was held in the case of *Regina v Ministry of Defence, Exparte Murray* (1997) Times Law - Reports 17 December 1997, fairness would in particular circumstances of a case, necessitate the giving of reasons for a decision, in that case, the Queen's Bench Divisional Court found that a Court-Martial should have given reasons for rejecting the evidence of a soldier with long and exemplary service that the effects of an anti-malarial drug had caused him to commit an offence of wounding to which he had pleaded guilty, and for sentencing him to imprisonment with consequent obligatory dismissal and reduction in rank.

In that case, the main consideration was that the soldier had presented evidence to show that the act of violence was entirely out of character, and hence an explanation as to why the court thought he had reacted as he did, would have been desirable so that the sentence or imprisonment and the dismissal from service could be properly understood by him, his family, and his regiment. The sentence of imprisonment and dismissal were challenged on the ground of unreasonableness in the *Wednesbury* sense.

In the instant case however, the decision of the Minister as conveyed by the Principal Secretary in his letter dated 21

April 1998 was that "on the basis of evidence, it has been established that the offence of gross misconduct has been proved." It was further stated that:

> The Minister has therefore decided that the termination of the appellant's contract of employment was justified and the determination of the Competent Officer been upheld.

The Minister therefore agreed with the reasons given by the Competent Officer. The offences set out in part II of schedule 2 of the Act, categorised as "serious disciplinary offences" constitute the element of misconduct on the part of the employee, which causes serious prejudice to the employer or the employer's undertaking. Where a worker has knowledge of a malpractice which prejudices the employer's undertaking, and he intentionally or negligently does not bring it to the notice of the employer, then, it could be a serious reflection upon his loyalty and integrity. According to the evidence in the case, the petitioner was aware of the malpractice. Hence the term implied in every contract of employment to serve the employer loyally and faithfully was breached. In these circumstances, the Minister's failure to give further reasons cannot be considered as being unfair on the petitioner. The case of *R v Ministry of Defence* (supra) should therefore be distinguished, as in that case fairness required that the Court-Martial should have given reasons why a sentence of imprisonment was imposed with consequent dismissal of the soldier, when he had pleaded guilty to an offence of wounding, with a defence that he acted under the effects of an anti-malaria drug. Whether that defence was accepted or not had to be stated to justify the sentencing. In the present case, the facts are clear, and the offence the petitioner was found to be in breach of, was equally clear. Hence there was no necessity for the Minister to give any reasons.

State counsel has also raised a procedural objection. She submitted that the affidavit, filed with the petition has been

sworn before the same attorney who has filed the petition, and that was in violation of rule 2(1) of the Supreme Court (Supervisory Jurisdiction of Subordinate Courts, Tribunals and Adjudicating Authorities) Rules, 1995. Although this objection need not be considered in view of the above findings, I would proceed to consider it as it is being raised for the first time in this court in respect of the Supervisory Jurisdiction Rules. That rule is as follows:

> 2(1) An application to the Supreme Court for the purposes of rule 1(2) shall be made by petition accompanied by an affidavit in support of the averments set out in the petition.

In the case of the *United Opposition v The Attorney General* (unreported) Constitutional Case no 7/95), this same objection was taken in relation to rule 3(1) of the Constitutional Court Rules 1994. That rule is as follows:

> 3(1) An application to the Constitutional Court in respect of matters relating to the application, contravention, enforcement or interpretation of the Constitution shall be made by petition accompanied by an affidavit of the facts in support thereof.

In that case, I ruled that:

> Rule 3(1) requires an affidavit of facts in support of the averments in the petition, not a statement swearing to the truth and correctness of these averments. This requirement cannot be short-circuited. An affidavit of 'facts' is required to obviate the necessity for the court to hear oral evidence.

Rule 2(1) of the Supervisory Jurisdiction Rules and rule 3(1) of the Constitutional Court Rules are distinctly different. The affidavit required under the former, is an affidavit simpliciter, in support of the averments in the petition. A petition under the supervisory jurisdiction is a review of a decision of a subordinate court, tribunal or adjudicating authority. Hence the

determination of the court is based on the record of such body, and not on evidence. In constitutional cases however, the accompanying affidavit of facts takes the place of evidence upon which an alleged infringement of a provision of the Constitution is considered. It was in these circumstances that the Constitutional Court interpreted rule 3(1) in the light of order 41, rule 8 of the Supreme Court Rules of U.K. which provides that "no affidavit shall be sufficient if sworn before the solicitor of the party on whose behalf the affidavit is to be used or before any Agent, partner or clerk of the solicitor." The basis of that rule, I presume is the common interest which both the party and the solicitor share in the outcome of the case, and hence the necessity for such "evidence" in the affidavit to have a semblance of independence.

However rule 2(1) under consideration in this case requires an affidavit supporting the bare averments of the petition. Hence, I would not extend the interpretation of rule 3(1) of the Constitutional Court Rules to rule 2(1) of the Supervisory Jurisdiction Rules, as I am of the view that affidavits should be sworn before a different attorney-at-law or any of the persons prescribed in section 171 of the Code of Civil Procedure only when such affidavits are used in court as instruments of evidence.

Hence I see no merit in this objection.

However, on the basis of the findings on merits, the petition is dismissed, but without costs.

Record: Civil Side No 217 of 1998

Dhanjee v Dhanjee

Foreign judgment – Custody - Enforcement

The estranged parties agreed in England to a consent order in respect of the custody of their child. The respondent brought the child to Seychelles in breach of that order. The applicant seeks an order to render the English judgment executory in Seychelles. The respondent objected that the law did not apply to custody orders, and that the judgment was not final and conclusive.

HELD:

(i) Where a document is sought to be admitted as a judgment of a foreign court, the authenticated copy to be admissible must purport to bear the seal of the foreign court without necessity of proof of the seal.

(ii) Section 227 of the Seychelles Code of Civil Procedure is an English translation of article 509 of the French Code of Civil Procedure and all French authorities on that article are relevant so as to apply to section 227.

(iii) The caselaw in France has established that article 509 is applicable to both monetary and non-monetary foreign judgments delivered as a result of civil litigation between private parties. The jurisprudence has however excluded the application of article 509 to administrative or criminal matters.

(iv) The French case law is applicable as local law unless there is a specific law to prohibit its application or sufficient reason to depart from that case law.

(v) The procedure for exequatur under article 509 of the French Code of Civil Procedure has been extended to child custody matters.

Judgment: plea in limine litis dismissed.

Legislation Cited
Civil Code of Seychelles, art 213
Evidence Act, s 2
Matrimonial Causes Act 1992
Reciprocal Enforcement of British Judgments Act
Seychelles Code of Civil Procedure, s 227

Foreign legislation noted
Code of Civil Procedure (Fr), art 509
Evidence Act 1851 (UK), s 7

Cases referred to
Pillay v Pillay (1973) SLR 307
Privatbanken v Aktieselekab Bantele (1978) SLR 226

Foreign cases noted
Austin v Bailey (1962) MR 113
Pillay v Pillay (1973) MR 179

France Bonte for the respondent
Nichol Tirant-Gherardi for the respondent
Dora Zatte for the Attorney-General

Appeal by the respondent was dismissed on 10 April 2002 in CA 13 of 2000.

Judgment delivered on 3 July 2000 by:

JUDDOO J: This is an application to render a foreign judgment delivered by the High Court in the United Kingdom executory in the Republic of Seychelles.

The applicant has filed a petition titled to be made under section 227 of the Seychelles Code of Civil Procedure (Cap 213) and the respondent has filed a reply to the petition. In *Privatbanken v Aktieselekab Bantele* (1978) SLR 226 this court observed that the procedure to render a foreign judgment executory under section 227 is by way of an ordinary action, a plaint. In the present case, the petition filed before this court is primarily and unequivocally on the basis of making the foreign judgment referred therein and delivered by the High Court in the U.K. executory in the Seychelles. The respondent has filed a reply thereto resisting the application in limine litis and on the merits in the manner of a defence without affidavit. The matter was heard and both parties were granted the opportunity to call their witnesses. The applicant gave evidence in court and was cross-examined by counsel for the respondent. The respondent elected to call no evidence on their behalf. The case has proceeded in the manner of a plaint and this court is not prevented from determining the issue nor has any prejudice resulted to the respondent. Accordingly, the matter is thereafter treated as an ordinary action, a plaint.

A photostat copy of the judgment purporting to bear the seal of the High Court of Justice, Family Division, Leeds, U.K. was produced by the applicant, as exhibit PI. Under section 7 of the English Evidence Act 1851, which is applicable to the Seychelles by virtue of section 2 of the local Evidence Act (Cap 74), where a document is sought to be admitted as a judgment of a foreign court, the authenticated copy to be document must purport to bear the seal of the foreign court without necessity of proof of the seal. The document, exhibit PI, bears of its face a seal which purports to be the seal of the High Court, Family Division, Leeds, U.K. Accordingly, I find the document to be admissible as a foreign judgment before this court.

The foreign judgment is a 'judgment by consent of the parties' delivered on 14 July 1999 by the High Court, Family Division, Leeds, U.K. under section 58(1) of the Children Act 1989 (UK) whereby:

(1) the wardship proceedings issued on 8 March 1999 be discharged;

(3) there shall be a residence order in relation to the child Milun Viral Dhanjee in favour of the applicant (plaintiff):

(4) there shall be contact between the said child and the first respondent (defendant) as follows:

A. Direct contact in 1999 ...
B. Direct contact in 2000 ...
C. Contact thereafter ...
D. Indirect contact ...

The applicant testified that she is a British citizen. She married the respondent on 17 July 1991 and from their marriage a child, Milun Viral Dhanjee, was born on 21 February 1994. By virtue of a consent judgment delivered in July 1999 by the High Court, Leeds, (U.K.) the applicant was awarded custody of the child as per exhibit PI. On 21 August 1999, the respondenthad taken the child for a weeks contact in compliance with the said consent judgment. However, since the 26 August 1999 the respondent has absconded with the child thereby denying to the applicant her rights under the judgment delivered. The applicant added that it was urgent that the judgment delivered in the U.K. be made executory in Seychelles.

Under cross examination, the applicant explained that their child holds dual nationality as a British citizen and a Seychellois national. She testified that the proceedings before the court in U.K. had lasted from January 1999 to July 1999 and custody of the child would have been determined by the court on 14 July 1999 when the parties reached an agreement which was drawn up and delivered as a consent judgment.

At the close of the case for the applicant, the respondent did not adduce further evidence. Counsel for the respondent submitted in essence that:

(1) section 227 of the Seychelles Code of Civil Procedure is not applicable to enforce a 'custody judgment' granted by a foreign court being limited to cases falling under article 2123 of the Civil Code which purports to judicial mortgages;

(2) alternatively, the foreign judgment sought to be declared executory does not satisfy the conditions for a foreign judgment to be declared executory since it is not a final and conclusive judgment

(3) even if the Reciprocal Enforcement of British Judgments Act (Cap 199) was to be applied the foreign judgment sought to be declared executory falls outside the definition of judgment in the Act since such definition is limited, to “civil proceedings ... whereby any sum of money is made payable and includes an award in proceedings or an arbitration and thereby excludes custody judgments.

An application by a party to render a foreign judgment executory in Seychelles may be determined in accordance with the provision enacted under section 227 of the Seychelles Code of Civil Procedure (Cap 213) which reads:

> Foreign judgment and deeds drawn up in foreign countries can only be enforced in the cases provided for by articles 2123 and 2128 of the Civil Code and agreeably with the provisions of the aforesaid articles...

Article 227 is an English translation of article 546 of the French Code of Civil Procedure (now article 509 of the French Code) which pertains to what is known as "exequatur". In *Privatbanken Aktieselskab v Bantele* (1978) SLR 231 it was observed that:

> Section 226 (now section 227) is an English translation of article 546 and all the French authorities on that article are relevant so as to apply section 226...

The full purport of this provision has been given considerate examination by eminent authors. In *Droit International Prive* Batiffol & Lagarde, (7th Edition, 1983) page 551, the authors states that:

> L'exequatur donne aux jugements et actes publics étrangers force exécutoire ... Les articles 2123 C. Civ. et 546 ancien C. Proc. Civ. ont prévu son existance san aucunement le réglementer. La jurisprudence a du construire un système déterminant les décisions susceptibles d'exequatur, les conditions de son octroi, la procédure à suivre et les effets du jugement auquel elle aboutit...

And, in *Encyclopedic Dalloz, Droit International*, Verbo Jugement Etranger (Matieres Civile et Commerciale) Titre 1er Note 3, the author commented that:

> L'article 546 du Code de procédure civile dispose que 'les jugements rendus par les tribunaux étrangers ... ne seront susceptibles d'exécution en France, que de la manière et dans les cas prévus' pararticle 2123 du Code Civil. Or il n'est question dans ce dernier article que de l'hypothèque judiciaire, dont il est prescrit qu'elle ne peut résulter des jugements rendus en pays étranger que s'ils ont été 'déclarés exécutoires par un tribunal français'... Le droit français en cette matière est donc à déduire d'une coutume jurisprudentielle

The jurisprudence in France has established that article 546 (of the French Civil Procedure Code) is applicable to both monetary and non-monetary foreign judgments delivered as a result of civil litigation between private parties. The jurisprudence has however excluded the application of article

546 to administrative or criminal matters as observed in *Encyclopedic Dalloz*, supra, note 11:

> Les jugement étrangers régis par les règles exposées ci-après comprennent toutes les décisions rendus par une juridiction étrangère dans un litige d'intérêt privé. Doivent donc en être écartées les décisions à caractère purement administratif ou répressif (matière pénale)...

and in *Droit International Prive*, supra page 551:

> L 'exequatur n'est accordé traditionnellement qu'aux décisions étrangères de droit privé par oppositions aux décisions pénales ou administratives...

Section 227 of the Seychelles Code of Civil Procedure is a faithful translation of article 546 of the French Code of Civil Procedure and the jurisprudence which has evolved under the French provision is applicable under the local law unless there is a specific law to prohibit its application or sufficient reason to depart therefrom.

In relation to custody matters, the jurisprudence has evolved to make 'exequatur' applicable to any act of coercion upon a person; as follows - vide: Dalloz, supra:

> **note 50**
> Doivent cependant recevoir l'exequatur, selon la jurisprudence de la cour de causation tous ceux parmi les jugements qui emportent exécution matérielle sur les biens ou coercition sur les personnes...
>
> **and note 55:**
> Quand à la coercition sur les persornnes elle s'entend dans les cas ou l'on veut en vertu d'un jugement étranger exiger laccomplissement d'un acte.

Note 57:
Le même principe vaut apparament et malgré l'hésitation de certains tribunaux pour Les jugements statuant sur la garde des enfants... voir les décisions cités, supra à 40, et sur l'ensemble de la question PONSARD. La reconnaissance et l'exécution en France des décisions étrangères concernant la garde des enfants...

Accordingly, I find that the procedure for exequatur under article 456 of the French Civil Procedure Code has been extended to 'child custody' matters. The jurisprudence under the French provision is applicable under section 227 of the Seychelles Code of Civil Procedure.

The next determination is whether the Reciprocal Enforcement of British Judgments Act (Cap 199) by virtue of its definition of judgment in the Act as "any judgment or order given or made by a court in any civil proceedings whereby any sum of money is made payable…" limits the operation of section 227 as far as U.K. judgments are concerned. The Reciprocal Enforcement of British Judgments Act 1922 (Cap 199) has to be read with section 9(1) and (2) of the Foreign Judgments (Reciprocal Enforcement) Act 1961 (Cap 85) Under section 4(1) of the latter Act a foreign judgment may be registered and, if not set aside under section 7, shall for the purposes of execution be of the same force and effect as a local judgment of the registering court. Under section 4(1) the President may by order direct that part 1 of the Act extend to a foreign country.

Under Statutory Instrument 56 of 1985 an order was made for part I of the Foreign Judgments (Reciprocal Enforcement) Act to apply to "the Commonwealth and to judgments obtained in the Commonwealth...". Section 9(2) of the Foreign Judgments (Reciprocal Enforcement) Act enacts that where an order is made extending part I to any part of the Commonwealth to which the Reciprocal Enforcement of British Judgments Act applies, the Reciprocal Enforcement of British Judgments Act

shall cease to have effect in relation to that port of the Commonwealth. Accordingly, the definition of "judgment" under the Reciprocal Enforcement of British Judgments Act is replaced by the definition of "judgment" under the Foreign Judgments (Reciprocal Enforcement) Act which includes "as a judgment or order given or made by a court in any civil proceedings..." This definition does not restrict the application of exequatur in respect of the United Kingdom Judgments.

The conditions that must be satisfied before a foreign judgment is declared executory under section 227 of the Seychelles Code of Civil Procedure (Cap 213) were, after a review of the French jurisprudence, summarised in *Privatbanken Aktieselskab v Bantele*, supra, as follows:

(1) The foreign judgment must be capable of execution in the country where it was delivered.

(2) The foreign court must have had jurisdiction to deal with the matter submitted to it.

(3) The foreign court must have applied the correct law to the case in accordance with the rules of Seychelles private international law.

(4) The rights of the defence must have been respected.

(5) The foreign judgment must not be contrary to any fundamental rules of public policy.

(6) There must be absence of fraud.

Under the first condition, counsel for the respondent submitted that the applicant has failed to establish as a fact that the judgment delivered in U.K. is final and conclusive and

that in the absence of proof to that effect Seychelles law should be resorted to whereby child custody matters can always be reviewed. In the instant case, the submission is misconceived.

The requirement is that the foreign judgment must be "capable of execution" in the foreign country. This is referred to in Dalloz, supra, note 197 as *Caractere Executoire*:

> Lorsque l'exequatur est poursuivi aux fins d'exécution, il faut que le jugement étranger soit exécutoire dans les pays dont il émane...
>
> and at note 200
>
> Il n'est pas d'avantage nécessaire que le jugement étranger soit passé en force de chose jugée. Il suffit qu'il soit exécutoire même par provision. Sont également susceptibles d'exequatur les jugements provisoires dont les condamnations restent exposés a des modifications ultérieures. La jurisprudence sur ce point est actuellement bien établie...

The judgment sought to be enforced in the Seychelles is a "residence and contact order" delivered by the High Court of Justice, Family Division, Leeds U.K. wherein the custody and care of the minor child, Milun Viral Dhanjee, was agreed to by the respondent and made part of the judgment delivered by the court. The applicant testified that the terms of the settlement were drafted and agreed by both parties outside court. Upon the undertaking given by both parties, a consent judgment was delivered by the court. No appeal has been lodged against the judgment delivered. Accordingly, I find that the said judgment being a consent judgment which has not been subject to appeal, is conclusive between the parties, and capable of execution in the foreign country.

On the question of jurisprudence and competence of the High Court of Justice, Leeds, U.K. the trial court must have jurisdiction in the international sense and also local

jurisdiction. The first must be determined in the light of Seychelles private international law whereas the second in the light of the law of the country of the trial court. The foreign court had local jurisdiction since the applicant and the minor child are British citizens and the respondent submitted to the jurisdiction of the court. On the other hand the foreign court had jurisdiction in the international sense under section 6(i) (c) of the Foreign Judgments (Reciprocal Enforcement) Act given that the jurisdiction of the foreign court is recognised under Statutory Instrument 56 of 1965 which extends part 1 of the Act to the Commonwealth and to judgments obtained in the Commonwealth.

The court must be satisfied that the foreign court has applied the correct law ("la loi competente") to this case in accordance with the rules of Seychelles private international law. The issue before the court concerned the custody of the minor child. In *Pillay v Pillay* (1973) MR 179 and (1973) SLR 307, the Court of Civil Appeal approved of the following passage from *Austin v Bailey* (1962) MR 113:

> Since the rule of private international law of any country must necessarily have their foundation in the internal law of that country those which are applicable must be based substantially on the provisions of our laws regarding civil rights and obligations. These laws are basically and almost entirely French, so that subject to any exception which may arise through certain different statutory enactments and treaty obligations, we must be guided by the French rules of private international law...

The Matrimonial Causes Act 1992 (Seychelles) is based on the Matrimonial Causes Act 1973 of the United Kingdom and the Domicile and Matrimonial Proceedings Act 1973. This constitutes "an exception which arises through certain different statutory enactments" and we are guided by the English rules of private international law. In the United Kingdom, the personal and proprietary relationship between

members of a family are governed by the law of the domicile - vide: *Conflict of Laws* (J.C. Morris 1988) page 14. In the case of a minor child the domicile is that of dependency. Section 4(1) and (2) of the Domicile and Matrimonial Proceedings Act (1973) (UK) provide that the domicile of a dependent child whose parents are alive but living apart shall be that of the mother - vide: *Conflict of Laws*, supra, page 29. Accordingly, the law of domicile applied by the foreign court was "la loi competente".

The next condition is whether the rights of the respondent were respected. The applicant testified that the matter proceeded before the High Court of Leeds from January to July 1999. The respondent submitted to the jurisdiction of the Court.

The foreign judgment includes undertakings by the applicant towards the respondent and various agreed periods of 'direct contracts' as well as 'staying contacts' between the minor child and the respondent. It is certain from the foreign judgment that the rights of the respondent were respected. In addition, I do not find that the foreign judgment offends against any fundamentals rules of public policy and nor is there any element of fraud present.

The evidence led by the applicant establishes that the respondent had not returned the minor child to her after a 'direct contact' visit. In so doing, the respondent is not a person who comes before this court with clean hands. He has submitted to judgment before the foreign court and has acted in contempt of the said judgment delivered. This court can only strongly disapprove of such behavior which stands in defiance of a judgment delivered by a foreign court.

In the end result, being satisfied that all the conditions for an 'exequatur' are fulfilled, I entered judgment in favour of the applicant with costs and hereby declare the judgment of the High Court of Justice, Leeds, UK executory in Seychelles.

Record: Civil side No 65 of 2000

The Republic v Francois

Misuse of Drugs Act – Trafficking – Constitutional rights – Presumption of innocence

The accused was prosecuted for trafficking in a controlled drug. The facts were disputed by the accused.

HELD:

(i) The presumption raised by section 14 of the Misuse of Drugs Act is a rebuttable presumption. The effect of section 14 is to shift the legal burden onto the accused, once it is established the accused possessed the prescribed quantity of controlled drug, of proving that the possession was not for the purpose of trafficking. When such a legal burden lies on the defence, the standard of proof is on the balance of probabilities and not beyond reasonable doubt.

(ii) A person's fundamental rights may be restricted, but they cannot be denied either expressly or impliedly.

(iii) With the words "does or offers to do any act preparatory to, or for the purpose of [drug trafficking]" the Legislature extended the range of culpability beyond those who sell, give, administer, transport, send, distribute or transfer the drug. The offence has been widened to include even those who merely prepare to do such acts. Therefore the court has to determine on the evidence produced whether the accused did an act that was preparatory to trafficking.

(iv) The words "act preparatory to" are intended to apply what the law would regard as something less than an attempt.

(v) Evidence of large sums of money or an extravagant lifestyle, which prima facie is explicable if derived from drug dealings, is admissible in drug offence cases if that evidence is of probative significance.

Obiter

(i) Although the evidentiary presumption in section 15 to 19 of the Misuse of Drugs Act may be consistent with the recognised derogation in article 19(1) of the Constitution, the presumption of trafficking contained in section 14 of the Misuse of Drugs Act may, in an appropriate case before the Constitutional Court, be declared to be inconsistent with article 19 of the Constitution.

(ii) The time for referring the consistency issue in the present case to the Constitutional Court under article 46(7) of the Constitution has passed, as it should have been done "in the course of proceedings".

Judgment – accused convicted as charged.

Legislation Cited
Constitution of Seychelles, arts 19, 47
Misuse of Drugs Act, ss 5, 14, 15, 26, 29

Foreign legislation noted
Charter of Rights and Freedom (Canada), s 11
Narcotic Control Act (Canada), s 8

Cases referred to
Philip Cedras v R (unreported) Criminal ppeal 11/1988
Raymon Tarnecki v R (unreported) SCA 4/1996
R v Garry Albert (unreported) Criminal side 45/1997
R v Philip Leon (unreported) Criminal side 93/1983
R v Ricky Chang Ty Sing (unreported) Criminal side 2/1997

Foreign cases noted
R v Morris (1995) 2 Cr App R 69
R v Oakes (1983) DLR 123

Ronny Govinden for the republic
Antony Derjaques for the accused

Judgment delivered on 26 July 2000 by:

PERERA J: The accused stands charged with the offence of trafficking in a controlled drug, contrary to section 5, read with section 14, and 26 (1)(a) of the Misuse of Drugs Act 1990, as amended by Act no. 14 of 1999, and punishable under section 29 and the second schedule referred thereto. The particulars of the offence, as set out in charge, are that, the accused:

> on 25 July 1998, at L'ilot, Glacis, was trafficking in a controlled drug by virtue of having been found in the possession of 166.4 grams of cannabis resin, which gives rise to the presumption of having possessed the said controlled drug for the purpose of trafficking.

P.C. Mervin Dufrene (Pw2), testifying for the prosecution stated that on 23 and 24 of July 1998, he and P.C. Ange Michel were assigned to observe the house occupied by the accused from a distance. He stated that he saw "something was being sold, and this went on for two days". Then, on 25 July 1998 around 11 a.m, he went with a group of about seven other officers to the house of the accused. The police vehicle he travelled was parked on the access road near that house directly opposite his room. The distance between the parked vehicle and the road was about 2–2½ meters.
Another police vehicle was parked behind it. According to this witness, the officers then surrounded the house. He went near the kitchen door, while P.C Belle was near the main entrance door of the sitting room. P.C Dufrene further testified that when he went near the kitchen door, he saw the mother of the accused pouring "baka" into bottles. P.C. Mitchell was knocking on the bathroom door, and then from where he was,

he saw the accused "coming from the direction where the noise was", towards the sitting room. He then moved towards the entrance to the sitting room. Then he saw the accused moving towards the window near the entrance door, which is fitted with louvre blades, and dropping something. He picked up a brown package wrapped in cling film. Counsel for the prosecution, then questioned the witness as follows:

> Q. What happened then?
> A. At that moment, P.C. Belle went in and caught him.
> Q. Did P.C Belle talk to you?
> A. He told me, Dufrene, there it is, he has dropped it there. I told him to go on holding him.

After that, the officers informed the accused that they had come to search the house. They told him that he will be arrested for being in possession of the substance which they suspected to be a controlled drug. He appeared to be frightened. The accused was searched. He had R500 in cash, and a pair of scissors in his pocket. P.C. Dufrene further stated that the accused took out a small round piece and a rectangular piece of black substance from his pocket. However as they were supposed to have been given to P.C. Dufrene before the accused was cautioned, the prosecution excluded them from the quantity of drugs exhibited in the case. The room occupied by him was thereafter searched and the officers found R 1558 in cash, and a pocket penknife. P.C. Dufrene testified that there were traces of drugs on the penknife. Although the penknife is an exhibit in the case, it had not been sent to the analyst for examination and reports as regards any substance said to have been on its blade.

P.C. Dufrene further testified that the accused was arrested and taken to the Glacis Police Station. From there he was taken to the Drug Squad at New Port, and later locked in a cell at the Central Police station. All the exhibits were in the custody of P.C. Dufrene, no one had access to them. On 27 July 1998, he obtained a letter from ASP Quatre addressed to

the analyst (exhibit PI) and he took with him 17 pieces of cannabis resin wrapped in Cling Film, and one small round and a rectangular piece of the same substance.

Dr. Gobine, the Analyst (Pw1) testified that he received the substance on 27 July 1998 at 8.40 a.m from P.C. Dufrene. After analysis, he reported that these items of dark substance were cannabis resin. He returned the items with his report on 28 July 1998 at 10 a.m to P.C Dufrene (exhibit P2). The weight of the substance upon analysis was 167 grams. However, on an application made by state counsel only the 17 pieces of cannabis resin were re- weighed in court by Dr. Gobine. As the two small pieces were excluded, it was found that the weight was 166.4 grams and not 167 grams as stated in the report. The charge was accordingly amended on a motion by the prosecution to read as 166 grams. The amended charge was again put to the accused, and he maintained his plea of not guilty.

P.C. Joel Belle (PW3) corroborated P.C. Dufrene's evidence that he accompanied the officers in the raid of the accused's house on 28 July 1998 around 11 a.m. He staged that the front door was open. There was an iron gate on it, which was also open. He saw the accused coming from a corridor inside the house with a packet of "black substance in his hand". Then he get hold of him, but he resisted dragged him near the window, put his hand through an open window and "threw" it. Then he told P.C. Dufrene to pick it up. P.C. Belle also stated that when he searched the accused, he found a pair of scissors in his pocket. Inside the room they found R1558 and a penknife stained with some substance that smelt like 'hasish'. P.C. Belle however did not state that he found R500 inside the accused's pocket, as testified by P.C. Dufrene. However, when the envelope containing R1558 was shown to him, he stated for the first time that he took out R500 from the accused's pocket and that he saw only R1500 in the wardrobe in the accused's room. The prosecution exhibit P5 however contains R2058.

On being cross examined, P.C. Belle stated that he observed an open shed adjoining the accused's house where there were people drinking "baka". He also stated that he saw a big drum of "baka" or toddy in the kitchen of the house occupied by the accused. He also saw several bottles filled with "baka". He however did not know whether the mother and father of the accused, who lived in that house, had a licence to sell "baka" to the public.

The prosecution sought to produce a statement which tantamounts to a confession made by the accused to the police on 25 July 1998 at 1.45 p.m at the Drug Squad Unit. The defence objected to its production on the basis that it was an involuntary statement made upon force being used on him. The Court held a voire dire hearing where the evidence of the officers who recorded the statement, the evidence of the accused, and medical evidence were adduced. Defence also produced two photographs (exhibit D4) which showed an injury in the waist area of the accused. On a consideration of the evidence at the voire dire hearing, the court rejected that statement, as one having been made involuntarily. I have, at the end of the defence case reviewed the evidence as regards the admission allegedly made by the accused in his statement. However, on a consideration of the totality of the evidence, I am fortified in my view that it was an involuntary statement. Hence no reliance is placed on any of the matters contained in it.

The accused, testifying on oath, stated that he lived with his mother, father and two sisters in that house. One of the sisters had a two year old child. He stated that there was a shed between the house and the shop near the road, where people gathered to play dominoes. They also consumed drinks bought from that shop. On 25 July 1998, he was watching television around 10 a.m. Close to the main entrance to the sitting room is a window fitted with louvre blades. It had curtains made of light, soft material of a kind that could be seen through. The curtains were drawn. Then he saw two police officers outside the house while being seated with his back to the main entrance. He denied that he

ran into the sitting room, as P.C. Belle and P.C Dufrene had testified. The accused further testified that two officers came to the sitting room where he was seated and took him to inspect his bedroom. P.C. Dufrene came in later with his mother who was outside. The officers found R2000 in his wardrobe. They asked him where he got that money, and he replied that they were the proceeds of sale of bananas. The officers found a penknife on top of the fridge, and his mother told them that it belongs to his father. He further stated that a third officer whose name he did not know, brought slabs of a brownish substance and accused him of having thrown them outside. He denied that he did so. Although they searched him, there was nothing on him.

He explained that the pair of scissors that was seized by the officers, was the one he used to cut his finger nails. On being cross examined, the accused stated that although the material of the curtains was light and soft, one could not see through them. He further stated that he had sold bananas the previous day but did not deposit R2000 in his account at the savings bank as he had intended to purchase certain items and also to buy "football book" tickets. He denied having any drugs in his possession, and also denied the assertion of the prosecution that he pulled P.C. Belle towards the window to throw out any package. He said:

> A.P.C. Belle is much larger and stronger than me; he was standing in front of me. How could I, small as I am, get beyond him, him having caught hold of my left hand, to pick up the package and throw it outside the window? He said that the package was in my left hand?
>
> Q. Do you know the consequences of being found guilty for trafficking in cannabis resin?
> A. Yes.
>
> Q. That is why you were so desperate to get rid of that substance on that day?

A. It does not make any sense for me to go and throw it through the window, for him to pick it up and confront me with it again.

Q. On that day, nothing made sense to you. You were desperate and determined to get rid of that substance and on that day, the struggle ensued and you managed to arrive at the window, on the left of the sitting room, it was not very far from the main door to the sitting room. I am putting that to you?
A. Yes, but P.C.Belle was standing in front of an open door, why would I struggle and fight to go throw it out a window that was further away from me. If I wanted to throw something out, why didn't I just check it out through the open door.

Q. So where was P.C. Belle standing?
A. He was standing just beyond, in front of the sitting room door.

The admission that P.C Belle was standing near the front door was consistent with the evidence of P.C. Dufrene and P.C. Belle himself, but inconsistent with the evidence of the accused, who testified that he was watching television in the sitting room and two police officers came and arrested him while he was seated there. The accused realising this discrepancy stated that in fact P.C. Belle was not standing near the door, and that when he testified that he was there, he was only refuting P.C. Belle's evidence to show that if that had been so, he could have thrown the substance through the open door and not the window. The accused claimed that he had only a R10 note and some coins in his pocket, and not Rs500 as stated by P.C Dufrene.

In re-examination, he stated that there was a window in his bedroom which faces the side road where, according to the police officers, the vehicle they arrived there with several officers, was parked. The accused also stated that the flush toilet was close to his room, and that there is another window

in the kitchen, which is situated before entering the sitting area from his bedroom.

The Court upon visiting the locus in quo, noted the doors, windows and the toilet which the accused mentioned in his testimony.

Lisette Francois (Dw2), the mother of the accused also stated that the house is occupied by five persons, herself, her husband, the accused, his two sisters, and a child of one of the sisters. Her husband is unemployed but receives rent from a rented shop premises. Only the daughters were employed. Between the house and the main road is a shop where people play dominos. They buy beer from the shop in front and drink there. Her husband buys a container of "baka" and gives it to the people who come to work in the house. The day the police raided the house she was pouring a bottle of "baka" in the kitchen for a man who had cut grass for her. P.C. Dufrene came in through the outside door of the kitchen, and pointing a pistol said "don't run". Robin was in the sitting room watching television. P.C. Dufrene asked her to accompany him to the sitting room. Both of them went through the kitchen to the sitting room. Inside the house, she saw the accused, her son, standing with his hands handcuffed behind his back. She did not see the accused throwing anything out of the window.

This witness maintained that she and P.C. Dufrene went into the house from inside the house and not outside and that in the sitting room, there were two officers with the accused, and another officer was just entering. If that be so, P.C Dufrene's evidence that after speaking to this witness, he moved towards the front window from outside the house, and that the package of drugs fell near his feet would be false.

The prosecution evidence regarding possession is based on the evidence of P.C Dufrene and P.C. Joel Belle. The raid on 25 July 1998 was, according to the evidence of P.C. Dufrene, preceeded by observation of the accused's house on the two previous days. He stated in evidence "I noticed something

was being sold, and this went on for two days." Hence there was no evidence as to what was being sold, or who was selling. Admittedly, there were at least five members of the household, including the accused.

Hence in the absence of positive evidence as to the sale of a controlled drug, the observations made by the officers on 23rd and 24th July 1998 from a distance, may have been the sale of *"baka",* by one of the members of that household, and not necessarily sale of drugs by the accused.

However, did the accused have possession of the drugs exhibited in this case?

Section 15(2) of the Misuse of Drugs Act provides that "the fact that a person never had physical possession of a controlled drug shall not be sufficient to rebut a presumption under this section". According to the evidence of P.C. Belle, the accused ran from inside the house, towards him, as he stood by the front door. He had some package with him. As he got hold of him, he struggled and put that package out of the window. The defence sought to refute his evidence by relying on the use of the word "threw" in the statements of P.C. Dufrene and P.C. Belle (exhibit Dl and D2) and the use of the word "dropping", used by both of them in evidence. It was suggested that they stated that the package was "dropped" on later realisation that one could not "throw" through a window fitted with louvre blades. I do not consider that to be a material discrepancy as long as the prosecution establishes that the accused had the package in his possession before throwing or dropping it through the window.

The accused's evidence that three officers entered the sitting room where he was seated watching television, was contradicted by his own evidence that P.C. Belle was standing in front of the sitting room door. Although he tried to explain that he said so as a supposition and not as a fact, that answer, in the context of the questioning by the state counsel, was an admission of the prosecution case, and more particularly the evidence of P.C. Belle, that he found P.C Belle

obstructing his getaway through the front door while other officers were banging on the back door.

Regarding the drugs, the accused answered his sounsel in examination-in-chief thus:

> Q. When did you first see the drugs brought to court?
>
> A. I saw those drugs shown in court in their hands at my house.
>
> Q. What did they show - what did you see?
>
> A. What did you mean?
>
> Q. You said you saw in their hands what did you see in their hands?
>
> A. I saw the drugs in the hands of the two police officers who came in. Not the first two who came in, but the third officer who came in after them. He came in with those drugs in his hands and he said that I was in possession of drugs and he put handcuffs on me.

He further stated that he did not know the name of this third officer who brought the drugs, but it was not P.C. Dufrene. It was therefore his defence that the drugs were "introduced" to implicate him. However, on a consideration of the totality of evidence I am satisfied beyond a reasonable doubt that the accused had in his possession the 17 slices of cannabis resin wrapped in "cling film" exhibited in the case.

As regards knowledge, the behavior of the accused in running towards the front door, with the package in hand, and attempting to get rid of it by putting it out of the window, is indicative of the animus possi dendi. He had knowledge that what he possessed was a controlled drug, and knowing the implications of being in possession thereof, in desperation he threw it away before P.C. Belle could arrest him with physical

custody of it. Accordingly, the prosecution has proved the elements of possession and knowledge beyond a reasonable doubt.

Counsel for the accused submitted that there was a "break in the chain of evidence" as regards the drugs produced in the case. ASP Quatre (Pw6), in his testimony stated that P.C Dufrene came to him for a letter to take the drugs for analysis on 27 July 1998 around 8-8.15 a.m. The drugs were allegedly seized on 25 July 1998. ASP Quatre stated that he was not aware where P.C. Dufrene had kept the exhibits for two days.

P.C. Dufrene testified that the drugs were opened and counted before the accused at the Glacis Police station before proceeding to the Drug Squad Unit. Questioned by counsel for the accused in examination-in-chief, the accused stated:

> Q. Belle says that at the Glacis Police Station, he opened a package and counted 17 pieces of drugs.
>
> A. Yes, they did open the package and counted it at Glacis.
>
> Q. What colour is the package?
>
> A. As I said, it was brown going to black,
>
> Q. You saw the brown paper package that was brought to Court?
>
> A. Yes.
>
> Q. Was that the package?
>
> A. Yes.

Hence the accused himself has identified the drugs exhibited in court as those that he was shown at the Glacis Police Station soon after arrest, and on the way to the Drug Squad

Unit at New Port. There can therefore be no doubt that there was any interference with that substance while they were in the locker of P.C. Dufrene. Thereafter they were taken to the analyst, who returned them to P.C Dufrene with a report. The drugs were inserted in a white envelope and duly initialed by Dr. Gobine at the four corners. In Court, the envelope and the initials were identified by Dr. Gobine. The envelope was then shown to counsel for the accused, who had no objections, and then opened thereafter. The analyst then identified the 17 slices and two small pieces therein as the substance he analyzed as "cannabis resin". In these circumstances, I am satisfied beyond a reasonable doubt that the chain of evidence has been maintained and that there has been no "mix up" or introduction of a substitute substance.

The accused is charged under section 5 read with section 14 and section 26(1) of the Misuse of Drugs Act.

Section 5 of the Misuse of Drugs Act, is as follows:

> Subject to this Act, a person shall not, whether on his own behalf or on behalf of another person whether the other person is in Seychelles or not, traffic in a controlled drug.

Section 26(1) contains the provision which makes trafficking an offence under the Act.

Section 14(d) provides that:

> A person who is proved or presumed to have had in his possession more than ..... 25 grammes of cannabis or cannabis resin shall, until he proves the contrary, be presumed to have had the controlled drug in his possession for the purpose of trafficking in the controlled drug, contrary to Section 5.

Before the offence of trafficking is established, the prosecution has to prove the elements of possession and knowledge beyond a reasonable doubt. As regards section 14, the Court of Appeal, in the case of *Raymond Tarnecki v R* (unreported)

S.C.A. No. 4 of 96 stated that:

> ... The presumption of trafficking raised by section 14 of the Act is but a rebuttable presumption. The effect of section 14 is to shift on the accused, upon proof that he was in possession of the prescribed quantity of controlled drug, the legal burden of proving that he was not in possession thereof for the purpose of trafficking. But, even then, when such legal burden lies on the defence, the standard of proof is not one of proof beyond a reasonable doubt, but on a balance of probabilities.

Although the Misuse of Drugs Act was enacted by Act no. 11 of 1990, it was brought into operation on 1 July 1995, by S.I. 52 of 1995. Hence the provisions of that Act should be consistent with the provisions of the present Constitution which came into force on 21 June 1993. Article 19(1) of the Constitution contains the fundamental right of every person to a fair hearing. Sub-article (2)(a), provides that every person who is charged with an offence:

> (2)(a) is innocent until the person is proved or has pleaded guilty

Sub-article (10) thereof provides that:

> Anything contained in or done under the authority of any law necessary in a democratic society shall not be held to be inconsistent with or in contravention of:
>
> (b) Clause (2)(a), to the extent that the law in question imposes upon any person charged with an offence the burden of proving particular facts or declare that the proof of certain facts shall be prima facie

> proof of the offence or of any element thereof.

Section 14 of the Misuse of Drugs Act falls under the second limb, in that it declares that upon proof of possession of more than 25 grams of cannabis resin, the presumption of trafficking applies until the accused proves the contrary.

In the case of *R v Oakes* (1983) D.L.R. 123, a decision of the Court of Appeal of Ontario, Canada, section 8 of the Narcotic Control Act came up for interpretation in relation to section 11 (d) of the Canadian Charter of Rights and Freedoms which guaranteed the presumption of innocence. Martin JA stated thus:

> I have reached the conclusion that section 8 of the Narcotic Control Act is constitutionally invalid because of the lack of a rational connection between the proved fact (possession) and the presumed fact (an intention to traffic)...mere possession of a small quantity of a narcotic drug does not support an inference of possession for the purpose of trafficking or even tend to prove an intent to traffic. Moreover, upon proof of possession, section 8 casts upon the accused the burden of disproving not some formal element of the offence but the burden of disproving the very essence of the offence.

Section 14(d) of the Misuse of Drugs Act appears to be similar in scope. Although the evidentiary presumptions in sections 15 to 19 of that Act may be consistent with the recognized derogation in article 19(10) of the Constitution, the presumption of trafficking contained in section 14 may, in an appropriate case before the Constitutional Court, be declared to be inconsistent with article 19 of the Constitution. A person's fundamental rights may be restricted, but they cannot be denied to him either expressly or impliedly.

Section 14(d) is structured under the heading *of* "Evidence" in

part III of the Act. Hence the burden on the accused is an evidentiary burden which has to be discharged on a balance of probabilities. Cross on "evidence" states that:

> when the accused bears the evidential burden, it is only necessary for there to be such evidence as would, if believed and un-contradicted, induce a reasonable doubt in the mind of a reasonable jury as to whether his version might not be true.

Before the prosecution establishes the offence of trafficking under the presumption in section 14(d), it has necessarily to establish that the accused was in possession with knowledge of the controlled drug. If the quantity of drugs as analysed is 25 grams or less, then a conviction on possession would be recorded. In the case of cannabis or cannabis resin, the possession of more than 25 grams attracts the presumption, not of trafficking as a matter of fact, but "for the purpose of trafficking in a controlled drug contrary to section 5." This is the subtle difference in terminology. Section 5 contains the prohibition to trafficking, within the meaning ascribed to it in section 2 of the Act.

The term "traffic" is defined as:

> (a) To sell, give, administer, transport, send, deliver or distribute; or
>
> (b) To offer to do anything mentioned in paragraph (a) or;
> (c) To do or offer to do any act preparatory to or for the purpose mentioned in paragraph (a);

But the particulars of the charge does not specify any of those different modes of "trafficking". In the charge, the prosecution relies on the mere possession of 166.4 grams of cannabis resin as constituting "trafficking" in the sense of that definition.

According to the prosecution case, which this court has accepted, the accused was in possession of 166.4 grams of cannabis resin, which he dropped out of the window in an attempt to dispossess himself of that substance. Hence did he do any act preparatory to or for the purpose of selling, giving, administering, transporting, sending, delivering or distributing, to be guilty of the offence of trafficking?

Article 19(2)(c) of the Constitution provides that every person charged with an offence "shall be given adequate time and facilities to prepare a defence to the charge". He may therefore present any defence. In the present case he relied on the defence of "introduction", or "planting" by the Police Officers. The punishment prescribed for trafficking is more severe than for possession. Hence if mere possession of more than 25 grams of cannabis resin amounts to "doing of an act preparatory" to trafficking, section 14(d) would not have given the accused an opportunity to prove that he was not possessing for the purpose of trafficking, as mere possession alone of that quantity would have constituted the offence, and there would not have been any issue of rebutting the presumption.

In the case of R v *Philip Leon* (unreported) Criminal case No. 93 of 1983), the accused was found in the possession of 24 grams 260 mg of cannabis. When the legal limit for presumption of trafficking was 15 grams. Seaton CJ, finding the accused guilty of possession, but not of trafficking despite the quantity stated:

> Under section 4A(2) of the Dangerous Drugs Act, as amended by amendment no 2 of 1982, a person who is in possession of more than 15 grams of cannabis is presumed, unless the accused proves the contrary to be trafficking in the drug. The accused has denied any possession of the drugs but as I have stated that I found that he was in possession, and since it was more than 15 grams, the presumption holds

> that he was trafficking in it. This does not by itself, however constitute "trafficking" as that is defined in section 2 of the Dangerous Drugs Act. I therefore find the accused not guilty of trafficking, but guilty of possession under section 4 of the Act."

However in a later case the words "does or offers to do any act preparatory to, or for the purpose of, trafficking in a drug ..." in section 4A(I)-(c) of the previous Dangerous Drugs Act, was considered by Seaton CJ in *Joseph Lame v R* (unreported) Criminal appeal no. 6 of 1988 he stated that in that sub-section:

> *T*he Legislature has extended the range of culpability beyond those who sell, give, administer, transport, send, distribute or transfer the drug. Its net of prohibition has been widened to include even those who merely prepare to do such things. The question which the court had to ask in this case therefore was, on the evidence produced, could it be said that the appellant did an act that was preparatory to trafficking?

The learned Chief Justice then cited the case of *Gardner v Ackroyd* (1952) 2. Q.B.D. 743 in which Goddard CJ sought to define the phrase "act preparatory to" the commission of an offence. In that case, the price of meat had been controlled by "the Meat (prices) (no. 2) Order". A butcher had prepared parcels of meat bearing labels showing the names of the purchasers and the price which exceeded the maximum prices. It was held that "it was sometimes difficult to determine whether an act is immediately or remotely connected with the crime"...and therefore it may be that it was intended to meet this difficulty that the words ‘an Act preparatory to the commission of an offence’ were used to embrace acts which are only remotely connected with the commission of the offence. Goddard CJ further stated "one thing must, I think, be certain, and that is that those words are intended to apply to what the law would regard as something less than an

attempt." Hence in that case the labeling of the price in excess of the controlled price, was considered as an act preparatory to the selling of meat contrary to the price order.

However, the Court of Appeal, in the case of *Philip Cedras v R* (unreported) Criminal appeal no. 11 of 1988*,* interpreting the same section stated:

> Possession of a dangerous drug is an act - Albeit a continuous act, involving the physical custody or control of the drugs. If a person is in possession of a dangerous drug for the purpose of trafficking, he is evidently doing an act for the purpose of trafficking and such act is clearly caught by section 4A (1)(c).

That judgment may have no application to the presumption in section 14 (d) of the Misuse of Drugs Act (Cap 133), as the presumption now is that possession was for the purpose of trafficking contrary to section 5. As I stated before, section 5 contains the prohibition against trafficking, and the term trafficking there has to be considered within the meaning of the definition of trafficking. To do any act 'preparatory to trafficking', should necessarily be, for the purpose mentioned in sub paragraph (a) thereof, that is, to sell, give, administer, transport, send, deliver or distribute.

In the present case, the direct evidence is that the accused had the drugs in his possession. The prosecution also relied on circumstantial evidence to establish trafficking. First, observation of the premises of the accused from a vantage point for two days, prior to the raid. Admittedly, the house was occupied by the parents and two sisters of the accused.

The evidence of P.C Dufrene that he observed "something being sold" from a distance, alone is not indicative of trafficking of drugs by the accused. This was different to the situation in the case of R *v Ricky Chang Ty Sing* Criminal case no. 2 of 1997, where four Police Officers watched from a vantage point, the accused receiving money from two men

and handing over a black substance, which upon immediate arrest was seized and analysed as cannabis resin. There was evidence of selling in that case.

Secondly, the prosecution relied on the sum of R2058 seized as proceeds from drug trafficking. P.C. Dufrene and P.C. Belle testified that R500 was found in the accused's pocket and R1558 in his wardrobe. The accused claimed he had only R10 and a few coins in his pocket and that the monies in the wardrobe were the proceeds from selling bananas which he had planted. He also stated that he did painting and other odd jobs. In the case of *R v Morris* (1995) 2 Cr App R 69 at 75, Morland J observed that:

> …evidence of large amounts of money in the possession of a defendant or an extravagant lifestyle on his part, prima facie explicable only if derived from drug dealings, is admissible in cases of possession of drugs with intent to supply if it is of probative significance to an issue in the case.

In the case of *R v Garry Albert* (unreported) Criminal case no 45/97) a sum of R4,141.05 was found in the possession of the accused together with a quantity of cannabis resin around 1.30p.m in the night when he returned to his house where Police Officers ambushed him. That was considered by me "as being probative to the issue of trafficking".

In the instant case however, as there was evidence of a possible sale of "baka", not necessarily by the accused, the sum of R2058 cannot be considered as being probative to the issue of trafficking in cannabis resin to the exclusion of any other possibility.

Thirdly, the prosecution case was that, the penknife produced in the case, according to P.C. Dufrene, contained traces of cannabis resin, which was indicative of cutting the slices of cannabis resin, for sale. However, the penknife had not been analysed for evidence of any substance, and hence it has no

evidentiary value as regards the issue of trafficking.

However the accused identified the 17 slices of cannabis resin exhibited in the case, as those that were shown to him at the Glacis Police Station, although his defence was that they were introduced at his residence by a Police Officer whose name he did not know. I have rejected that defence and found that the accused was in possession of the drugs which he dropped through the window. P.C. Dufrene and Dr. Gobine, the analyst testified that the 17 slices were individually wrapped in cling film, and the whole was again wrapped together. In the analyst's report (exhibit P2), it is stated that the lengths of those 17 slices ranged from 6 cms to 8.7 cms. In the case of *Gardner* (supra), the individual wrapping of parcels of meat, with labels containing the names of customers, and the prices which were above the controlled price, were considered as "acts preparatory to the commission of the offence" of selling above controlled price. As Goddard CJ stated, those words are used to cover acts which are remotely connected with the commission of the offence, and acts that fall short of an attempt to commit an offence.

Hence the individual wrapping of the slices in different lengths of marketable quantities, is probative of the issue of trafficking under section 5, read with the definition in section 2 of the Act.

The only matter for concern is that although section 14 provides a rebuttable presumption, it gives the accused no opportunity to do so unless he admits the offence of possession. This may be considered as a violation of the right to a presumption of innocence until proven guilty, which, under the present Constitution is a fundamental right. In Canada, section 8 of the Narcotic Drugs Act, which contains a similar provision as section 14 of our Act, the trial is divided into two phases. In the first phase, the sole issue to be determined is whether or not the accused is guilty of possession, upon evidence relevant to that issue only. In the second phase, the question to be resolved is whether or not the possession charged is for the purpose of trafficking. The

procedure specified is that the second phase commences with a finding of the court that the accused is guilty of possession. Thereupon he is given an opportunity to establish that he was not trafficking. The prosecutor then adduces evidence of trafficking, and the accused would then adduce evidence to the contrary. The court would decide on a balance of probabilities.

Without statutory provisions, the courts in Seychelles are unable to follow such a procedure which would safeguard the fundamental rights of accused persons, as provided in the Constitution. Section 4(a) of the previous Dangerous Drugs Act was enacted to curb the incidence of trafficking. It is justifiable in a democratic society to restrict fundamental rights of individuals in the interest of the society. Whether section 14 as presently constituted is inconsistent with article 19(2)(a) may remain to be considered in an appropriate case before the Constitutional Court. The time for referring this issue in the present case to the Constitutional Court under article 46(7) has passed, as it should have been done "in the course of proceedings."

Hence on the basis of section 5 of the Misuse of Drugs Act, read with section 2, and section 14 and 26(1)(a) thereof, I am satisfied beyond a reasonable doubt that the prosecution has establish the offence of trafficking.

I therefore find the accused guilty of the offence of trafficking, as charged, and accordingly convict him.

Record: Criminal side No 34 of 1998

Essack v Auto Clinic (Prop) Ltd

Code of Civil Procedure - Judgment debt – Procedure for execution

The plaintiff sought to enforce a judgment against a leasehold interest of the defendant. The plaintiff served a commandment on the defendant and sought a sale by licitation. A director of the defendant intervened to have the proceedings quashed.

HELD:

(i) The proceedings were commenced by a commandment under the Immovable Property (Judicial Sales) Act. Section 117 of the Code of Civil Procedure does not apply as these proceedings do not constitute a “suit”.

(ii) Any person whose interest can be affected by the result of legal proceedings between other parties can intervene in those proceedings.

(iii) The intervener has an interest in the present proceedings. A sale of the leasehold interests of the company would affect such interest.

(iv) Where an enactment provides the practice and procedure, those provisions should first be exhausted before invoking any parallel provisions for relief under any other enactment.

(v) The Code of Civil Procedure contains specific provisions for the recovery of money awarded in a judgment. The

judgment debtor is first given an opportunity, upon a warrant to levy being served, to pay the specified amount. If the debtor has no money, the process officer is able to seize movable property of the judgment debtor and sell it in accordance with section 255 of the Code of Civil Procedure.

(vi) Licitation is done when two or more co-owners find that common property cannot be divided conveniently or without loss, and hence seek a public auction to recover the value and share in equal terms.

(vii) Sale by licitation is not applicable when what is sought is the enforcement of a judgment for payment of money.

Judgment: proceedings quashed.

Legislation Cited
Civil Code of Seychelles, arts 1686, 1688, 1778, 2103
Courts Act, s 17
Immovable Property (Judicial Sale) Act, ss 2, 36, 98
Seychelles Code of Civil Procedure, ss 2, 117, 240, 246, 255
Seychelles Industrial Development Corporation Act, ss 5, 13

Cases referred to
Lorenzo Appiani v Mary Greers (unreported) Civil side 35/1995
Teemooljee & Co Ltd v Whitewright (1965) SLR 165**Foreign cases noted**
Raffaut v Mauritius Marine Insurance Co (1886) MR 108

Philippe Boulle for the plaintiff
John Renaud for the defendant
Ruling delivered on 17 January 2000 by:

PERERA J: The petitioner, David Essack commenced proceedings before this court upon a commandment being

served on the respondent company, Auto-Clinic (Pty) Ltd under section 2 of the Immovable Property (Judicial Sales) Act (Cap 94). In the memorandum of charges, the petitioner seeks a "sale by licitation" of "the leasehold interest of a portion of land at Providence, Mahe, known as Parcel v. 6788 of the extent of approximately 1171 sq metres with buildings thereon, valued by Guilly Anacoura, Process Server at R 1,200,000". The sale is sought in execution of a judgment of this court dated 20 October 1998 in case no 186 of 1998, wherein one of the directors of the respondent company, namely, Dennis Ward-Horner had consented to judgment being entered in a sum of R240,403. The costs in that case having been taxed at R4,340 and the interest being calculated at R11,218.80, a total sum of R255,961.80 is sought to be recovered from the sale. The sale is fixed for tomorrow, 18 January 2000 at 11 a.m before this court.

There is presently before the court, a motion and affidavit filed by one Alan Horner, who is admittedly a director of the respondent company. He moves to intervene in these proceedings for the purpose of stopping or postponing the sale, or for an order to quash the whole proceedings.

In his affidavit the intervenor, Allan Horner, avers that he and his brother Dennis Ward Horner are the only two directors of the respondent company. He denies that David Essack the judgment-creditor (petitioner in these proceedings), is a director of the company. On a perusal of the plaint in case no, 186 of 1998, it appears that David Essack had averred that he was a director, and that the company "represented by Dennis Horner, a director" was the lessee of premises on the Providence Industrial Estate. In that case, Essack in his capacity as a director sued the company for a sum of R147, 000 lent by him to the company and R40,000 for unpaid salaries of 20 months. The judgment entered was therefore a "judgment for a sum of money," as envisaged in section 240 of the Code of Civil Procedure.

Intervention

Mr J.Renaud, counsel for the intervenor relied on section 117 of the Code of Civil Procedure (Cap 213) which is as follows:

> 117. Every person interested in the event of a pending suit shall be entitled to be made a party thereto in order to maintain his rights, provided that his application to intervene is made before all parties to the suit have closed their cases.

The term "suit" is defined in section 2 of the said Code as "a civil proceeding commenced by a plaint". Clearly, the proceedings in the instant matter was commenced by a commandment under the provisions of the Immovable Property (Judicial Sales) Act, and hence section 117 does not apply, as these proceedings do not constitute a "suit."

Mr Renaud however urged the court to exercise the inherent powers and grant leave to intervene on a consideration of the interest of the intervenor as a director of the company. He relied on the case of *Teemooljee & Co. Ltd v. Whit-wright* (1965) SLR 165 wherein the court allowed the intervenor of a third party (the government) where a lease entered between the government and the defendant which had been provisionally seized was being validated. In that case the court held that the validation proceedings was "a pending suit" within the meaning of section 122 (section 117 of the present code). It was also held obiter that where section 122 did not apply, section 15 of the Courts Act empowered the court to allow the intervention of an interested party.

Section 17 of the present Courts Act (Cap 52) is as follows:

> In civil matters, whenever the laws and rules of procedure applicable to the Supreme Court are silent, the procedure, rules and practice of the High Court of justice shall be followed as far as practicable.

In this respect, Mr Renaud cited the case of *Raffaut v*

Mauritius Marine Insurance Co (1886) MR 108, wherein a practice similar to that of the High Court of Justice of the United Kingdom was followed. The court in that case held that "any person whose interest can be affected by the result of law proceedings between other parties can intervene in those proceedings."

In the instant case there is no dispute that Alan Horner, the intervenor is a director of the company against which judgment has been entered by consent of one of the directors. It does riot fall on this court to consider the dispute between the directors of the company and the validity of the claim made by one director against the company in case no. 186 of 1998. What is pertinent for present purposes is that the intervenor has an interest in the present proceedings. A sale of the leasehold interests of the company would affect such interest. Hence it is equitable that he be allowed to intervene to protect his interests. Accordingly, Alan Horner is added as the intervenor - defendant, and is therefore entitled to prosecute the motion.

The Procedure

Case no. 186 of 1998 of this court where David Essack was the plaintiff, and the Auto-Clinic (Pty) Ltd was the defendant, was an action for a claim of money. Hence the provisions of the Seychelles Code of Civil Procedure (Cap 213) applied. That code lays down the practice and procedure in civil suits, including the procedure for execution of judgments. Accordingly section 240 of the Code provides that:

> 240. If the judgment is for a sum of money, the Registrar shall, on receipt of the application, issue under the seal of the court a warrant of execution to one of the Process Servers of the court, who by warrant shall be empowered to levy such sum of money and also the costs of execution by distress and sale of the movable property of the party named in the warrant.

Section 246 is as follows:

> 246. If the movable property of the judgment debtor be insufficient to satisfy the judgment and the costs of execution, the Registrar shall on the application of the judgment creditor issue a writ of execution against the immovable property, if any, of the judgment debtor, such immovable property shall be seized and sold in accordance with the procedure laid down by the Immovable Property (Judicial Sales) Ordinance and any other law relating to the seizure and sale in execution of immovable property in force for the time being in Seychelles".

It is an accepted principle of law that where an enactment provides the practice and procedure, those provisions should first be exhausted before invoking any parallel provisions for relief under any other enactment. Admittedly, the plaintiff in case no. 186 of 1998, the judgment creditor, did not comply with sections 240 and 246 of the said Code. Instead, he "short circuited" that procedure and commenced proceedings under the Immovable Property (Judicial Sales) Act (Cap 94),

The Code of Civil Procedure contains specific provisions for the recovery of money awarded in a judgment of the court. The judgment debtor is first given an opportunity, upon a warrant to levy being served on him, to pay the amount decreed. If he has no money, the Process Officer is empowered to seize movable property of the judgment debtor and proceed to sell them following the procedure laid down in section 255 et seq. Section 246 provides that:

> If the movable property of the judgement debtor be insufficient then a writ of execution against immovable property be issued, and such immovable property shall be seized and sold under the procedure laid down by the Immovable Property (Judicial Sales) Act, or any other law relating to seizure and sale in execution of immovable property.

Chapter 1 sub-heading 1 of the Immovable Property (Judicial

Sales) Act is titled “seizure of immovable property in general". The procedure laid down thereunder is primarily applicable to special privileges upon immovables set out in article 2103 of the Civil Code and not to an execution of a judgment for money. Hence the general provisions of Cap 94 should be followed only to the extent they are applicable from the stage of the seizure of the immovable property as envisaged in section 246 of the Code of Civil Procedure, Such proceedings then become a "sale by levy".

The present proceedings have commenced by a commandment, and the memorandum of charges is for a "sale by licitation." This is utterly misconceived when what is sought is the enforcement of a judgment for payment of money. Article 1686 et seq of the Civil Code provide that licitation is done when two or more co-owners find that the common property cannot be divided conveniently or without loss, and hence seek a public auction to recover the value and share in equal terms. Article 1688 provides inter alia that the procedure in the Immovable Property (Judicial Sales) Act be followed. Section 98 et seq of that Act provides the procedure.

The petitioner has a judgment to recover R255,961.80 from the respondent company. According to the memorandum of seizure, the Process Server has seized the entire property and the buildings thereon. He states in the memorandum that he seized Parcel V. 6788 and the buildings, namely one concrete block building 30m x 15m comprising of one workshop, one store and one bonded warehouse. As regards the valuation, he states - "I valued Parcel No. V.6788 with buildings, appurtenances and dependencies thereof at the sum of R1,200,000". Obviously that was the value of the entire property, and not the "leasehold interest" of the respondent company which the petitioner seeks to sell. The mise a prix in the memorandum of charges is also given as RI,200,000. The memorandum of charges in any event is defective as the entire property of the lessor has been seized and valued for sale.

The petitioner in his affidavit dated 7 January 2000 avers that respondent company leased the property from the Seychelles Industrial Development Corporation (Sidec) and that the lease, at paragraph 7(10) thereof contains a condition that the company shall not assign, under let or part with the possession of the premises or any part thereof without the express permission in writing of the lessor, which consent shall not be unreasonably withheld in the case of a respectable and responsible person. Admittedly, the lease between Sidec and the respondent company is a "building lease" as envisaged in article 1778 - 1 of the Civil Code. Mr Renaud raised the issue of propriety of a director of the company, consenting to judgment thus permitting the leasehold interests being sold by auction to third parties without the consent of the lessor. Mr Boulle submitted that Sidec consented to the sale, and has since adjourning this matter for this ruling, produced a letter from the Managing Director of Sidec, which is in following terms:

> We, Seychelles Industrial Development Corporation, hereby confirm in our capacity as lessor, that permission has been granted for the Judicial Sale of the leasehold interest in Parcel V. 6788 which will take place on the 18ih day of January 2000.
>
> The permission is granted, subject to compliance with the obligations and other convenants contained in the lease.

This, in effect, purports to be an exercise of the discretion of the lessor to permit the lessee to assign or part with the possession of the premises, but the proviso to that consent seems to reserve the right of Sidec to withdraw consent if at the sale, the rights are purchased by someone who in their opinion does not fall into the category of a "respectable and responsible person". Although under section 5(3) of the Seychelles Industrial Development Corporation Act (Cap 216), the managing director is the chief executive officer of the corporation, and has, inter alia the power to sign

documents on behalf of the Corporation the court is called upon to assume that the decision to grant permission was taken at a meeting presided by at: least three directors as required by section 13(3) of the said Act. The court is reluctant to consider this document especially as counsel for the intervenor had not been given an opportunity to make his submissions, and as he has already made allegations of complicity and fraud on the part of David Essack and Dennis Ward-Horner, who are two directors of the respondent company. The consent of the lessor makes those allegations worse confounded.

Hence there are several procedural and substantive irregularities in the present proceedings. Section 36 of the Immovable Property (Judicial Sales) Act empowers this court to postpone the sale sine die or to a specified day, "upon strong grounds of necessity or expediency". This Section came up for interpretation in the case of *Lorenzo Appiani v Mary Geers* (unreported) Civil side 35 of 95) where the respondent (Mary Geers) had charged two lands in Praslin in favour of Appiani in consideration of a loan for R2,710,000, and defaulted payment. The proceedings commenced correctly on a commandment for a "sale by levy", and on the authority as a "creditor" under article 2103 of the Civil Code. In that matter, the mere application for further time to pay was considered to be inadequate for purposes of postponing the sale under section 36 of the Act. In the instant matter, no useful purpose would be served by postponing the sale as the entire proceedings are flawed. Accordingly, I grant prayer of the motion and quash the whole proceedings. The petitioner is however free to take necessary steps to execute the judgment in case no. 186/98 according to law.

The registrar shall forthwith publish a notice on the notice boards of the court that the proposed sale of the leasehold rights in Parcel V.6788 situated at Providence has been cancelled by an order of this court,

Record: Civil Side No 331 of 1999

Aglae v The Government of Seychelles

Criminal Procedure Code - Arrest – Detention – Constitutional rights – Damages

The plaintiff claimed damages for injuries suffered when he was arrested and detained.

HELD:

(i) An arrest by a police officer on the ground of reasonable suspicion will be lawful even if in fact no offence has been committed. Reasonable suspicion is less than prima facie proof of guilt.

(ii) "Torture" is concerned with "deliberate treatment causing very serious and cruel suffering". The plaintiff's claim under the head "torture" is unwarranted.

Judgment for the plaintiff. Damages awarded R35,000.

Legislation Cited
Constitution of Seychelles, art 18
Criminal Procedure Code ss,18, 100

Cases referred to
Canaya v Government of Seychelles (unreported) Criminal side 42/1999
Derjacques v R (unreported) SCA 17/1995

Foreign cases noted
Dallison v Caffrey [1965] 1 QB 348
Hussein v Chong Fook Kam [1970] AC 942
Ireland v United Kingdom (18 January 1978) ECHR

Franky Simeon for the plaintiff
Lucy Pool for the defendant

Judgment delivered on 12 October 2000 by:

JUDDOO J: The plaintiff has filed a plaint against the defendant claiming damages, in the sum of R250,000 arising out of his unlawful arrest and illegal detention by members of the Defence Forces (S.P.D.F) acting in the course of their duties with the defendant and for which the defendant is vicariously liable. The claim is resisted by the defendant.

The plaintiff avers in his plaint that, on 12 October 1998, he was arrested by soldiers whose names were unknown. He was kept under detention until 23 October 1998, when he was released, it is averred that during his detention he was repeatedly assaulted and tortured by soldiers.

The plaintiff testified that after learning that police officers were searching for him, he voluntarily called to Mont Fleuri Police Station on 12 October 1998. He was handcuffed and brought to Bel Eau Military Base and was thereafter taken to 'Grand Police'. Reaching there he was questioned by an officer about his alleged possession of a firearm which he denied. As a result he was subjected to assault and torture and kept under detention without being brought before the Magistrates' Court.

The plaintiff added that on the 8th day of his detention he was brought to his residence where a search was carried out without success. Thereafter he was further kept under detention until 23 October 1998 when he was released. He has not been charged with any offence. The plaintiff testified that during his detention he had been tied to a tree and beaten with a hose. He suffered various injuries to his chest and arms, had lacerations to his feet and cigarette bums on his thighs. He was medically examined at Les Mamelles Clinic at the time of his release. The plaintiff claims to have suffered physically and emotionally as a result. He was thoroughly cross-examined and maintained his version in court.

A second witness, Justin Aglae, was called on behalf of the plaintiff. He testified that he was arrested in October 1998 and was detained at 'Grand Police' where he spent five days.

During his period of detention, he met with the plaintiff whom he knew. He saw the latter being tied up and beaten with a hose. However, under cross-examination, he explained that he had only known the plaintiff after they travelled together in the same vehicle when they were released but maintained having seen him being beaten through the metal bars of his detention cell.

The plaintiff's mother, Anna Aglae, testified in court. It is clear she did not retain a good memory of the events. The most that can be extracted from her testimony is that the plaintiff, her son, was living in a small hut near her house. Sometime in October 1998 she realised that her son was missing from her residence. She searched for him everywhere but did not find him. She eventually, made an application to court for the release of his son from the authorities.

Lastly, Dr. Hassanali, gave evidence in his capacity as a medical officer attached to the Les Mamelles Clinic. On 23 October 1997 he examined the Plaintiff and he found the following injuries:

> Abrasion around right wrist 1 cm wide and 9cm long, abrasion around left wrist 1cm to 1.5cm wide and 10cm long, circular burn injuries of 1cm each on front of right thigh, abrasion 1.5cm to 2cm wide and 14cm around right leg above ankle and abrasion 21.5cm wide and 16cm round left leg above ankle.

The witness found the injuries to be consistent with tightening of ropes around the legs and wrists and cigarette burns. Under cross-examination, the witness added that the injuries were ‘not grievous’. He had prescribed and given medicine to the plaintiff and requested the latter to call back if there was any complication. The witness added that the plaintiff did not call back upon him at the material time.
Defence witness Sonny Leggaie gave evidence that he is a sub-inspector in the Seychelles Police Force and was involved in 1998 in a joint operation conducted by the police

force and some army members. He was in charge of a group of police officers working alongside army officers. The witness admitted that the plaintiff was arrested on 12 October 1998 at Mont Fleuri Police Station and brought to 'Grand Police' suspected to be in possession of arms and ammunitions. He is not aware of any assault committed on the plaintiff. Under cross-examination, the witness did not recall for how long the plaintiff had been detained, whether he was brought before a court or when the plaintiff was released from detention at 'Grand Police'. He added that the point of the police-army operation was to apprehend suspects involved in illegal drugs or illegal possession of firearms or ammunitions. He admitted that to his knowledge the plaintiff had not been charged with any such offence.

A second defence witness, Gerald Marie, gave evidence that he was an army officer at the material time and took part in the joint army-police operations. The plaintiff was suspected for possession of firearms. On 11 October 1997 a search was carried out to find the plaintiff at his residence without success. The next day, he was informed by Mont Fleuri Police Station that the plaintiff had called at the said station. The plaintiff was brought to 'Grand Police', questioned and released. The witness testified that the plaintiff was never assaulted. Under cross-examination, the witness added that he does not recall the date when the plaintiff was released from 'Grand Police'.

There is admission by the defence witness Sonny Legaie, in court, that the plaintiff was arrested on 12 October 1998. Although both defence witnesses seem to have obliterated from their mind the date to release of the plaintiff there is the unchallenged version of Dr. Hassanali who examined the Plaintiff on 23 October 1998 at the time the latter was released by the authorities. There is also evidence that the reason for the initial arrest of the plaintiff was because he was suspected to be involved in the offence of possession of firearms. No such firearm was found at his residence after a search no resulting charges were brought against the plaintiff.

Article 18(1) of the Constitution of the Republic of Seychelles enshrines the right to liberty and security of the person. This right is, however, subject to the derogations under article 18(2)(b) whereby the law may provide for:

> The arrest or 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.

subject to fulfilling the requirement under section 18(3):

> A person who is arrested or detained has a right to be informed at the time of arrest or detention or as soon as is reasonably practicable thereafter in, as far as is practicable, a language that the person understands of the reason of the arrest or detention…

Accordingly, under section 18(1) (a) of the Criminal Procedure Code ("Cap 54) the law provides that:

> any police officer may without an order from a judicial officer arrest any person whom be suspects on reasonable grounds of having committed cognizable offence.

and under section 100(l)(a) of the Criminal Procedure code the law provides that:

> a person who has been arrested without a warrant shall be released within 24 hours of the detention or arrest unless the suspect is brought before a court and the court has ordered the suspect be remanded…

An arrest by a police officer on the ground of reasonable suspicion will be lawful even if in fact no offence has been committed. Reasonable suspicion is less than prima facie

proof of guilt, vide: *Hussein v Chong Fook Kam* (1970) A.C. 942. However, where as in the instant case, the lawfulness of an arrest depends upon "reasonable cause for suspicion"; it is for the defendant to prove the existence of such reasonable cause and for the court to decide whether he has discharged this burden of proof. Vide: *Dallison v Caffrey* (1965) 1QB 348 per Lord Denning MR at page 365:"The burden was on Detective Constable Cafjrey to prove that he had reasonable cause for suspecting that Dallison coninnlleil had commited the crime..." The test as expressed by Diplock L.j. in the same case, is "whether a reasonable man assumed to know the law and possessed of the information which was in fact possessed by the defendant would believe that there was reasonable and probable cause" for the arrest. This test expressed against the background of the common law in UK was equally applicable to the 'reasonable cause for suspicion' under the Criminal Law Act 1967. Vide: Winfeild & Jolowicz**,** Tort 11th Edn, Page 61 and is equally applicable, mutatis mutandis, to the local provisions of the law.

In the present case, the plaintiff had voluntarily called at the police station upon being informed that searches were being made by the police authorities for his person. As testified by the plaintiff he was brought before Major Ernesta and the latter informed him, at an earlier opportunity, that he was being arrested on suspicion of having a gun in his possession with which he had threatened people. Accordingly, it cannot be said that the suspicion was unreasonable and that the plaintiff was not informed, as soon as was reasonably practicable, of the reason for his arrest so as to make the said arrest unlawlul.

As far as the detention of the plaintiff is concerned, his version that he had been detained from 12 October to 23 October 1998 has remained unchallenged. This version is supported by Dr. Hassanali who testified that the plaintiff was examined on 23 October 1998 at the time of his release. The plaintiff was arrested at Mont Fleuri police station and brought to Bel Eau where he was kept in a cell for about one hour before being taken to 'Grand Police' where he was detained

until his release on 23 October 1998. During his period of detention, he was not brought before any Court of law. He was kept in a cell for the first eight days before being allowed to 'clean the garden' for the remaining three days. The detention of the plaintiff had been in complete disregard to section 18(l)(b) of the Constitution and section 100 of the Criminal Procedure Code and was unlawful.

As far as the injuries sustained are concerned, the testimony of Dr. Hassanali has remained unchallenged. The plaintiff has testified as to the various acts of assault upon him which is supported by the evidence of the injuries sustained. The testimony of Dr. Hassanali also establishes that the injuries suffered by the plaintiff were not of a grievous nature. In *Ireland v United Kingdom* (judgment of 18 January 1978) the European Court had the occasion to examine the ambit of the word 'torture' under article 3 of the European Convention of Human Rights and reached the conclusion that the English techniques of interrogation used by the police did involve inhuman treatment but not torture. The court mentioned as the distinctive element between 'inhuman treatment' and 'torture', that 'torture' is concerned with 'deliberate treatment causing very serious and cruel suffering' and held that the particular acts complained of "did not occasion suffering of the particular intensity and cruelly implied by the word 'torture'. (Vide: Theory and Practice of the European Convention Human Rights, Dijk & Van Hoof, 2nd Edition page 227). In that respect, the plaintiffs claim under the head 'torture' is unwarranted.

In the end result and taking into account all the circumstances of the case and taking into account similar cases, including *Derjacques v R* (unreported) Civil appeal 17 of 1995 and *Canaya v Government of Seychelles* (unreported) Civil side 42 of 1999, I will allow the plaintiff the following claims:

- a sum of SR10,000 for pain and suffering as a result of assault;

- a sum of SR10,000 for moral damages for depression, stress, humiliation and fear; and

- a sum of SR15,000 for illegal detention for a period of 11 days from 12 October until 23 October.

Judgment is accordingly entered in favour of the plaintiff in the sum of SR35,000 with interest at the legal rate from date of plaint and costs.

Record: Civil Side No 49 of 1999

Canaya v The Government of Seychelles

Criminal Procedure Code - Arrest – Detention – Constitutional rights – Damages

The plaintiff was arrested and detained. He sought damages for injuries suffered while being held in custody.

HELD:

> 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.

Judgment for the plaintiff. Damages awarded R25,000.

Legislation Cited
Constitution of Seychelles, art 18
Civil Code of Seychelles, art 1149
Criminal Procedure Code, art 100

Cases referred to
Willy Charles v Attorney-General (unreported) Constitutional case 5/1998
Darrel Green v The SLA (unreported) Constitutional case 3/1997

Foreign cases noted
Namasivayam v Gunawardene (1989) 1 SRI LR 394

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 PI). 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 relevent 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:

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	R50,000
	R150,000

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

Alcindor v The Plantation Club Resort & Casino

Employment – Termination – civil damages

The plaintiff was dismissed from the defendant's employ for breach of trust and received relief under the Employment Act. The plaintiff then sued for civil law damages. The defendant averred that relief under the Employment Act excluded a civil law claim.

HELD:

(i) If an employee has received statutory benefits for unjustifiable termination under the Employment Act, that employee is barred from commencing new proceedings against the employer based on the same cause of action in a different forum.

(ii) If in the course of termination of a contract, the employer committed a delict against the employee, the delictual act would be a cause of action separate from the unjustifiable termination.

Judgment for the defendant.

Legislation Cited
Civil Code of Seychelles, arts 1370, 1382
Employment Act 1995

Cases referred to
Elizabeth v SPTC (unreported) Civil side 157/1997
Lionnet v Central Bank of Seychelles (unreported) Civil appeal 33/1998
Philo v Pension Air (unreported) Civil side 78/1998
Rosalie v Bodco Ltd (unreported) Civil side 193/1997
Rosette v Union Literate Company (unreported) Civil appeal 16/1994

Anthony Juliette for the plaintiff
Bernard Georges for the defendant

Ruling on Plea in Limine Litis delivered on 11 October 2000 by:

JUDDOO J: The plaintiff claims from the defendant, his former employer, loss and damages in the sum of R26,930 with interest and costs for prejudice suffered on account that an offence of breach of trust against him leading to the termination of his employment has not been proved. The claim is resisted by the defendant company which has raised a plea in limine litis to the effect that this court "has no jurisdiction to hear this matter, the plaintiff having opted to obtain relief under the Employment Act."

It is not denied that the plaintiff terminated the employment of the defendant on 30 May 1997 on the "ground of breach of trust." Subsequently, on 19 August 1997, the competent officer in the Ministry of Employment and Social Affairs ruled that the offence of breach of trust against the plaintiff had not been proved and ordered the defendant company to pay the plaintiff R3544.95 under the provisions of the Employment Act 1995. The said sum has been paid as ordered. The plaintiff in the instant proceedings claims for prejudice suffered on account that the offence of breach of trust against him had not been proved and claims damages for loss of salary for 3 months and moral damages.

Under Article 1370(2) of the Civil Code:

> (2) When a person has a cause of action which may be founded either in contract or in delict, he may elect which cause of action to pursue. However if a law limits the liability to either of the two causes of action the plaintiff shall be bound to pursue the cause of action to which the law relates. A plaintiff shall not be allowed to pursue both causes of action consequently.

Moreover, under section 4(3) of the Employment Act 1995 (prior to the amendment brought by Act No.8 of 1999):

> where provision is made under this Act for the hearing and determination of any matter in relation to a contract of employment to which this Act applies, any remedy or relief granted under this Act in respect of that matter shall, subject to the jurisdiction of the Supreme Court, be binding on the parties to the hearing or determination.

It has been held by the Court of Appeal in *Genevieve Lionnet v Central Bank of Seychelles* (unreported) Civil Appeal No. 33 of 1998 that the above section 4(3) "cannot possibly be construed as ousting the jurisdiction of the Supreme Court" and that in circumstances where the plaintiff has not resorted to the grievance procedure under the Employment Act 1995, the jurisdiction of the Supreme Court in a claim for damages for unjustified termination, is not ousted.

However the Court of Appeal did not disturb its earlier determination in *Antoine Rosette v Union Literate Company* (unreported) Civil appeal No. 16 of 1994, judgment delivered on 18 May 1995 (although based on the earlier Employment Act of 1990), that where a grievance had been lodged with the Ministry of Employment and Social Affairs and an employee was awarded statutory benefits for unjustified termination of employment under the latter Act, the latter "cannot commence and drag the employer through fresh proceedings based on the same cause of action in another forum." This reasoning is equally applicable to the Employment Act 1995 and constitutes a bar to the instant proceedings.

It is to be noted in the present case that the cause of action relied upon by the plaintiff is not a separate act from the unjustifiable termination and forming the basis of a different cause of action from that determined under the Employment Act. As commented by Ayoola JA in the *Rosette* case:

> However if in the course of terminating a contract, the employer committed a delict, such as, for instance, a libel or assault, that act which

amounted to a delict would be a separate cause of action apart from unjustifiable termination.

Instances of such acts separate from the termination of employment have been found in several decisions of this Court including:

(i) *B. Rosalie v Bodco Ltd* (unreported) Civil side No. 193 of 1997: where the court held that the failure of the employer to comply with an order made by the competent officer and the Minister to reinstate the plaintiff constituted a"*faute"* under article 1382 of the Civil Code;

(ii) *B. Elizabeth v SPTC* (unreported) Civil side No. 157 of 1997: where the court found that the failure to amend a certificate of employment by the employer was an error of conduct which constituted a 'faute' under article 1382; and

(iii) *E. Philo v Pension Bel Air* (unreported) Civil side No. 78 of 1998: where the court found (vide: Ruling on Plea in limine litis) that the omission by the employer to pay statutory benefits awarded to the plaintiff under the Employment Act could amount to a 'faute' under the Civil Code.

In the present case the plaintiff has been awarded statutory benefits for the unjustified dismissal and is barred from claiming before this court from the same cause of action.

I uphold the plea in limine litis and dismiss the plaint. I make no order as to costs.

Record: Civil Side No 345 of 1997